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Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses

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SUMMARY

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Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses

The concept of *mens rea*, or a "guilty mind," reflects the idea that a crime generally must consist of not only a proscribed act but also a "mental element" sufficient to warrant punishment. Three questions regularly arise with respect to the mental state required for a given federal crime: (1) whether the statute establishing the crime contains a mental-state requirement, or requirements, at all; (2) if the statute does contain mental-state requirements, which elements of the offense must meet which requirements; and (3) what the mental-state requirements mean. Under federal law, determining the mental state required for commission of a crime necessitates an examination of congressional intent.

Congressional intent can be difficult to discern given that federal criminal statutory law (largely codified at Title 18) contains no uniform *mens rea* standards or generally applicable definitions of mental-state terms. Because federal statutory law lacks general rules for assessing and applying *mens rea* terms and requirements across criminal statutes, courts have applied canons of statutory interpretation and developed presumptions specific to *mens rea* when the state of mind requirement for a federal offense is unclear. For example, when a criminal statute is silent on the question of what mental state is required, courts will ordinarily apply a presumption in favor of scienter. The presumption counsels that typically some indication is required that Congress intended to dispense with *mens rea* as an element of a crime, and simply omitting a *mens rea* term from the statutory language will not be considered adequate evidence of such intent. Assuming the presumption of *mens rea* applies and calls for a mental-state requirement to be read into a statute that does not expressly contain one, the question becomes what *kind* of mental state is required. In this respect, the Supreme Court has said that the presumption requires "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'"—typically, at least knowledge of certain elements of the offense at issue.

With respect to which elements of a crime must meet a given *mens rea* requirement, the Supreme Court has stated that the presumption in favor of scienter applies to "each of the statutory elements that criminalize otherwise innocent conduct," though such a distributive approach emphasizing a distinction between elements that make conduct criminal and those that do not can sometimes be difficult to apply in practice. Finally, regarding what specific mental-state requirements mean, federal law uses dozens of different *mens rea* terms that are frequently undefined. As such, reference to judicial precedent construing the provision at issue is often required to understand what mental state is required for a particular federal crime. Even so, federal *mens rea* requirements largely fall into loose categories that may include (1) an awareness of, or conscious purpose to bring about, conduct, a circumstance, or a result that is a required element of the offense (commonly represented by terms such as "intent," "knowledge," or "willfulness," among others), or (2) an awareness and disregard of a substantial risk of harm or failure to perceive a substantial risk of harm when a reasonable person would have perceived it (commonly represented by the terms "recklessness" and "negligence," respectively).

A class of "public welfare" or "regulatory" offenses may actually require no *mens rea* for their commission at all. For this class of offenses, rather than applying the presumption in favor of scienter, statutory silence is treated as imposing "strict criminal liability" in the sense that one need not have at least knowledge of the facts that make one's conduct illegal. Ultimately, several factors may be relevant to a court's determination of whether a particular criminal statute imposes strict liability, including the nature of the statute and the particular activity or item regulated, the purpose of the criminal prohibition (i.e., punishment of wrongdoing versus protection of the public), the degree to which a defendant will be in a position to ascertain the relevant facts, and the severity of the penalties.

In the past, Congress has considered legislation that would have established default *mens rea* requirements and application rules in the absence of clear standards in the offense text, and at least one bill (S. 739) has been introduced to this effect in the 117th Congress. Among other things, such legislation would impose standards of either *knowledge* or *willfulness* on many offense elements and would require that *mens rea* terms provided in the text should ordinarily apply to each offense element, with exceptions. Proponents of such efforts argue that strict-liability offenses and offenses with weak mental-state requirements fail to provide fair notice and represent part of a broader trend of federal over-criminalization. Opponents assert that applying blanket *mens rea* requirements to existing offenses could permit corporate wrongdoers to evade prosecution and produce unintended consequences. Ultimately, comprehensive *mens rea* legislation has not become law as of this writing.

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Introduction

To say that the legal principle *actus non facit reum nisi mens sit rea*[1] is long-standing would be a considerable understatement. According to some legal scholars, the phrase, which means "the act is not culpable unless the mind is guilty," has been in use for "at least approximately one thousand years."[2] Embodied in the phrase is the "universal and persistent" notion that "an injury can amount to a crime only when inflicted by intention."[3] In contemporary American law, the concept of *mens rea*, or a "guilty mind," reflects this idea that a crime generally must consist of not only a "harmful act" but also a "mental element" or criminal intent sufficient to justify punishment.[4]

A world of complexity belies the seeming simplicity of the principle that a crime requires a guilty mind. To start, "mental element," "guilty mind," or "state of mind"[5] are somewhat imprecise terms, as they may be used to refer to "matters that are not really mental at all" (for instance, crimes that only require a *mens rea* of negligence).[6] Additionally, courts face persistent issues in interpreting *mens rea* standards like "knowledge," "willfulness," and "intent" and determining which elements in particular crimes must meet these standards.[7]

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[1] An alternative phrasing that is sometimes used is *actus reus non facit reum nisi mens sit rea*. *Compare* United States v. Bates, 96 F.3d 964, 967 (7th Cir. 1996), *with* Craig A. Stern, *The Heart of Mens Rea and the Insanity of Psychopaths*, 42 CAP. U. L. REV. 619, 627 n.58 (2014).

[2] Matthew R. Ginther & Francis X. Shen, et al., *Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt*, 71 VAND. L. REV. 241, 245 n.10 (2018); *see also* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (stating that the phrase has been used "[f]or hundreds of years . . . with unbroken cadence").

[3] Morissette v. United States, 342 U.S. 246, 250 (1952).

[4] *Id.* at 250-51. This principle addresses broader notions of the purposes of criminal law and its effectiveness in deterring, reforming, and/or punishing, i.e., what sorts of behaviors are justly proscribed and can reasonably be expected to be curtailed by the threat of criminal penalties. *See, e.g.*, *id.* (noting that the concept of a mental element in criminal law "is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a . . . substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution"); Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51, 61 (2003) ("If the criminal law operates by guiding the conscious actions of persons capable of understanding the rules and rationally applying them, it would be unfair and thus unjustified to punish and to inflict pain intentionally on those who did not act intentionally or who were incapable of the minimum degree of rationality required for normatively acceptable cooperative interaction.").

[5] Various terms are used in judicial opinions and legal scholarship to describe the mental component of a crime, including *mens rea*, state of mind, mental state, and scienter. This report uses such terms interchangeably. As noted below, the Model Penal Code treats the concept of a crime's mental component under the rubric of "culpability." *See infra* notes 42-71 and accompanying text.

[6] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.1 (3d ed. 2017); *see Criminal Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining criminal negligence as, among other things, an "objectively assessed mental state of an actor who should know" that there is a certain degree of risk in a prohibited action). However, criminal negligence is not common in the context of federal criminal law. *See* 1A KEVIN F. O'MALLEY, JAY E. GRENIG, & WILLIAM C. LEE, FEDERAL JURY PRACTICE & INSTRUCTIONS § 17:01 (6th ed. 2006) (indicating that concepts of recklessness, negligence, and strict liability have "little relevance in federal criminal law"); Elonis v. United States, 135 S. Ct. 2001, 2011 (2015) ("[W]e have long been reluctant to infer that a negligence standard was intended in criminal statutes." (citation and internal quotation marks omitted)); *but see, e.g.*, 33 U.S.C. § 1319(c) (establishing criminal penalties for negligent violations of certain pollutant discharge limitations, among other things).

[7] *E.g.*, Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. L. REV. 341, 341-42 (2001) (referring to "infinite shades of meaning" among common-law *mens rea* standards and "important fundamental *mens rea* questions that still have no clear answers"); United States v. Bailey, 444 U.S. 394, 403 (1980) ("Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime."); United States v. Marshall, 753 F.3d 341, 345 (1st Cir. 2014) ("The statutory term

Moreover, though courts have pronounced in sweeping language the paramount importance of imposing criminal punishment only on those who are mentally culpable, a class of so-called "regulatory" or "public welfare" offenses are said to be "strict liability" crimes in that they require no *mens rea* for their commission at all.[8]

One resource that has played a significant role in the development and clarification of certain *mens rea* principles is the Model Penal Code (MPC).[9] The MPC is a major work of legal scholarship first produced in 1962 that was intended to establish a comprehensive model statute that American jurisdictions could use to revise their criminal codes.[10] Many states have, in whole or part, supplanted "confused, vague, and inconsistent" approaches to mental states drawn from the common law with the more systematic approach to state-of-mind requirements found in the MPC's "culpability" provisions.[11] Federal courts also have looked to MPC principles for guidance in interpreting federal law,[12] notwithstanding the fact that federal criminal statutory law (largely codified at Title 18) contains no uniform *mens rea* standards or generally applicable definitions of mental-state terms.[13] Given that federal statutory law lacks such consistent rules for assessing and applying *mens rea* terms and requirements across criminal statutes, courts have had to use canons of statutory interpretation[14] and adopt certain *mens rea*-specific presumptions when the state of mind required for a particular federal offense is unclear.[15]

In light of the ad hoc nature of state-of-mind requirements under federal law, Congress has shown interest for decades in establishing more systematized *mens rea* standards and application rules.[16] Because the issue is one of perennial interest to Congress, this report provides an overview of *mens rea* requirements for federal crimes.[17] The report first sketches the common-law background

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'willfully' is a chameleon, what the Supreme Court has called 'a word of many meanings whose construction is often dependent on the context in which it appears.'" (citation omitted)).

[8] *See infra* § "Whether Mens Rea is Required"; *Morissette*, 342 U.S. at 250, 252-255 (stating that the requirement of a "mental element" for commission of a crime is "no provincial or transient notion" but recognizing offenses "of another character" which require no such element and "consist only of forbidden acts or omissions").

[9] *See* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 284-85 (1981) (describing MPC as "model for" reforming common-law *mens rea* principles reflected in statutes of the time).

[10] *See id*.

[11] *Id*. (indicating that as of 1981, nearly two-thirds of states had revised their criminal codes based on the MPC, and many revisions included the MPC's section on culpability); *see* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (identifying "thirty-four [state] enactments [that] were influenced in some part by the Model Penal Code").

[12] *E.g.*, *Bailey*, 444 U.S. at 406 (looking to "[p]rinciples derived from common law as well as precepts suggested by the" MPC to discern level of culpability); Voisine v. United States, 136 S. Ct. 2272, 2278 (2016) (citing MPC definition of "reckless" as "the dominant formulation").

[13] Geraldine Szott Moohr, *Playing with the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Laws*, 7 J. L. ECON. & POL'Y 685, 692 (2011) ("The United States Code does not define *mens rea* terms or provide interpretive guidelines. Instead, each federal criminal law specifies its own *mens rea* element, making it possible for legislators to select from a wealth of common law terms.").

[14] For more information on statutory interpretation as a general matter, see CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon.

[15] *E.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) (acknowledging a "presumption in favor of a scienter requirement" that "should apply to each of the statutory elements that criminalize otherwise innocent conduct").

[16] *E.g.*, Mens Rea Reform Act of 2018, S. 3118, 115th Cong. (2018); Criminal Code Reform Act of 1977, S. 1437, 95th Cong. ch. 3 (as passed by Senate, Jan. 30, 1978).

[17] This report limits its focus to federal *mens rea* requirements for purposes of criminal liability and thus largely does not address mental-state issues that may arise at sentencing or under the U.S. Sentencing Guidelines. *See, e.g.*, United States v. Prophet, __F.3d__, No. 18-3776, 2021 WL 800384, at *2 (3d Cir. Mar. 3, 2021) (noting circuit split regarding

of the concept of *mens rea*, summarizes the MPC's innovations on the subject, and then explores *mens rea* standards and interpretive issues in federal statutes and caselaw.[18] The report concludes with a brief discussion of recent proposals that would impact federal *mens rea* requirements and some of the arguments in favor of and in opposition to such proposals.

Background

A crime traditionally has been understood to consist of the concurrence of *both* a proscribed act (the *actus reus*) and a "guilty mind" (or *mens rea*).[19] The concept of a mental element—*mens rea*, scienter, state of mind, criminal intent, or an equivalent term—being necessary for a prohibited act to be sufficiently blameworthy to justify criminal punishment has endured for hundreds of years, if not longer.[20] In its early form at English common law, at least according to some scholars, *mens rea* embodied the notion of an intent to do an act with an "evil motive."[21] This "original notion . . . was gradually transformed by a centuries-long process that attempted to identify specific states of mind required for the commission of particular offenses."[22] The concept of a guilty mind as a necessary component of crime "took deep and early root in American soil,"[23] but by the middle of the twentieth century, the common-law development of particular state-of-mind requirements on a crime-by-crime basis (and their inconsistent codification, in whole or in part, in state criminal codes) led to considerable disarray and confusion.[24]

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whether earlier version of Guideline enhancement required finding of *mens rea*).

[18] Because, as already described, federal *mens rea* standards are statute-specific and non-uniform, it would be impossible to comprehensively address the state-of-mind requirements for federal crimes in a general way. Thus, this report seeks only to exemplify the variation in federal criminal law by exploring the requirements of a few representative statutes.

[19] LAFAVE, *supra* note 6, § 5.1.

[20] *See* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 642 (1993) (tracing origins of a mental element in crime to "the earliest known legal systems" but noting that "systematic *mens rea* requirements" did not exist in Anglo-Saxon law "until at least the thirteenth century").

[21] *Id.* at 654-67.

[22] *Id.* at 667. Motive is often now recognized to be analytically distinct from *mens rea*. United States v. Safehouse, 985 F.3d 225, 238 (3d Cir. 2021) ("[M]otive is distinct from *mens rea*. A defendant can be guilty even if he has the best of motives."); Gardner, *supra* note 20, at 694 ("The modern practice . . . largely abandons the evil motive tradition at the offense definition level by defining the *mens rea* required for each crime descriptively in terms of particular states of mind."). The relationship between the two can still sometimes creates conceptual difficulty in particular contexts, however. *See, e.g.*, United States v. Ali, 870 F. Supp. 2d 10, 20 (D.D.C. 2012) ("Court decisions, treatises, and law reviews are rife with debates about the relationship between specific intent and motive, and the relevance (if any) of the latter in a criminal case."). Motive may also be an express element of particular crimes, such as hate crimes, *e.g.*, 18 U.S.C. § 249(a) (prohibiting certain acts "because of the actual or perceived race, color, religion, or national origin of any person," among other things), and, depending on one's definition, may also be considered a component of certain defenses to criminal liability. *See, e.g.*, Rosemond v. United States, 572 U.S. 65, 89 (2014) (Alito, J., concurring in part and dissenting in part) ("Unsurprisingly, our cases have recognized that a lawful motive (such as necessity, duress, or self-defense) is consistent with the *mens rea* necessary to satisfy a requirement of intent."); Gardner, *supra* note 20, at 694-95 (explaining that the law "affords excuses in certain situations, even though offenders act with the specific state of mind required for the crime but either lack, or lack the capacity to form, the evil motive essential for moral blame").

[23] Morissette v. United States, 342 U.S. 246, 252 (1952).

[24] *Id.* at 252 ("The unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element."); Treiman, *supra* note 9, at 284 ("Before 1960, most states had criminal codes that were little more than statutory versions of the common law. . . . Each crime was defined in virtual isolation from others and consequently, the meaning of terms would vary from crime to crime, with no attempt at consistent definition . . . .").

This confusion is perhaps best reflected in the development of the concepts of "general intent" and "specific intent" as a shorthand way to describe the *mens rea* classifications of common-law crimes. At a high level, many such offenses—for example, murder, battery, and larceny—can be characterized as either "specific intent" or "general intent" crimes.[25] In one formulation, "specific intent" denotes an intent to "achieve some additional consequence" or "commit some further act" beyond the "commission of the proscribed act."[26] For example, larceny likely would be considered a specific intent crime, as it often requires obtaining control over the property of another (the proscribed act) *with the intent* "to deprive the owner of the stolen property permanently."[27] By contrast, in the words of one federal appellate court, "a general intent crime requires only that the act was volitional (as opposed to accidental), and the defendant's state of mind is not otherwise relevant."[28] For instance, battery at common law "consisted of the unlawful application of force to the person of another, including an offensive touching."[29] This crime would be considered a general intent crime, because it does not "require any specific intent either to injure or to touch offensively, but rather only a more general intent to commit the unlawful act" of applying force.[30]

Though the examples of larceny and battery might suggest relative clarity, delineation between "specific intent" and "general intent" crimes in fact can be problematic in several respects. For one thing, disagreement has abounded over time as to the proper meaning and usage of the two terms. As explained by the Supreme Court:

> Sometimes "general intent" is used in the same way as "criminal intent" to mean the general notion of *mens rea*, while "specific intent" is taken to mean the mental state required for a particular crime. Or, "general intent" may be used to encompass all forms of the mental state requirement, while "specific intent" is limited to the one mental state of intent. Another possibility is that "general intent" will be used to characterize an intent to do something on an undetermined occasion, and "specific intent" to denote an intent to do that thing at a particular time and place.[31]

Additionally, even classifying a crime as requiring either specific or general intent might not necessarily serve to elucidate the requisite mental state in a meaningful way. As one scholar has framed it, the concepts of general and specific intent do not themselves "describe culpable mental states" but merely "describe the relationship between an offense's mental elements and its physical elements."[32] A crime might be considered a "general intent" crime, in other words,

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[25] United States v. Bailey, 444 U.S. 394, 403 (1980); Batey, *supra* note 7, at 343. As discussed in more detail *infra*, a third category of so-called regulatory or strict-liability offenses requires no culpable mental state at all. *See Morissette*, 342 U.S. at 252-53 (noting offenses "with very different antecedents and origins" that "depend on no mental element but consist only of forbidden acts or omissions").

[26] Eric A. Johnson, *Understanding General and Specific Intent: Eight Things I Know for Sure*, 13 OHIO ST. J. CRIM. L. 521, 525, 527 (2016); *see also* United States v. Lamott, 831 F.3d 1153, 1156 (9th Cir. 2016) ("In a crime requiring 'specific intent,' the government must prove that the defendant subjectively intended or desired the proscribed act or result.").

[27] Johnson, *supra* note 26, at 525.

[28] *Lamott*, 831 F.3d at 1156. Defining general intent solely in terms of volition is of dubious usefulness, as any crime proscribing an affirmative act requires that the act be voluntary. *See* LAFAVE, *supra* note 6, § 6.1(c) ("At all events, it is clear that criminal liability requires that the activity in question be voluntary.").

[29] United States v. Delis, 558 F.3d 177, 180 (2d Cir. 2009).

[30] *Id.*

[31] United States v. Bailey, 444 U.S. 394, 403 (1980) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 201-02 (1972)).

[32] Johnson, *supra* note 26, at 522-23.

because it does not require a specific mental state with respect to some consequence or result beyond the proscribed act (as in the battery example), but this does little to clarify the meaning of the *mens rea* requirement that the crime does have. Though the definition of "general intent" given above distinguishes only between volition and accident, the concept of intentionality has long been "slice[d] . . . more finely than accident versus non-accident."[33] In fact, a crime might incorporate the notion of a volitional act that brings about an unintended (read: accidental) result where the actor is highly careless in failing to appreciate the risk that a reasonable person would appreciate.[34] This kind of crime does not fit comfortably in either the general or the specific intent bucket, nor does a crime that requires conscious disregard of a known risk.[35]

Exacerbating these definitional problems at common law was the proliferation of different *mens rea* terms that often provided little clarity as to what sort of mental state was actually required. "Terms such as willfully, corruptly, maliciously, feloniously, wrongfully, unlawfully, wantonly, intentionally, purposely, with criminal negligence, and culpably" were all used (among others), sometimes "to describe what was probably the same mental state," sometimes to describe different mental states, and often without "any further definition."[36] The result was "seemingly infinite shades of meaning along [a] continuum upon which" the concepts of specific and general intent resided.[37] It was in the context of this "variety, disparity, and confusion of [judicial] definitions of the requisite but elusive mental element"[38] that the drafters of the MPC sought to establish "relatively clear definitions of mental requirements and relatively straightforward rules regarding how to read these requirements into criminal statutes"[39] through what it termed general "culpability" rules.[40] Because the MPC approach has had a significant impact on the development and understanding of the mental element of crime in general,[41] this report provides a brief overview of the MPC's culpability provisions.

Model Penal Code Approach

As noted above, the MPC was intended to be used as a model for criminal code reform across jurisdictions.[42] It has proved to be extremely influential, with many states revising their codes in

[33] Francis X. Shen & Morris B. Hoffman, et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1310 (2011).

[34] *Id*. at 1311.

[35] *See* Johnson, *supra* note 26, at 532-36 (noting court disagreement and arguing that such crimes should be considered general intent crimes).

[36] Treiman, *supra* note 9, at 284.

[37] Batey, *supra* note 7, at 341.

[38] Morissette v. United States, 342 U.S. 246, 252 (1952).

[39] Batey, *supra* note 7, at 401; *see also* Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 579 (1988) (explaining that the MPC drafters "were required to resolve an approach to culpability" and "appeared to recognize that the fundamental need was clarity").

[40] MODEL PENAL CODE § 2.02 (1985).

[41] *See, e.g.*, Gainer, *supra* note 39, at 579 (describing MPC approach as "the now classic approach to culpability that few of us could imagine doing without"); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 816 & n.7 (1980) (recognizing that around 70% of states undertaking code revisions adopted a mental-state system "essentially identical" to the MPC, and even those that did not were "significantly influenced" by it).

[42] Robinson & Dubber, *supra* note 11, at 323; *see also* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 947-48 (1999). The MPC was reissued with Commentaries in 1980 and 1985.

light of the MPC's principles and with some federal courts looking to those principles in construing federal law.[43]

The MPC's culpability provisions are found in Article 2 of Part I, principally Section 2.02 and surrounding sections. One of these provisions' core achievements is in "reduc[ing] nearly eighty miscellaneous culpability terms to five carefully defined levels."[44] These levels have become a prevalent, if not the predominant, prism through which courts view state-of-mind distinctions.[45] The five levels of culpability are: (1) purpose; (2) knowledge; (3) recklessness; (4) negligence; and (5) strict liability.[46] The MPC also clarifies the relationship between these different culpability levels and the offense elements to which they apply by dividing elements into three categories: (1) conduct, (2) attendant circumstances, and (3) results.[47] The element categories are not defined, but an example of conduct and circumstance elements might involve a crime of having sexual intercourse with a minor, with intercourse being the conduct element and the age of the victim being the circumstance element.[48] An example of a result element would be engaging in conduct that causes the death of another human being, with death being the proscribed result.[49]

Each culpability level in the MPC is defined in relation to each kind of objective offense element.[50] The table below reflects the definitions of the MPC's culpability levels for the three element categories:

[43] *See supra* notes 11-12 and accompanying text; Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 LOUISVILLE L. REV. 173, 173 (2015).

[44] Robinson, *Brief History*, *supra* note 41, at 815.

[45] *Id*. at 816.

[46] MODEL PENAL CODE §§ 2.02(2)(a)-(d), 2.05 (1985).

[47] *See generally id*. § 2.02. The MPC defines the term "element of an offense" as such conduct, circumstance, or result of conduct as "is included in the description of the forbidden conduct in the definition of the offense," establishes the requisite culpability, negates an excuse, justification, or a statute of limitations defense, or establishes jurisdiction or venue. *Id*. § 1.13(9).

[48] Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 235 (1997).

[49] *Id*.

[50] MODEL PENAL CODE § 2.02 (1985); *e.g.*, *id*. § 2.02(2)(a) ("Purposely. A person acts purposely with respect to a material element when (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.") (emphasis added).

Table 1. MPC Culpability Levels

Culpability Level	Conduct	Circumstance	Result
Purposely	Conscious object to engage in conduct of that nature	Aware of the existence of such circumstances or believes or hopes that they exist	Conscious object to cause such a result[51]
Knowingly	Aware that conduct is of that nature	Aware of at least a high probability that such circumstances exist, unless actor actually believes they do not exist[52]	Aware that it is practically certain that conduct will cause such a result
Recklessly	None[53]	Consciously disregards a substantial and unjustifiable risk that the material element exists	Consciously disregards a substantial and unjustifiable risk that the material element will result from conduct[54]
Negligently	None	Should be aware of a substantial and unjustifiable risk that the material element exists	Should be aware of a substantial and unjustifiable risk that the material element will result from conduct[55]
Strict Liability	None	None	None

[51] A separate provision establishes that a "conditional" purpose satisfies the requirement of purpose "unless the condition negatives the harm or evil sought to be prevented by the law defining the offense." *Id.* § 2.02(6).This provision encompasses a situation where, for instance, an actor might be guilty of larceny (which requires a purpose to deprive the owner permanently of property) if the actor takes property intending to keep it unless the actor wins the lottery. In this situation, though the purpose is conditional, the condition does not "negative[] the harm or evil sought to be prevented," but if the actor takes the property intending to keep it only if it turns out to actually be his, the harm or evil arguably *would* be negated. *See* LAFAVE, *supra* note 6, § 5.2(d).

[52] This definition, which is actually a product of two separate provisions of Section 2.02, encompasses a formulation of the common-law "willful blindness" doctrine, under which "persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts" for *mens rea* purposes. Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766 (2011).

[53] The MPC does not expressly define recklessness or negligence with respect to conduct, though commentators have different perspectives on the significance of the omission. Some commentators have posited that the drafters may have thought that recklessness or negligence as to conduct is not likely to arise, while others have suggested that the minimum culpability that applies with respect to conduct is knowledge. For further discussion of this issue, see Paul H. Robinson & Jane A. Grall, *Elements Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 710-12 (1983).

Source: American Law Institute, Model Penal Code, Section 2.02.

As the table reflects, the MPC's culpability levels may be viewed in a kind of descending order of intentionality. "Purposely" generally requires an element to be the actor's "conscious object," "knowingly" requires the actor's awareness to a practical certainty or of a high probability (regardless of what the actor desires or has as their object), "recklessly" requires the actor's awareness of a substantial risk, and "negligence" requires no awareness at all but merely that the actor objectively should have been aware of a substantial risk. For a limited category of strict liability offenses, the mental state of the actor is irrelevant.[56] These definitions represent an effort to cut through the confusing morass of *mens rea* terms that had existed up to that point.[57] The categorization of offense elements and the implicit recognition that the requisite *mens rea* might be different and should be analyzed separately with respect to each offense element also reflects a shift away from a prior notion that "each offense has one state of mind requirement," i.e., that criminal offenses may be classified simply as "general intent" or "specific intent" rather than specifying what state of mind is actually required for which components of the crime.[58]

Beyond the definitions of mental-state requirements and the move towards *mens rea* element analysis with respect to those requirements, the MPC establishes certain general principles of interpretation that apply in assessing the mental state or states required for a particular offense.[59] Most notably, the MPC creates a baseline culpability standard for any material element[60] that does not explicitly contain one—Section 2.02(3) states that unless otherwise provided, "[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law," the element is established if the person acts at least recklessly.[61] Coupled with this default rule is a rule that if an offense prescribes the culpability level sufficient for commission of the offense without specifying which elements of the offense carry that specific culpability requirement, the requirement applies to *all* material elements "unless a contrary purpose plainly appears."[62] For example, for an offense of knowingly killing a "house pigeon," the prosecution would have to prove that the actor knowingly killed *and* that he knew what he killed was a house pigeon, unless

[54] For recklessness in general, "[t]he risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(c) (1985).

[55] For negligence in general, "[t]he risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *Id.* § 2.02(2)(d).

[56] *Id.* § 2.02.

[57] *See, e.g.*, Robinson & Grall, *supra* note 53, at 692-93 (noting that Section 2.02 "clarifies *mens rea* analysis" by, among other things, "narrow[ing]" the "eighty or so culpability terms" that existed previously).

[58] *Id.* at 688.

[59] *E.g.*, MODEL PENAL CODE §§ 2.02-.06 (1985).

[60] The MPC defines a "material element" as an element that does not relate to basic matters such as the statute of limitations, jurisdiction, venue, or other matters unconnected with "the harm or evil . . . sought to be prevented by the law defining the offense" or a justification or excuse for the proscribed conduct. *Id.* § 1.13(10).

[61] *Id.* § 2.02(3). An explanatory note states that "[t]here is a rough correspondence between this provision and the common law requirement of 'general intent.'" *Id.* § 2.02 explanatory note. The drafters, by omitting "negligence" and referencing general intent, seemed to indicate that crimes without an explicit *mens rea* requirement would maintain a common-law conception requiring at least some conscious awareness of relevant information, as distinct from mere accident. *See supra* notes 28-35 and accompanying text.

[62] *Id.* § 2.02(4).

the text of the law in question "plainly" reflected that knowledge of the type of pigeon should not be required.[63]

The MPC additionally provides a number of rules on other points of law that may relate to mental-state requirements, such as the *mens rea* for inchoate crimes and certain defenses.[64] This report addresses the MPC approach to these topics as a point of comparison with approaches under federal law in subsequent sections.[65]

In the decades since the MPC's initial development, a substantial body of legal scholarship has offered critiques of, and potential refinements to, its culpability provisions.[66] For instance, some commentators have taken issue with the "narrow distinction" between knowledge and recklessness with respect to a circumstance, which appears to turn on the murky question of what is highly probable versus a "substantial risk."[67] Others have noted the conflict and inconsistency that can arise in applying the rule that recklessness is the default when culpability is undefined over the rule that a culpability requirement attached to one material element normally attaches to all.[68] Nonetheless, legal scholars appear largely to prefer the MPC's approach to mental states over the disarray of the common law, asserting that the MPC's culpability provisions are a "tremendous advance."[69] Many U.S. jurisdictions also have either adopted a number of the provisions or been influenced by them,[70] and the Supreme Court has also looked to the MPC as a "source of guidance" in construing *mens rea* requirements in federal criminal statutes.[71] What is notable about federal law, however, is that the MPC's culpability provisions have *not* been codified or adopted on a broad scale. Instead, federal law largely embodies an ad hoc approach, which this report now examines in more detail.

Federal *Mens Rea* Requirements

In 1966, Congress created the National Commission on Reform of Federal Criminal Laws, which was given a broad mandate to "review and study . . . the statutory and case law of the United States . . . for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice."[72] In its working papers, the Commission

[63] *See* Gardner, *supra* note 20, at 683. The house pigeon example discussed in the Gardner article stems from a 19th century English law addressed in the common-law case of *Cotterill v. Penn*. *Id*. at 679.

[64] *E.g.*, MODEL PENAL CODE § 2.04 (1985) (recognizing that ignorance or mistake is a defense if it negates the mental state required for a material element of the offense, with exceptions).

[65] *See infra* § "Selected Additional *Mens Rea* Issues in Federal Law."

[66] *E.g.*, Robinson & Grall, *supra* note 53, at 706-07 ("A major defect of the Model Penal Code is its failure to define adequately the three kinds of objective elements of an offense," which is "essential for proper application of the defined culpability terms."); Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 182-84 (2003) (diagnosing various problems).

[67] Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 474 (1992).

[68] Robinson & Grall, *supra* note 53, at 715.

[69] Simons, *Model Penal Code's Mens Rea Provisions*, *supra* note 66, at 180.

[70] *See* Shen & Hoffman, *supra* note 33, at 1318 ("Whether in actual legislation, common law, or simply norms accepted by lawyers and judges, the MPC has become 'a standard part of the furniture of the criminal law.'" (citation omitted)); Batey, *supra* note 7, at 341 (indicating that as of 2001, "a substantial minority" of U.S. jurisdictions used the culpability structure reflected in Section 2.02 of the MPC).

[71] United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978).

[72] Pub. L. No. 89-801. 80 Stat. 1516 (1966).

painted a rather unflattering picture of the state of *mens rea* requirements for federal crimes.[73] The Commission noted that in contrast with the MPC, federal statutory law did not contain uniform and defined mental-state standards or rules of construction for the application of *mens rea* terms.[74] Instead, according to the Commission, federal criminal statutes drew from common-law terminology in articulating mental-state requirements (if at all) on an ad hoc, statute-by-statute basis.[75] The Commission identified, in Title 18 of the U.S. Code alone, 78 different *mens rea* terms.[76] According to the Commission, this "staggering array" of mental-state terms did not "reflect accurately or consistently what are the mental elements of the various crimes," nor was there any "discernible pattern or consistent rationale" for why particular terms were used in particular statutes.[77] As such, the Commission acknowledged that courts were left to discern what Congress meant by including (or not including) one of the plethora of terms in any given context, which led to the same terms having different, and sometimes inconsistent, meanings depending on the statute.[78]

The Commission's final report and recommendations, submitted to Congress and the President in 1971, proposed, among other things, to remedy the confusion over federal *mens rea* requirements by establishing generally applicable culpability rules and definitions similar to those found in the MPC.[79] Legislation introduced based on the Commission's report gained some traction but did not become law.[80] More recent legislation aimed at altering federal *mens rea* standards has also been introduced but has not become law;[81] as such, it remains that the U.S. Code has no general *mens rea* term definitions or interpretive rules, and dozens of different terms are used throughout the Code.[82] Courts construe these terms "depending on the circumstances of the case and a reading of congressional intent," with the result that identical *mens rea* terms "vary significantly" from statute to statute.[83] In other words, ascertaining the *mens rea* required for a federal crime will often necessitate reference to judicial decisions construing the language used to define that particular offense.

For the foregoing reasons, and given that at least one estimate puts the number of federal statutes carrying criminal penalties in the thousands,[84] it would be unwieldy to examine comprehensively federal *mens rea* requirements in a systematic way. Instead, this section of the report (1) examines more broadly the interpretive approaches and presumptions that the Supreme Court and other federal courts have utilized to glean congressional intent in construing the mental-state requirements (if any) of federal criminal statutes; (2) provides a survey of mental-state requirements under federal law, loosely grouped along the lines of the MPC's culpability

[73] *See* 1 NAT'L COMM'N ON REFORM OF FED. CRIM. L., WORKING PAPERS 118-20 (1970).

[74] *Id.* at 119.

[75] *Id.*

[76] *Id.* at 119-20.

[77] *Id.*

[78] *Id.* at 120-21.

[79] *See* NAT'L COMM'N ON REFORM OF FED. CRIM. L., FINAL REPORT: PROPOSED NEW FEDERAL CRIMINAL CODE 27-29 (1971), https://www.ndcourts.gov/Media/Default/Legal%20Resources/legal-research/criminal-code/FinalReport.pdf.

[80] *E.g.*, Criminal Code Reform Act of 1977, S. 1437, 95th Cong. ch. 3 (as passed by Senate, Jan. 30, 1978).

[81] *E.g.*, Mens Rea Reform Act of 2018, S. 3118, 115th Cong. (2018).

[82] Moohr, *supra* note 13, at 692.

[83] *Id.* at 693.

[84] John G. Malcolm, *Morally Innocent, Legally Guilty: The Case for Mens Rea Reform*, 18 FEDERALIST SOC'Y REV. 40, 41 (2017). This number does not include federal regulations that implicate criminal penalties, which may number in the thousands as well. *Id.*

categorizations; and (3) addresses certain additional aspects of federal criminal liability that implicate *mens rea*—specifically, inchoate offenses of attempt and conspiracy, corporate criminal liability, and defenses.

Federal *Mens Rea* Interpretive Approach

The Supreme Court has "long recognized that determining the mental state required for commission of a federal crime requires construction of the statute and inference of the intent of Congress."[85] Three questions routinely arise with respect to determining the requisite mental state for a particular federal crime: (1) whether the statute establishing the crime contains a mental-state requirement or requirements; (2) if the statute contains mental-state requirements, which elements of the offense must meet which requirements; and (3) what the mental-state requirements mean.[86] Because statutory language is not always clear, the federal courts have "developed a rich—if somewhat untidy—body of substantive background principles" and presumptions that guide the interpretive exercise.[87] This section and the next address each of the three questions identified above and the relevant principles and presumptions that courts may apply to help answer those questions.

Whether *Mens Rea* is Required

Because the language of a statute is the starting point in statutory construction,[88] a federal criminal statute containing a *mens rea* term such as "knowingly" clearly indicates that Congress meant to require some culpable mental state.[89] When Congress omits an express *mens rea* requirement from the statutory text, however, the question arises as to whether that omission was intentional—in other words, whether Congress intended to dispense with any mental-state requirement and make the offense one of strict liability.[90] In a series of cases, the Supreme Court has recognized, at least with respect to federal offenses based on traditional common-law crimes, a "presumption in favor of scienter,"[91] meaning the Court will ordinarily presume a "degree of knowledge sufficient to make a person legally responsible for the consequences of his or her act or omission."[92] Put differently, the Court has held that ordinarily "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a

[85] Staples v. United States, 511 U.S. 600, 605 (1994) (citation, internal alteration, and internal quotation marks omitted).

[86] *E.g.*, *id.* at 605-08 (addressing existence of knowledge requirement in statute with no explicit *mens rea* and application of that requirement to different elements of offense).

[87] Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 770 (2012); *see* United States v. Figueroa, 165 F.3d 111, 119 (2d Cir. 1998) (Sotomayor, J.) (referencing "principles of construction underlying the criminal law" as "signposts to congressional intent").

[88] *Staples*, 511 U.S. at 605.

[89] *See Figueroa*, 165 F.3d at 114 ("By using the word 'knowingly,' Congress chose to include some knowledge requirement for a conviction under [the statute].").

[90] "Strict-liability crime" is defined as one "for which the action alone is enough to warrant a conviction, with no need to prove a mental state; specif., a crime that does not require a *mens rea* element, such as traffic offenses and illegal sales of intoxicating liquor." *Strict-Liability Crime*, BLACK'S LAW DICTIONARY (11th ed. 2019). Strict liability may apply to only one or some of the elements of an offense. *E.g.*, *Staples*, 511 U.S. at 609 (addressing statute imposing strict liability as to unregistered nature of firearm but requiring knowledge of features of firearm making it subject to regulation).

[91] Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019).

[92] *Id.* (citation, internal alteration, and internal quotation marks omitted).

crime,"[93] and mere omission of a *mens rea* term will not be considered a sufficient indication of such intent.[94]

The genesis of the presumption in favor of scienter can be traced to the Supreme Court's 1952 decision in *Morissette v. United States*.[95] In *Morissette*, the Court, in reading an intent requirement into a statute proscribing theft or conversion of federal property,[96] spoke broadly of intent as "so inherent in the idea of" crimes codified from common law "that it required no statutory affirmation" and counseled "caution in assuming that Congress, without clear expression," sought to eliminate any mental-state requirement.[97] A later Supreme Court decision more clearly articulated a presumption that Congress "legislated against the background of . . . traditional legal concepts which render intent a critical factor"[98] and further acknowledged such a presumption as consistent with a separate interpretive doctrine that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[99]

Assuming the presumption of *mens rea* applies, and thus that a mental-state requirement should be read into a statute that does not explicitly contain one, the question becomes what *kind* of mental state is required. In this respect, the Supreme Court has held that "[t]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[100] Typically, the standard of knowledge is sufficient to meet this requirement.[101] For instance, in *Staples v. United States*, the Court held that a statute making it unlawful to receive or possess certain kinds of unregistered firearms[102] required knowledge of the features of the firearm that brought it within the scope of

[93] *Staples*, 511 U.S. at 606.

[94] Morissette v. United States, 342 U.S. 246, 263 (1952).

[95] *Id.*

[96] 18 U.S.C. § 641.

[97] *Morissette*, 342 U.S. at 252, 254 n.14. The *Morissette* Court rooted its decision in the principle that "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Id.* at 263. In accordance with this principle, the Court recognized that "[s]tealing, larceny, and its variants and equivalents" were well-known at common law, and judicial precedent "consistently retained the requirement of intent in larceny-type offenses." *Id.* at 261. The Court in later decisions has appeared to recognize the applicability of the presumption even to statutes lacking direct common-law antecedents, however. *E.g.*, Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (acknowledging that presumption is "traceable to the common law" but referring to the presumption as applicable generally to "criminal statutes").

[98] United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978).

[99] *Id.* (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

[100] Carter v. United States, 530 U.S. 255, 269 (2000) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)). As explained in more detail *infra*, this formulation also speaks to the question of *which elements* of a statutory offense bear a *mens rea* requirement.

[101] *See Carter*, 530 U.S. at 268 (concluding that presumption in favor of scienter required proof "of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime," but caveating that "some situations may call for implying a specific intent requirement into statutory text"); Elonis v. United States, 135 S. Ct. 2001, 2012 (2015) (concluding that statute proscribing transmission of threatening communication required purpose to threaten or knowledge of threatening nature of communication, but declining to address whether recklessness as to threat would be sufficient); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1112 (1999) ("[W]hen Congress has omitted all culpability language, . . . [t]he Court apparently has adopted the 'knowledge' standard as the default[.]").

[102] 26 U.S.C. § 5861(d).

the statute.[103] In reaching its conclusion, the Court noted that omitting a requirement that a "defendant know the facts that make his conduct illegal" would "impose criminal sanctions on a class of persons whose mental state . . . makes their actions entirely innocent."[104]

The Court also has recognized a class of "'public welfare' or 'regulatory' offenses" to which the presumption will not apply (i.e., offenses where statutory silence is treated as imposing "a form of strict criminal liability" by "not requir[ing] the defendant to know the facts that make his conduct illegal.")[105] Typically, "such offenses involve statutes that regulate potentially harmful or injurious items" or activities, which put individuals on notice of the likelihood of regulation,[106] and impose relatively small penalties.[107] One of the earliest examples of the Supreme Court's recognition of a public welfare offense lacking a *mens rea* requirement is *United States v. Balint*, in which the Court addressed a statute prohibiting the sale of certain narcotics without a tax form issued by the federal government.[108] The defendants argued that the government was required to prove that they knew the drugs they sold —derivatives of opium and coca leaves—were covered by the statute, but the Court concluded that the statute did not require proof of such knowledge.[109] In so doing, the Court recognized a class of "regulatory measures" lacking a scienter requirement where the emphasis was "upon achievement of some social betterment rather than . . . punishment."[110] Acknowledging the question as one of congressional intent, the Court determined that the statute at issue fell into this class given its "manifest purpose . . . to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute," noting that the opportunity of the seller to determine the nature of the drug being sold and the difficulty of proving knowledge "[d]oubtless . . . contributed to [Congress's] conclusion" that such knowledge should not be required.[111]

Subsequent cases have appeared to back away from the somewhat broad conception of strict-liability crimes presented in *Balint*, emphasizing the "limited circumstances" in which they will be recognized.[112] Ultimately, several factors may be relevant to a court's determination of whether a particular criminal statute imposes strict liability, including the nature of the statute and the particular activity or item regulated, the purpose of the criminal prohibition (i.e., punishment of wrongdoing versus protection of the public), the degree to which a defendant will be in a position to ascertain the relevant facts, and the severity of the penalties.[113]

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[103] 511 U.S. 600, 619 (1994).

[104] *Id*. at 605, 614-15.

[105] *Id*. at 606-07.

[106] *Id*. at 607.

[107] Morissette v. United States, 342 U.S. 246, 254, 256 (1952) (recognizing criminal regulatory offenses "which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare" and noting that "penalties [for such offenses] commonly are relatively small, and conviction does no grave damage to an offender's reputation").

[108] 258 U.S. 250, 251 (1922).

[109] *Id*. at 251, 253-54.

[110] *Id*. at 252.

[111] *Id*. at 254.

[112] Staples v. United States, 511 U.S. 600, 607 (1994); *see also* United States v. U.S. Gypsum Co., 438 U.S. 422, 437-38 (1978) ("[T]he limited circumstances in which Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status."); *Morissette*, 342 U.S. at 251 (referencing "universal and persistent" notion that crime requires intention).

[113] *See, e.g.*, *Staples*, 511 U.S. at 607; *Morissette*, 342 U.S. at 255-56; United States v. Dotterweich, 320 U.S. 277, 281-82 (1943); *Balint*, 258 U.S. at 254.

In short, though the line between a public welfare offense and a traditional offense to which the presumption of *mens rea* applies "can be difficult to draw,"[114] a court will generally look to "the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements."[115] Strictly speaking, however, even so-called "strict liability" public welfare offenses are not viewed as *completely* dispensing with any state-of-mind requirement—rather, they require "only so much knowledge as is necessary to provide defendants with reasonable notification that their actions are subject to strict regulation."[116] Put differently, public welfare offenses "require at least that the defendant know that he is dealing with some dangerous or deleterious substance" but not necessarily "the facts that make his conduct fit the definition of the offense."[117]

The absence of a *mens rea* requirement in a criminal statute may present constitutional difficulties in particular contexts. For instance, the Supreme Court in *United States v. X-Citement Video, Inc.* interpreted a statute criminalizing distribution of sexually explicit visual depictions of minors[118] as requiring a defendant to have knowledge of the minority of those involved, in part based on First Amendment concerns.[119] Ordinarily, restrictions on speech based on its content are presumptively unconstitutional,[120] and although child pornography generally falls within an exception for unprotected speech,[121] the *X-Citement Video* Court recognized prior precedent as suggesting that the absence of a *mens rea* requirement as to the character of such materials could "raise serious constitutional doubts" under the First Amendment.[122] Additionally, some lower courts have suggested that "the imposition of severe penalties, especially a felony conviction," for a strict-liability crime may violate the Due Process Clause of the Fifth Amendment,[123] as "a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his reputation."[124] Nevertheless, although the Supreme Court has struck down one strict-liability city ordinance on due-process grounds in a fairly unique circumstance

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[114] Leonid Traps, *"Knowingly" Ignorant: Mens Rea Distribution in Federal Criminal Law After Flores-Figueroa*, 112 COLUM. L. REV. 628, 633 (2012).

[115] *Staples*, 511 U.S. at 607.

[116] United States v. Figueroa, 165 F.3d 111, 116 (2d Cir. 1998) (Sotomayor, J.).

[117] *Staples*, 511 U.S. at 607 n.3.

[118] 18 U.S.C. § 2252(a).

[119] 513 U.S. 64, 78 (1994).

[120] CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion.

[121] *Id.*

[122] 513 U.S. at 78; *see* United States v. Class, 930 F.3d 460, 468-70 (D.C. Cir. 2019) (noting that due-process vagueness analysis is "more searching" where law imposes criminal penalties, threatens to inhibit exercise of a constitutional right, and lacks a scienter requirement, but upholding statute prohibiting firearm possession on Capitol grounds despite lack of requirement that defendant knowhe is on Capitol grounds); *but cf.* United States v. Wilson, 565 F.3d 1059, 1068 (8th Cir. 2009) (noting that "the First Amendment calculus is different depending on the proximity of the defendant to the victim" and concluding that criminal prohibition on *production* of child pornography is "not entitled to any *mens rea* safeguards").

[123] United States v. Enochs, 857 F.2d 491, 494 n.2 (8th Cir. 1988); *see also* United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985) (indicating that *mens rea* may only constitutionally be eliminated "where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch," and concluding that felony provision of Migratory Bird Treaty Act "d[id] not meet these criteria"); *cf.* United States v. DeCoster, 828 F.3d 626, 633 (8th Cir. 2016) ("The elimination of a *mens rea* requirement does not violate the Due Process Clause for a public welfare offense where the penalty is 'relatively small,' the conviction does not gravely damage the defendant's reputation, and congressional intent supports the imposition of the penalty.").

[124] *Wulff*, 758 F.2d at 1125.

involving "wholly passive" conduct with no notice or opportunity to comply,[125] it has at other times appeared to affirm the constitutionality of strict-liability crimes more generally.[126] Further, at least one federal appellate court has rejected the proposition that strict-liability felonies are *per se* unconstitutional.[127] As such, the precise constitutional limits of strict-liability public welfare offenses are unclear.[128]

Application of *Mens Rea* to Specific Elements

Assuming either that Congress has provided a *mens rea* requirement in a federal criminal statute, or that a court concludes a statute silent on the issue carries one, the question may arise as to which *elements* of the crime must meet that requirement. One innovation of the Model Penal Code was its recognition that the mental state for a particular crime should be analyzed on an element-by-element basis.[129] This approach is also generally employed under federal law.[130] In some statutes, Congress may have provided relatively clear instruction as to what *mens rea* term must be established for distinct components of the crime at issue—for example, 18 U.S.C. § 1591 makes it a crime to "knowingly" recruit a person "knowing" or "in reckless disregard of the fact" that force or other proscribed means will be used to cause the person to engage in a commercial sex act, or that the person is under the age of 18 and will be caused to engage in a commercial sex act.[131] It is often the case, however, that Congress will provide penalties for a "willful" or "knowing" violation of a statute that contains multiple elements, for instance, or will omit a textual mental-state requirement for a crime that is presumed to have at least one as described above.[132] In this circumstance, courts are left to glean congressional intent as to which elements must meet the *mens rea* term that either is specified or presumed.

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[125] Lambert v. California, 355 U.S. 225, 228-29 (1957). The provision in *Lambert* made it unlawful for any person convicted of a felony "to be or remain in Los Angeles for a period of more than five days without registering" with the Chief of Police. *Id*. at 226. In striking down the ordinance, the Court reasoned that notice is "[e]ngrained in [the] concept of due process." *Id*. at 228.

[126] *See Balint*, 258 U.S. at 252 ("It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled . . . ."); *U.S. Gypsum Company*, 438 U.S. at 437 (stating that "strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements"). The Court has also noted the muted impact of *Lambert*, stating that its "application has been limited" and signaling some agreement with the proposition that it "stands as an isolated deviation from the strong current of precedents[.]" Texaco, Inc. v. Short, 454 U.S. 516, 537 (1982) (citation and internal quotation marks omitted).

[127] United States v. Engler, 806 F.2d 425, 433 (3d Cir. 1986) (stating that bright-line rule regarding felonies "ignore[s] a formidable line of cases imposing strict liability in felony cases without proof of scienter"); *see also* United States v. Stepanets, __F.3d__, No. 19-1471, 2021 WL 748385, at *6 (1st Cir. Feb. 26, 2021) ("[Precedent] refutes the notion that due process requires there to be a *mens rea* element in an offense as a categorical matter.").

[128] *Engler*, 806 F.2d at 434 ("The Supreme Court has indicated that the due process clause may set some limits on the imposition of strict criminal liability, but it has not set forth definite guidelines as to what those limits might be.")

[129] *See supra* § "Model Penal Code Approach."

[130] *See, e.g.*, Rehaif v. United States, 139 S. Ct. 2191, 2195-96 (2019) (assessing which elements of statutory crime require knowledge).

[131] 18 U.S.C. § 1591(a). The statute also limits the "reckless disregard" standard for certain conduct and provides an exception to the requirement of knowledge or reckless disregard of age where "the defendant had a reasonable opportunity to observe the person" recruited. *Id*. §§ 1591(a), (c).

[132] *E.g.*, *Rehaif*, 139 S. Ct. at 2196 (referring to circumstance where *mens rea* term "introduces a long statutory phrase, such that questions may reasonably arise about how far into the statute the modifier extends"); *see supra* notes 90-99 and accompanying text (discussing judicial development of presumption in favor of scienter).

As with the question of whether a statute has a *mens rea* requirement at all, federal courts have applied certain presumptions and general principles that guide them in determining which elements of a crime must meet a mental-state requirement. First, the Supreme Court has made clear that the presumption in favor of scienter applies to "each of the statutory elements that criminalize otherwise innocent conduct."[133] Put another way: "Absent clear congressional intent to the contrary, statutes defining federal crimes are . . . normally read to contain a *mens rea* requirement that attaches to enough elements of the crime that together would be sufficient to constitute an act in violation of the law."[134] For instance, in *United States v. Bruguier*, a federal appellate court concluded that a federal statute proscribing "knowingly" engaging in a sexual act with another person "if that other person is . . . incapable of appraising the nature of the conduct" or physically incapable of expressing lack of consent[135] required both knowingly engaging in the sexual act *and* knowledge that the other person could not appraise the nature of the conduct or express lack of consent.[136] In reaching this conclusion, the court noted that knowingly engaging in a sexual act with another person "is not inherently criminal under federal law, barring some other attendant circumstance."[137] By contrast, in *United States v. Feola*, the Supreme Court determined that a statute criminalizing assault on a federal officer "while engaged in or on account of the performance" of official duties[138] did not require the assailant to be aware that the victim was a federal officer, emphasizing that a perpetrator "knows from the very outset that his planned course of conduct is wrongful" and thus the "situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected."[139]

The distributive approach emphasizing a distinction between elements that make conduct criminal (as in *Bruguier*, where incapacity and knowledge thereof made conduct criminal that otherwise was not inherently so) and elements that "merely aggravate[] conduct that already is criminal" (as in *Feola*, where the element at issue merely defined a subset of assaults as federally punishable) has been subject to criticism for its lack of clarity.[140] Recent Supreme Court cases have at times appeared to skirt the lack of clarity and move towards a rule more akin to the MPC approach—i.e., that, absent an indication of congressional intent to the contrary, a mental-state requirement applies to each material element of the offense.[141] For example, in *Flores-Figueroa v. United States*, the Court addressed a provision imposing a mandatory two-year prison term on certain persons who "knowingly transfer[], possess[], or use[], without lawful authority, a means of identification of another person."[142] In a largely textual analysis, the Court concluded that the statute required proof that the defendant knew that the "means of identification" belonged to another person, based in part on the recognition that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to

[133] United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994).

[134] United States v. Figueroa, 165 F.3d 111, 116 (2d Cir. 1998) (Sotomayor, J.).

[135] 18 U.S.C. § 2242. The statute is jurisdictionally limited to the special maritime and territorial jurisdiction of the United States and certain federal facilities. *Id*.

[136] 735 F.3d 754, 763 (8th Cir. 2013).

[137] *Id*. at 761.

[138] 420 U.S. 671, 673 n.1 (1975) (quoting 18 U.S.C. § 111).

[139] *Id*. at 685.

[140] *See* Johnson, *Rethinking the Presumption of Mens Rea*, *supra* note 87, at 780 ("The academic commentary has been broadly critical of this limitation on the *mens rea* presumption.").

[141] *See supra* note 62 and accompanying text.

[142] 556 U.S. 646, 647 (2009) (quoting 18 U.S.C. § 1028A(a)(1)).

each element."[143] Some observers subsequently noted that this language could be viewed as "parallel[ing] the distributive default of the Model Penal Code,"[144] though several Justices wrote separately in the case to make clear that they did not necessarily agree with the language as a "normative description of what courts *should* ordinarily do when interpreting such statutes."[145] The federal courts of appeals have largely recognized that *Flores-Figueroa*'s language does not "establish a bright-line rule that a specified *mens rea* always applies to every element of the offense."[146] In contrast, in *Torres v. Lynch*, the Court explained that "[i]n general, courts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense."[147] Moreover, in *Rehaif v. United States*, the Court indicated that the presumption of scienter as to an element "applies with equal or greater force when Congress includes a general scienter provision in the statute itself," citing the MPC provision that establishes a default distributive rule applying to all material elements.[148] The Court in *Rehaif* also gestured to the "innocent conduct" analysis, however, in concluding that the statute at issue—which penalized "knowing[]" violations of a provision proscribing firearm possession by aliens unlawfully in the United States—required application of the knowledge standard to both the defendant's conduct and immigration status, specifying that "the possession of a gun can be entirely innocent" and thus applying *mens rea* to immigration status helped "separate wrongful from innocent acts."[149]

Regardless of whether or when a presumption of scienter attaches to other elements of a criminal offense, what is clear is that no presumption applies with respect to *jurisdictional* elements—i.e., elements that "simply ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct" by, for instance, limiting an offense to conduct "in or affecting commerce."[150] As the Court in *Rehaif* stated: "Because jurisdictional elements normally have

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[143] *Id*. at 652.

[144] Traps, *supra* note 114, at 629; *see also* Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 L. & CONTEMP. PROBS. 109, 121 (2012) ("If [the Court's] claim is taken as a canon of construction, it should work much like the MPC's provision that dictates a culpability term should apply to all material elements.").

[145] *Flores-Figueroa*, 556 U.S. at 658 (Scalia, J., concurring); *see also id*. at 660 (Alito, J., concurring) (viewing as "fair" a "general presumption" that a specified *mens rea* applies "to all the elements of the offense" but collecting contextual instances where that presumption is rebutted).

[146] United States v. Washington, 743 F.3d 938, 942 (4th Cir. 2014); *see also* United States v. Price, 921 F.3d 777, 786 (9th Cir. 2019) ("We have explicitly rejected the notion that the Court's reading of 'knowingly' in *Flores-Figueroa* compels the same reading in every criminal statute that uses the word 'knowingly.'"); United States v. Cox, 577 F.3d 833, 838 (7th Cir. 2009) (indicating that *Flores-Figueroa* "did not establish a rule for all circumstances"); United States v. Daniels, 653 F.3d 399, 410 (6th Cir. 2011) ("*Flores-Figueroa* does not compel a particular interpretation . . . . Rather, the resolution of this issue depends on the relative weight given to text and context."). Some courts have expressly treated *Flores-Figueroa* as recognizing a presumption that a stated *mens rea* term, or at least a "knowingly" term at the beginning of a sequence of statutory elements, applies to every subsequent element, which can be rebutted "where the context or background circumstances of a statute lead to a different reading." United States v. Bruguier, 735 F.3d 754, 761 (8th Cir. 2013) (citation and internal quotation marks omitted); United States v. Daniels, 685 F.3d 1237, 1248-49 (11th Cir. 2012) ("Although there is a general presumption that a knowing *mens rea* applies to every element in a statute, cases concerned with the protection of minors are within a special context, where that presumption is rebutted.").

[147] 136 S. Ct. 1619, 1630 (2016).

[148] 139 S. Ct. 2191, 2195 (2019) (citing MODEL PENAL CODE § 2.02(4) (1985)).

[149] *Id*. at 2197.

[150] *Id*. at 2196 (noting that "jurisdictional elements do not describe the 'evil Congress seeks to prevent'" (quoting *Torres*, 136 S. Ct. at 1630)).

nothing to do with the wrongfulness of the defendant's conduct, such elements are not subject to the presumption in favor of scienter."[151]

Meaning of *Mens Rea* Standards in Federal Statutes

Beyond the questions of whether a statute contains *mens rea* requirements and, if so, which elements carry those requirements is the question of what the *mens rea* standards established under federal law actually mean. Many of the dozens of different *mens rea* terms in federal law are undefined.[152] Further, the terms used may be conclusory and give little indication of what mental state is called for—for instance, terms such as "corruptly," "maliciously," "unlawfully," and "feloniously" can all be found in Title 18 alone.[153] As such, understanding what mental state is required for a given federal crime will almost necessarily require reference to judicial opinions construing that particular provision. Even then, "the same terms are defined differently depending on which substantive crime is at issue, which federal circuit one is in, and which judge within a given district is crafting the jury's instructions."[154]

As the National Commission on Reform of Federal Criminal Laws acknowledged decades ago, however, judicial opinions interpreting federal *mens rea* terms "display far fewer mental states than the statutory language" might suggest.[155] Of "paramount importance" in federal criminal law are the concepts of "intention" or, in the language of the MPC, "purpose," "as well as knowledge or awareness."[156] Less common, though still relevant, are concepts embodied at least partially in the MPC's frameworks for recklessness and negligence.[157] Different courts may have different approaches to these concepts and the definitions they entail. This section provides an overview of

[151] *Id*. Additionally, relying on the notion that only the *mens rea* necessary to separate wrongful from otherwise innocent conduct is required, courts have found no need to read a *mens rea* requirement into provisions that merely enhance the sentence for conduct that is already criminally proscribed. *E.g.*, Dean v. United States, 556 U.S. 568, 575-76 (2009) (noting that "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts" and concluding no *mens rea* applied to a "sentencing enhancement . . . account[ing] for the risk of harm resulting from the manner in which the crime is carried out"); United States v. McDuffy, 890 F.3d 796, 801 (9th Cir. 2018) ("Thus, the presumption in favor of scienter is lessened, if not altogether absent, when considering sentencing enhancement provisions."). Questions may arise as to when a provision in a statute constitutes an element of the offense versus an enhancement provision. *Cf.* United States v. Burwell, 690 F.3d 500, 505, 508 (D.C. Cir. 2012) (calling "misguided" the suggestion "that the label 'element of the offense,' as opposed to 'sentencing factor,' is determinative of the *mens rea* requirement" and emphasizing that "certain offense elements do not require proof of an additional *mens rea* so long as the offense as a whole carries a scienter requirement that separates innocent from criminal conduct").

[152] *See supra* notes 72-78; James A. Macleod, *Belief States in Criminal Law*, 68 OKLA. L. REV. 497, 511 (2016) ("The federal criminal code employs a far greater array of mental state terms than does the MPC, and these terms are typically left undefined in the statutes in which they are found.").

[153] *See* 1 WORKING PAPERS, *supra* note 73, at 119 (citing 18 U.S.C. §§ 201, 549, 1427, & 1506).

[154] Macleod, *supra* note 152, at 511. Because *mens rea*, as "an ingredient of the crime charged," is "a question of fact which must be submitted to the jury," Morissette v. United States, 342 U.S. 246, 274 (1952), judicial interpretations of statutory *mens rea* requirements typically arise in the context of challenges to the trial court's jury instructions defining the mental-state element that must be proved. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 423 (1985) (involving challenge to jury instructions based on district court's refusal to instruct jury that specific intent was required).

[155] *Id*. at 120.

[156] O'MALLEY, GRENIG, & LEE, *supra* note 6, § 17:01.

[157] MODEL CRIM. JURY INSTRUCTIONS ch. 5 (U.S. CT. APPEALS, 3D CIR. 2018) [hereinafter THIRD CIRCUIT JURY INSTRUCTIONS], https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions ("Federal crimes commonly include the mental states intentionally, knowingly, or willfully, and less commonly recklessly or negligently.").

the meanings of some of the most common *mens rea* standards under federal law, grouped loosely into categories similar to those recognized in the MPC.

Intentionally, Knowingly, and Willfully

The terms "intentionally," "knowingly," and "willfully" are among those "used most frequently" in federal criminal statutes, but as with other federal *mens rea* terms, they have "eluded precise definition."[158] It seems that all three terms require at least some degree of conscious, subjective awareness of the element to which the requirement attaches.[159] Beyond this baseline, the meanings of the terms may vary or overlap considerably depending on the court, statute, and context of their use.[160]

Intentionally and Knowingly

The concept of committing an offense "intentionally" has long been mired in confusion given the varying usages of the term at common law and the rather unclear distinction between "specific intent" and "general intent" crimes.[161] In one view, intent might be thought to embody a "bifurcated concept" embracing a requirement that a person "consciously desire[]" some result *or* that they be aware that it "is practically certain," whatever their desire.[162] Under this approach, any "limited distinction" between knowledge and intention or purpose is not "considered important since 'there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.'"[163] An ostensible blurring of the concepts of intention and knowledge is embodied in some federal court jury instructions that define "knowingly" as "voluntarily and intentionally,"[164] as well as cases that may treat the term "intent" as "requir[ing] only that the defendant reasonably knew the proscribed result would occur" *or* as

[158] O'MALLEY, GRENIG, & LEE, *supra* note 6, § 17:01. A fourth term bearing similarity to the other three is "maliciously," which, in one formulation, denotes intent to do a prohibited act without justification, mitigation, or excuse. *E.g.*, United States v. Kelly, 676 F.3d 912, 918 (9th Cir. 2012); *cf.* United States v. Grady, 746 F.3d 846, 849 (7th Cir. 2014) (approving jury instruction defining "maliciously" as "intentionally or with deliberate disregard of the likelihood that damage or injury would result" but omitting proposed addition of phrase "without just cause or reason"). The concept of "malice" is used to define the requisite mental states for certain federal homicide crimes, which also provide an example of one circumstance where the "mitigation or excuse" component of the above definition is relevant—murder and voluntary manslaughter both require intent to kill or cause serious bodily injury (or at least extreme recklessness as to such result), but voluntary manslaughter bears a mitigating element of "sudden quarrel or heat of passion" that renders it "without malice." United States v. Serawop, 410 F.3d 656, 664 (10th Cir. 2005); *see* United States v. Delaney, 717 F.3d 553, 557 (7th Cir. 2013) ("This is puzzling, because 'malice aforethought' in the statute means intent and so what does it mean to say that a person did something intentionally but without malice?"). Malice can also bear a distinct meaning that incorporates notions of "evil purpose or motive" in at least one statute. *See* United States v. Hassouneh, 199 F.3d 175, 181 (4th Cir. 2000) ("[T]he history surrounding the progression of the Bomb Hoax Act confirms that Congress intended the term 'acts willfully and maliciously' to mean 'acts with an evil purpose or motive.'").

[159] Or at least a high enough degree of risk that the existence of the element is "virtually certain." Shen & Hoffman, *supra* note 33, at 1312 (describing "most recent major fault line in the law of intentionality" as distinguishing between "desire-based intent" and "a new category of 'recklessness-plus'" that is "grounded in the degree of risk the actor is consciously undertaking").

[160] *E.g.*, Bryan v. United States, 524 U.S. 184, 191 (1998) ("The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears.").

[161] *See supra* § "Background."

[162] United States v. U.S. Gypsum Co., 438 U.S. 422, 445 (1978) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 196 (1972)).

[163] *Id.*

[164] *E.g.*, United States v. Tracy, 36 F.3d 187, 194 (1st Cir. 1994).

requiring that the defendant "specifically intended such an outcome as his purpose" depending on the common-law categorizations of specific versus general intent.[165] This approach may lead to disagreement as to whether particular federal statutes with an intent requirement call for merely awareness or a higher degree of purpose or desire,[166] though courts have often applied a general intent standard as a default.[167]

The approach[168] largely reflected in the MPC and some federal precedent is to distinguish between "intention" or purpose on the one hand as being limited to a conscious object or desire, and "knowledge" on the other hand as capturing a requirement of awareness of a high probability or to a practical certainty.[169] The Supreme Court in *Bailey* referenced this distinction approvingly and suggested that intention or purpose "corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."[170]

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[165] United States v. Dyer, 589 F.3d 520, 528 (1st Cir. 2009); *see also* United States v. Tobin, 552 F.3d 29, 32-33 (1st Cir. 2009) ("Although the word 'intent' can often mean with 'knowledge' that a particular result will follow, it sometimes instead requires a 'purpose' to bring about a specific end."). A specific intent requirement may even be construed to encompass recklessness in some contexts. *See* United States v. McAnally, 666 F.2d 1116, 1119 (7th Cir. 1981) ("[T]raditionally in the criminal law an extreme form of recklessness has been treated as intentional . . . ."); *but see* United States v. Adamson, 700 F.2d 953, 962 (5th Cir. 1983) (criticizing "loose references to recklessness" in discussions of specific intent requirement of statute proscribing misapplication of bank funds). Recklessness as a *mens rea* standard under federal law is discussed in more detail *infra*.

[166] *E.g.*, United States v. Veach, 455 F.3d 628, 632 (6th Cir. 2006) (acknowledging disagreement over whether statute proscribing threatened assault of certain federal officials "with intent to . . . intimidate," among other things, is specific or general intent crime); United States v. Rodriguez, 416 F.3d 123, 126-27 (2d Cir. 2005) (disagreeing with Ninth Circuit that immigration statute requires purpose to reenter U.S. illegally, rather than merely "knowingly and intentionally" taking the action that constitutes an attempt to reenter). Depending on the statute, an intent requirement may also be conditional, i.e., intent may be established if the defendant intends to take a proscribed action or produce a proscribed result only "if necessary"; put differently, "a defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose." Holloway v. United States, 526 U.S. 1, 11 (1999). This principle is consistent with the approach of the MPC. *See* MODEL PENAL CODE § 2.02(6) (1985) ("When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense."). Intent additionally may be "transferred" where one has intent to harm a specific victim but a different victim is actually harmed instead. *See, e.g.*, United States v. Savage, 970 F.3d 217, 276 (3d Cir. 2020) (surveying application of doctrine under federal law); *cf.* MODEL PENAL CODE § 2.03(2) (treating transferred intent as matter of causation).

[167] *E.g.*, United States v. Lynch, 881 F.3d 812, 815 (10th Cir. 2018) ("Where specific intent is not required, criminal statutes are usually read to require 'only that a defendant know the facts that make his conduct illegal.'" (citation omitted)); United States v. Martinez, 49 F.3d 1398, 1401 (9th Cir. 1995), *superseded by statute as recognized in* United States v. Randolph, 93 F.3d 656, 661 (9th Cir. 1996) ("[W]hen a statute does not contain any reference to intent, general intent is ordinarily implied."). As described *supra*, whether a particular federal statute establishes a general or specific intent crime is ultimately a question of legislative intent that may depend on the text of the statute, how the crime at issue was treated at common law, and legislative history, among other things. *E.g.*, United States v. Lamott, 831 F.3d 1153, 1156-57 (9th Cir. 2016) (considering "[s]everal factors" as indicative of congressional intent to establish general intent crime, including lack of use of phrase "with intent to," common law precedent regarding assault and battery, and legislative record surrounding passage of law).

[168] O'MALLEY, GRENIG, & LEE, *supra* note 6, § 17:01 (quoting WAYNE R. LAFAVE, CRIMINAL LAW § 3.5 (4th ed. 2003)).

[169] *See supra* § "Model Penal Code Approach." Some federal courts may frame knowledge in terms of "belief" rather than awareness, particularly in contexts such as sting operations where a circumstance element at issue may not actually be present. *E.g.*, United States v. Flores, 945 F.3d 687, 712 (2d Cir. 2019) ("[A]lthough knowledge is . . . belief substantiated by veracity, in the context of a sting operation belief is tantamount to knowledge." (citation and internal quotation marks omitted)).

[170] United States v. Bailey, 444 U.S. 394, 405 (1980); *see also* United States v. Ramamoorthy, 949 F.3d 955, 961 (6th Cir. 2020) ("To commit a general-intent crime, a defendant must only intend to do the act that the law proscribes. To commit a specific-intent crime, a defendant must do more than knowingly act in violation of the law. He must also act with the purpose of violating the law." (internal citations and quotation marks omitted)). One commentator has argued

Some federal courts utilize a definition of "knowing" that approximates the MPC approach, instructing that to act knowingly a defendant must have "realized what he was doing and [be] aware of the nature of his conduct" rather than acting "through ignorance, mistake or accident."[171] Congress has also signaled an intent to distinguish between the two *mens rea* terms in this way in particular statutes. For instance, prior to 1986, the Computer Fraud and Abuse Act (CFAA) proscribed "knowingly" accessing a computer without authorization or exceeding authorized access in certain circumstances.[172] In its 1986 amendments, however, Congress changed the standard from "knowingly" to "intentionally," and the Senate report emphasized that the change was meant to require "more than that one voluntarily engaged in conduct . . . . Such conduct . . . must have been the person's conscious objective."[173]

For federal statutes that establish a "knowing" *mens rea* requirement, one issue that can arise concerns a circumstance where a person may not have positive knowledge of the element at issue "only because he consciously avoided it."[174] In this situation, every federal circuit has recognized that so-called "willful blindness" or "deliberate ignorance" can equate to knowledge.[175] Though the precise formulations and requirements vary, courts "appear to agree on two basic requirements: (1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact."[176] For instance, if a person is found to be transporting narcotics in the trunk of their car and claims that their suspicions were aroused by the smell of dryer sheets used to mask the narcotics' odor but that they did not actually know the trunk contained drugs, a willful blindness jury instruction may be appropriate in a subsequent prosecution for knowing possession of a controlled substance

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that the Supreme Court's dicta in *Bailey* mistakenly treats the difference between general and specific intent as "reducible to the difference between two mental states." Johnson, *Rethinking the Presumption of Mens Rea*, *supra* note 87, at 790 n.119. As described above, at least one conception of the difference between general and specific intent is that it delineates between the *elements* to which a given mental state attaches. *See id.* at 790-91; *supra* § "Background."

[171] United States v. Salinas, 763 F.3d 869, 880 (7th Cir. 2014). Ordinarily, "the term 'knowingly' merely requires proof of knowledge of the *facts* that constitute the offense" and not knowledge of the law or unlawfulness. Bryan v. United States, 524 U.S. 184, 193 (1998) (emphasis added). However, construction of particular statutes may lead to a different result based on the analysis described *supra*, § "Application of Mens Rea to Specific Elements." For instance, in *Liparota v. United States*, the Court determined that a statute prohibiting knowing use of food stamps "in any manner not authorized" by statute or regulation required a defendant to know "that his conduct was unauthorized or illegal." 471 U.S. 419, 434 (1985).

[172] *See* United States v. Sablan, 92 F.3d 865, 868 (9th Cir. 1996) (describing legislative history).

[173] S. REP. NO. 99-432, at 6 (1986); *see* United States v. Drew, 259 F.R.D. 449, 459 (C.D. Cal. 2009) (quoting report language in interpreting CFAA). The notion of intent as conscious object or purpose can also be significant for other kinds of crimes like homicide, which is federally proscribed in jurisdictionally limited circumstances, and treason. *See Bailey*, 444 U.S. at 405.

[174] United States v. Jewell, 532 F.2d 697, 702 (9th Cir. 1976).

[175] *See* Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011) (mentioning that "the Courts of Appeals . . . all appear to agree" on basic parameters of willful blindness doctrine). The concept, however, is "categorically different from negligence or recklessness," United States v. Heredia, 483 F.3d 913, 918 n.4 (9th Cir. 2007) (en banc), which are discussed in more detail *infra*.

[176] *Id.* One point of apparent disagreement concerns whether the defendant also must have the "motive in deliberately failing to learn the truth . . . to give himself a defense in case he should be charged with the crime." *Heredia*, 483 F.3d at 919 (rejecting motive requirement); *but see* United States v. Davis, 901 F.3d 1030, 1034 (8th Cir. 2018) (stating that willful blindness instruction "is proper if the evidence supports the inference that the defendant was aware of a high probability of the existence of the fact in question *and* purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." (internal alteration & quotation marks omitted)); *see generally* Alexander F. Sarch, *Willful Ignorance, Culpability, and the Criminal Law*, 88 ST. JOHN'S L. REV. 1023 (2014) (describing disagreement).

under 21 U.S.C. § 841(a)(1).[177] A rationale frequently given for the doctrine is that "persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts."[178]

Willfully

Beyond "knowingly" and "intentionally," another of the most commonly used *mens rea* terms in federal criminal law is "willfully,"[179] which may appear as a standalone term[180] or in conjunction with "knowingly."[181] The term also exemplifies, perhaps better than any other, the non-uniformity of mental-state requirements under federal law. As the Supreme Court has recognized, the "word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears."[182] Other courts have referred to the term more colorfully as "notoriously slippery" and a "chameleon word."[183] As the National Commission on Reform of Federal Criminal Laws summarized it, courts "have endowed the requirement of willfulness with the capacity to take on whatever meaning seems appropriate in the statutory context," providing "[p]erhaps the best illustration of the confusion engendered by existing statutory formulations of the mental element" in federal criminal law.[184]

In a common formulation, "a 'willful' act is one undertaken with a 'bad purpose,'" meaning that to act "willfully" requires "knowledge that [one's] conduct was unlawful."[185] This formulation distinguishes the term "willfully" from a common conception of "knowingly" under federal law, as the latter ordinarily requires only knowledge of the facts that constitute an offense.[186] The typical knowledge-of-unlawfulness formulation of "willfully" does *not*, however, require knowledge of the precise legal provision or prohibition that has been violated.[187] Rather, all that is required is knowledge that conduct is unlawful "in some general sense."[188]

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[177] *See Heredia*, 483 F.3d at 917-18 (describing this situation).

[178] United States v. Parker, 872 F.3d 1, 14 (1st Cir. 2017) (quoting *Global-Tech*, 563 U.S. at 766).

[179] O'MALLEY, GRENIG, & LEE, *supra* note 6, § 17:01.

[180] *E.g.*, 18 U.S.C. § 924(a)(1)(D) (establishing criminal penalties for those who "willfully" violate certain firearm-related requirements).

[181] *E.g.*, 18 U.S.C. § 1501 (prohibiting "knowingly and willfully" obstructing a federal process server, among other things).

[182] Bryan v. United States, 524 U.S. 184, 191 (1998) (quoting Spies v. United States, 317 U.S. 492, 497 (1943)).

[183] United States v. Starnes, 583 F.3d 196, 210 (3d Cir. 2009) (quoting United States v. Ladish Malting Co., 135 F.3d 484, 487-88 (7th Cir. 1998)).

[184] *See* 1 WORKING PAPERS, *supra* note 73, at 120.

[185] *Bryan*, 524 U.S. at 191.

[186] Dixon v. United States, 548 U.S. 1, 5 (2006). As noted above, construction of particular statutes may result in a definition of "knowingly" that *does* include knowledge of unlawfulness to some degree, which may be thought of as more akin to the typical formulation of a willfulness requirement. *See supra* note 171.

[187] *See Bryan*, 524 U.S. at 195-96 (rejecting argument that willfulness requirement in firearm-related statute necessitates knowledge of the law, as "knowledge that the conduct is unlawful is all that is required"); Screws v. United States, 325 U.S. 91, 103, 106 (1945) (Reading willfulness requirement in 18 U.S.C. § 242 as calling for "specific intent to deprive a person of a federal right made definite by decision or other rule of law" but indicating that defendant does not need to be "thinking in constitutional terms").

[188] United States v. Starnes, 583 F.3d 196, 210 (3d Cir. 2009); *see also* United States v. Kosinski, 976 F.3d 135, 154 (2d Cir. 2020) ("As a general matter, a person who acts willfully need not be aware of the specific law that his conduct may be violating. Rather, knowledge that the conduct is unlawful is all that is required." (citation and internal quotation marks omitted)); United States v. Hernandez, 859 F.3d 817, 823 (9th Cir. 2017) ("In this case, the government was required to show that [the defendant] knew his transportation of firearms . . . was somehow unlawful, even if he did not

Courts have identified additional "levels of interpretation" of "willfully."[189] In some contexts the term may merely "denote an act which is intentional, or knowing, or voluntary, as distinguished from accidental"—in other words, it may be synonymous with other *mens rea* standards discussed in this section.[190] By contrast, in the context of "highly technical statutes that present[] a danger of ensnaring individuals engaged in apparently innocent conduct,"[191] courts have recognized a heightened formulation of "willfulness" that requires "proof that the defendant actually knew of the specific law prohibiting the conduct."[192] For instance, in *Cheek v. United States*, the Supreme Court determined that statutory provisions of the tax code criminalizing willful tax evasion and willful failure to file returns required "actual knowledge of the pertinent legal duty," as the complexity of the tax laws "made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed" by those laws.[193]

Example of Courts' Construction of Arson Statute, 18 U.S.C. § 81

An example of the complications that may arise in construing federal statutes that require some level of intentionality or awareness can be found in dueling court constructions of 18 U.S.C. § 81.[194] That statute prohibits "willfully and maliciously sett[ing] fire to or burn[ing] any building, structure or vessel," among other things, in a certain federal jurisdictional context.[195] In

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know of the specific legal duty, or the particular law, that made it unlawful.").

[189] *Starnes*, 583 F.3d at 210.

[190] *Bryan*, 524 U.S. at 191 n.12; *see, e.g.*, United States v. Gonsalves, 435 F.3d 64, (1st Cir. 2006) ("Willfulness . . . means nothing more in this context than that the defendant knew that his statement was false when he made it or . . . consciously disregarded or averted his eyes from its likely falsity."). This is the definition of willfulness embraced by the MPC, which states that a willfulness requirement "is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." MODEL PENAL CODE § 2.02(8) (1985). Under federal law, in fact, a requirement of willfulness may even be construed to encompass recklessness depending on the context. *See* United States v. Blankenship, 846 F.3d 663, 673 (4th Cir. 2017) ("In interpreting a variety of criminal statutes, other Circuits have reached the same conclusion: . . . 'reckless disregard' still can—and does—constitute criminal willfulness."). Recklessness as a *mens rea* requirement in federal statutes is discussed in more detail *infra*.

[191] *Bryan*, 524 U.S. at 194.

[192] *Starnes*, 583 F.3d at 211; *see* Ratzlaf v. United States, 510 U.S. 135, 149 (1994) (applying stringent formulation of willfulness requirement to financial anti-structuring laws). In these circumstances, the inclusion of a willfulness requirement may operate as an exception to the long-standing maxim that "ignorance of the law or a mistake of law is no defense to criminal prosecution." United States v. Marshall, 753 F.3d 341, 345 (1st Cir. 2014) (Souter, J.) (quotation omitted). In other words, where a willfulness requirement necessitates proof that the defendant actually knew of the legal provision that proscribed his conduct, ignorance of that law may constitute a defense to conviction because it negates the requisite *mens rea*. A discussion of these and other defense issues that relate to *mens rea* can be found *infra*, § "Selected Additional Mens Rea Issues in Federal Law."

[193] 498 U.S. 192, 200, 202 (1991).

[194] *See* Batey, *supra* note 7, at 367-71 (describing statute and court opinion construing it as "a particularly clear example of the definitional possibilities inherent in general intent").

[195] 18 U.S.C. § 81. In full, the statute provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously sets fire to or burns any building, structure or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping, or attempts or conspires to do such an act, shall be imprisoned for not more than 25 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed, or both.
>
> If the building be a dwelling or if the life of any person be placed in jeopardy, he shall be fined under this title or imprisoned for any term of years or for life, or both.
>
> *Id.*

United States v. M.W., the Tenth Circuit[196] construed the statute's "willfully and maliciously" *mens rea* requirement in the case of a student who broke into a school located on an Indian reservation and set fire to school records in the principal's office.[197] The fire got out of control and resulted in extensive damage to the school building.[198] The district court found the student guilty of arson under 18 U.S.C. § 81 and, on appeal, the student argued that the statute required him to have "the intent to burn [the] building," which he did not have because he only intended to burn the records.[199] The Tenth Circuit applied the MPC approach and determined that (1) knowledge was sufficient to meet the willfulness requirement, and (2) because burning the building was a result element, the student could be convicted if he was "aware that it [was] practically certain that his conduct" would cause that result.[200] In other words, the Tenth Circuit construed the "willfully and maliciously" term as requiring only knowledge—i.e., awareness to a practical certainty—that conduct would result in setting fire to a building and upheld the student's conviction based on the lower court's finding that he had such awareness.[201]

By contrast, in *United States v. Doe (R.S.W.)*, the Ninth Circuit construed the same statute in similar factual circumstances as requiring neither intent to burn a building *nor* "knowledge this would be the probable consequence of the defendant's act."[202] Rather, according to the court, all that the "willfully and maliciously" term required was general intent to do the act that caused a building to burn, i.e., "that the defendant set the fire intentionally and without justification or lawful excuse."[203] In reaching this conclusion, the court expressly rejected reliance on the MPC, observing that because the *mens rea* term was drawn from the common law definition of arson, the court should assume that Congress "knew how the common law defined that phrase" and "intended to adopt the [general-intent] meaning that common law gave" it when enacting 18 U.S.C. § 81.[204] In dissent, one judge argued that the court's construction effectively turned the statute into a strict liability offense, as the majority mistakenly applied a standard of intentionality "not to the proscribed conduct of setting fire to a building, but to [the defendant's] mental state toward setting [items in the building] aflame."[205]

As these two cases reflect, *mens rea* terms like "intentionally," "knowingly," and "willfully" may overlap or blend into each other, and judicial interpretations of such terms may differ markedly even as applied to the same statute under very similar factual circumstances. Thus, in *M.W.*, the court viewed "willfully and maliciously" as requiring only knowledge, but it treated that knowledge requirement as extending to the result of a *building* being burned, while in *R.S.W.*, the court purported to treat "willfully and maliciously" as synonymous with intention but concluded that intention (in the sense of voluntariness) with respect to the act of lighting the fire was sufficient to meet the statute's *mens rea* requirement.

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[196] This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Fifth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[197] 890 F.2d 239, 239 (10th Cir. 1989).

[198] *Id*.

[199] *Id*. at 240.

[200] *Id*. at 240-41.

[201] *Id*. at 241.

[202] 136 F.3d 631, 635 (9th Cir. 1998).

[203] *Id*. at 635.

[204] *Id*. at 634, 636.

[205] *Id*. at 637-38 (Fletcher, J., dissenting).

Recklessly and Negligently

Though the *mens rea* concepts of recklessness and negligence are much less central in federal criminal law than are concepts of intention or knowledge,[206] some federal criminal provisions do utilize them.[207] In general, recklessness and negligence are distinct from other *mens rea* standards in that they focus on *risk*.[208] Nonetheless, recklessness shares with higher forms of *mens rea* a requirement of subjective awareness, while negligence is often understood to establish an objective standard that arguably takes it out of the realm of a true "mental-state" requirement altogether.[209]

Recklessly

According to the Supreme Court, the "dominant formulation" of a *mens rea* requirement of recklessness is that one "consciously disregard[s] a substantial risk" of harm.[210] This formulation is drawn from the MPC, which defines recklessness as conscious disregard of "a substantial and unjustifiable risk" that an element exists or will result from one's conduct.[211] It appears that federal courts largely use this definition, or one that is substantially similar, in construing federal statutes that contain the term "reckless" or "reckless disregard."[212] As the definition suggests, criminal recklessness under federal law generally requires subjective awareness of a risk and deliberate disregard of it, i.e., "the intentional taking of a risk that might result in harm,"[213] though there may be some variation among courts and across statutes as to whether awareness of

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[206] *See* O'MALLEY, GRENIG, & LEE, *supra* note 6, § 17:01 (stating that concepts of recklessness and negligence "have little relevance in federal criminal law"); THIRD CIRCUIT JURY INSTRUCTIONS, *supra* note 157, ch. 5, p. 36 ("'Recklessly' is not frequently used to define the state of mind requirement in federal criminal statutes.").

[207] *E.g.*, 18 U.S.C. § 1591(a) (prohibiting, among other things, knowingly recruiting a person "in reckless disregard of the fact" that force or other proscribed means will be used to cause the person to engage in a commercial sex act); 18 U.S.C. § 755 (establishing criminal penalties for one who "negligently suffers [a federal prisoner] to escape," among other things).

[208] *See, e.g.*, MODEL PENAL CODE §§ 2.02(2)(c)-(d) (1985).

[209] *E.g.*, *id.*; *see supra* note 6 and accompanying text; Godwin v. United States, 441 F. Supp. 3d 1243, 1257 n.9 (M.D. Ala. 2020) ("The basic distinction between recklessness and negligence is that an actor is criminally negligent when he should have been aware of the risk but was not, while recklessness requires that the defendant actually be aware of the risk but disregard it." (alteration, citation, and internal quotation marks omitted)).

[210] Voisine v. United States, 136 S. Ct. 2272, 2278 (2016) (quoting MODEL PENAL CODE § 2.02(2)(c) (1985)).

[211] MODEL PENAL CODE § 2.02(2)(c) (1985).

[212] *E.g.*, Farmer v. Brennan, 511 U.S. 825, 836-37 (1994); United States v. Fagatele, 944 F.3d 1230, 1239 (10th Cir. 2019); United States v. Rodriguez, 880 F.3d 1151, 1159-61 (9th Cir. 2018); Anderson v. Kingsley, 877 F.3d 539, 543-45 (4th Cir. 2017); United States v. Mottweiler, 82 F.3d 769, 771 (7th Cir. 1996); Macleod, *supra* note 152, at 513 n.54 ("[T]he MPC recklessness 'formulation is substantially the same as the formulations of recklessness in federal and state criminal codes and judicial decisions.'" (quoting LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 35 (2009)).

[213] *Anderson*, 877 F.3d at 545; *see Farmer*, 511 U.S. at 836-37 ("The criminal law . . . generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware."). The MPC further defines a "substantial and unjustifiable" risk as a risk "of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(c) (1985). Some federal courts may include this further definition in jury instructions as well, recognizing that although recklessness requires *subjective* awareness, "the nature of the risk is measured by an *objective* standard." United States v. Rodriguez, 880 F.3d 1151, 1161 (9th Cir. 2018) (emphasis added); *but cf.* THIRD CIRCUIT JURY INSTRUCTIONS, *supra* note 157, at ch. 5, pp. 35-36 (noting that although "the Third Circuit does not seem to have included this further definition in its few cases discussing recklessly, the trial court could include it in an instruction on recklessly if it thinks a further explanation is necessary").

facts and circumstances *giving rise* to a risk is sufficient to establish recklessness in the absence of awareness of the risk itself.[214]

Recklessness thus differs from a *mens rea* standard of "knowledge" primarily in regard to the degree of *certainty* of a circumstance or outcome of which a defendant is aware—in the MPC formulation that is sometimes used by federal courts, knowledge connotes awareness of a high probability or to a practical certainty; recklessness, by contrast, focuses on awareness of some lesser degree of risk.[215] For example, the Fourth Circuit in *United States v. Carr* considered a federal statute prohibiting intentionally damaging or destroying certain buildings by means of fire or an explosive and causing the death of any person.[216] The case required the court to distinguish between a knowing and reckless state of mind with respect to the death that occurred for sentencing purposes.[217] The district court found that the defendant, who set fire to an apartment building resulting in the death of an occupant, was "recklessly indifferent to whether people would be in the apartment building" because the mailboxes, gas meters, and cars out front made it "obvious" the structure was occupied.[218] The district court viewed this "reckless indifference" as "equat[ing] to knowledge" and thus refused to consider a lower sentence that could apply for recklessly causing death.[219] On appeal, the Fourth Circuit rejected the lower court's conflation of recklessness and knowledge, making clear that although both standards "require a subjective awareness of risk on the part of the actor," the "degree of the risk that the actor is aware of" (i.e., a substantial risk versus practical certainty) distinguishes the two.[220] The court held that, although the lower court's findings regarding indicia of occupancy like mailboxes "certainly support[ed] a finding of recklessness," its failure to make a finding on the question of whether the evidence supported the higher standard of knowledge (i.e., whether he acted "with an awareness that death was practically certain to result") was erroneous.[221]

Given that the primary distinction between common definitions of knowledge and recklessness focuses on the degree of risk of a particular outcome, at least one circuit has held that, in determining the sufficiency of the evidence, "a finding that an accused acted recklessly may be enough to sustain a jury verdict" pursuant to a statute that requires knowledge "because a jury

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[214] *Compare Rodriguez*, 880 F.3d at 1160 (making clear that for purposes of statutory prohibition on transporting an illegal alien for financial gain, defendant must not merely be aware of facts "from which the inference of the risk at issue could be drawn" but must "actually *draw the inference*"), *with* United States v. Kendrick, 682 F.3d 974, 984 (11th Cir. 2012) (stating that "reckless disregard" term in separate subsection of same statute "means to be aware of, but consciously and carelessly ignore, facts and circumstances clearly indicating that" element exists); *see also* United States v. Carson, 870 F.3d 584, 603 (7th Cir. 2017) (recognizing that "[o]ther courts to have considered the question have concluded that the phrase 'reckless disregard' in [a] statute [proscribing sex-trafficking activities] requires only an awareness of facts and circumstances that give rise to a risk of a . . . violation, not an awareness of the risk itself").

[215] *See supra* notes 168-169; United States v. Carr, 303 F.3d 539, 547 (4th Cir. 2002) ("From the definitions we see that 'knowing' and 'reckless' states of mind both require a subjective awareness of risk on the part of the actor. The difference lies in the degree of the risk that the actor is aware of.").

[216] 303 F.3d at 540 (addressing 18 U.S.C. § 844(i)).

[217] *Id*. at 540-41. The state-of-mind distinction was relevant by virtue of the United States Sentencing Guidelines, which in an application note encouraged a downward departure from the applicable sentencing range if "the defendant did not cause the death intentionally or knowingly" but caused it through "recklessness or negligence." *Id*. at 545-46 (citing U.S. SENT'G GUIDELINES MANUAL § 2A1.1 cmt. n.1 (U.S. SENT'G COMM'N 2001)). A separate application note defined the term "reckless" in a similar fashion as the MPC. *Id*.

[218] *Id*. at 544, 545.

[219] *Id*.

[220] *Id*. at 546-47.

[221] *Id*. at 548 (citation and internal quotation marks omitted).

may properly infer the requisite intent."[222] Any boundary between the two levels of culpability may also be further blurred in some instances—for example, the Sixth Circuit has interpreted a statute proscribing (among other things) knowing failure to disclose information required under Title I of the Employee Retirement Income Security Act of 1974 as requiring only "proof of a voluntary conscious failure to disclose without ground for believing that such non-disclosure is lawful, or with reckless disregard for whether or not it is lawful."[223] In other words, a "knowing" *mens rea* requirement may be construed in particular contexts to require only recklessness with respect to a circumstance or result, as may a "willfulness" requirement in some cases.[224]

Negligently

Negligence is a concept that will likely be most familiar to those acquainted with tort law.[225] It can also have criminal applications, although negligence as a federal *mens rea* standard is less prevalent than other terms discussed in this report.[226] At the most basic level, negligence embodies (1) conduct that is "judged by an objective (reasonable man) standard," and (2) some "degree of risk which the defendant's conduct must create."[227] One conception of negligence in the criminal context, reflected in the MPC, is that the defendant "should be aware" of a risk that the statutory element at issue exists or will result from his conduct.[228] According to this view, the "basic distinction" between recklessness and negligence is that a defendant "is criminally negligent when he should have been aware of the risk but was not, while recklessness requires that the defendant actually be aware of the risk but disregard it."[229] Whether a defendant "should have been aware" is, in turn, judged by the objective standard of a reasonable person.[230] The MPC approach to negligence also emphasizes that the risk must be "substantial and unjustifiable," i.e., the risk must be "of such a nature and degree" that failure to perceive it "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[231] These elaborations may be said to embody a heightened standard of "gross" or "criminal" negligence, as distinguished from the ordinary negligence typically sufficient for civil liability that, in one representative formulation, requires only "doing something which a reasonably prudent person would not do, or . . . failing to do something which a reasonably prudent person would do."[232]

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[222] United States v. Adamson, 700 F.2d 953, 962 (5th Cir. 1983) (emphasis omitted); *see also* United States v. Ladish Malting Co., 135 F.3d 484, 488 (7th Cir. 1998) ("Criminal recklessness may be so close to actual knowledge that proof of one suffices for proof of the other[.]").

[223] United States v. Krimsky, 230 F.3d 855, 859 (6th Cir. 2000) (quoting United States v. S & Vee Cartage Co., Inc., 704 F.2d 914, 919 (6th Cir.1983)).

[224] *See supra* note 190.

[225] *See* LAFAVE, *supra* note 6, § 5.4(a) (indicating that negligence "will usually do for tort liability").

[226] *See supra* note 157 and accompanying text; William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1072 (1992) ("referencing "near complete absence of negligence" in Title 18 of U.S. Code).

[227] LAFAVE, *supra* note 6, § 5.4(a).

[228] United States v. Zats, 298 F.3d 182, 189 (3d Cir. 2002) (quoting MODEL PENAL CODE § 2.02(2)(d) (1985)).

[229] Godwin v. United States, 441 F. Supp. 3d 1243, 1257 n.9 (M.D. Ala. 2020) (citation and internal quotation marks omitted).

[230] *See* LAFAVE, *supra* note 6, § 5.4(a)(2) ("All that negligence requires is that [a person] ought to have been aware of [the risk] (i.e., that a reasonable man would have been aware of it).").

[231] MODEL PENAL CODE § 2.02(2)(d) (1985).

[232] United States v. Pruett, 681 F.3d 232, 241 (5th Cir. 2012). The MPC and *Pruett* formulations of ordinary and so-called gross negligence are far from the only ones—as one commentator has noted, "[t]raditional criminal law doctrine . . . does not employ or emphasize any single conception of negligence" but rather "contains a variety of doctrines that

Some have suggested that an "ordinary" negligence standard is inappropriate for imposition of criminal liability, arguing that criminalizing mere failure to exercise ordinary care has "limited deterrent value" and is "fundamentally unfair."[233] Nevertheless, "the notion that criminal liability might extend in special circumstances to simple negligence . . . is a surprisingly long-standing feature of federal statute, with a similarly long history of favorable treatment by the Supreme Court."[234] As such, to the limited extent negligence is employed in federal law as a *mens rea* standard for criminal prohibitions, it may be interpreted as requiring only ordinary negligence in the absence of an indication of legislative intent to impose a higher standard.[235] However, there is no uniform conception of negligence in federal criminal law. As with the other *mens rea* standards discussed in this report, formulations may vary by court or statute[236] and may overlap with conceptions of more culpable mental states like recklessness. For instance, 18 U.S.C. § 1112 defines involuntary manslaughter as "the unlawful killing of a human being without malice . . . in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death."[237] Several courts have interpreted the statute as imposing a *mens rea* requirement of "gross negligence" but have defined that requirement in at least partially subjective terms.[238]

Example of Courts' Construction of Occupational Safety & Health Act, 29 U.S.C. § 666(e)

An illustrative example of the dividing lines between recklessness, negligence, and higher levels of culpability in federal criminal law can be found in a Seventh Circuit decision addressing the Occupational Safety & Health Act (OSHA), which establishes (among other things) criminal penalties for employers who "willfully violate[]" health and safety standards or regulations such that death of an employee results.[239] In *United States v. Ladish Malting Co.*, the Seventh Circuit reviewed jury instructions that defined "willfully" as "knowingly and voluntarily" in "reckless

could be broadly classified as involving negligence[.]" Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283, 288 n.7 (2002).

[233] Brigid Harrington, *A Proposed Narrowing of the Clean Water Act's Criminal Negligence Provisions: It's Only Human?*, 32 B.C. ENV'T AFFS. L. REV. 643, 657 (2005); *see* Leslie Yalof Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 910-11 (1998) (identifying a "prevailing view that punishing ordinary negligent behavior generally should be avoided" as unjust and ineffective). Sometimes the argument takes on a constitutional dimension. *But see* United States v. Hanousek, 176 F.3d 1116, 1122 (9th Cir. 1999) (rejecting argument that ordinary negligence standard in Clean Water Act violates due process).

[234] Brook B. Andrews, *Mens Rea in the CWA*, S.C. LAW., July 2016, at 21, 23.

[235] *See Pruett*, 681 F.3d at 243 (agreeing with Ninth and Tenth Circuits that ordinary negligence is sufficient for misdemeanor Clean Water Act provision); United States v. Alvarez, 809 F. App'x 562, 567-68 (11th Cir. 2020) (per curiam) (recognizing that plain language of Seaman's Manslaughter Statute "criminalizes simple negligence").

[236] *E.g.*, 42 U.S.C. § 7413(c)(4) (applying to one who "negligently places another person in imminent danger of death or serious bodily injury").

[237] 18 U.S.C. § 1112(a). Involuntary manslaughter may also occur through "the commission of an unlawful act not amounting to a felony" or in the commission "in an unlawful manner" of a lawful act which might produce death. *Id.* The offense is limited to conduct occurring within the special maritime and territorial jurisdiction of the United States. *Id.* § 1112(b).

[238] *See* United States v. Bolman, 956 F.3d 583, 586 (8th Cir. 2020) (defining gross negligence for purposes of involuntary manslaughter as "wanton or reckless disregard for human life" with knowledge that the defendant's "conduct was a threat to the lives of others or having knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his act might subject others"); United States v. Pineda-Doval, 614 F.3d 1019, 1038-39 (9th Cir. 2010) (similar).

[239] 29 U.S.C. § 666(e).

disregard" of relevant requirements, further defined "reckless disregard" in part as "having knowledge" of a hazardous working condition, and defined "having knowledge" of such condition to mean that the employer "knew or should have known of the hazardous condition."[240] In other words, the instructions permitted a conviction if the jury concluded that the employer "should have known" of a dangerous condition and "reasonably should have known" that the condition violated federal requirements.[241]

The appellate court concluded that these instructions regarding the requisite *mens rea* with respect to the hazardous working condition at issue were erroneous.[242] The court determined that defining "knowledge" in terms of what one "knew or should have known" improperly rendered the statutory willfulness requirement synonymous with ordinary negligence.[243] According to the Seventh Circuit, the instructions "equated willfulness with knowledge, watered down knowledge to recklessness, defined recklessness as negligence, and used the civil rather than the criminal approach to negligence" by failing to add the "standard gloss" of a heightened negligence standard applicable in criminal cases.[244] The court stated it was "essential to preserve the difference" between these standards by requiring that knowledge mean *actual* knowledge or willful blindness and that recklessness mean actual awareness of a risk, lest "knowledge, recklessness, criminal negligence, and civil negligence . . . merge into a single mental state[.]"[245] As such, the court concluded that "[t]ransforming" willfulness to ordinary negligence was "inappropriate both in principle and for [OSHA] in particular."[246]

Other *Mens Rea* Standards

As described previously, because the U.S. Code does not generally employ the standardized culpability rules and definitions found in the MPC, federal *mens rea* requirements are largely statute-specific.[247] Congress has also, at times, used state-of-mind language in particular statutes that either does not clearly signal which level of culpability is intended or that appears to establish a state-of-mind requirement that does not fit neatly into one of the categories described above, leaving courts to attempt to interpret the language in a way that comports with congressional intent. As a result, specific federal crimes, as defined or as interpreted by the federal courts, may bear mental-state requirements that appear to blend components of more than one standard.[248]

For instance, several federal statutes prohibit conduct engaged in with either intent or knowledge, or with "reason to believe," "reasonable cause to believe," or "reason to know" of some attendant circumstance or result.[249] Court decisions have displayed a degree of confusion as to where this

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[240] 135 F.3d 484, 486-87 (7th Cir. 1998). The employer contested "the requirement that it act 'knowingly' with respect to the facts—that is, that the firm be aware" of the hazardous condition. *Id.* at 487.

[241] *Id.* at 487.

[242] *Id.* at 487-88.

[243] *Id.* at 488.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *See supra* notes 152-154 and accompanying text.

[248] *E.g.*, 49 U.S.C. § 5124(b) (defining "knowingly" for purposes of criminal violations of restrictions on transportation of hazardous material as "actual knowledge of the facts giving rise to the violation" *or* that "a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge").

[249] *See* 18 U.S.C. § 794(a) (proscribing delivery of defense information to foreign government or actor "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation"); *id.* § 1521 (proscribing filing false lien against federal officer or employee "knowing or having reason to know" of falsity);

language falls on the continuum between actual knowledge and an objective, "reasonable person" standard closer to negligence. The Tenth Circuit, for instance, construed a statute that prohibits possession or distribution of listed chemicals "knowing, or having reasonable cause to believe," they will be used to manufacture a controlled substance as involving a "subjective inquiry" that "requires scienter to be evaluated through the lens of th[e] particular defendant, rather than from the prospective of a hypothetical reasonable man."[250] In other words, the court viewed the *mens rea* standard of "reasonable cause to believe" as "akin to actual knowledge,"[251] requiring subjective knowledge "or something close to it" that the chemical at issue would be used to manufacture a controlled substance.[252] However, the court in a subsequent case addressing a statute that proscribes filing a false lien against a federal officer or employee "knowing or having reason to know" of its falsity,[253] interpreted the statute as permitting conviction "if a reasonable person who possessed the information possessed by the defendant would have the requisite knowledge of falsity," i.e., the court treated the *mens rea* standard of "knowing" or "having reason to know" as having "both a subjective component (that is, what information this particular defendant had) and an objective component (what a reasonable person would infer from that information)."[254] In dicta, the court distinguished language from its earlier decisions that suggested a different reading and maintained that prior holdings were consistent with the proffered interpretation.[255]

Other circuits have agreed with a conception of "reasonable cause to believe" as a hybrid subjective/objective standard, emphasizing that the inquiry "turns on the facts actually known by the defendant in a particular case—facts from which the jury can infer that any reasonable person in the defendant's position would have had to know . . . ."[256] At least one district court has made clear, however, that a similar standard in a statute prohibiting delivery of defense information to a foreign government or actor "with intent or reason to believe that it is to be used" in a particular way is *not* a negligence standard, as it requires the jury to "find that defendant personally and subjectively believed or should have believed" the information was to be used for the prohibited purpose.[257]

Selected Additional *Mens Rea* Issues in Federal Law

In addition to the questions of what mental states are required for federal offenses and what they mean, distinct issues arise for certain classes of offenses and species of federal criminal liability—specifically, inchoate crimes, such as attempt and conspiracy, and corporate liability.

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21 U.S.C. § 841(c)(2) (proscribing possession or distribution of listed chemicals "knowing, or having reasonable cause to believe," they will be used to manufacture controlled substance).

[250] United States v. Saffo, 227 F.3d 1260, 1268-69 (10th Cir. 2000).

[251] *Id*. at 1269.

[252] United States v. Truong, 425 F.3d 1282, 1289 (10th Cir. 2005).

[253] United States v. Williamson, 746 F.3d 987, 994 (10th Cir. 2014).

[254] *Id*.

[255] *Id*. at 994 n.2.

[256] United States v. Munguia, 704 F.3d 596, 603 (9th Cir. 2012) (quoting United States v. Johal, 428 F.3d 823, 828 (9th Cir. 2005)) (emphasis omitted); *see also* United States v. Galvan, 407 F.3d 954, 957 (8th Cir. 2005) (concluding that jury instruction treating "reasonable cause to believe" as akin to actual knowledge would incorrectly render the phrase redundant).

[257] United States v. Mallory, 343 F. Supp. 3d 570, 576 (E.D. Va. 2018).

Mental state considerations also can be relevant to an alleged offender's defense to criminal liability.

Inchoate Crimes

Under federal law, it is a separate crime to conspire to commit any other federal crime, i.e., to *agree* with another to commit the crime and typically to take some overt action in furtherance of its commission.[258] Likewise, though there is no general federal attempt provision, attempts to commit many of the most common federal crimes are proscribed in individual statutes.[259] These crimes, which existed at common law, are said to be "inchoate" in the sense that they are "crimes on their way to becoming other crimes unless stopped or abandoned."[260] Because these offenses, in a general sense, encompass the contemplation or objective of committing another crime, they are sometimes said to require a "heightened mental state" that, in the words of the Supreme Court, "separates criminality itself from otherwise innocuous behavior."[261] The MPC reflects this notion in its conspiracy and attempt provisions by generally requiring the highest level of culpability, "purpose"—to promote or facilitate commission of an offense (in the case of conspiracy) or to engage in conduct or cause a result (in the case of attempt).[262]

In federal law, the *mens rea* for inchoate crimes is often couched in the language of "specific intent."[263] More precisely, an attempt to commit a federal crime has been framed as taking "a substantial step towards completion of the offense" while acting "with the specific intent to commit the underlying crime,"[264] and a conspiracy, among other things, "requires proof of

[258] *See* CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*, by Charles Doyle. 18 U.S.C. § 371 generally proscribes conspiracies to commit other federal crimes, and dozens of other federal statutes separately criminalize conspiracies to engage in specific kinds of misconduct. *Id.* Though Section 371 carries an overt-act requirement, some of the more specific conspiracy provisions do not. *See id.* at 2 ("Section 371 and a few others require at least one conspirator to take some affirmative step in furtherance of the scheme. Many have no such explicit overt act requirement.").

[259] CRS Report R42001, *Attempt: An Overview of Federal Criminal Law*, by Charles Doyle.

[260] *Id.* at 13.

[261] United States v. Bailey, 444 U.S. 394, 405 (1980).

[262] *See* MODEL PENAL CODE §§ 5.01, 5.03 (1985). The MPC's attempt provision has "two exceptions" to the purpose requirement: first, "the culpability otherwise required for commission of the [attempted] crime" is all that is required for a circumstance element, and for offenses with a result element, either purpose *or* "a belief that the result will occur without further conduct on the actor's part" is sufficient. *Id.* § 5.01 explanatory note.

[263] *E.g.*, United States v. Berckmann, 971 F.3d 999, 1003 (9th Cir. 2020) ("[A]ttempt crimes always require specific intent."); United States v. Childress, 58 F.3d 693, 707 (D.C. Cir. 1995) ("[I]t is clear that conspiracy is a 'specific intent' crime."). Though not technically inchoate, 18 U.S.C. § 2(a) also extends federal criminal liability to anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense. Such accomplice or "aiding and abetting" liability requires an affirmative act in furtherance of the offense and "inten[t] to facilitate that offense's commission," i.e., participation in the underlying crime as "something that [the accomplice] wishes to bring about." Rosemond v. United States, 572 U.S. 65, 76-77 (2014). In other words, aiding and abetting liability may be thought of as requiring a specific intent to advance the offense at issue through, at minimum, active participation "with full knowledge of the circumstances constituting the charged offense." *Id.* (quoting Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)); *see also* United States v. Gaviria, 116 F.3d 1498, 1535 (D.C. Cir. 1997) ("The elements of aiding and abetting an offense are (1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge (3) that the other was committing an offense; and (4) assisting or participating in the commission of the offense.").

[264] United States v. Cote, 504 F.3d 682, 687 (7th Cir. 2007); *see also* United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1192 (9th Cir. 2000) (recognizing "the doctrine that the crime of attempt requires a showing of specific intent even if the crime attempted does not" (internal quotation marks omitted)).

specific intent to further the conspiracy's objective."[265] Given the multiple and sometimes indeterminate meanings and usages of the term "specific intent,"[266] however, federal courts may disagree on what is required to prove the mental state for an inchoate crime in a particular statutory context. For instance, 8 U.S.C. § 1326 criminalizes reentry and attempted reentry into the United States by aliens who have been removed and lack express permission from the Attorney General to reapply for admission to the country.[267] The federal courts of appeals generally agree that prohibited reentry under the statute is a general intent crime—i.e., one must have an intent to enter but does not need to intend to enter unlawfully (in other words, without the permission of the Attorney General).[268]

Courts are split, however, on the requisite mental state for *attempted* reentry under Section 1326. The Ninth Circuit has reasoned that consistent with the common law meaning of "attempt," which requires a specific intent to commit the underlying crime, attempted reentry under Section 1326 requires, among other things, that "the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General."[269] Yet other circuits have diverged from this interpretation. For example, the Second Circuit concluded in *United States v. Rodriguez* that because Section 1326 establishes a crime unknown at common law, the "words in the statute are liberated from their common law meanings."[270] As such, based on the perceived "clarity of the statutory language" and considerations of statutory purpose, the court in *Rodriguez* determined that Section 1326 requires only intent to reenter, that there is "no specific intent requirement for attempted reentry," and the government is not obligated to establish a defendant's mental state with respect to lack of consent or permission.[271] The Second Circuit framed this conclusion as a rejection of the proposition that Section 1326's attempt provision incorporates a specific intent requirement,[272] though at least one other circuit has

[265] *Childress*, 58 F.3d at 708. One prominent treatise notes likely confusion where the objective of the conspiracy is a separate crime, "for under such circumstances the mental state for that crime must also be taken into account." LAFAVE, *supra* note 6, § 12.2(c)(2). Put differently, "in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." United States v. Feola, 420 U.S. 671, 686 (1975); *see* United States v. Brooks, 681 F.3d 678, 699 (5th Cir. 2012) ("Conspiracy actually has two intent elements—intent to further the unlawful purpose and the level of intent required for proving the underlying substantive offense."). As noted in an MPC comment, the implication of a specific intent requirement for conspiracy appears to be that "when recklessness or negligence suffices" for a result element of a substantive crime, "there could not be a conspiracy to commit that crime." MODEL PENAL CODE § 5.03 cmt. at 408 (1985).

[266] *See supra* notes 31-35 and accompanying text.

[267] 8 U.S.C. § 1326(a).

[268] *See* United States v. Carlos-Colmenares, 253 F.3d 276, 277-78 (7th Cir. 2001) (collecting cases).

[269] *Gracidas-Ulibarry*, 231 F.3d at 1196.

[270] 416 F.3d 123, 126 (2d Cir. 2005). The court also held that "nothing in the plain language of the statute or in its legislative history" suggested that "Congress intended to impose a heightened *mens rea* requirement in cases of attempted reentry." *Id.* at 127.

[271] *Id.* at 128; *see also* United States v. Morales-Palacios, 369 F.3d 442, 449 (5th Cir. 2004) ("[I]n proving an attempted illegal reentry it is sufficient that the government demonstrates that a previously deported alien knowingly intended to reenter the United States—general intent with respect to the *actus reus* of the crime[.]").

[272] In a subsequent case, the Ninth Circuit asserted that an intervening Supreme Court decision, *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), supported its view because it appeared to recognize that Section 1326 "incorporates the common law meaning of attempt." United States v. Argueta-Rosales, 819 F.3d 1149, 1160 (9th Cir. 2016). The Supreme Court has not directly addressed the circuit split regarding Section 1326's attempt provision, however.

appeared to treat attempted reentry as "a specific intent crime" while still construing the requisite intent as extending only to "achiev[ing] entry into the United States."[273]

With regard to conspiracy, the so-called "*Pinkerton* doctrine" (in reference to a famous Supreme Court case) actually provides somewhat of a *mens rea* exception for separate substantive offenses committed in the course of a conspiracy. Under the doctrine, criminal liability is extended "to a conspirator for a coconspirator's substantive offenses 'when they are reasonably foreseeable and committed in furtherance of the conspiracy.'"[274]

Corporate Liability

Many federal criminal statutes apply to "whoever" or to any "person" who engages in prohibited conduct.[275] Title 1 of the U.S. Code provides that unless the context of an Act of Congress indicates otherwise, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[276] As such, corporate entities generally may commit, and be prosecuted for, federal criminal offenses, which raises the question of *how* legal entities that can act only through individuals can themselves be considered to have committed criminal conduct with the requisite *mens rea*. This question is one on which federal law deviates from the approach of the MPC. Under federal law, corporate criminal liability extends to offenses committed by a corporate officer, employee, or agent if acting within the scope of his or her authority at least partly for the benefit of the corporation.[277] Where these conditions are met, the *mens rea* of the officer, employee, or agent engaging in the proscribed conduct is imputed to the entity for purposes of criminal liability,[278] even if the entity's policies or compliance program deter such activity.[279]

A distinct issue "arises when no single employee possesses the requisite *mens rea* necessary for the offense but a number of employees have, together, committed the unlawful act."[280] In this circumstance, at least one circuit has endorsed a theory of "collective" knowledge by which the

[273] United States v. De Leon, 270 F.3d 90, 92 (1st Cir. 2001).

[274] United States v. Henry, 984 F.3d 1343, 1355 (9th Cir. 2021) (quoting United States v. Long, 301 F.3d 1095, 1103 (9th Cir. 2002)); United States v. Hernandez-Roman, 981 F.3d 138, 144 (1st Cir. 2020) ("[I]t is well-established that, by virtue of the jury's guilty verdict as to the conspiracy . . . , the defendant became substantively liable for the foreseeable acts of his coconspirators in furtherance of the conspiracy.").

[275] CRS Report R43293, *Corporate Criminal Liability: An Overview of Federal Law*, by Charles Doyle.

[276] 1 U.S.C. § 1. Individual statutes may also specifically define the entities to which they apply. *E.g.*, 18 U.S.C. § 1961(3) (specifying that "'person' includes any individual or entity capable of holding a legal or beneficial interest in property").

[277] *See, e.g.*, United States v. Grayson Enters., Inc., 950 F.3d 386, 407 (7th Cir. 2020) ("To prove [the company's] liability, the government needed to prove beyond a reasonable doubt that (1) an offense was committed by [the company's] agent, (2) in committing the offense, the agent intended, at least in part, to benefit [the company], and (3) the agent acted within his authority."); United States v. Oceanic Illsabe Ltd., 889 F.3d 178, 195 (4th Cir. 2018) ("[A] corporation is liable for the criminal acts of its employees and agents done within the scope of their employment with the intent to benefit the corporation."). It is not necessary that the actions actually benefitted the entity, nor must the employee or agent have been acting *solely* for the entity's benefit. United States v. Automated Med. Laboratories, Inc., 770 F.2d 399, 407 (4th Cir. 1985).

[278] *E.g.*, United States v. Philip Morris USA Inc., 566 F.3d 1095, 1118 (D.C. Cir. 2009) ("Because a corporation only acts and wills by virtue of its employees, the proscribed corporate intent depends on the wrongful intent of specific employees.").

[279] *E.g.*, United States v. Ionia Mgmt. S.A., 555 F.3d 303, 310 (2d Cir. 2009); United States v. Potter, 463 F.3d 9, 25-26 (1st Cir. 2006). Such policies or programs may be relevant, however, to whether an agent or employee was acting in the scope of his or her duties. *Potter*, 463 F.3d at 26.

[280] Erin L. Sheley, *Tort Answers to the Problem of Corporate Criminal Mens Rea*, 97 N.C. L. REV. 773, 782 (2019).

scienter of individual employees may be aggregated.[281] Other courts have been dubious of this theory, particularly as applied to culpability standards beyond knowledge.[282]

The MPC takes a different approach to corporate criminal liability (and, accordingly, *mens rea*). Section 2.07 of the MPC limits corporate liability for most kinds of crimes to situations where "the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."[283] This "inner circle" approach to corporate liability has been criticized by some as underinclusive, given modern-day corporate realities.[284]

Defenses

A defendant's mental state can be relevant to his or her asserted defense to criminal liability in several respects, depending on the nature of the defense at issue. In one regard, affirmative defenses such as self-defense and necessity have their own mental components that are separate from the *mens rea* required for commission of the charged crime. For instance, the Tenth Circuit's formulation of the requirements for self-defense as a defense to a federal homicide charge includes that the defendant "reasonably believes that he is in imminent danger of death or great bodily harm, thus necessitating an in-kind response."[285] In other words, even where the defendant indisputably possesses the requisite *mens rea* for a federal crime involving the use of force against, or causing the death of, another, the defendant is not guilty of the crime if he or she subjectively believed the force used was necessary and that belief was objectively reasonable under the circumstances.[286] Additional defenses such as duress and necessity likewise do not ordinarily "negate a defendant's criminal state of mind" but allow "the defendant to avoid

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[281] *See* United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1984) ("[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly." (quoting United States v. T.I.M.E.–D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974)).

[282] *E.g.*, United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1275 (D.C. Cir. 2010). One commentator has framed criticism of the collective knowledge doctrine as centering on the proposition that the doctrine creates an "unrealistic requirement that senior management keep track of the knowledge of all of its employees." Sheley, *supra* note 280, at 783.

[283] MODEL PENAL CODE § 2.07(1)(c) (1985). Liability extends more broadly to corporate agents for what the MPC deems "violations," which generally impose strict liability, among other things. *Id.* §§ 2.05, 2.07(1)(a).

[284] *E.g.*, Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2068 (2016). Professor Diamantis notes, for instance, that those at the top of the corporate hierarchy generally are "uninformed about and uninvolved in the day-to-day activities of a corporation, where criminal action often takes place[.]" *Id.* at 2068-69.

[285] United States v. Toledo, 739 F.3d 562, 567 (10th Cir. 2014).

[286] *Id.* at 568 ("Self-defense only requires the defendant's reasonable belief that deadly force was necessary, not that he exercise a duty to retreat or recognize the unavailability of reasonable alternatives."); United States v. Earth, 984 F.3d 1289, 1300 (8th Cir. 2021) (approving jury instructions stating that if "a person reasonably believes force is necessary to protect herself from what she reasonably believes to be unlawful physical harm about to be inflicted by another and uses that force, then she acted in self-defense"); United States v. Biggs, 441 F.3d 1069, 1071 (9th Cir. 2006) (requiring "a reasonable belief that the use of force was necessary to defend himself or another against the immediate use of unlawful force"). In the context where self-defense often arises—a federal prosecution for homicide under particular jurisdictional circumstances—an *un*reasonable but honest belief that the force used was necessary, amounting to criminal negligence, may constitute "imperfect self-defense" that permits conviction of involuntary manslaughter rather than, say, second-degree murder. *Toledo*, 739 F.3d at 568; United States v. Milk, 447 F.3d 593, 599 (8th Cir. 2006). The MPC approach makes the defense unavailable where the defendant's belief as to the unlawfulness of the conduct being used against him is erroneous due to ignorance or a mistake regarding the law. MODEL PENAL CODE § 3.09 (1985).

liability"[287] based on conditions that justify the criminal conduct and involve proof (among other things) of certain objectively reasonable beliefs on the defendant's part.[288] Statutory defenses established by Congress and applicable only to specific federal offenses may also necessitate proof of some mental state independent of the *mens rea* required for commission of the crime. For example, 18 U.S.C. § 2243(a) prohibits, in certain jurisdictional contexts, knowingly engaging in a sexual act with another person who is between 12 and 15 years old when there is at least a four-year age difference between the two people.[289] The *mens rea* required for commission of the crime is knowingly engaging in the sexual act; the defendant need not have known the age of the victim or the age difference.[290] However, the statute provides a defense if "the defendant reasonably believed that the other person had attained the age of 16 years."[291]

Other defenses to federal criminal liability focus on circumstances that negate the defendant's *mens rea* with respect to the charged crime. Voluntary intoxication, for instance, is generally recognized by the federal courts as a defense that may negate the *mens rea* of a specific-intent, but not a general-intent, crime.[292] A mistake may operate similarly.[293] The federal insanity

[287] Dixon v. United States, 548 U.S. 1, 7 (2006).

[288] *E.g.*, United States v. Nwoye, 824 F.3d 1129, 1136-37 (D.C. Cir. 2016) (recognizing that defendant must have had a "*reasonable* fear" of imminent danger, among other things); United States v. Dixon, 901 F.3d 1170, 1176 (10th Cir. 2018) (requiring "well-grounded apprehension" of danger and direct causal relationship that could be "reasonably anticipated" between criminal action and avoiding threatened harm); United States v. Miller, 59 F.3d 417, 422 (3d Cir. 1995) (additionally requiring that defendant did not "recklessly place herself in a situation in which she would be forced to engage in criminal conduct"); United States v. Dixon, 413 F.3d 520, (5th Cir. 2005), *aff'd*, 548 U.S. 1 (2006) (defendant must not have "recklessly or negligently placed herself in a situation in which it was probable" she would be forced to commit crime).

[289] 18 U.S.C. § 2243(a).

[290] *Id.* § 2243(d) (providing that the government "need not prove that the defendant knew" age or requisite age difference); United States v. White Calf, 634 F.3d 453, 457 (8th Cir. 2011) ("§ 2243(d) makes clear that the government's burden to prove scienter in a § 2243(a) prosecution is limited to proving the defendant knowingly engaged in a sexual act." (alteration and internal quotation marks omitted)).

[291] *Id.* § 2243(c)(1). It is also a defense under the statute that, at the time of the sexual act, the persons engaging in it were married to each other. *Id.* § 2243(c)(2).

[292] *E.g.*, United States v. Garrett, 898 F.3d 811, 814 (8th Cir. 2018) ("It is widely accepted by this court and others that a defendant charged with a specific intent crime is entitled to an intoxication instruction when the evidence would support a finding that the defendant was in fact intoxicated and that as a result there was a reasonable doubt that he lacked specific intent." (alterations and internal quotation marks omitted)); Faucett v. United States, 872 F.3d 506, 510 (7th Cir. 2017) ("[W]e have on a few occasions dealt with a claim of voluntary intoxication; each time we've treated it as a 'negative' defense to a specific-intent crime that negates the *mens rea* of the crime." (alteration omitted)); United States v. Lamott, 831 F.3d 1153, 1156 (9th Cir. 2016) (acknowledging concession "that voluntary intoxication is a defense to specific intent crimes, but not to general intent crimes"); United States v. Dyke, 718 F.3d 1282, 1293 (10th Cir. 2013) ("Voluntary intoxication can be used, of course, as a *mens rea* defense to specific intent crimes[.]"). Given the lack of clarity as to the meaning of general intent and specific intent, as described elsewhere in this report, the limitation to specific-intent crimes "has generated substantial litigation" as to whether particular federal criminal statutes require one or the other (and thus may be subject to an intoxication defense). *Garrett*, 898 F.3d at 814 n.3. The MPC appears to strictly limit when intoxication may serve as a defense while acknowledging that it may so serve if "it negatives an element of the offense," though lack of awareness of a risk, due to self-induced intoxication, of which the defendant would otherwise be aware is excepted when recklessness is the requisite culpability element. MODEL PENAL CODE § 2.08 (1985).

[293] *See* Rehaif v. United States, 139 S. Ct. 2191, 2198 (2019) (recognizing that "mistaken impression" as to a collateral legal matter can result in defendant "not hav[ing] the guilty state of mind that the statute's language and purposes require"); United States v. Vasarajs, 908 F.2d 443, 447 n.7 (9th Cir. 1990) ("Generally, a criminal defendant's mistake of fact can only be a valid defense if it negates the existence of a requisite *mens rea* component of the crime charged and if the crime allows for the interposition of such a defense."); United States v. Miranda-Enriquez, 842 F.2d 1211, 1213 (10th Cir. 1988) ("[A] mistake defense is possible only if there is some mental state required to establish a material element of the crime that the mistake can negate." (quoting United States v. Anton, 683 F.2d 1011, 1013 (7th

defense, codified at 18 U.S.C. § 17, recognizes a defense for persons with conditions that may negate the requisite *mens rea* and conditions that have been deemed independently to justify declining to impose criminal liability. The statute provides an affirmative defense if a "severe mental disease or defect" leaves the defendant "unable to appreciate" either (1) the "nature and quality" of his acts or (2) "the wrongfulness" of his acts.[294] The first prong, referred to by the Supreme Court as the "cognitive capacity" prong, involves an inquiry into "whether a mentally ill defendant could comprehend what he was doing when he committed a crime," for if he "had no such capacity, he could not form the requisite intent—and thus is not criminally responsible."[295] The second prong, "moral capacity," looks to whether the defendant, regardless of his awareness of the nature of his conduct or intent to do the proscribed act or bring about the proscribed result, could "distinguish right from wrong when committing his crime."[296] At least one circuit has concluded that "wrongfulness for purposes of the federal insanity defense statute is defined by reference to objective societal or public standards of moral wrongfulness, not the defendant's subjective personal standards of moral wrongfulness."[297] Thus, under this conception, what the defendant would personally believe to be right and wrong is irrelevant.

Federal *Mens Rea* Reform and Considerations for Congress

After the efforts of the congressionally created National Commission on Reform of Federal Criminal Laws did not yield significant changes to federal *mens rea* requirements in the 1970s,[298] some commentators continued to urge reforms consistent with, or building on, the MPC approach.[299] In 2013, the House Judiciary Committee established a "bipartisan task force on over-criminalization" to review "current federal criminal statutes and make recommendations for improvements."[300] One of the issues the task force reviewed was "the lack of a consistent and

Cir. 1982) (internal quotation marks omitted)). The MPC makes clear that a mistake of fact or law is a defense if it "negatives" the mental state "required to establish a material element of the offense," among other things and with some caveats. MODEL PENAL CODE § 2.04 (1985).

[294] 18 U.S.C. § 17(a).

[295] Kahler v. Kansas, 140 S. Ct. 1021, 1026 (2020); *see id.* at 1038 (Breyer, J., dissenting) (noting that the "prong corresponds roughly to the modern concept of *mens rea* for many offenses"). The *Kahler* Court was describing the two prongs of the *M'Naghten* test, the "most famous statement of the traditional insanity defense" from a nineteenth-century English case, *id.* at 1038 (Breyer, J., dissenting), but as the Court noted, the federal insanity-defense statute essentially adopts that test. *Id.* at 1037 (majority op.) (recognizing that "Congress chose in the end to adhere to the *M'Naghten* rule").

[296] *Id.* at 1025, 1027.

[297] United States v. Ewing, 494 F.3d 607, 621 (7th Cir. 2007); *see also* United States v. Cuebas, 415 F. App'x 390, 398 (3d Cir. 2011) (agreeing, in an unpublished opinion, with *Ewing* that "subjective moral justification plays no role in determining whether a defendant was insane").

[298] LAFAVE, *supra* note 6, § 1.1(b). The Commission proposed generally applicable culpability rules and definitions similar to those reflected in the MPC, which became the basis for several bills introduced in Congress in subsequent years. *E.g.*, Criminal Code Revision Act of 1983, H.R. 2013, 98th Cong. (1983).

[299] *E.g.*, Moohr, *supra* note 13, at 703-07 (noting default rule based on MPC that introductory *mens rea* term should apply to each subsequent element had "benefit" of reducing inconsistent court decisions by "imposing a single standard").

[300] Press Release, Congressman Bobby Scott, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization (Mar. 4, 2021), https://bobbyscott.house.gov/media-center/press-releases/house-judiciary-committee-creates-bipartisan-task-force-on-over.

adequate *mens rea* requirement in the federal code."[301] Relying on the work of the task force, "a Criminal Justice Reform Initiative at the Judiciary Committee" was created in early 2015 "to address the significant Congressional interest in criminal justice reform from Members who do and do not serve on the Judiciary Committee."[302] Several bills stemming from this and other legislative efforts[303] in the 114th and 115th Congresses sought to make changes to the status quo with respect to federal *mens rea* requirements. Though the proposals varied in the details, they typically incorporated ideas and concepts stemming from the MPC approach to culpability. Ultimately, none of the bills from prior Congresses became law. However, consideration of altering federal *mens rea* requirements continues in the 117th Congress. On March 11, 2021, several Senators introduced the Mens Rea Reform Act of 2021,[304] multiple versions of which had been introduced in earlier Congresses. This section describes the pending bill in the current Congress, provides an overview of earlier legislation from the 114th and 115th Congresses[305] that would have impacted federal *mens rea* requirements, and briefly sets out some considerations for Congress reflected in these legislative efforts.

117th Congress

The Mens Rea Reform Act of 2021 would establish that for elements of most federal criminal offenses "for which the text . . . does not specify a state of mind," a default *mens rea* of "willfully" would apply.[306] The bill would define "willfully" as knowledge of unlawfulness *and*, for elements involving the nature, circumstances, object, or result of conduct of a person, that the person knew of and had as his or her conscious object the accomplishment of conduct of that nature, with those circumstances, or with the object or result.[307] In other words, the bill sets as a default *mens rea* standard that one act purposely and with knowledge that one's conduct is unlawful. The bill also provides that where a *mens rea* term is present but the text of the offense does not specify the elements to which it applies, the term applies to all elements unless "a contrary purpose plainly appears."[308] Exception is made to both the default *mens rea* term and default application rules if (1) the text makes clear that no state of mind was meant to be required for such element, (2) the element establishes jurisdiction or venue, or (3) applying either rule would "lessen the degree of mental culpability" for that element under Supreme Court precedent

[301] REP. BOBBY SCOTT, H. COMM. ON THE JUDICIARY, 113TH CONG., DEMOCRATIC VIEWS ON CRIMINAL JUSTICE REFORMS RAISED BEFORE THE OVER-CRIMINALIZATION TASK FORCE & THE SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS 99 (2013), https://www.nacdl.org/getattachment/b88e9bed-f28b-441b-99a6-cfcb4745fa4b/overcriminalization-task-force-democrats-report.pdf.

[302] H.R. Rep. No. 114-889, at 2 (2016).

[303] *E.g.*, *The Adequacy of Criminal Intent Standards in Federal Prosecutions: Hearings Before the Senate Judiciary Committee*, 114th Cong. (2016).

[304] Mens Rea Reform Act of 2021, S. 739, 117th Cong. (2021).

[305] Though it does not appear that legislation was introduced in the 116th Congress that would have made wholesale changes to federal *mens rea* requirements, bills introduced in the House and Senate would have taken a preliminary, information-gathering step of requiring the Attorney General and agency heads to compile into a report all federal statutory and regulatory criminal offenses and list for each, among other things, the applicable *mens rea* requirement. *See* Next Step Act of 2019, H.R. 1893 & S. 697, 116th Cong. § 305(b)-(c) (2019). At least one bill in the 117th Congress would do the same. *See* Smarter Sentencing Act of 2021, S.1013, 117th Cong. § 5 (2021).

[306] S. 739, 117th Cong. § 2(a) (2021). The bill would exclude offenses that are not punishable by imprisonment or a maximum criminal fine of at least $2,500, as well as military offenses governed by Title 10 and state laws adopted for certain areas within federal jurisdiction. *Id*.

[307] *Id*.

[308] *Id*.

or existing statutory or regulatory law.[309] With respect to the exception for textual clarity that no state of mind is required, the bill would specify that "the mere absence of a specified state of mind for an element of a covered offense in the text of the covered offense shall not be construed to mean that Congress affirmatively intended not to require the Government to prove any state of mind with respect to that element."[310] Put differently, for Congress to provide for strict liability for an element of a federal offense, it would need to explicitly denote in the text of the offense that no *mens rea* is required for that element. The bill would expressly apply to existing offenses,[311] meaning that some federal offenses silent as to *mens rea* that had previously been interpreted as strict liability could now carry a heightened state-of-mind requirement, were the bill to become law.[312]

114th and 115th Congresses

An earlier version of the bill from the 117th Congress was first introduced in the 114th Congress. The Mens Rea Reform Act of 2015[313] would have required (with some exceptions) that with respect to any element for which the text of an offense "does not specify a state of mind," the government must prove that the defendant acted willfully.[314] The bill also would have established a default distribution rule when application of a term is unclear. Specifically, where a covered offense specifies the requisite *mens rea* but does not specify to which elements of the offense the requirement applies, the bill would have required that the requisite *mens rea* "apply to all elements of the covered offense" subject to exceptions including a plain contrary purpose in the statute and jurisdictional elements, among other things.[315] The version of the Mens Rea Reform Act from the 114th Congress would have provided definitions for certain *mens rea* terms as well, defining the term "knowingly" as awareness with respect to conduct and circumstance elements and awareness that conduct is practically certain to cause a result with respect to result elements, in a manner largely consistent with the MPC's approach.[316] The bill also would have defined "willfully" for purposes of the default *mens rea* requirement as "knowledge that the person's conduct was unlawful."[317]

Another bill from the 114th Congress, The Stopping Over-Criminalization Act of 2015, H.R. 3401, would have imposed a default *mens rea* requirement of knowledge in the absence of specification otherwise "in the provision of law defining the offense," though offenses "where a defendant might reasonably be unaware the conduct could be criminally punished" would have

[309] *Id*.

[310] *Id*.

[311] The bill would also apply to some offenses that *occurred* prior to enactment, with a number of exceptions (for example, if applying the new legislation would punish as a crime conduct that was innocent when done). *Id*.

[312] Recent arguments in support of and opposition to altering federal *mens rea* requirements appear to fall along similar lines as the positions taken regarding previous legislative efforts, described *infra*. For an elaboration of these arguments, see generally Benjamin Levin, *Mens Rea Reform and its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491 (2019).

[313] As described *supra* and *infra*, modified versions of the Mens Rea Reform Act were reintroduced in the 115th and 117th Congresses. Mens Rea Reform Act of 2017, S. 1902, 115th Cong. (2017); Mens Rea Reform Act of 2018, S. 3118, 115th Cong. (2018); Mens Rea Reform Act of 2021, S. 739, 117th Cong. (2021).

[314] Mens Rea Reform Act of 2015, S. 2298, 114th Cong. § 2 (2015).

[315] *Id*. § 2(c)-(d).

[316] *Id*. § 2(a).

[317] *Id*.

required proof that "the defendant had reason to know the defendant's conduct was unlawful."[318] The bill would have applied its default state of mind to "each element of the offense" with exception only for specific provision otherwise in the law defining the offense.[319] The Criminal Code Improvement Act of 2015, also from the 114th Congress, would have established that if "no state of mind is required by law" for a federal criminal offense, "the state of mind the government must prove is knowing" *unless* the offense involves conduct that a reasonable person in the same or similar circumstances would not know or have reason to know was unlawful, in which case "the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful."[320]

The Criminal Code Improvement Act of 2015, H.R. 4002, was reported out of committee on November 18, 2015.[321] Proponents of the bill, and of *mens rea* reform more generally, urged that the existing lack of clarity as to the requisite mental state for certain crimes violates principles of fair notice and asserted that strict liability offenses or offenses with relatively minimal mental-state requirements represent part of a larger, concerning trend of federal over-criminalization that Congress should seek to remedy.[322] Opposition to establishing mental-state requirements that would apply across federal criminal law centered on the prospect that such requirements could make it harder to punish corporate actors under provisions meant to protect public health and welfare.[323] Representatives of the Department of Justice noted the difficulties that applying newly formulated broad-brush mental-state requirements could create in pursuing some significant cases, suggesting that indiscriminate application of such rules to existing offenses could have unintended consequences.[324] Ultimately, neither the Criminal Code Improvement Act of 2015 nor the other legislation discussed above from the 114th Congress became law.

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[318] Stopping Over-Criminalization Act of 2015, H.R. 3401, 114th Cong. § 3 (2015).

[319] *Id*.

[320] Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong. § 11 (as reported by H. Comm. on the Judiciary, Dec. 23, 2016).

[321] See Markup of H.R. 2830; H.R. 3713; H.R. 4002; H.R. 4003; H.R. 4001; H.R. 4023 Before the House Judiciary *Committee*, 114th Cong. 53 (2015).

[322] *E.g.*, Sens. Chuck Grassley & Orrin Hatch, *Mens Rea Reform and the Criminal Justice Reform Constellation*, WASH. EXAMINER (July 19, 2018), https://www.judiciary.senate.gov/press/rep/commentary/grassley-hatch-op-ed-mens-rea-reform-and-the-criminal-justice-reform-constellation (arguing that when "crimes are drafted without clear criminal intent requirements, it becomes increasingly easy for unsuspecting Americans to be sent to jail for conduct they had no idea was against the law"); *see also* John Malcolm, *The Pressing Need for Mens Rea Reform*, THE HERITAGE FOUNDATION (Sept. 1, 2015), http://www.heritage.org/research/reports/2015/09/the-pressing-need-for-mens-rea-reform.

[323] *See, e.g.*, Mike DeBonis, *The Issue that Could Keep Congress from Passing Criminal Justice Reform*, WASH. POST (Jan. 20, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/01/20/the-issue-that-could-keep-congress-from-passing-criminal-justice-reform/ (referencing view that applying willfulness requirement across federal criminal law would constitute "a quiet attempt to make it ever more difficult for the federal government to prosecute corporations and their executives for crimes against the public welfare"); Editorial Board, *Don't Change the Legal Rule on Intent*, N.Y. TIMES (Dec. 5, 2015), https://www.nytimes.com/2015/12/06/opinion/sunday/dont-change-the-legal-rule-on-intent.html?_r=0.

[324] *E.g.*, DeBonis, *supra* note 323 (describing supposition of chief of DOJ Criminal Division that applying willfulness requirement to offense of murdering a U.S. national abroad could make proving terrorist mental state "a difficult if not impossible task"); Matt Apuzzo & Eric Lipton, *Rare White House Accord with Koch Brothers on Sentencing Frays*, N.Y. TIMES (Nov. 24, 2015), https://www.nytimes.com/2015/11/25/us/politics/rare-alliance-of-libertarians-and-white-house-on-sentencing-begins-to-fray.html (suggesting that application of knowledge-of-unlawfulness standard could have prevented guilty pleas in cases involving food-borne illness and mislabeling of prescription medication).

The Mens Rea Reform Act was reintroduced in the Senate in the 115th Congress with some changes clarifying the definition of willfulness and the application of the requirement to existing offenses, among other things, but that bill likewise did not become law.[325]

Considerations for Congress

The bills discussed above, which sought or seek to address in different ways recurrent issues with respect to federal *mens rea* requirements, raise distinct interpretive questions that Congress might examine. One question is how stringent a default mental-state requirement should be where the statute is silent. As described previously, federal courts will ordinarily presume that a *mens rea* element is included in a criminal offense even if it is not explicit in the text, and usually that element is set at least at the level of knowledge.[326] Two of the bills described above would appear to have codified that default by making knowledge the statutory standard unless otherwise provided, while the various versions of the Mens Rea Reform Act set out a higher default of willfulness but with different definitions (i.e., knowledge of unlawfulness or, in the formulation from the bill pending in the 117th Congress, purpose and knowledge of unlawfulness).[327] All of the aforementioned bills would have impacted the degree to which courts might recognize an *exception* to the presumption of scienter in the case of certain kinds of public-welfare offenses for which strict liability might ordinarily be deemed appropriate, as would the version of the Mens Rea Reform Act pending in the 117th Congress. Even the two bills that would have established a knowledge default for many kinds of offenses would appear to have disfavored the kinds of regulatory and public-welfare offenses for which courts might recognize strict liability, as many such offenses could be viewed as involving conduct that "a reasonable person . . . would not have reason to believe[] was unlawful" or "criminally punished" and would thus have been subject to a special rule requiring at least "reason to know" or "reason to believe" such conduct was, in fact, unlawful.[328]

A related question raised by the bills from the 114th and 115th Congresses and the bill pending in the 117th Congress is when a statute can be deemed *silent* on the question of *mens rea* such that a statutory default would apply. For instance, the Criminal Code Improvement Act of 2015 would have added a mental-state requirement to any federal criminal offense for which "no state of mind is required by law," but would not have made clear whether "required by law" would have been limited to offenses that are textually silent as to mental state or would have included judicial interpretations regarding an offense's *mens rea* requirement.[329] The bill likewise would have had

[325] Mens Rea Reform Act of 2018, S. 3118, 115th Cong. (2018). An earlier version of the bill, introduced in 2017, was identical to the legislation now pending in the 117th Congress. *Compare* Mens Rea Reform Act of 2017, S. 1902, 115th Cong. (2017), *with* Mens Rea Reform Act of 2021, S. 739, 117th Cong. (2021).

[326] *See supra* notes 100-104 and accompanying text.

[327] Neither of the bills requiring knowledge as a default would have defined that mental state more precisely, meaning that the term presumably would still have been subject to different definitions depending on the court. *See supra* notes 161-178 and accompanying text.

[328] Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong. § 11 (as reported by H. Comm. on the Judiciary, Dec. 23, 2016); Stopping Over-Criminalization Act of 2015, H.R. 3401, 114th Cong. § 3 (2015). The version of the Mens Rea Reform Act introduced in 2018 also would have required federal agencies to revisit offenses found in regulations and "specify[] the state of mind required for each element" of the offense (if not already clear), and strict-liability elements in regulatory offenses would have been explicitly prohibited. S. 3118, 115th Cong. § 101(a) (2018).

[329] *See* Orin Kerr, *A Confusing Proposal to Reform the 'Mens Rea' of Federal Criminal Law*, WASH. POST (Nov. 25, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/25/a-confusing-proposal-to-reform-the-mens-rea-of-federal-criminal-law/ ("Does 'required by law' mean 'expressly written into the text,' or does that mean 'required by the statute as interpreted by judicial precedent'?"). The committee report referenced "longstanding statutory law and established case-law" and stated that the bill's intent was "not to require Federal courts to apply a

uncertain application to an offense with a mental-state requirement textually or judicially assigned to some, but not all, of its elements. The Mens Rea Reform Act of 2021 pending in the 117th Congress would address this issue by limiting its default mental-state requirement to "any element of the offense for which the text of the covered offense does not specify a state of mind," but exceptions would be made if, among other things, the result would "lessen the degree of mental culpability" required to be proven for a given element under other provisions of law or Supreme Court precedent.[330]

One version of the Mens Rea Reform Act from the 115th Congress would have modified the reach of its default requirement by providing that for existing offenses lacking a state-of-mind requirement for one or more elements either in the text of the offense *or* under Supreme Court precedent, a default *mens rea* of willfulness would apply in the absence of a contrary provision in statutory text or an applicable exception.[331] This provision potentially could have operated to overrule Supreme Court precedent with respect to its interpretation of existing federal crimes that lack a mental-state requirement for at least one element to the extent such precedent recognized a lower, or no, *mens rea* for that or another element.

Another question raised by the bills is whether, how, and under what circumstances to apply a distribution rule for a *mens rea* term whose application to certain elements of an offense is unclear. Currently, a federal court assessing whether a particular element of an offense carries a *mens rea* requirement will ask if it criminalizes otherwise innocent conduct, a statute-specific inquiry that may be less than pellucid.[332] The Mens Rea Reform Act of 2021 would eschew this approach in favor of a clearer distribution rule akin to the MPC position—a *mens rea* requirement in the text of a federal criminal offense would apply to each element of the offense unless an exception applied.[333] Earlier versions of the Mens Rea Reform Act would have operated similarly,[334] as would the Stopping Over-Criminalization Act of 2015.[335] That latter bill would have made exception only where "otherwise specifically provided in the provision in the law defining the offense,"[336] however, whereas the Mens Rea Reform Act of 2021 would make exception for elements relating to jurisdiction and venue and, among others, circumstances where the text of an offense makes clear that Congress "affirmatively intended" no mental-state requirement to apply or where application of the default would actually *lessen* the requisite mental state under Supreme Court precedent.[337]

As the above discussion reflects, even setting aside the prospect of more broadly systematizing and codifying mental-state term definitions in federal law, efforts to establish general application

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'knowingly' standard in areas where the caselaw is settled." H.R. Rep. No. 114-889, at 4-5 (2016). Even with that guidance, it would not have been clear what constitutes "settled" caselaw and whether that includes only Supreme Court precedent or lower-court decisions as well. *See* Kerr, *supra* ("Let's say that a statute has no express mental state, but the Supreme Court has said that the required mental state is intent. Does this new provision trump the Supreme Court, lowering the mental state back down to knowing? Or does the precedent still apply? If precedents still apply, what if the precedents are lower court cases that have not been uniformly adopted? Would a court follow the precedent where it is binding but not where it isn't, leading to different interpretations of the law? And if that happened, what standard of 'required by law' would the Supreme Court use to resolve the differences?").

[330] S. 739, 117th Cong. § 2(a) (2021).

[331] S. 3118, 115th Cong. § 101(a) (2018).

[332] *See supra* notes 133-149 and accompanying text.

[333] S. 739, 117th Cong. § 2(a) (2021).

[334] *E.g.*, S. 2298, 114th Cong. § 2(a) (2015).

[335] *See* H.R. 3401, 114th Cong. § 3 (2015).

[336] *Id*.

[337] S. 739, 117th Cong. § 2(a) (2021).

rules or default requirements in the absence of clear legislative drafting can raise a host of questions that Congress might examine in the 117th Congress in relation to the Mens Rea Reform Act of 2021 or any other legislation addressing the topic that might be introduced. As of this writing, no action has been taken on the Mens Rea Reform Act of 2021.

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