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United States v. Nofziger and the Revision of
18 U.S.C. § 207: The Need for a New Approach to the
Mens Rea Requirements of Federal Criminal Law

In 1980, the United States Congress gazed into the future of federal
criminal law, beheld the opportunity for reform of mens rea—and turned
away. In the same year, the United States Supreme Court gazed into the
future, beheld a similar opportunity—and paused, at least long enough
to sketch a bare outline of what it saw. The succeeding years, however,
appear to have clouded the Court's vision.

As a result, federal criminal law still lacks a unified, workable model
determining the state of mind requirements of a criminal statute. The
recent decision in United States v. Nofziger manifests this shortcom-
ing. Nofziger involved one defendant and one statute. It produced two
opinions—both mistaken. The amended version of the statute Nofziger inter-
preted also manifests the shortcoming. Congress attempted to elimi-
nate the statute's confusion. It enacted a new subsection—still
ambiguous.

The statute in question was a product of Congress' desire to slow
the swirl of the "revolving door" involving personnel rotating between
government and private industry. In 1978, it strengthened the Ethics in

1 For the purposes of this Comment, "mens rea . . . mean[s] a state of mind that is criminal if
there is the requisite act, and actus reus . . . mean[s] an act that is criminal if there is the requisite
2 The reform was embodied in the Criminal Code Reform Act of 1979, S. 1722, 96th Cong., 1st
Sess. (1979) [hereinafter S. 1722]. The bill was referred to the Committee on the Judiciary, which
The bill as a whole "can be regarded as a . . . truly momentous advance toward fulfillment of one of
the most basic demands of our society, viz, justice in the administration of criminal law." Id. at 2.
Sections 301-03 of the bill would have reformed the determination of state of mind in federal crimina-

3 In United States v. Bailey, 444 U.S. 394 (1980), the Court discussed and endorsed criminal
law reform proposals aimed at producing "workable principles for determining criminal culpability
. . . a byproduct [of which] has been a general rethinking of traditional mens rea analysis." Id. at 403.

4 The Court's decisions in United States v. Yermian, 468 U.S. 63 (1984), and Liparota v. United
States, 471 U.S. 419 (1985), indicate that the Court has not completely grasped the assumptions
aimed at reforming the determination of mens rea. See infra notes 86 and 108.
6 For a discussion of the "revolving door" problem, see Johnson, Agency "Capture": The "Revolv-
ing Door" between Regulated Industries and Their Regulating Agencies, 18 U. RICH. L. REV. 95, 95-96 (1983).
Government Act, further limiting the involvement former government employees may have in matters related to their past responsibilities. Because Congress was concerned with officials actually or apparently using public office for private gain, it imposed criminal penalties on former employees who violated additional post-employment restrictions. One restriction prohibits a former government employee from making certain business contacts with the employee's prior agency for one year after leaving government service. Title 18 of the United States Code currently provides, in relevant part:

> Whoever, [being a covered government employee], within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

1. the department or agency in which he served as an officer or employee, or any officer or employee thereof, and
2. in connection with any . . . particular matter, and
3. which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than $10,000 or imprisoned for not more than two years, or both.10

In February of 1988, Franklyn C. Nofziger was tried and convicted under subsection 207(c). The District of Columbia Circuit, by a divided panel, overturned his conviction in June, 1989.11 The majority interpreted the statute's mens rea element to require knowledge of each element in the offense. Because the government did not prove that Mr. Nofziger knew his former agency had a "direct and substantial interest" in certain matters, the majority ruled that his guilt was not established.12 Responding to this decision, in November of 1989 Congress amended

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8 According to the Senate Report:
   [The revision] is an attempt to prevent corruption and other official misconduct before it occurs, as well as penalizing it once it is uncovered. . . .
   18 U.S.C. 207, like other conflict of interest statutes, seeks to avoid even the appearance of public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. Thus government in its dealings must make every reasonable effort to avoid even the appearance of conflict of interest and favoritism.
9 Subsections (a), (b), and (c) of section 207 describe the three post-employment restrictions. See Mundheim, Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door, 14 CREIGHTON L. REV., 707, 711-14 (1981) (briefly describing the historical development and practical effect of the Ethics in Government Act of 1978).
13 Nofziger, 878 F.2d at 454.
subsection 207(c).\(^{14}\) Part of the revision eliminated the requirement that the communication or appearance relate to matters of direct and substantial interest to the former agency.

Obviously, \textit{Nofziger} was important to \textit{Nofziger}; it kept him out of prison. Nevertheless, its legal significance lies in the reasoning the majority and the dissent used in interpreting the statute. In fact, \textit{Nofziger} graphically illustrates a problem of interpreting the federal criminal code that is altogether too common. Title 18 gives no explicit direction to judges, jurors, lawyers, or citizens on how to determine the \textit{mens rea} requirements, if any, for each element of offenses defined in it.\(^{15}\) Thus, different courts may require different states of mind for the same elements of the same offenses.\(^{16}\) Where order should reign, chaos prevails.


\footnotesize{\(^{15}\) The Senate Judiciary Committee reported that:}

\footnotesize{No Federal statute attempts a comprehensive and precise definition of the terms used to describe the requisite state of mind. Nor are the terms defined in the statutes in which they are used. Instead the task of giving substance to the "mental element" used in a particular statute, or to be inferred from a particular statute, has been left to the courts. S. REP. No. 553, 96th Cong., 2d Sess. 59 (1980).}

\footnotesize{\(^{16}\) The varying interpretations of the \textit{mens rea} requirement in the National Firearms Act, 26 U.S.C. §§ 5841-72 (1988), illustrate the confusion in the courts regarding construction of federal criminal statutes. The Act provides:

\begin{quote}
It shall be unlawful for any person—
\begin{itemize}
  \item[(b)] to receive or possess a firearm transferred to him in violation of the provisions of this chapter [relating to taxation and registration]; or
  \item[(c)] to receive or possess a firearm made in violation of the provisions of this chapter; or
  \item[(d)] to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . . .
\end{itemize}
\end{quote}

26 U.S.C. § 5861 (1988). "Firearm" is defined in § 5845 to include shotguns and rifles with shortened barrels, automatic weapons, silencers, and other "destructive devices."}

Initially, several courts held that the government need \textit{not} prove that a defendant knew that his weapon was a "firearm" subject to registration under the Act. Thus, no state of mind was necessary regarding the characteristics of the weapon. An early case that interpreted the Act stated:

\begin{quote}
The statute makes the mere possession of an unregistered firearm transferred in violation of law an offense. If an accused possess such firearm, the offense is complete. . . . Scienter is not involved. United States v. Decker, 292 F.2d 89, 90 (6th Cir. 1961) (citation omitted). This interpretation was followed by the Fifth Circuit in United States v. Vasquez, 476 F.2d 730 (5th Cir.), \textit{cert. denied}, 414 U.S. 836 (1973). The court held that the Government was not required to prove that the defendant had knowledge that the physical characteristics of the weapon rendered it subject to registration. \textit{Id.} at 732.

Nevertheless, some courts were troubled by the possible ramifications of this interpretation. In United States v. Herbert, 698 F.2d 981 (9th Cir.), \textit{cert. denied}, 464 U.S. 821 (1989), the Ninth Circuit created a limited exception to the general rule that knowledge of the weapon's characteristics need not be proven. The court required the government to prove the defendant's state of mind as to weapons which could have been lawfully possessed but had been internally modified to become "firearms" under the Act. The court stated that, if the law were otherwise,

\begin{quote}
then any person who possessed an internally modified weapon with absolutely no knowledge or method of verification of the modification would be in violation of the law. We are sure Congress did not intend that this statute be so draconian. \textit{Id.} at 986-87.
\end{quote}

Recently, two federal circuit courts have expanded the reasoning of \textit{Herbert} to require proof of state of mind regarding the weapon's characteristics. In United States v. Williams, 872 F.2d 773, 777}
This Comment examines the *Nofziger* decision and subsection 207(c) as prototypes of the problems in interpreting federal criminal statutes. Part I outlines the facts and ruling in *Nofziger*. Part II discusses the language difficulties found in interpreting all statutes and explains the jurisprudential assumptions that federal courts are supposed to use to interpret the *mens rea* requirement of the federal criminal code. The assumptions provide a framework for analyzing federal criminal statutes. Part III analyzes the ruling in *Nofziger*. It argues that the *Nofziger* majority incorrectly interpreted subsection 207(c) when it required the prosecution to prove that the defendant acted knowingly with respect to each element of the crime. Part IV analyzes the present subsection 207(c) according to the framework outlined in Part II(B)(2). It argues that the statute should be interpreted to require knowledge for the "appearance offense," purpose for the "communication offense," and recklessness for the statute's remaining elements. This interpretation reflects the grammatical structure of subsection 207(c) and uses the analytical framework outlined in Part II(B)(2). Part V briefly discusses the amended statute and applies the analytical framework to interpret it. This Comment concludes that federal courts should apply the suggested analytical framework when interpreting all federal criminal statutes.

I. Summary of the Facts and Holding of *United States v. Nofziger*

Franklyn C. Nofziger served as Assistant to the President for Political Affairs under President Ronald W. Reagan from January 21, 1981, to January 22, 1982. After his resignation, Mr. Nofziger formed the political consulting firm of Nofziger-Bragg Communications. In February of (6th Cir. 1989), the Sixth Circuit cited to *Herbert* in requiring proof of the defendant's knowledge that the weapon was automatic and thus fell under the Act.

The Fifth Circuit faced this issue in *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989). In an *en banc* decision, the judges split as closely as possible—eight to seven—on the issue of whether *mens rea* was required for conviction. The eight judge majority required proof that the defendant knew the guns were automatic weapons. The majority required that the defendant have "knowledge of the relevant physical characteristics of the items possessed." 885 F.2d at 1253 n.8. According to the majority, the "rule [allowing conviction without proof of this knowledge] is aberrational in our jurisprudence—a jurisprudence largely based on the Anglo-Saxon common law—[so] we discard it." *Id.* at 1249. The majority thus overruled *Vasquez*. The seven dissenting judges strongly disagreed with requiring proof of *mens rea* for conviction. According to the dissent, "the pertinent question is whether Congress intended to place on the owner a reasonable duty of inquiry; by far the better view is that it did."

*Id.* at 1261. These cases demonstrate the need for a uniform method of interpreting federal criminal statutes.

17 This Comment utilizes a framework incorporating these assumptions. We refer to them as "assumptions" because they are not codified as law in Title 18. Nevertheless, modern criminal law developed these assumptions: in the Model Penal Code, adopted at the state level; in the products of criminal law reform bills, proposed at the federal level; and in Supreme Court holdings. See infra notes 91-93 and accompanying text.

18 The "appearance offense" means the portion of § 207(c) that prohibits "act[ing] as agent or attorney for, or otherwise represent[ing], anyone other than the United States in any formal or informal appearance before [the official's former department or agency]."

The "communication offense" means the portion of § 207(c) that prohibits a former official from "mak[ing] any oral or written communication on behalf of anyone other than the United States, to [the official's former department or agency]."

The remaining elements are described in parts (1) - (3) of § 207(c). 18 U.S.C. § 207(c) (1988).

1988, a jury convicted Mr. Nofziger of three violations of subsection 207(c) of the Ethics in Government Act.20

Three separate communications formed the basis of Mr. Nofziger's conviction. The first offense was an April 8, 1982, letter to Edwin Meese III, Counselor to the President, urging the White House to support the Welbilt Electronic Die Corporation's efforts to obtain an Army contract. The second offense was a letter to James Jenkins, Deputy Counselor to the President, urging support of a labor union. Finally, the third offense was Mr. Nofziger’s lobbying of White House officials to support additional export sales of the Fairchild Republic Corporation’s A-10 antitank aircraft.21

The jury found (1) that Mr. Nofziger intended to influence his former agency,22 and (2) that the communications were made within one year after Mr. Nofziger left the government, and that the White House had "a direct and substantial interest" in the matters.23

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20 Nofziger, 878 F.2d at 444. For the text of the statute, see text preceding supra note 10.
21 Brief for the United States at 6-14, Nofziger (No. 88-3058). The following is a summary of the context in which Mr. Nofziger made the communications that were the basis of his conviction.

First Offense: Mr. Nofziger lobbied on behalf of the Welbilt Electronic Die Corporation, a minority-owned manufacturer located in the South Bronx of New York City. The White House was interested in economic development of this area, and Welbilt was identified under a minority set-aside program of the Small Business Administration as a possible manufacturer of small gasoline engines for the Army. In March 1982, with an apparently irreconcilable $15 million difference between the Army offer and Welbilt's proposal, the company retained Nofziger-Bragg Communications as its lobbyist. Pursuant to this arrangement, Mr. Nofziger sent the April 8 letter to Edwin Meese III, Counselor to the President. The trial court found that because the White House had a direct and substantial interest in this matter, Mr. Nofziger violated § 207(c) by contacting his former agency about the matter within a year after he resigned.

Second Offense: The Marine Engineers Beneficial Association (MEBA), a private labor union, retained Mr. Nofziger in April 1982 to convince the Reagan Administration to expand the use of civilian manning—as opposed to the use of Navy personnel—on United States ships. Previously, President Reagan made a campaign promise to implement civilian manning, and the matter was discussed at a Cabinet meeting. The trial court found that because the White House had a substantial interest in civilian manning, Mr. Nofziger's letter on behalf of MEBA to James Jenkins, Deputy Counselor to the President, violated § 207(c).

Third Offense: In 1982, Fairchild Republic Corporation retained Mr. Nofziger to lobby for retention of U.S. budget funds for additional purchases of its A-10 antitank aircraft. On August 20, 1982, President Reagan urged the Secretary of Defense Caspar W. Weinberger to encourage export sales of the A-10 or otherwise keep the aircraft in production at current levels. The trial court found that because President Reagan had a substantial interest in this matter, Mr. Nofziger violated § 207(c) by urging the National Security Council staff to implement President Reagan's directive.

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22 The jury instruction on intent to influence read as follows:
An intent to influence is an intent to affect either opinion or action. For you to find that Defendant Nofziger made a communication with the intent to influence that is required for a 207(c) offense, you must find that he intended on behalf of someone, other than the United States, to have that communication influence the opinion or action of the person who is alleged to have received the communication in connection with the alleged particular matter.

Record at 4129-30, United States v. Nofziger, No. 87-0309 (D.D.C. 1987), cited in Brief for United States at 30-31, Nofziger (No. 88-3058). The instruction only required the jury to find that the defendant possessed the intent to influence the person receiving the communication. It did not require the jury to find that the defendant intended or hoped that parts (1) - (3) of § 207(c) existed.

23 The jury instruction on "direct and substantial interest" read as follows:
Another element is that the alleged particular matter must have been a matter in which the White House had a direct and substantial interest at the time of the alleged communication.

The term "direct" refers to the nature of the interest or involvement of the White House in the matter. You may find that the interest of the White House in the matter was a
The District of Columbia Circuit overturned Mr. Nofziger's conviction. The majority, Judges Stephen F. Williams and James L. Buckley, initially decided that subsection 207(c) was ambiguous as to the mens rea requirements. The majority then used two canons of statutory construction to resolve the ambiguity. First, the majority invoked the rule of lenity, which requires a court to interpret an ambiguous criminal statute in favor of the defendant. Second, the majority employed the rule that a statute's mens rea requirement should be presumed to apply to every element of the offense unless a clear legislative intent to the contrary exists. Therefore, the majority decided that the mens rea of "knowingly" should apply to all elements of subsection 207(c). Because the government failed to prove that Mr. Nofziger possessed knowledge of each element—especially the requirement that the matter be of direct and substantial interest to the White House—the majority overturned the conviction.

Judge Harry T. Edwards filed a dissenting opinion. He argued that subsection 207(c) is not ambiguous, so the rule of lenity was inapplicable. Judge Edwards interpreted "knowingly" to apply to the clause it directly precedes—the appearance offense. For the communication offense, he argued that the applicable mens rea should be "intent to influ-

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direct interest if you find that an officer, employee, or other representative of the White House was actively involved with the matter. Such active interest may be shown, for example, by giving advice, by making recommendations, or by giving approval or disapproval. The White House may have a direct interest in the matter even if the final action or decision making concerning the matter may have been the responsibility of an agency other than the White House.

The term "substantial" refers to the extent and the significance of the interest or involvement of the White House in a particular matter. It is not necessary for you to find that a particular matter was of major importance to the White House as compared to other matters. In deciding whether the White House had a substantial interest in the matter, you may consider the effort devoted by officers, employees, or other representatives of the White House on the matter and importance of the matter to the White House.

To find the defendants guilty, you must find beyond a reasonable doubt that the particular matters alleged in the indictment were of both direct and substantial interest to the White House on the dates alleged in the indictment.

Id. at 4128-29, cited in Brief for United States at 36-37. The instruction does not require the jury to find that the defendant had any state of mind as to whether the matter was of direct and substantial interest to the White House. Rather, all the jury had to decide was whether the matter was in fact of direct and substantial interest to the White House.

24 United States v. Nofziger, 878 F.2d 442, 446-52 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989). "Having concluded that subsection 207(c) is ambiguous, we must next decide how to resolve the ambiguity." Id. at 452.

25 "The first of these [two canons] is the rule of lenity: "'Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"' Id. (quoting United States v. Bass, 404 U.S. 336, 347 (1971) (citation omitted)).

26 "The second applicable rule states that absent evidence of a contrary legislative intent, courts should presume mens rea is required." Nofziger, 878 F.2d at 452 (citing United States v. Liparota, 471 U.S. 419, 426 (1985)).

27 "[W]e must be guided by the rule of lenity and the presumption of mens rea. These clearly require that the conviction of Nofziger be set aside because it is not based on a finding that he had knowledge of each element of the offenses charged." Nofziger, 878 F.2d at 454.

28 "To my mind, the language and structure of section 207(c) reveal no ambiguity or uncertainty, making the rule of lenity completely irrelevant in this case." Nofziger, 878 F.2d at 457 (Edwards, J., dissenting).
Because the jury found that Mr. Nofziger communicated with his former agency with an intent to influence its decisions, and that the subjects of his communications were of direct and substantial interest to Mr. Nofziger's former agency, Judge Edwards would have upheld the jury's verdict.

The government petitioned the D.C. Circuit for a rehearing of the Nofziger decision en banc. The rehearing was denied, although four of the nine members of the circuit felt that the decision was "clearly wrong." The government then filed a petition for certiorari in the United States Supreme Court, which was also denied.

II. Background on the Framework for Analyzing Criminal Statutes

In order to make a useful analysis of the Nofziger decision and its interpretation of subsection 207(c), this Comment first must discuss two fundamentals for interpreting federal criminal statutes: (1) the possible bases of uncertainty arising from statutory language; and (2) the prevailing jurisprudential assumptions that courts should use when determining the state of mind requirements in federal criminal statutes.

A. Uncertainty of Meaning Arising from Language

A court should begin its interpretation of a statute by analyzing the language of the relevant section. Unfortunately, many statutes contain defects that hinder a reader's ability to interpret the statute. Difficulties with the language of a statute usually fall into one of three areas: generality, vagueness, or ambiguity.

The first problem is generality. It is present when a term "is not limited to a unique referent and thus can denote more than one." The term "permits simultaneous reference," therefore, the reader may be

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The first problem is generality. It is present when a term "is not limited to a unique referent and thus can denote more than one." Therefore, the reader may be
unable to choose the correct referent from a finite number of possible referents.

The second problem is vagueness. Vagueness "refers to the degree to which, independent of equivocation, language is uncertain in its respective application to a number of particulars."

Vagueness differs from generality because a term's generality leaves the reader uncertain as to what members of a given group the term refers, while a term's vagueness leaves the reader uncertain as to the boundaries of the term's meaning. A term's vagueness is "indicated by the finite area and lack of specification of its boundary."

The third problem is ambiguity. In its most basic sense, ambiguous language is equivocal; it is "capable of double interpretation." An ambiguous term differs from a general term in that an ambiguous term permits alternative, "either-or" reference, while the general term permits simultaneous reference. Ambiguity differs from vagueness because the uncertainty that stems from ambiguity leaves the reader with alternative interpretations, while the uncertainty that stems from vagueness leaves the reader with questions of degree. Ambiguity differs from both generality and vagueness because generality and vagueness are not always diseases of language but can instead serve as useful drafting tools, whereas ambiguity always hinders the interpretation of language.

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36 M. Black, Language and Philosophy 31 (1949). Professor Dickerson used the following example:

The generality of ["automobile"]... is exemplified by its capacity for simultaneously covering both Fords and Chevrolets without a tinge of uncertainty. Its vagueness is exemplified by the uncertainty whether it covers three-wheeled vehicles that bear a strong resemblance also to motorcycles.

R. Dickerson, supra note 32, at 52. Nevertheless, there is a limit on how broadly a term similar to automobile may be interpreted. In interpreting the word "vehicle" to exclude airplanes, Justice Holmes noted: "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air .... But in everyday speech 'vehicle' calls up the picture of a thing moving on land." McBoyle v. United States, 283 U.S. 25, 26 (1931).

37 R. Dickerson, supra note 35, at 33 (citing 3 Oxford English Dictionary 263 (1933)). "[A]n ambiguity presupposes at least two particular alternatives each of which, taken alone, is free of ambiguity and not so vague as to be meaningless." R. Dickerson, supra note 32, at 55 (footnote omitted).

38 "In the sentence 'A grandmother sometimes has heavy responsibilities,' the word 'grandmother' is general. In the sentence 'My grandmother sometimes has heavy responsibilities,' it may well be ambiguous, if both grandmothers are living." R. Dickerson, supra note 35, at 42.

39 Id. at 40. Professor Dickerson provided the following contrasting examples:

Language can be ambiguous without being vague. If in a mortgage, for example, it is not clear whether the word "he" in a particular provision refers to the mortgagor or the mortgagor, the reference is ambiguous without being... vague or imprecise. Conversely, language can be vague without being ambiguous. An example is the written word "red."

Id.

40 See id. at 42. Vagueness and generality can be utilized by the drafter of the statute to give leeway to those charged with administering the statute. Id. at 43.

41 [T]he ambiguous word carries the threat, in specific use, of competitive thrusts of meaning that are almost never desirable or justifiable. Because of its potential for deception or confusion, an ambiguous word should not be used by the draftsman in a context that does not clearly resolve the ambiguity.

Id. at 34.
ambiguous text prevents a court from utilizing only the words of the text to interpret the statute and compels a court to search for meaning.\(^42\)

Three kinds of ambiguity may be distinguished.\(^43\) The first is semantic ambiguity, which occurs when a word has multiple possible meanings.\(^44\) The second is syntactic ambiguity, which is "uncertainty[y] of modification or reference within the particular instrument."\(^45\) The third

\(^42\) When a court declares a statute ambiguous, it asserts that some of the words used may refer to several objects and the manner of their use does not disclose the particular objects to which the words refer. . . . It is then the function of the court to make the referent clear or as clear as possible from the information and evidence which is presented to it.

\(^43\) See generally R. Dickerson, supra note 32, at 46-48. Professor Dickerson provided a brief synopsis of the different types of ambiguity:

Semantic ambiguity is uncertainty of multiple meaning that tends to follow particular words (e.g., "residence," "child") into the contexts of actual use. Syntactical ambiguity is uncertainty of modification or reference (e.g., a squinting modifier). Contextual ambiguity is uncertainty as to how a statement affects or is affected by another statement with which it is inconsistent.

R. Dickerson, supra note 32, at 283.

\(^44\) R. Dickerson, supra note 35, at 36. Professor Dickerson illustrated semantic ambiguity by attempting to determine the referent of the word "residence" in the following example: "[i]n the statement, 'His rights depend on his residence,' it is not clear whether they depend on place of abode or on legal home." R. Dickerson, supra note 32, at 44.

The use of the word "willfully" in criminal statutes is an example of semantic ambiguity. Federal courts have given the term two different meanings. The first meaning requires the prosecution to prove that the accused acted with the purpose to break the law. In Screws v. United States, 325 U.S. 91 (1945), the Supreme Court interpreted a section of the federal civil rights statute, which provides: "[w]hoever, under color of any law . . . willfully subjects . . . any inhabitant of any State . . . to the deprivation of any rights [shall be fined or imprisoned]." 18 U.S.C. § 52 (1940) (current version at 18 U.S.C. § 242 (1988)). It held that punishment is imposed "only for an act knowingly done with the purpose of doing that which the statute prohibits." Screws, 325 U.S. at 102 (emphasis added).

The second meaning requires the prosecution to prove only that the accused acted with the knowledge that his conduct would have a certain result. Recently, the Tenth Circuit interpreted the federal arson statute, which provides: "[w]hoever, within the . . . jurisdiction of the United States, willfully and maliciously sets fire to or burns . . . any building [shall be fined or imprisoned]." 18 U.S.C. § 81 (1988). In upholding the conviction, the court noted that "[o]ne of the most common state-of-mind terms in statutory crimes is 'willfully.' The Model Penal Code follows many judicial decisions in declaring that knowing conduct is sufficient to establish willfulness." United States v. M.W., 890 F.2d 239, 240 (10th Cir. 1989) (citation omitted). The court concluded that in this context, "willfully and maliciously" includes acts done with the knowledge that burning of a building is the practically certain result: "A person acts knowingly with respect to a material element of an offense when . . . if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result." Id. at 241 (quoting the Model Penal Code § 2.02(2)(b)(ii) (Official Draft and Revised Comments 1985)) (emphasis added). Judge Learned Hand expressed the most sensible view regarding the word "willfully": "It's an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, 'wilful' would lead all the rest in spite of its being at the end of the alphabet." ALI PROCEEDINGS 160 (1955), quoted in MODEL PENAL CODE § 2.02, comment 10, n.47 (Official Draft and Revised Comments 1985).

\(^45\) R. Dickerson, supra note 35, at 36. Professor Dickerson used the following example to illustrate syntactic ambiguity: "'The trustee shall require him promptly to repay the loan.' . . . Does 'promptly' modify 'require' or 'repay'?" Id. at 36 and n.8.

The statute at issue in Liparota v. United States, 471 U.S. 419 (1985), exhibits syntactic ambiguity in a definition of a criminal offense. The statute, punishing food stamp fraud, provides in relevant part: "whoever knowingly uses, transfers, acquires, alters, or possesses coupons . . . in any manner not authorized by this chapter . . . shall . . . be guilty of a felony." 7 U.S.C. § 2024(b)(1) (1988). The syntactic ambiguity arises because there is a question of "how far down the sentence the term 'knowingly' travels." Liparota, 471 U.S. at 434 (White, J., dissenting).
is contextual ambiguity, which is "uncertainty as to how a statement affects or is affected by another statement with which it is inconsistent." Thus, differentiating the kinds of uncertainty facilitates the resolution of the uncertainty. Misidentifying an uncertainty allows a court to stray from the meaning of the statute's language and accept less valid interpretations.

A court should read a statute to identify any sources of uncertainty. This will allow it to determine if the language is clear enough to ascertain meaning. If the language is clear and plain enough, then the court need not use any extrinsic aids. If the language is not clear enough to for the court to ascertain the meaning of the statute, the court should look elsewhere to establish the meaning.

B. Jurisprudential Assumptions in Federal Criminal Law Regarding the Determination of Mens Rea

The jurisprudential assumptions that contemporary federal courts should use grew out of the determined efforts of criminal law reformers to solve the problems that developed as common law crimes gave way to statutory crimes. This Subpart will begin by briefly outlining the historical evolution of several state of mind issues. This Subpart will then explain the assumptions that courts should use to determine the proper state of mind for each element of a criminal offense.

1. Historical Background

An American criminal law maxim is that a every crime needs the "concurrence of an evil-meaning mind with an evil-doing hand." Thus,
the general rule is that every crime must include mens rea—the mental element—as well as an actus reus—the act.51

The major exceptions to this general requirement of mens rea fall into two groups. The first group is composed of those crimes, developed in the English common law, that did not require a guilty state of mind. Leading examples of this group are the doctrine that ignorance of the law is no defense, the felony-murder/misdemeanor-manslaughter rule, and the law of statutory rape.52 The doctrine of ignorantia juris non excusat (ignorance of the law is no excuse) was first expounded by Chief Justice Sir John Popham in the Trial of Sir Christopher Blunt.53 This rule, as developed by English courts, held that state of mind need not be proven as to the legal element of the offense. Ignorance of the law is thus no defense to a criminal prosecution. In the area of homicide, the courts developed the felony-murder and misdemeanor-manslaughter rules.54 Under these rules, an accidental killing, otherwise not punishable, became murder if it occurred during the commission of a felony and manslaughter if during a misdemeanor. The offender was held strictly liable for any deaths occurring during the crime.

The statutory crime of sexual intercourse with a minor developed in England as a strict liability offense. Statutory rape required no mens rea as

belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Id. at 250.

51 "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500 (1951). The Latin maxim actus non facit reum nisi mens sit rea (an act does not make one guilty unless his mind is guilty) encapsulates this principle. See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 3.4, at 212 (2d ed. 1986).

The origins of the mens rea requirement date back to the 1500s. Professor Williams noted that "the requirement of a guilty state of mind (at least for the more serious crimes) had been developed by the time of Coke, which is as far back as the modern lawyer needs to go." G. WILLIAMS, supra note 1, at 30.

Although mens rea has long been a part of Anglo-American criminal law, in ancient legal systems scienter was not a requirement. For example, consider the plight of King Oedipus, punished even though he lacked an "evil-meaning mind." Judge Richard A. Posner explained:

[Early legal systems, in which the roots of law in revenge still show, rely on strict liability more heavily than modern legal systems do. The protagonist of Oedipus Tyrannus is guilty of parricide and incest, and must be punished terribly even though he neither knew nor had reason to know that the man he had killed was his father and the woman he had married was his mother.


53 1 St. Tr. 1415, 1450 (1600). The Chief Justice stated that "I am sorry to think, that Englishmen should seem to excuse themselves by ignorance of the law, which all subjects are bound to know, and are born to have the benefit of." Id.

54 For two thorough and thoughtful discussions of the common law evolution of the felony-murder rule and its development in America, and two different conceptions of the jurisprudential consequences of the rule, see People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980). All seven justices joined in the holding abolishing the felony-murder rule in Michigan. Nevertheless, the two chief opinions disagreed on whether felony-murder created a special type of malice. Justice Fitzgerald, writing for the majority, held that "the felony-murder doctrine . . . provides a separate definition of malice, thereby establishing a fourth category of murder. The effect of this doctrine is to recognize the intent to commit the underlying felony, in itself, as a sufficient mens rea for murder."

409 Mich. at 707, 299 N.W.2d at 321. Justice Ryan, in a separate opinion, argued that "[m]alice has nothing to do with common-law felony-murder; it is not an element of the crime, and is not properly considered by the jury. Except for its name, felony-murder bears little if any resemblance to the offense of murder." 409 Mich. at 742, 299 N.W.2d at 333 (Ryan, J., concurring) (footnote omitted).
to the age of the victim, although the victim’s age was an element of the offense bearing on liability. This crime seems to provide a historical analog for a strict liability offense. Nevertheless, this view of statutory rape ignores the actual role that the victim’s age played in the definition of the offense. Because a statutory rape defendant could have been convicted of fornication in an ecclesiastical court regardless of the victim’s age, the age was not the deciding factor in imposing criminal liability; rather, it determined the level of punishment and proper court.

The traditional view of statutory rape is that an accused can be convicted of the offense even if he possessed no state of mind as to the age of the victim. See O. HOLMES, THE COMMON LAW 58-59 (1881). The prosecution need not prove that the accused possessed any state of mind as to an element of the offense that goes to liability: the age of the victim. See infra notes 107-08 and accompanying text for the definition of an element that goes to liability.

An early formulation of statutory rape appears in the 1828 English statute “consolidating and amending the Statutes in England relative to Offences against the Person.” Offences Against the Person Act, 1828, 9 Geo. 4, ch. 51, preamble (emphasis in original). The relevant sections read as follows:

XVII. And be it enacted, That if any Person shall unlawfully and carnally know and abuse any Girl under the age of Ten Years, every such Offender shall be guilty of Felony . . . ; and if any Person shall unlawfully and carnally know and abuse any Girl, being above the age of Ten years and under the Age of Twelve years, every such Offender shall be guilty of a Misdemeanor . . .

XX. And be it enacted, That if any Person shall unlawfully take, or cause to taken, an unmarried Girl, being under the Age of Sixteen Years, out of the Possession and against the Will of her Father or Mother . . . every such Offender shall be guilty of a Misdemeanor . . .

Id.

The English statutes were later codified in 24 & 25 Vict. ch. 100. Section 50 made carnal knowledge of a girl under ten years old a felony; § 51 made carnal knowledge of a girl between ten and twelve a misdemeanor; and § 55 made it a misdemeanor to take a girl under sixteen out of the possession of her parents. Because twelve was the age of consent, carnal knowledge of a girl over twelve could only be punished by § 55. According to one commentator, “there must have been many cases in which the real culpability of those accused under section 55 lay in the seduction [and sexual intercourse] rather than in the abduction of a girl between the ages of 12 and 16.” Cross, Centenary Reflections on Prince’s Case, 91 LAW Q. REV. 540, 541 (1975).

Section 55 was at issue in the celebrated case of Regina v. Prince, L.R.-2 Cr. Cas. 154, 13 Cox Cr. Cas. 158 (1875). The defendant was convicted of taking the underage victim out of the possession of her parents. The court upheld the conviction, despite its acceptance of the jury’s finding that the defendant had a reasonable belief that the victim was over sixteen. Baron Bramwell wrote the majority opinion, concluding that the defendant should be punished because [t]he act forbidden is wrong in itself . . . I do not say illegal, but wrong. . . . I say that done without lawful cause is wrong, and that the Legislature meant it should be at the risk of the taker whether or no she was under sixteen. . . . It seems to me impossible to say that, where a person takes a girl out of her father’s possession, not knowing whether she is or is not under sixteen, that he is not guilty.

Prince, 13 Cox Cr. Cas. at 141-43 (emphasis added). Thus, the court stressed the immoral nature of the defendant’s actions. Because of the relatively high sentence imposed upon Prince by the trial court, the suggestion has been made that the judges suspected him of sexual intercourse with the girl. See Cross, supra, at 550. The victim was over the age of consent, however, so the only crime Prince could be convicted of was taking her from her parents.

Later English cases interpreted Prince to also dispense with the state of mind requirement for the carnal knowledge offenses (§§ 50-51). Prince was taken as precedent for all three offenses.

The interpretation of statutory rape as a strict liability crime rests on the assumption that, at the time the English statute was originally enacted, the age of the girl was a material element of the offense that went to the liability of the defendant for his conduct. This is not a correct view of this element of the crime. Instead, the age of the victim should more properly be viewed as an element that goes to the either the jurisdiction over or the grading of the offense. Assume that the girl in a statutory rape case is over sixteen. In this case, the defendant could still be convicted of a crime: the crime of fornication. He could not, however, be convicted in a temporal court; rather, such a trial would be held in an ecclesiastical court. In 1828, at the time the original statute was enacted, ecclesiastical courts possessed the jurisdiction to convict defendants of fornication. The leading commen-
Several American states adopted the English statutory rape and carnal knowledge laws. Courts in these states followed English precedent by making statutory rape a strict liability offense, despite the existence of applicable state statutes expressly requiring a criminal state of mind for conviction. Because the underlying act of fornication was often not

tors on English law noted this situation. William Blackstone, although critical of the practice, traced the development of the ecclesiastical court jurisdiction:

In 1650, when the ruling powers found it for their interests to put on the semblance of a very extraordinary strictness and purity of motive, not only incest and willful adultery were made capital crimes; but also the repeated act of keeping a brothel, or committing fornication, were (upon a second conviction) made felony without the benefit of clergy. But at the restoration, when men from an abhorrence of the hypocrisy of the late times fell into a contrary extreme, of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual court, according the rules of canon law.

4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 64 (T. Green facsimile ed. 1979) (1st ed. 1769) (emphasis added). William Holdsworth, also critical of the practice, noted that “[t]his jurisdiction [over the private affairs of life] was restored to the ecclesiastical courts in 1661; and there is no legal reason why at the present day they should not try cases of adultery and fornication.” 1 W. HOLDsworth, A HISTORY OF ENGLISH LAW 621 (3d ed. 1922). Parliament itself implicitly recognized this right of ecclesiastical courts in 1787, when it passed a statute establishing that “no suit shall be commenced in any ecclesiastical court for fornication or incontinence . . . after the expiration of eight calendar months from the time when such offence shall have been committed.” The Ecclesiastical Suits Act, 1787, 27 Geo. 3, ch. 44, quoted in 6 HALSBURY’S STATUTES OF ENGLAND 177 (1929).

Since the defendant in a statutory rape case could have been tried and convicted in an ecclesiastical court regardless of the age of the victim, the age of the victim is an element of the offense going to jurisdiction or grading. Elements that relate to jurisdiction and grading have been traditionally viewed as requiring non mens rea. Contemporary criminal law also does not require that a state of mind be proven for these elements. See infra note 108; cf. Feola v. United States 420 U.S. 671 (1975) (holding that the defendant need not be aware of the circumstances that caused his offense to be a federal crime); United States v. Holland 810 F.2d 1215 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987) (holding that the defendant need not be aware of the circumstances that caused his offense to be a more serious crime).

Thus, the traditional view that statutory rape is historically a strict liability offense is not correct. The earliest case law interpreting this crime can be harmonized with modern assumptions for the determination of mens rea, assumptions that exempt matters of jurisdiction or grading from the state of mind requirement. For an explanation of these assumptions, see infra notes 101-08 and accompanying text. The statutory rape provisions should be interpreted utilizing the modern assumptions with the element of the victim's age going not to liability, but rather to jurisdiction or grading.

57 The drafters of the New York Field (Penal) Code explicitly credit the English statute as the predecessor of their law against taking an underage girl out of her parent's possession. See PENAL CODE OF THE STATE OF NEW YORK § 329, comment (1865) (proposed 'Field Code') (citing to the Offences Against the Person Act, 9 Geo. 4, ch. 31, § 20).

Although never adopted in New York, the New York Field Code was used as a basis for the California Penal Code of 1872; see McMurray, California Jurisprudence, 13 CAL. L. REV. 445, 461 (1925). The Field Code influenced the penal codes of many other states.

58 In People v. Ratz, 115 Cal. 132, 46 P. 915 (1896), the California Supreme Court explicitly cited Regina v. Prince as support for strict liability statutory rape. In this case, the defendant urged that he lacked criminal state of mind because he believed that the prosecutrix was over the age of consent. The court rejected his contention, stating:

The whole question is learnedly and elaborately discussed in Reg. v. Prince, L.R. 2 Crown Cas. 154 . . . [The English court] held that neither defendant's honest belief [of the victim's maturity], nor the reasonable ground afforded him for such belief, relieved him from the consequences of his act.

Ratz, 46 P. at 916. Thus, the California Supreme Court held that an honest misbelief regarding the victim's age was no defense to statutory rape.

Other state courts also cited Prince in holding a statutory rape defendant strictly liable for the element of the victim's age. See, e.g., State v. Newton, 44 Iowa 45 (1876); Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1895); Edens v. State, 43 S.W. 89 (Tex. Crim. 1897); Miller v. State, 16 Ala. App. 554, 79 So. 314 (1918).

59 The California Penal Code contains a prefatory section specifying that "to constitute a crime there must be unity of act and intent." CAL. PENAL CODE § 20 (West 1988) (originally enacted as
a crime, the interpretation of statutory rape by American courts transformed it into an offense in which the defendant was held strictly liable for a liability element. Regardless of a defendant's state of mind as to the age of the victim, if the victim was under the statutory age, the defendant was guilty of rape; if the victim was over the age, the defendant was not guilty of any crime. A misunderstanding of the role played by the victim's age in the offense caused American courts to erroneously create a strict liability crime. Although courts in some states—notably California—have allowed the defendant's reasonable mistake regarding the victim's age as a defense, most American courts continue to hold a statutory rape defendant strictly liable as to the girl's age.

The Penal Code of California, Feb. 14, 1872. This section seems to negate strict liability criminal offenses. But in People v. Ratz, 115 Cal. 132, 46 P. 915 (1896), the California Supreme Court endorsed strict liability statutory rape by not allowing the defense of mistake as to the victim's age.

According to the court, the defendant had assumed the risk of his victim being underage, so his lack of state of mind was not a defense. By invoking the assumption of risk doctrine, the court effectively negated the criminal state of mind requirement. The California Supreme Court thus disregarded a state statute requiring mens rea for all criminal offenses. Instead, it followed English case law and made statutory rape a strict liability offense.

When the California Supreme Court decided People v. Ratz, 115 Cal. 132, 46 P. 915 (1896), the California Penal Code contained no crime of fornication. See The Penal Code of California, Feb. 14, 1872. Thus, there was no lesser offense, and the age of the victim served as a basis for criminal liability. The English precedent cited by Ratz dispensed with state of mind for the victim's age because it served as a basis for grading and jurisdiction. Nevertheless, the Ratz court followed this precedent when the victim's age served as a basis for liability. Because the contexts of the statute were not analogous, the application of Prince by Ratz was erroneous.

As additional support for strict liability statutory rape, the California Supreme Court in Ratz cited to its earlier decision in People v. Fowler, 88 Cal. 136, 25 P. 1110 (1891). In this case, the defendant was convicted of taking an underage female out of the possession of her parents for purposes of prostitution. In upholding the conviction, the court noted that "[i]t is claimed that the information is defective because it is not alleged that the defendant knew the girl was under age. We think that under this statute the people are not bound to allege or prove that the defendant knew the girl was under 18 years of age." Id. at 1110. As proof of this contention, the Fowler court cited § 632 of J. Bishop, Statutory Crimes (1879). This section simply quotes the holding in State v. Ruhl, 8 Iowa 447 (1859). In Ruhl, the Supreme Court of Iowa upheld the conviction of a man accused of taking an unmarried female out of her parents' custody for the purposes of prostitution. The trial court had excluded testimony offered by the defendant "to show that [the] defendant believed, or had good reason to believe, that the prosecuting witness was, at the time of taking . . . over fifteen years of age." Ruhl, 8 Iowa at 450. To support its decision upholding the trial court, the Iowa Supreme Court used the doctrine of transferred intent. According to this doctrine, "[t]he wrong intended, but not done, and the wrong done, but not intended, coalesce, and together constitute the same offence . . . as if the prisoner had intended the thing unintentionally done." Id. at 451 (quoting J. Bishop, Criminal Law § 254 (1st ed. 1856)). At the heart of this doctrine lies the assumption that had the facts been has the defendant believed them to be, his conduct would still have been blameworthy. According to Bishop, "this doctrine seems to be qualified by the proposition, that the thing intended must not be merely malum prohibitum; it must be malum in se." J. Bishop, Criminal Law § 257 (1st ed. 1856). Fornication was not a crime in California at the time Ratz was decided. Thus, the California Supreme Court incorrectly applied the doctrine of transferred intent to support its holding.

The two cases on which Ratz relied, Prince and Fowler, do not support the holding that knowledge of the victim's age was not required of the defendant.

In People v. Hernandez, 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964), the California Supreme Court held that the defendant's reasonable belief that the prosecutrix had reached the age of consent could constitute a defense to a statutory rape charge. The court recognized that the state of mind requirement of § 20 of the California Penal Code could not be satisfied by references to the defendant's assumption of the risk. According to the court, while many cases have ruled that criminal state of mind is presumed in statutory rape,

[the courts have uniformly failed to satisfactorily explain the nature of the criminal intent present in the mind of one who in good faith believes he has obtained a lawful consent before engaging in the prohibited act. As in the Ratz case, the courts often justify convic-
The second group of exceptions to the mens rea requirement arose when both English and American courts developed a body of law to interpret the growing number of "public welfare" offenses.62 These crimes "depend on no mental element but consist only of forbidden acts or omissions."63 Unlike the traditional crimes codified in statutes, public welfare offenses have no common law antecedents but instead are "creatures of statute."64 Public welfare offenses came into existence when the legislature decided to promote the public good by enacting regulations accompanied by criminal sanctions. The new regulations allowed the government to convict violators without proving that the defendant possessed a state of mind for each and every element of the offense.

The law of public welfare offenses began to develop in England in 1846 with Regina v. Woodrow.65 The court upheld the conviction of a tobacco dealer for possessing adulterated tobacco, even though he had no knowledge of its character. In 1866, the famous case of Regina v. Stephens66 began the general trend in England to dispense with the requirement of mens rea for public nuisance offenses. The defendant in Stephens, on policy reasons which, in effect, eliminate the element of intent. The Legislature, of course, by making intent an element of the crime [in § 20], has established the prevailing policy from which it alone can properly advise us to depart.

A few recent decisions have followed Hernandez by eliminating the inconsistency of strict liability rape. Courts in a few states have allowed the defendant's reasonable mistake regarding the victim's age as a defense to the crime of statutory rape. See, e.g., State v. Guest, 583 P.2d 836, 839-40 (Alaska 1978) (relying on a general disapproval of strict criminal liability); and State v. Elton, 680 P.2d 727, 729 (Utah 1984) (holding that "there must be proof of a culpable mental state which establishes that the defendant was at least criminally negligent as to the age of the partner" after noting that the prefatory section of the Utah Penal Code requires that a state of mind be proven with respect to each element of an offense). Nevertheless, most courts continue to hold that the defendant's knowledge of the female's minority is not an element of a statutory rape crime. These courts have usually cited considerations of public policy—problems with enforcement and the protective purposes of the statute—as justifications for this divergence from the general state of mind requirement. Despite these explanations, statutory rape, with its extensive common law antecedents, does not fit into the framework for strict liability public welfare offenses, see infra notes 62-64 and accompanying text. Thus, requiring no mens rea for this offense is an anomaly of modern criminal law.

62 Professor Sayre recognized that there has grown up within comparatively recent times a group of public welfare offenses, consisting of violations of police regulations which are punishable without proof of any individual blameworthiness and which form an exception to the general established doctrines of the criminal law.


65 15 M. & W. 404 (Exch. 1846). Judge Pollock stated that regarding the case of provisions, or of any matter that affected the public health, it would not be at all unreasonable to require persons dealing in them to be aware of their character and quality, and to be responsible for their goodness, whether they know it or not;—they are bound to take care.

Id. at 415.

66 1 L.R.-Q.B. 702 (1866). Judge Mellor stated:

Inasmuch as the object of this indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment.

Id. at 710.
a quarry owner, was charged with creating a public nuisance because his employees obstructed a river with rubbish from the quarry. The court upheld Stephen’s conviction even though his workmen had acted “without his knowledge and against his general orders.” The elimination of a mens rea requirement for adulterated foods and public nuisances spread to other areas of the law.

A parallel movement occurred in America when the states began to enact their own public welfare statutes. In Barnes v. State, the Connecticut Supreme Court interpreted the crime of selling liquor to a common drunkard as requiring no state of mind as to the character of the buyer. Thus, the defendant was convicted even though he had no knowledge that the buyer was a drunkard. The doctrine became firmly established in the United States as a result of several Massachusetts cases interpreting public welfare statutes. Decisions involving liquor and adulterated foods began the trend. In Commonwealth v. Boynton, the Massachusetts Supreme Judicial Court upheld the conviction of a defendant for selling intoxicating liquor although he did not know it to be intoxicating. Commonwealth v. Farren, following Boynton, held that a defendant need not possess any state of mind as to adulterated character in a conviction for selling adulterated milk. Other states followed Massachusetts' lead in enacting public welfare crimes and requiring no state of mind for some elements of these offenses.

The Supreme Court applied this public welfare exception to the mens rea requirements of a federal criminal law in United States v. Balint. This case involved a prosecution under the Narcotic Act of 1914, which restricted traffic in narcotics. The Court held that if a federal criminal statute is silent as to state of mind for an element, then no state of mind need be proven for that element. The Supreme Court followed Balint

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67 Id. at 708.
68 These areas included prosecutions for receiving lunatics into a house which was not a registered asylum (Reg. v. Bishop, 5 Q.B.D. 259 (1880)), for selling liquor to a drunken person (Cundy v. Le Cocq, 13 Q.B.D. 207 (1884)), and for killing a tame house pigeon (Horton v. Gwynne, 2 K.B. 661 (1921)).
69 19 Conn. 398 (1849).
70 83 Mass. 160 (2 Allen 1861).
71 91 Mass. 489 (9 Allen 1864).
73 258 U.S. 250 (1922).
74 Narcotic Act of December 17, 1914, Pub. L. No. 63-223, §§ 1-2, 38 Stat. 785, 786 (1914) (superseded by Internal Revenue Code of 1939). The relevant sections provide:

It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section. [In addition] . . . it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

75 The Supreme Court recognized that while the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement.
in *United States v. Dotterweich*,76 in which the Court interpreted the Federal Food, Drug, and Cosmetic Act.77 The Court held that state of mind need not be proven as to the mislabeled character of the drugs.78

The expansion of the doctrine that statutes containing no state of mind terms were construed so as not to require state of mind for some elements met with criticism. Commentators urged that this rule should be limited.79 Further, the federal courts were becoming increasingly confused as to the proper state of mind requirements for federal crimes with common law antecedents.80

*Balint*, 258 U.S. at 251-252 (citation omitted). The Court decided that the purposes of the Narcotic Act, especially that of minimizing drug use, would be best served by not reading a *mens rea* requirement into the statute. The Court thus did not require proof that the defendant knew he was dealing with narcotics. According to the Court: "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." *Id.* at 254.

76 320 U.S. 277 (1943).
77 21 U.S.C. §§ 301-392 (1988). The defendant was prosecuted under § 331(a), which prohibits "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."
78 In this case, the defendant was guilty of shipping misbranded drugs, even "though consciousness of wrongdoing be totally wanting." *Dotterweich*, 320 U.S. at 284. The Court approved of legislation that dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *Id.* at 281. In these "public welfare" statutes, the "penalties serve as effective means of regulation," so strict liability is justified. *Id.* at 280-81.

Professor Sayre stated:

The group of offenses punishable without proof of any criminal intent must be sharply limited. The sense of justice of the community will not tolerate the infliction of punishment which is substantial upon those innocent of intentional or negligent wrongdoing; and law in the last analysis must reflect the general community sense of justice. *Sayre*, supra note 62, at 70.

Professor Sayre delineated "two cardinal principles" for determining whether or not an offense fits into this "public welfare" exception to the *mens rea* requirement:

The first relates to the character of the offense. . . . Crimes created primarily for the purpose of singling out individual wrongdoers for punishment or correction are the ones commonly requiring *mens rea*; police offenses of a merely regulatory nature are frequently enforceable irrespective of any guilty intent.

The second criterion depends upon the possible penalty. If this be serious, particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind. *Id.* at 72.

Professor Sayre outlined the following eight areas into which public welfare offenses generally fall:

1. Illegal sales of intoxicating liquor;
2. Sales of impure or adulterated food or drugs;
3. Sales of misbranded articles;
4. Violations of anti-narcotic acts;
5. Criminal nuisances;
6. Violations of traffic regulations;
7. Violations of motor-vehicle laws;
8. Violations of general police regulations, passed for the safety, health or well-being of the community. *Id.* at 73.

Justice Jackson noted: "[t]he 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." *Morissette v. United States*, 342 U.S. 246, 252 (1952).
The Supreme Court attempted to remedy the confusion in *Morissette v. United States*.\(^\text{81}\) The Court interpreted the federal conversion of property statute.\(^\text{82}\) It held that *mens rea* is an essential element of the crime of knowing conversion of Government property, since conversion was originally a common law offense. The Court thus distinguished between common law crimes, which require *mens rea*, and regulatory or "public welfare" crimes, which can be subject to strict liability if no *mens rea* requirement exists in the statute.\(^\text{83}\)

The Supreme Court's decision in *Morissette* has not succeeded in bringing order to the determination of the appropriate states of mind in federal criminal law.\(^\text{84}\) *Morissette* failed because it established a vague rule for the application of an ambiguous concept. *Morissette*'s division of crimes into common law offenses or public welfare offenses is vague because there is no clear distinction between the two categories.\(^\text{85}\) This vagueness caused subsequent decisions to make arbitrary and confusing distinctions.\(^\text{86}\) *Morissette*'s requirement of *mens rea* for common law offenses is ambiguous because the decision did not specify which state of

\(^{81}\) 342 U.S. 246 (1952).
\(^{82}\) The statute, in relevant part, reads: "[w]hoever embezzles, steals, purloins or knowingly converts to his use or the use of another, or without authority sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . . . Shall be fined . . . or imprisoned." 18 U.S.C. § 641 (1988).
\(^{83}\) The Court stated that "we have not found, nor has our attention been directed to, any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law." *Morissette*, 342 U.S. at 265.

Conversely, in justifying the application of strict liability to regulatory offenses, the Court stated that whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

*Id.* at 256.

\(^{84}\) The Supreme Court, assessing the state of federal criminal law nearly thirty years after *Morissette*, observed in United States v. Bailey, 444 U.S. 394, 403 (1980), that

few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime. In 1970, the National Commission on Reform of Federal Criminal Laws decried the "confused and inconsistent ad hoc approach" of the federal courts to this issue and called for "a new departure."

\(^{85}\) Even in *Morissette*, the Court seemed to realize this fact:

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and those that do not. We attempt no closed definition, for the law on the subject is neither settled nor static.

*Morissette*, 342 U.S. at 260.

\(^{86}\) When applying this distinction to crimes contained in the federal criminal code, courts have difficulty identifying those possessing common law antecedents. There often is nothing intuitive or logical about these distinctions. For example, a law regulating hand grenades has been held to be a regulatory offense, United States v. Freed, 401 U.S. 601 (1971), while food stamp regulations have not been so held, Liparota v. United States, 471 U.S. 419 (1985).

In *Freed*, the Supreme Court held that the regulations on hand grenades in the National Firearms Act, §§ 5841-72 (1988), fall into the category of public welfare offenses. The Court stated: "[t]his is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an inno-
mind a court should apply, in spite of both the panoply of state of mind terms and the different possible meanings of a single term.

The distinction between common law and welfare offenses is vague, and thus causes more confusion than it cures. Nevertheless, a certain amount of vagueness is not fatal to criminal law if the vagueness plays an appropriate role. For example, when a statute defines illegal conduct, it may do so using clear standards, as opposed to overly precise rules. A person risks violating these standards when engaging in some given conduct. The point at which conduct becomes unlawful should be a question for the jury. To guide the jury, however, each criminal statute should contain identifiable standards that describe what the prosecution must prove to convict the defendant. The appropriate mens rea for an

cent act." *Freed*, 401 U.S. at 609. For the defendants to be convicted, the Court thus required no specific knowledge that the grenades were unregistered.

In *Liparota*, the Supreme Court held that a violation of the Food Stamp Act of 1964, 7 U.S.C § 2024 (1988), was not a public welfare offense. Thus, the Court held that the government must prove that the defendant knew his acquisition or possession of food stamps was unauthorized by law. Because this was not proven, the Court reversed the conviction. According to the Court, the offense at issue here differs substantially from those "public welfare offenses" we have previously recognized. In most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety.

*Liparota*, 471 U.S. at 452-53. However, this distinction is dubious, since a reasonable person would expect food stamp use to be subject to "stringent public regulation."

The Court is correct: hand grenades and food stamps (perhaps the modern analog to "guns and butter") are not comparable as items. Nevertheless, the regulations are comparable as laws, and the laws both strictly regulate the items. Although the legal distinction seems illusory, the Court held that laws concerning food stamps are not "regulatory," while those concerning hand grenades are "regulatory."

Morissette noted:

[Congress] has seen fit to prescribe that an evil state of mind, described variously in one or more such terms as "intentional," "wilful," "knowing," "fraudulent" or "malicious," will make criminal an otherwise indifferent act, or increase the degree of the offense or its punishment.

Morissette, 342 U.S. at 264. For the modern hierarchy of state of mind terms, see infra notes 94-100 and accompanying text.

Consider the different meanings of the term "wilfully." See *supra* note 44.

Justice Black, writing for the majority in *United States v. Petrillo*, 332 U.S. 1 (1947), stated:

It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. . . . The Constitution has erected procedural safeguards to protect against conviction for crime except for violations of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards.

*Id.* at 7 (citations omitted).

In *Nash v. United States*, 229 U.S. 373, 377 (1913), Justice Holmes wrote for the majority that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

The standards must, however, be clear enough to satisfy the requirement that the public be given notice of what is criminal and what is not. This necessity of notice derives from the constitutional principle of due process. Justice Douglas, in *Lambert v. California*, 355 U.S. 225, 228 (1957), described the role of notice in due process:

Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.
offense is the most important standard of a criminal statute because it
mandates the minimum level of culpability necessary for conviction.

2. Modern Assumptions for Interpreting Criminal Statutes

Modern criminal law is moving away from traditional notions of
criminal states of mind and towards more sophisticated conceptions re-
garding states of mind and how they should be determined. Three dif-
f erent sources embody this reform. The first and earliest source is the
Model Penal Code section “General Requirements of Culpability.”
The second source is the “Culpable States of Mind” chapter in the Criminal
Code Reform Act of 1979. The third source is Part II(A) of the
Supreme Court’s opinion in United States v. Bailey.

Three jurisprudential assumptions embody the thrust of contempo-
rary criminal law reform on the proper determination of a state of mind
required by a criminal offense. The analytical framework utilized by this
Comment incorporates all three. The first assumption is that all state of

91 MODEL PENAL CODE § 2.02 (Official Draft and Revised Comments 1985). The American Law
Institute approved this provision in May, 1962. See id. at 225-26.

“Section 2.02 may appropriately be considered the representative modern American culpability
scheme.” Robinson & Grall, Element Analysis in Defining Criminal Liability, 35 STAN. L. REV. 681, 692

92 S. 1722, supra note 2, §§ 301-303. Although Congress never enacted S. 1722 or its successor
bills, commentators praised its reforms. “S. 1722 replaces the confusing and inconsistent ad hoc
approach to culpability that now characterizes federal criminal law with a new system that has its
genesis in the Model Penal Code, the recommendations of the National Commission, and recent
state codifications.” Feinberg, Toward a New Approach to Proving Culpability: Mens Rea and the Proposed
Federal Criminal Code, 18 AM. CRIM. L. REV. 123, 129 (1980). Professor Feinberg continued:

S. 1722 attempts to reform, modernize, and streamline the way the federal criminal law
currently treats the issue of culpability. . . .

.......

[S. 1722 has the ability to] clarify the law and make it more readily understandable
to lawyer and layman alike. Although the new rules of construction may, on first reading,
appear to be complex, the rules are easily mastered and should promote fairness, consist-
tency, and discipline in drafting.

Id. at 142, 143.

93 444 U.S. 394, 403-406 (1980). The Court, when it began its analysis, noted that “[t]his ambigu-
ity [involving the determination of mens rea] has led to a movement away from the traditional
dichotomy of intent and toward an alternative analysis of mens rea.” Bailey, 444 U.S. at 404.

Bailey interpreted the federal escape statute, which provides: “[w]hoever escapes or attempts to
escape from . . . any institution or facility in which he is confined by direction of the Attorney Gen-
eral . . . shall . . . be fined . . . or imprisoned.” 18 U.S.C. § 751 (a) (1988). At trial, the defendants
attempted to present a defense of duress based on jail conditions. The District Court refused their
proposed jury instruction on duress.

The appellate court reversed, holding that

[section 751(a) required the prosecution to prove that a particular defendant left federal
custody voluntarily, without permission, and “with an intent to avoid confinement” . . . .
[which] encompass[es] only the “normal aspects” of punishment prescribed by our legal
system. Thus, where a prisoner escapes to avoid “non-confinement” conditions such as
beatings or homosexual attacks, he would not necessarily have the requisite intent to sus-
tain a conviction under § 751(a).

Bailey, 444 U.S. at 401 (quoting Bailey v. United States, 585 F.2d 1087, 1093 (1978)). The Supreme
Court decided that the statute did not contain “such a heightened standard of culpability or such a
narrow definition of confinement.” Id. at 408. It therefore held that “the prosecution fulfills its
burden under § 751(a) if it demonstrates that an escapee knew his actions would result in his leaving
physical confinement without permission.” Id. The Supreme Court thus reversed the Court of Ap-
peals and reinstated the conviction.

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mind terms may be reduced to a four-part hierarchy.\footnote{94} This assumption rejects the traditional division between specific and general intent.\footnote{95} The Model Penal Code and S. 1722 use a similar hierarchy of culpability: purpose/intent,\footnote{96} knowledge,\footnote{97} recklessness,\footnote{98} and negligence.\footnote{99} One of

\footnote{94} The state of mind hierarchy can only be understood in relation to the three different types of elements that constitute an offense. The three types of elements are conduct, surrounding circumstance, and result. See infra notes 104-06 and accompanying text.

The variety of terms now used in federal criminal statutes to describe states of mind is tremendous. "Present Federal criminal law is composed of a bewildering array of terms used to describe the mental element of an offense. The National Commission's consultant on the subject identified 78 different terms used in present law." S. REP. No. 553, 96th Cong., 2d Sess. 59 (1980).

\footnote{95} The Supreme Court criticized the traditional distinction: "[a]t common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This venerable distinction, however, has been the source of a good deal of confusion." Bailey, 444 U.S. at 403. Professors LaFave and Scott noted:

The meaning of the word "intent" in the criminal law has always been rather obscure, largely as a result of its use in such phrases as "criminal intent," "general intent," "specific intent," "constructive intent," and "presumed intent." Intent has traditionally been defined to include knowledge, and thus it is usually said that one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts.

W. LAFAVE & A. SCOTT, supra note 51, § 3.5, at 216. The concept of "specific intent" has been particularly troublesome:

The term "specific intent" has been productive of untold confusion, partly because courts have not been consistent in their use of it and partly for the more fundamental reason that it is often quite difficult to determine whether a statute should be interpreted to require specific intent—that is, the Code concept of a true "purpose."


\footnote{96} The Model Penal Code employs the term "purpose" to express the highest state of mind and defines it as follows:

A person acts purposely with respect to a material element of an offense 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.

MODEL PENAL CODE § 2.02(2)(a) (Official Draft and Revised Comments 1985).

S. 1722 retains the term "intentional," and defines it as follows:

A person's state of mind is intentional with respect to—

1. his conduct if it is his conscious objective or desire to engage in the conduct; or

2. a result of his conduct if it is his conscious objective or desire to cause the result.

S. 1722, supra note 2, § 302(a).

In Bailey, the Supreme Court preferred the use of "purpose": "a person who causes a particular result is said to act purposefully if "he consciously desires that result, whatever the likelihood of that result happening from his conduct."" Bailey, 444 U.S. at 404 (quoting United States v. United States Gypsum, 438 U.S. 422, 445 (1978) (quoting W. LAFAVE & A. SCOTT, CRIMINAL LAW § 28, at 196 (1st ed. 1972))).

There are two noticeable differences between these two definitions. First, the Model Penal Code uses the term "purpose," while S. 1722 uses the term "intentional." This is a distinction without a difference, since the heart of both definitions is the concept of conscious objective. The Supreme Court noted that "the respondents acted with the purpose—that is, the conscious objective—of leaving the jail . . . ." Bailey, 444 U.S. at 408.

Second, the Model Penal Code applies "purposely" to elements that are surrounding circumstances, while S. 1722 limits "intentional" to elements that are either conduct or result. This distinction does make a meaningful, albeit slight, difference. The analytical framework of this Comment utilizes the limited application of S. 1722. A court would not be able to meaningfully apply a state of mind of intent or purpose to an element that is a surrounding circumstance. "[A] person cannot intend an existing circumstance, but can only have knowledge of, or be reckless or negligent with respect to, its existence." Feinberg, supra note 92, at 133.

\footnote{97} According to the Model Penal Code:

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware
that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

**Model Penal Code § 2.02(2)(b) (Official Draft and Revised Comments 1985).**

According to S. 1722:

A person’s state of mind is knowing with respect to—

1. his conduct if he is aware of the nature of his conduct;
2. an existing circumstance if he is aware or believes that the existing circumstance exists; or
3. a result of his conduct if he is aware or believes that his conduct is substantially certain to cause the result.

S. 1722, *supra* note 2, § 302(b).

In *Bailey*, the Supreme Court defined knowingly as follows: “a person who causes a particular result ... is said to act knowingly if he is aware ‘that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.’” *Bailey*, 444 U.S. at 404 (quoting *Gypsum*, 438 U.S. at 445 (quoting W. LaFave & A. Scott, *supra* note 96, at 194)).

98 The Model Penal Code defines “reckless” as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The 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) (Official Draft and Revised Comments 1985).**

S. 1722 defines “reckless” as follows:

A person’s state of mind is reckless with respect to—

1. an existing circumstance if he is aware of a substantial risk that the circumstance exists but disregards the risk; or
2. a result of his conduct if he is aware of a substantial risk that the result will occur but disregards the risk;

except that awareness of the risk is not required if its absence is due to self-induced intoxication. A substantial risk means a risk that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

S. 1722, *supra* note 2, § 302(c).

The differences between the definitions are not significant. The first difference is that the Model Penal Code’s application of “recklessness” to result and attendant circumstances is implicit, while S. 1722’s application of “reckless” to result and existing circumstances is explicit. The second difference is the Model Penal Code’s use of “unjustifiable” in defining the type of risk that an offender may disregard. The Senate Committee felt that “substantial” risk included the meaning of “unjustifiable”: “As the proposed Code uses the term ‘reckless,’ the risk consciously disregarded must be substantial and unjustifiable. ... The Committee believes that use of the term ‘substantial’ in conjunction with the last sentence in subsection (c) ... encompasses this concept [of unjustifiable].” S. Rep. No. 553, 96th Cong., 2d Sess. 64 (1980).

99 The Model Penal Code defines negligence:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature of and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that reasonable person would observe in the actor’s situation.

**Model Penal Code § 2.02(2)(d) (Official Draft and Revised Comments 1985).**

S. 1722 defines negligence as follows:

A person’s state of mind is negligent with respect to—

1. an existing circumstance if he ought to be aware of a substantial risk that the circumstance exists; or
2. a result of his conduct if he ought to be aware of a substantial risk that the result will occur.

A substantial risk means a risk that is of such a nature and degree that to fail to perceive it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

S. 1722, *supra* note 2, § 302(d).
the most important distinctions drawn by the hierarchy is between its definitions of purpose and knowledge.100

The second assumption underlying the interpretation of modern criminal statutes is that element-by-element analysis can advance the determination of a statute's state of mind requirements.101 Element-by-element analysis recognizes that different states of mind may apply to different elements of the crime.102 When courts utilize element-by-element analysis, they do so step by step. Initially, the court classifies the

100 The Court noted in Bailey that "[p]erhaps the most significant, and most esoteric, distinction drawn by this analysis is that between the mental states of 'purpose' and 'knowledge.'" 444 U.S. at 404. Professors LaFave and Scott noted that "the modern approach is to define separately the mental states of knowledge and intent (sometimes referred to as purpose, most likely to avoid confusion with the word 'intent' as traditionally defined). This is the approach taken in the Model Penal Code." W. LaFave & A. Scott, supra note 51, § 3.5(b), at 218 (footnote omitted).

In some cases, including prosecutions for complicity, this distinction is crucial. The Comment to the Model Penal Code notes:

Model Penal Code § 2.02 comment 2, at 234 (Official Draft and Revised Comments 1985).

An analysis of the state of mind requirements for the offense of complicity reveals the importance of the difference between "purpose" and "knowledge." One view, propounded vigorously by Judge Learned Hand, is that the proper state of mind for complicity is a purpose to promote the criminal result. Judge Hand noted that the traditional terms describing complicity have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture; . . . that he seek by his action to make it succeed. All the words used— even the most colorless, "abet"—carry an implication of "purposive attitude" towards it.

United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (emphasis added). The other view, argued by Judge John J. Parker, holds that the state of mind of knowledge is sufficient for complicity:

Guilt as an accessory depends, not on "having a stake" in the outcome of crime . . . but on aiding and assisting the perpetrators. . . . One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he had received full price for the gun. . . .

Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940) (emphasis added). The former view was adopted by the Model Penal Code, establishing that "[a] person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense . . ." that person either acts or fails to act. Model Penal Code § 2.06(3) (Official Draft and Revised Comments 1985) (emphasis added). The distinction is similarly important to the law of conspiracy and attempt. The Court in Bailey that "[a]nother such example [where heightened culpability merits special attention] is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior." Bailey, 444 U.S. at 405.

101 The Court explicitly praised this technique for determining the proper states of mind of a statute. "[T]he suggested element-by-element analysis is a useful tool for making sense of an otherwise opaque concept." United States v. Bailey, 444 U.S. 394, 406 (1980). The "opaque concept" to which Bailey referred is the concept of mens rea.

102 The Supreme Court in Bailey reflected this:

Is the same state of mind required of the actor for each element of the crime, or may some elements require one state of mind and some another? In United States v. Feola . . . we were asked to decide whether the Government, to sustain a conviction for assaulting a federal officer under 18 U.S.C. § 111, had to prove that the defendant knew that his victim was a federal officer. After looking to the legislative history of § 111, we concluded that Congress intended to require only "an intent to assault, not an intent to assault a federal officer." . . .

What Feola implied, the American Law Institute stated: "[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."

Bailey, 444 U.S. at 405-06 (citations omitted).
elements of the offense as either conduct, surrounding circumstances, or prohibited result. Next, the court, having identified the elements that are surrounding circumstances, must further classify them as either requiring a state of mind or not requiring a state of mind. The elements that do not require a state of mind relate to grading, venue, jurisdiction, or a question of law. The surrounding circum-

103 The Model Penal Code defines "element of an offense" as follows:

"[E]lement of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as
(a) is included in the description of the forbidden conduct in the definition of the offense;
(b) establishes the required kind of culpability; or
(c) negatives an excuse or justification for such conduct; or
(d) negatives a defense under the statute of limitations; or
(e) establishes jurisdiction or venue.

**Model Penal Code** § 1.13(9) (Official Draft and Revised Comments 1985).

To apply these definitions to 18 U.S.C. § 207(c), the requirement that the nature of the communication be "in connection with any . . . particular matter . . . in which such department or agency has a direct and substantial interest," 18 U.S.C. § 207(c)(2)-(3), is a surrounding circumstance included in the description of the forbidden conduct.

104 The Model Penal Code provides a useful definition of conduct. Conduct is "an action or omission and its accompanying state of mind, or, where relevant, a series of acts or omissions." **Model Penal Code** § 1.13(5) (Official Draft and Revised Comments 1985).

105 Surrounding circumstances are referred to as "attendant circumstances" by the Model Penal Code, **Model Penal Code** § 2.02 (Official Draft and Revised Comments 1985), and "existing circumstances" by S. 1722, supra note 2, § 301(a).

106 An element classified as a result is similar to an element classified as a surrounding circumstance in that all four states of mind can be applied to both types of elements under either Model Penal Code § 2.02 or S. 1722 § 302. An element classified as conduct is different: the only applicable states of mind are purposely (Model Penal Code) or intentionally (S. 1722), and knowingly. See **Model Penal Code** § 2.02(2) (Official Draft and Revised Comments 1985) and S. 1722, supra note 2, § 301(c).

107 The Model Penal Code provides that a person is not guilty unless he acted with some state of mind "with respect to each material element of the offense." **Model Penal Code** § 2.02(1) (Official Draft and Revised Comments 1985) (emphasis added). The Code had earlier defined "material element" by negative example:

"[M]aterial element of an offense" means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct . . . .

**Id.** § 1.13(10). Thus, no state of mind is necessary for the non-material elements, such as the statute of limitations, jurisdiction, venue, and questions of law.

108 Elements not requiring a state of mind relate to one of five matters, as outlined in S. 1722: **Matters of Law Requiring No Proof of State of Mind.**—

1. **Existence of Offense.**—Proof of knowledge or other state of mind is not required with respect to—
(A) the fact that particular conduct constitutes an offense, or that conduct or another element of an offense is pursuant to, or required by, or violates, a statute or regulation, rule, or order issued pursuant thereto;
(B) the fact that particular conduct is described in a section of this title; or
(C) the existence, meaning, or application of the law determining the elements of an offense.

2. **Jurisdiction, Venue, and Grading Matters.**—Proof of state of mind is not required with respect to any matter that is solely a basis for federal jurisdiction, for venue, or for grading.

3. **Matters Designated a Question of Law.**—Proof of state of mind is not required with respect to any matter that is designated as a question of law.

S. 1722, *supra* note 2, § 303(d). This section includes grading, one matter that is not included by the Model Penal Code in its section defining which elements are not material and thus do not require a state of mind; see *supra* note 107. For elements of grading, the Model Penal Code would require some state of mind. "[T]he culpability structure of section 2.02 is meant to apply to grading criteria.
stance elements that require a state of mind are those elements that do not relate to grading, venue, jurisdiction, or a question of law, but rather relate to liability for the substantive offense. Finally, the court, having classified all the elements, examines the statute and attempts to assign a


The framework utilized in this Comment includes grading as an element for which no state of mind need be required. This position follows the common law, id. at 546-47, and present federal case law. See, e.g., United States v. Holland, 810 F.2d 1215 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987) (upholding a conviction for selling a controlled substance within 1000 feet of a school, without proof that the defendant knowingly was in the school zone, where the element of being within 1000 feet of a school resulted in a different offense and a more serious penalty); United States v. Falu, 776 F.2d 46 (2d Cir. 1985) (same); United States v. Collado-Gomez, 834 F.2d 280 (2d Cir. 1987), cert. denied, 485 U.S. 969 (1988) (upholding a conviction under statute providing for enhanced penalties for selling “crack,” without proof that the defendant knew the specific controlled substance he possessed).

The Model Penal Code and S. 1722 agree that a matter of jurisdiction requires no state of mind. This position follows the controlling Supreme Court decisions. In United States v. Feola, 420 U.S. 671, 684 (1975), the Court held that the federal assault statute “cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer.” The Court further noted that “the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute. The question, then, is not whether the requirement is jurisdictional, but whether it is jurisdictional only.” Id. at 676 n.9 (emphasis added).

The specific language of both the Model Penal Code and S. 1722, excluding elements that are jurisdictional from the state of mind requirement, flows from this requirement that an excluded element be “jurisdictional only.” The Model Penal Code uses the phrase “an element that does not relate exclusively to . . . jurisdiction”, § 1.13(10), supra note 107 (emphasis added). S. 1722 uses the phrase “to any matter that is solely a basis for federal jurisdiction,” § 303(d), supra (emphasis added). If jurisdiction is necessarily part of the substantive offense, it will require a state of mind. See, e.g., United States v. Schankowski, 782 F.2d 628 (6th Cir. 1986) (holding that knowledge was required for conviction under the mail fraud statute, since “there can be no separation of the crime from the predicate act. Unless mail is involved there is nothing to prohibit . . .”). Unfortunately, the Supreme Court’s more recent holding in United States v. Yermian, 468 U.S. 63 (1984) clouds that clear holding in Feola. The statute at issue was 18 U.S.C. § 1001 (1982), which, in relevant part, provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations . . . shall be fined . . . or imprisoned . . . .

The Court began by noting that “[t]he statutory language requiring that knowingly false statements be made ‘in any matter within the jurisdiction of any department or agency of the United States’ is a jurisdictional requirement.” Yermian, 468 U.S. at 68. It concluded that “proof of actual knowledge of federal agency jurisdiction is not required under § 1001.” Id. at 75 (emphasis added). Nevertheless, in a footnote, the Court seemed to back away from the clear holding of Feola that a jurisdictional element requires no state of mind at all:

It is worth noting that the jury was instructed . . . that the Government must prove that respondent “knew or should have known” that his false statements were made within the jurisdiction of a federal agency.

As the Government did not object to the reasonable-foreseeability instruction, it is unnecessary for us to decide whether that instruction erroneously read a culpability requirement into the jurisdictional phrase . . . . The jury’s finding that federal agency jurisdiction was reasonably foreseeable by the defendant, combined with the requirement that the defendant had actual knowledge of the falsity of those statements, precludes the possibility that criminal penalties were imposed on the basis of innocent conduct.

Id. at n.14. This footnote cannot be explained. The Court could have held that the federal agency jurisdiction was part of the substantive offense by noting that the states do not prosecute people who lie on federal forms. If the Court had done this, then the surrounding circumstance element it views as jurisdictional would instead go to liability, thus requiring a state of mind. See infra notes 113-14 and accompanying text. Alternatively, the Court could have held that no state of mind at all is required for the jurisdictional matter, which would have followed its holding in Feola. The Court declined to do either, and the decision seems to cast doubt on the continued vitality of Feola.
state of mind term to each element. The Supreme Court has reiterated its support of this tool,109 and it has been praised by several commentators.110 Federal appellate courts have recognized and utilized this approach.111 In the words of one court, using element analysis is simply

109 The Court held in Liparota v. United States, 471 U.S. 419, 424 n.4 (1985), that "[t]he required mental state may of course be different for different elements of a crime." This approach has been called either "element analysis" or "element-by-element analysis."

110 Professors Robinson and Grall argued:

Element analysis provides the comprehensiveness, clarity, and precision needed to give fair notice and to limit governmental discretion . . . .

Element analysis, by providing a precise statement of all separate elements of an offense definition, has the conceptual advantage of increased simplicity. It eliminates the need for separate bodies of law such as mistake and accident by demonstrating that these apparently independent doctrines are actually concerned with culpability as to particular objective elements. In addition, the clarity and precision of element analysis has the practical effect of reducing litigation by reducing ambiguities in offense definitions.

Robinson & Grall, supra note 91, at 703-04 (footnotes omitted).

Professors LaFave and Scott recognized the heart of element-by-element analysis: "the mental ingredients of a particular crime may differ with regard to the different elements of the crime." W. LaFave & A. Scott, supra note 51, § 3.4(d), at 215.

111 The Fifth Circuit recognized the utility of element-by-element analysis in United States v. Adamson, 665 F.2d 649 (5th Cir. Unit B 1982), aff'd in part and rev'd in part on rehearing, 700 F.2d 953 (5th Cir. Unit B), cert. denied, 464 U.S. 833 (1983) [hereinafter Adamson I]. The court was attempting to determine the appropriate state of mind necessary for conviction under 18 U.S.C. § 656 (1982), which provides:

Whoever, being an officer, director, agent or employee of . . . any Federal Reserve bank . . . willfully misapplies any of the moneys, funds or credits of such bank . . . , shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . .

Prior decisions of the Fifth Circuit and other circuits had "uniformly construed the statute to include the 'intent to injure or defraud the bank' as a material element of the crime." Adamson I, 665 F.2d at 652 (citations omitted).

The presiding judge for the trial of Adamson had charged the jury that "[a] reckless disregard of the interest of the bank is the equivalent of the intent to injure or defraud the bank." Id. at 651. This instruction explicitly tracked the Fifth Circuit holding in United States v. Welliver, 601 F.2d 203, 210 (5th Cir. 1979), which Adamson I cited: "Welliver thus has interpreted the 'intent to injure or defraud' element of willful misapplication to import a mens rea of merely recklessness." Adamson I, 665 F.2d at 655. This state of mind requirement was thus satisfied if the prosecution could prove that the defendant had acted with reckless disregard for the interest of the bank.

The court was uneasy with this conception of mens rea, and noted that "[n]o other circuit has approved a jury instruction equating 'recklessness' with 'intent to injure or defraud.'" Adamson I, 665 F.2d at 654 (footnote omitted). In a footnote, the court explained how the Fifth Circuit rule could be harmonized with the positions of other circuits by applying element-by-element analysis:

This interpretation begins with the premise that an offense can have a different state of mind requirement for different elements of the crime. United States v. Bailey, 444 U.S. 394, 405-06 [1980]. . . . The recklessness charge approved in Welliver might be said to refer only to the ultimate consequences—whether the acts in question will tend to injure or defraud the bank—and not to the constituent parts of the offense. Under this analysis, the defendant in Welliver would have violated the statute if he knew he was in effect arranging a loan without a written obligation for repayment but need only have been reckless with regard to whether such a loan would tend to injure or defraud the bank . . . .

Id. at 655 n.17 (emphasis in original). The court continued:

In the present case, under this analysis, to violate § 656 the defendant would have to know that the named borrower lacked the ability or intent to repay, but the defendant need only be reckless with regard to whether such a loan would tend to injure or defraud the bank.

Id. (emphasis in original). The court did not adopt this interpretation because "[t]he charge approved by Welliver, however, is not consistent with this analysis." Id. The panel thus upheld the conviction of Adamson, relying on Welliver.

One year later, in an en banc rehearing of the case, the Fifth Circuit reversed the panel and overruled Welliver by an 8-4 decision. United States v. Adamson, 700 F.2d 953 (5th Cir. Unit B), cert. denied, 464 U.S. 833 (1983) [hereinafter Adamson II]. The court held that
"heeding the advice of the Supreme Court."112

The third assumption that courts should make builds on the traditional assumption that a state of mind is presumed when not expressed. Generally speaking, a court will read into a statute a state of mind if that statute does not expressly require a state of mind.113 The analytical framework of this Comment, drawn from modern criminal law, improves the traditional presumption by specifying the particular state of mind that should be presumed for a particular type of element. For elements that are either surrounding circumstance or result elements, a court should require that at least the state of mind of recklessness be proved for that element. For elements that are conduct elements, a court should require that at least the higher state of mind of knowledge be proved for that element. This requirement of a minimum state of mind adopts S. 1722's explicit

the appropriate mens rea standard for § 656 is knowledge. In order to convict a defendant for willfully misapplying funds with intent to injure or defraud a bank, the government must prove that the defendant knowingly participated in a deceptive or fraudulent transaction.

The trier of fact may infer the required intent, i.e., knowledge, from the defendant's reckless disregard of the interest of the bank . . . .

Adamson II, 700 F.2d at 965 (emphasis in original). Thus, the interpretation urged in Adamson I, which called for a state of mind of knowledge as to the ability of the borrower to pay and a state of mind of recklessness as to the effect on the bank, was implicitly adopted by the entire circuit in Adamson II.112 United States v. Sturm, 870 F.2d 769, 777 (1st Cir. 1989). The court stated that "we have avoided specific intent terminology and instead have used the Model Penal Code's element-by-element approach towards intent." Id. See also United States v. M.W., 890 F.2d 239 (10th Cir. 1989) (adopting element-by-element analysis and Model Penal Code view of "knowingly").

113 Unless the statute expressly indicates that no state of mind is required, a court should infer that the legislature intended to require that some state of mind be proved for an offense.

The Court affirmed this doctrine in Bailey: "mere omission [from the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced." Bailey, 444 U.S. at 406 n.6 (quoting Morissette v. United States, 342 U.S. 252, 263 (1952)) (insert in original). This general component of the assumption is not a contemporary development. Since Morissette, American law has contained a presumption against strict liability for common law crimes. Thus, express legislative intent is necessary to eliminate the requirement of a state of mind, making a criminal statute subject to strict liability. As the Court recently held in Liparota:

[In United States v. United States Gypsum Co. . . . we noted that "certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement" and that criminal offenses requiring no mens rea have a "generally disfavored status." Similarly, in this case, the failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law.]


The Model Penal Code and S. 1722 adopt this assumption in the context of element-by-element analysis. The Model Penal Code formulates this presumption in two sections. Section 2.02(1) establishes that "[e]xcept as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Section 2.05 defines "When Culpability Requirements Are Inapplicable to Violations and to Offenses Defined by Other Statutes." MODEL PENAL CODE §§ 2.02(1), 2.05 (Official Draft and Revised Comments 1985).

S. 1722 notes, in relevant part:

Except as otherwise expressly provided, the following provisions apply to an offense under any federal statute:

(a) REQUIRED PROOF OF STATE OF MIND.—A state of mind must be proved with respect to each element of an offense, except that—

(1) no state of mind must be proved with respect to a particular element of an offense if that element is specified in the description of the offense as existing or occurring "in fact"...

S. 1722, supra note 2, § 303.
position and the Model Penal Code's implicit position. These inferences for a minimum state of mind operate when a statute does not specify the required state of mind for an element of the offense, whether that element relates to conduct, a surrounding circumstance, or a result.

The framework adopted by this Comment also follows S. 1722's guidance as to when a given section does or does not "specify" a state of mind for a given element. The Model Penal Code contains a section that applies any state of mind expressed in an offense to all the elements of that offense unless "a contrary purpose plainly appears." This section undermines the utility of element-by-element analysis, and the frame-

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114 S. 1722 and the Model Penal Code differ in the way this presumption is presented. The relevant section of the Model Penal Code, its "default culpability provision," reads:

When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

MODEL PENAL CODE § 2.02(3) (Official Draft and Revised Comments 1985). Professors Robinson and Grall explained that "Model Penal Code section 2.02(3) requires recklessness for any element for which the offense definition does not specify culpability." Robinson & Grall, supra note 91, at 712.

Nevertheless, the Model Penal Code implicitly presumes a different minimum state of mind for elements of an offense that relate to conduct. In its definition of recklessness at § 2.02(2)(c), supra note 98, the Code does not define "recklessly" with respect to conduct. Professors Robinson and Grall explained the result of the interaction between §§ 2.02(2)(c) (recklessness definition) and 2.02(3) (default culpability provision):

[A] person must be at least "reckless" with respect to circumstance and result elements and at least "knowing" with respect to conduct elements. The difference between circumstance and result elements and conduct elements occurs because "recklessly" is not defined with respect to conduct.

Robinson & Grall, supra note 91, at 700 n.84.

S. 1722, on the other hand, explicitly reads in recklessness for elements that are surrounding circumstances or results, and knowledge for elements that are conduct. S. 1722 provides:

REQUIRED STATE OF MIND FOR AN ELEMENT OF AN OFFENSE IF NOT SPECIFIED.—Except as provided in subsection (a), if an element of an offense is described without specifying the required state of mind, the particular state of mind that must be proved with respect to—

(1) conduct is "knowing";

(2) an existing circumstance is "reckless"; and

(3) a result is "reckless".

S. 1722, supra note 2, § 303(b).

Recklessness is the appropriate state of mind to presume because it requires a subjective component in the mind of the defendant. The distinction between recklessness and negligence "hinges upon the awareness of the defendant." Robinson, A Brief History of Distinctions in Criminal Culpability, 31 HASTINGS L.J. 815, 820 (1980) (emphasis in original). The requirement of awareness justifies the use of recklessness as a minimum level of culpability.

115 The entire section reads:

Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

MODEL PENAL CODE, § 2.02(4) (Original Draft and Revised Comments 1985) (emphasis in original).

116 Section 2.02(4), applying a prescribed culpability requirement to all material elements, is not consistent with § 2.02(3), requiring at least recklessness unless otherwise provided, because § 2.02(4) directs a court to apply a state of mind expressed in the offense to all the elements of the offense regardless of the role those elements play. Professors Robinson and Grall noted that "(s)ection 2.02(3) is, in fact, central to the implementation of element analysis" yet the drafters of the Model Penal Code included § 2.02(4), which "is characteristic of an offense analysis model of offense definition." Robinson & Grall, supra note 91, at 715-16. Professors Robinson and Grall used the following example:

Consider the definition of harassment:

A person commits a petty misdemeanor if, with purpose to harass another, he . . . insults . . . another in a manner likely to provoke violent or disorderly response.
work suggested by this Comment rejects it. Instead, this Comment follows S. 1722's guidance for the proper application of an expressed state of mind term in a section. S. 1722 limits the reach of an expressed state of mind term "to the element that it immediately introduces." If an element of the offense lacks a state of mind term immediately modifying it, then a court should apply S. 1722's provision requiring that a certain minimum state of mind must be proven for that element.

In sum, when a court interprets a criminal statute, it should take several steps. The court should (1) analyze the section element by element, classifying each element as either conduct, surrounding circumstance, or result; (2) as to those elements that are surrounding circumstances, determine if they require a state of mind; (3) determine if the statute specifies a state of mind for each element that requires a state of mind; if it does, then apply the expressed state of mind terms; (4) when a statute does not specify a state of mind term for each element that requires a state of mind, decide how to apply any state of mind terms that are included; and finally (5) as to those elements lacking a state of mind modifier, require the prosecution to prove the state of mind of recklessness for elements that are surrounding circumstances or results, and a state of mind of knowing for elements that are conduct.

These three assumptions—the state of mind hierarchy, element-by-element analysis, and the requirement of state of mind when one is not expressed—will give greater predictability and certainty to interpretation of the statute. Although these assumptions are not codified, ample precedent exists in Supreme Court opinions to justify viewing the framework as the preferred approach to interpreting the federal criminal law.

If section 2.02(3) is applied, the defendant must be purposeful only as to harassing another, and need be only reckless with respect to all other elements. If section 2.02(4) is applied, the actor must act purposely with respect to all elements. The section 2.02(3) recklessness requirement should be preferred. Robinson & Grall, supra note 91, at 715 (first two ellipses in original, third ellipsis added).

117 The value of element-by-element analysis and the Supreme Court's expressed preference for it, see supra notes 101-02, 109-12 and accompanying text, justify the rejection of § 2.02(4) (applying the prescribed culpability requirement to all material elements) in order to allow for more effective element-by-element analysis.

118 The Senate Report noted that § 303(b) of S. 1722: [Prescribe]s the requisite degree of culpability that must be proved with respect to an element of the offense where none immediately modifies the element. The rule of construction provided in this subsection [§ 303(b)] applies, except as otherwise provided by subsection (a), where a statute specifies a mental state but it is unclear whether the mental state applies to all the elements of the offense or only to the element that it immediately introduces.


119 The level of state of mind depends on the type of element that the offense definition does not modify. "Where a state of mind does not immediately introduce an actus reus element of an offense, the state of mind which must be proved with respect to conduct is knowing and to an existing circumstance or a result is reckless." S. REP. No. 553, 96th Cong., 1st Sess. 67 (1980).

120 Elements that relate to jurisdiction, grading, venue, or question of law do not require a state of mind. See supra notes 107-08 and accompanying text.
III. Analysis of the Opinions in Nofziger

The analysis of both Nofziger opinions centers on the proper interpretation of the state of mind required by subsection 207(c). Judge Thomas A. Flannery, the presiding judge in Mr. Nofziger's trial, recognized the shortcomings of this provision: "[T]he big problem with this case is that we are dealing with a statute that is hardly a model of clarity."121 Likewise, the big problem with Nofziger is that trial courts are now dealing with a decision that is hardly a model of clarity.

The Nofziger majority analyzed the statute in two steps: it determined that the statute was ambiguous, and then used extrinsic aids to resolve the ambiguity. The majority's analysis of the ambiguity turned on the following question: "whether . . . Congress has manifested an unambiguous intent to impose strict liability for the communication offense by limiting the reach of 'knowingly' to the appearance offense."122 The majority felt that the referent of "knowingly" was uncertain. Because the majority formulated the issue in this manner, it felt compelled to examine whether the statute was syntactically ambiguous.123 The majority focused on whether "knowingly" refers to (1) the appearance offense plus the rest of the subsection, or (2) the appearance offense alone.

The majority thus perceived two plausible readings of subsection 207(c). One reading would not limit the reach of "knowingly" to the appearance clause, but would allow it to modify both the communication offense and parts (1) - (3). The other reading would limit the reach of "knowingly" to the appearance clause, which, in the majority's view, eliminated any state of mind requirement for both the communication offense and parts (1) - (3).124 If both of the readings were in fact plausible, then the statute was ambiguous and the majority properly used extrinsic aids to resolve the ambiguity.

A. The Majority's Conclusion that the Statute Is Ambiguous

The Nofziger majority began its analysis of subsection 207(c) by assuming that one plausible reading of the statute was the one used by the district court, which limited the reference of "knowingly" to the appear-


122 Nofziger, 878 F.2d at 446. By "communication offense," the majority referred to the portion of § 207(c) that prohibits a former official from "mak[ing] any oral or written communication on behalf of anyone other than the United States, to [his former department or agency]."

By "appearance offense," the majority referred to the prohibition on "act[ing] as agent or attorney for, or otherwise represent[ing], anyone other than the United States in any formal or informal appearance before [the official's former department or agency]." 18 U.S.C. § 207(c) (1988).

123 The majority did not utilize the specific terminology "syntactic ambiguity." However, this is exactly the type of ambiguity the majority examined. Recall that the definition of syntactic ambiguity is an uncertainty of reference. See supra note 45 and accompanying text. When the majority tried to determine the "reach" of the ambiguous term "knowingly," it was, in effect, trying to determine to what "knowingly" refers.

124 The majority believed that the effect of the statute's syntax was "to strand the mens rea 'knowingly' in a grammatical no man's land in which it is uncertain whether it applies to both offenses . . . , or just the appearance offense . . . ." Nofziger, 878 F.2d at 450.
To prove that another plausible reading would extend the reach of "knowingly" to the entire subsection, the majority presented five arguments. The opinion: (1) analogized to present case law; (2) analyzed the legislative history of the statute; (3) analyzed the grammatical structure of the subsection; (4) analogized to the Model Penal Code; and (5) cited interpretations by executive agencies.

The majority cited two principal cases to support its contention that the statute is ambiguous. Liparota v. United States addressed a statute penalizing anyone who "knowingly uses, transfers, acquires, alters, or possesses coupons [food stamps] or authorization cards in any manner not authorized . . ." The Liparota majority determined that the statute was syntactically ambiguous, and then invoked the rule of lenity to apply "knowingly" to all the elements. The Nofziger majority used

125 The district court rejected the reading of the statute that applies "knowingly" to the communication offense and requires actual knowledge of parts (1) - (3). Nofziger, 878 F.2d at 446. The district court stated:

The court does not believe this pervasive, super-modifying role [assigned the word "knowingly"] can be reconciled with common usage. Nor can the court accept this reading without some clear indication that Congress intended such a less-than-obvious result.


The presiding judge at the trial, Thomas A. Flannery, faced the problem of deciding how to interpret "knowingly" in a different context as chairman of the Judicial Conference of the United States Subcommittee on Pattern Jury Instructions. He noted that

...we have made a particular effort to develop clear statements of the state of mind that is necessary for a finding of guilt. ... We have avoided the word "knowingly," a term that is a persistent source of ambiguity in statutes as well as jury instructions. ... LaFave and Scott observed some years ago that it is often unclear how far down the sentence the word "knowingly" is intended to travel.


128 The Liparota majority found that the statute was syntactically ambiguous when it noted that there were two different interpretations which turned on exactly what the word "knowingly" modifies. It noted:

Although Congress certainly intended by use of the word "knowingly" to require some mental state with respect to some element of the crime defined in § 2024(b)(1), the interpretations proffered by both parties accord with congressional intent to this extent. Beyond this, the words themselves provide little guidance. Either interpretation would accord with ordinary usage.

Liparota, 471 U.S. at 424 (emphasis in original).

129 "In the instant case, the rule [of lenity] directly supports petitioner's contention that the Government must prove knowledge of illegality to convict him under § 2024(b)(1)." Liparota, 471 U.S. at 427-28.

Section 2024(b)(1) is sufficiently different from § 207(c) so as to render Liparota's interpretation of § 2024(b)(1) unhelpful to the correct interpretation of § 207(c). See infra notes 131-33 and accompanying text.

Further, Liparota has been criticized for seeming to create an ignorance of the law defense. See, e.g., W. LaFave & A. Scott, supra note 51, § 3.8, at 424 n.1; Note, Ignorance of the Law as an Excuse, 86 Colum. L. Rev. 1392, 1399-1400 (1986). In Liparota, the Supreme Court held that a defendant could not be convicted of violating the food stamp statute unless he knew that his acquisition or use of the stamps was not authorized by law. According to the majority, this result was supported by the "generally disfavored status" of strict liability offenses. Liparota, 471 U.S. at 426. The majority was mistaken. Limiting the reach of "knowingly" in the food stamp statute would not create a strict liability crime. The dissent revealed what the majority actually did: "In relying on the 'background assumption of our criminal law' that mens rea is required . . . the Court ignores the equally well founded assumption that ignorance of the law is no excuse." Id. at 441 (White, J., dissenting). If "knowingly" is not read to apply to the "not authorized by" language, then the prosecution would
Liparota to prove that the Supreme Court has found provisions similar to subsection 207(c) ambiguous.\textsuperscript{130}

This analogy is not persuasive. The food stamp statute in Liparota is structured differently from subsection 207(c). In the Liparota statute, it is unclear how far into the statute’s language “knowingly” travels. The knowledge requirement could apply to the entire clause or solely to the “use” of the coupons. The punctuation of the statute gives no indication of which actions require knowledge. Conversely, in subsection 207(c) “knowingly” is readily connected to the appearance offense and separated by two commas and an “or” from the communication offense. Subsection 207(c) prohibits “knowingly act[ing] as agent or attorney for... anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, mak[ing] communications [to the prohibited department].”\textsuperscript{131}

Further, unlike the statute in Liparota, subsection 207(c) includes within it a separate offense that is subject to its own express mens rea requirement. The majority opinion argued that “this is a distinction without a difference.”\textsuperscript{132} The majority stated that “[i]f one removes the communication offense and its ‘intent to influence’ modifier from subsection 207(c)” the resulting text would be similar to the ambiguous statute in Liparota, so the knowledge requirement should be interpreted similarly.\textsuperscript{133} The majority, in effect, ignored certain parts of the statute to find the ambiguity it desired. Rewriting a Congressional statute and then interpreting the judicially rewritten version, however, is an unacceptable method of judicial interpretation.\textsuperscript{134} Instead, a court should strive to interpret a statute so as to give every word and every phrase meaning.\textsuperscript{135} A court should not omit material language from a statute to clarify it.


\textsuperscript{131} 18 U.S.C. § 207(c) (1988) (emphasis added).

\textsuperscript{132} Nofziger, 878 F.2d at 447.

\textsuperscript{133} Id.

\textsuperscript{134} Statutory construction should begin by reading the text, not by removing portions of it. See supra note 32. In a recent opinion, the Supreme Court criticized the approach of the Nofziger majority: “courts are not authorized to rewrite a statute because they might deem its effects susceptible to improvement.” Badaracco v. Commissioner, 464 U.S. 386, 398 (1984).

\textsuperscript{135} The Supreme Court has repeatedly held that each word and each phrase of a statute should be given meaning. In United States v. Menasche, 348 U.S. 528 (1955), it noted that “’[t]he cardinal principle of statutory construction is to save and not to destroy’ . . . It is our duty ’to give effect, if possible, to every clause and word of a statute,’ . . . rather than to emasculate an entire section . . .” Id. at 538-39 (first quoting Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1936), second quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1882)). See also Connecticut Dept. of Income Maint. v. Heckler, 471 U.S. 524, 530 n. 15 (1985) (holding that “[i]t is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute”). Generally speaking, “[a] statute should be construed so that effect is given to all
The majority also cited United States v. Johnson & Towers. In Johnson & Towers, the Third Circuit interpreted a statute penalizing any person who "knowingly treats, stores, or disposes of any hazardous waste . . . either—(A) without having obtained a permit . . . or (B) in knowing violation of [the permit]." The Johnson court determined that the statute was ambiguous and that "knowingly" applied to both subparts (A) and (B). The majority in Nofziger stated that, similarly, "knowingly" should apply to both offenses in subsection 207(c). But the text of the Solid Waste Disposal Act in Johnson & Towers is substantially different from the Ethics in Government Act in Nofziger. The Solid Waste Disposal Act consists of the state of mind "knowingly," the prohibited acts, and then two subparts describing the surrounding circumstances, with the second subpart containing the state of mind "knowing." The Ethics in Government Act consists of the state of mind "knowingly," the prohibited act, and then two subparts describing the surrounding circumstances, with the second subpart containing the state of mind "appearing." This grouping of state of mind and prohibited act is not found in the Solid Waste Disposal Act interpreted by Johnson & Towers. Because of the textual differences in the statutes, the Third Circuit's decision is inapplicable. In addition, any comparison to the Johnson & Towers holding is suspect: a recent decision by the Ninth Circuit, interpreting the Solid Waste Disposal Act, reached a contrary result.

After examining these decisions, the majority turned to the text of the section. But instead of looking first at the statute's language, the majority stated that "[w]e begin our analysis of subsection 207(c) with its genesis, which was President Carter's proposal . . . ." The majority then recounted the legislative history of subsection 207(c) to support its ultimate contention that the subsection is syntactically ambiguous. This reversed the normal order of statutory analysis, and it ignored the

its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another." 2A C. Sands, supra note 32, § 46.06 (footnotes omitted) (emphasis added).


138 In United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), cert. denied, 110 S. Ct. 1143 (1990), the Ninth Circuit interpreted the Solid Waste Disposal Act directly contrary to the interpretation of the Third Circuit in Johnson & Towers. In Johnson, the Third Circuit held that employees could be subjected to criminal prosecution under § 6928(d)(2) only if they knew or should have known that their employer had failed to obtain the required permit. In Hoflin, the Ninth Circuit stated:

We respectfully decline to follow the Third Circuit's analysis in Johnson & Towers. Had Congress intended knowledge of the lack of a permit to be an element under subsection (A) it easily could have said so. It specifically inserted a knowledge element in subsection (B), and it did so notwithstanding the "knowingly" modifier which introduces subsection (2). In the face of such obvious congressional action we will not write something into the statute which Congress so plainly left out.

Hoflin, 880 F.2d at 1038. The Ninth Circuit refused to require knowledge under subsection (A) because the grammatical structure of the statute did not support such a requirement.

The grammar of § 207(c) lends itself to a similar analysis. If Congress intended to require knowledge of parts (1) - (3), Congress could have "specifically inserted" the word "knowingly" after the communication offense to modify parts (1) - (3). Because Congress did not do this, the court should not have required the prosecution to prove that Nofziger possessed knowledge of the circumstances described in parts (1) - (3).

139 Nofziger, 878 F.2d at 448.

140 See supra note 32 and accompanying text.
maxim that a court should use legislative history to solve ambiguity, not to create it.¹⁴¹

Assuming that the majority appropriately examined the legislative history, the statute's history still does not support the majority's interpretation of subsection 207(c) as requiring the offender to possess knowledge of each element of the offense. The Senate version of the statute modified the entire subsection with the adverb "knowingly."¹⁴² The House version, on the other hand, contained two separate clauses with "knowingly" modifying the first clause—the appearance offense—and "intent to influence" modifying the second clause—the communication offense.¹⁴³ The Conference Committee adopted the House version. It stated that "the two elements of the House language, as set forth above [with 'knowingly' modifying only the appearance offense] are each independent of the other for the purposes of a violation of any subsection in which those terms appear."¹⁴⁴ The majority contended that the Conference Committee viewed the two versions as containing stylistic, rather than substantive, differences.¹⁴⁵ It ignored the fact that the House version was chosen over the Senate one. Nonetheless, the Conference Committee's paraphrasing of the House version into two independent clauses indicated that the grammatical structure was important in its choice. The majority opinion disregarded this implication.

The majority's next argument involved an analysis of the grammar of subsection 207(c). The majority contended that the grammatical structure of the statute does not point toward only one interpretation. It agreed that the communication clause is subject to the intent requirement. But the majority argued that the intent requirement for the communication offense "is not inherently incompatible" with an additional knowledge requirement for the entire statute.¹⁴⁶ The grammatical structure of the statute, however, contradicts the majority's view that "know-
ingly" extends throughout the entire statute. The statute contains two separate offenses, the appearance offense and the communication offense. Each offense contains its own mens rea requirement—appear "knowingly" and communicate "with the intent to influence." If Congress meant to require "knowingly" to apply the elements of subsection 207(c) coming after the communication offense, it could have drafted the statute to make "knowingly" clearly modify all the elements of the offense.

The majority cited the Model Penal Code in its fourth argument to prove that a plausible reading does not limit "knowingly" to the appearance clause. The majority sought to demonstrate that the "intent to influence" requirement of the communication offense does not preclude "knowingly" from applying to all of subsection 207(c)'s elements because both states of mind can apply to the communication offense. This approach layers the "knowingly" state of mind on top of the "intent to influence" state of mind instead of applying the two state of mind requirements separately.

The majority presented an example from the Model Penal Code to prove that a higher state of mind expressed in an offense's definition—in subsection 207(c), the "intent to influence" term—does not necessarily apply to all elements of the offense. As to the elements which the expressed term does not modify, the "[default culpability provision] 'should control elements of this character, and therefore recklessness should suffice in the absence of special provision to the contrary.'"

147 See infra notes 187-91 and accompanying text; see also Nofsiger, 878 F.2d at 455 (Edwards, J., dissenting).

148 The requirement of knowledge for parts (1) - (3) could be achieved by drafting § 207(c) as the Senate did. See supra note 142. Alternatively, § 207(c) could have been drafted as follows:

    Whoever, . . . within one year after such employment has ceased, knowingly . . . represents anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

    (1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

    (2) in connection with . . . any particular matter, and

    (3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

    while possessing knowledge of the circumstances described in parts (1), (2), and (3), shall be fined . . . or imprisoned . . . .

The emphasized phrase is the hypothetical addition to § 207(c).

149 “[A] requirement that the communication be made with the ‘intent to influence’ is not inherently incompatible with a parallel requirement that the other elements of the communication offense be subject to the ‘knowingly’ mens rea.” Nofsiger, 878 F.2d at 450-51.

150 The majority argued that “knowingly” applies to all elements and that the communication offense simply has an added requirement of intent to influence. “The Model Penal Code provides several analogies that would support the applicability of both mens rea requirements to the communication offense.” Nofsiger, 878 F.2d at 450.

151 The majority cited the example of burglary. Nofsiger, 878 F.2d at 450. To be guilty of burglary, the defendant must have entered the dwelling place of another at night with the “purpose to commit a crime therein.” The state of mind of purpose does not apply to the elements of “night” and “dwelling house.” The majority sought to prove that offenses that contain a higher state of mind (i.e., “with intent to influence,” “with purpose to commit a crime”) allow for lower state of mind terms to apply to other elements of the offense.

152 Nofsiger, 878 F.2d at 450, quoting the commentary of the Model Penal Code describing the default culpability provision (MODEL PENAL CODE § 2.02 comment 6 (Official Draft and Revised 1990).
This section does not support the argument that a single element can have multiple states of mind; rather, it supports a basic premise of element-by-element analysis, that a single offense can have multiple states of mind while each element has its own state of mind. The section requires a court to apply a single, alternative state of mind if the state of mind specified in the statute was not meant to apply to all elements. If this provision were applied to subsection 207(c), the result would be a requirement of recklessness as to parts (1) - (3), and not the state of mind of “knowingly.”

Finally, as the last argument to support its conclusion that knowledge is required for all elements of the statute, the majority cited administrative regulations promulgated by the Office of Government Ethics (OGE). The majority looked to OGE regulations interpreting subsection 207(b)(i), a provision which has a structure similar to subsection 207(c). Both subsections establish an appearance offense and a communication offense. But subsection 207(b)(i) contains one element—the fact that the matter was previously under the official’s responsibility—that is not present in subsection 207(c). This prior responsibility element, unique to subsection 207(b)(i), is the specific element for which the OGE regulation requires knowledge. Nevertheless, the majority used the OGE interpretation of subsection 207(b)(i) to support its view that knowledge is required for all elements of subsection 207(c). The

Comments 1985)) (insert in original). For the text of the provision, see supra note 114. This requirement, that recklessness be presumed where no other state of mind term applies, assumes that the provision’s expressed state of mind term (immediately modifying at least one element of the offense) is not meant to apply to all other elements of the offense. This involves the application of Model Penal Code § 2.02(4) (applying an expressed culpability requirement to all material elements unless a contrary purpose plainly appears). See supra notes 115-16.

For a full discussion of element-by-element analysis, see supra notes 101-102 and accompanying text.

Because § 207(c) is not clear as to which state of mind (“knowingly” or “with intent to influence”) should apply to parts (1) - (3), § 2.02(3) of the Model Penal Code—the default culpability provision—would apply and require recklessness as to those elements.


18 U.S.C § 207(b)(i) (1988) provides:

Whoever, (i) [being a covered government employee], within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) . . . —

(1) any department, agency, court . . . or any officer or employee thereof, and

(2) in connection with any . . . particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) as to (i), which was actually pending under his official responsibility . . . within a period of one year prior to the termination of such responsibility or, as to (ii), in which he participated personally and substantially . . .

shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

5 C.F.R § 737.7(b)(4) (1989) states that a “former employee is not subject to the restriction unless at the time of the proposed representation of another, he or she knows or learns that the matter had been under his or her responsibility.”

Nofziger, 878 F.2d at 451. The majority stated that the OGE’s interpretation should be followed because “the language being interpreted is identical in both subsections.” Id. While the
majority's use of the OGE regulation was therefore not persuasive because 207(c) does not contain the prior responsibility element.

Further, at the time the OGE issued regulations interpreting subsection 207(b)(i), it also issued detailed regulations interpreting subsection 207(c). In these regulations, the OGE did not require knowledge for any of the subsection 207(c) elements. Thus, the OGE interpretation of subsection 207(b)(i) does not indicate that a court should similarly interpret subsection 207(c). A court should follow the OGE's regulations for subsection 207(c), which require knowledge only for the appearance offense.

The majority concluded that subsection 207(c) is ambiguous because more than one plausible reading of the subsection exists. This conclusion is erroneous. The foregoing analysis revealed that the reading propounded by the majority is not a plausible reading of subsection 207(c). The reach of "knowingly" should be limited to the appearance offense. This leaves only one plausible reading: "knowingly" applies to appearance element of the offense, and "intent to influence" applies to the communication element of the offense. Thus, contrary to the majority's conclusion, the subsection is not ambiguous.

B. The Majority's Resolution of the Ambiguity

The Nofziger majority invoked two "canons of statutory construction" to support its interpretation requiring knowledge of all elements of subsection 207(c). First, it cited the rule of lenity, which requires courts to interpret ambiguous criminal statutes in the defendant's favor. The application of the rule of lenity to subsection 207(c) is inappropriate. First, the Supreme Court established that "the 'touchstone' of language defining the conduct of the appearance and communication offenses is the same, the attendant circumstance of subsection 207(b)(i), for which the OGE required knowledge, is not an element of subsection 207(c).

The majority argued that the interpretation of § 207(b)(i) should apply by analogy to § 207(c) because "the OGE . . . has not issued any regulation interpreting subsection 207(c)." Nofziger, 878 F.2d at 451. This assertion is mistaken. The OGE issued detailed interpretations of both subsections on Feb. 1, 1980. Examination of the Federal Register reveals that the regulations were implemented simultaneously. See 45 Fed. Reg. 7411-12, 7413-15 (1980). The OGE regulation interpreting subsection 207(b)(i) contains a specific requirement that the former official knew that a matter was pending under his or her responsibility. See 5 C.F.R. § 737.7(b)(4) (1989). While the regulations for subsection 207(c) set out requirements regarding the element of influence, prior involvement, and other issues, the regulations require no knowledge for any element of this subsection. See 5 C.F.R. § 737.11 (1989). This omission indicates that the OGE determined that the knowledge requirement should only apply to subsection 207(b)(i). In the presence of this statutory construction by the OGE, a court should not require knowledge in 207(c) because of an analogy to the OGE's interpretation of 207(b)(i).

"In sum, we find nothing in the text of subsection 207(c), or in its legislative history, or in official interpretations of the statute, that will support the government's contention that the subsection unambiguously limits the reach of 'knowingly' to the appearance clause." United States v. Nofziger, 878 F.2d 442, 452 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989).

For an explanation of the proper state of mind that should be required for parts (1) - (3), see infra notes 196-201 and accompanying text.

Nofziger, 878 F.2d at 452.

Id.
the rule of lenity ‘is statutory ambiguity.’”164 Because subsection 207(c) is not ambiguous165 the rule is inapplicable. Second, the ambiguity that the majority sought to resolve is not the actual ambiguity. The majority viewed subsection 207(c) as ambiguous as to whether or not the state of mind of knowledge is required for all elements of the offense, including parts (1) - (3). This view of the ambiguity is mistaken. Subsection 207(c) is actually ambiguous as to whether a state of mind of recklessness is required for parts (1) - (3), or whether no state of mind at all is required for parts (1) - (3).166 Thus, even if the rule of lenity is applicable, it should not be applied to require knowledge for parts (1) - (3).

The majority also relied on the general presumption against strict liability criminal offenses. The majority stated that “absent evidence of a contrary legislative intent, courts should presume mens rea is required.”167 According to the majority, the mens rea presumption is particularly strong in this context because subsection 207(c) is a felony, and “to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct.”168 Finally, the offense in Nofziger did not fit the pattern of “public welfare” offenses that might warrant the imposition of strict liability.169 The majority, however, failed to understand that limiting “knowingly” to the appearance offense would not subject the communication offense to strict liability. Instead, the conduct element of the offense would be subject to its own express “intent to influence” state of mind.

In sum, the majority erroneously applied the rule of lenity and the presumption against strict liability and inappropriately disregarded grammatical structure and legislative intent in interpreting subsection 207(c). By virtue of its misinterpretation of the statute, the majority skewed the result in favor of Mr. Nofziger.

C. The Dissent’s Analysis

The Nofziger dissent strongly disagreed with the majority’s characterization of subsection 207(c) as ambiguous.170 It argued that the plain meaning and the legislative intent clearly indicate that “knowingly” modifies the appearance offense and “intent to influence” is the mens rea re-

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164 Bifulco v. United States, 447 U.S. 381, 387 (1980). See also Crandon v. United States, 110 S. Ct. 997 (1990), which held that because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute’s coverage. . . . [The rule of lenity] serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.

165 See Part III(A) of this Comment, supra notes 125-61 and accompanying text.

166 See infra notes 192-94 and accompanying text.

167 Nofziger, 878 F.2d at 452.

168 Id. at 453 (quoting Liparota v. United States, 471 U.S. 419, 426 (1985)).

169 Id. at 454. Public welfare statutes are an exception to the requirement of mens rea. In these statutes, the lawmakers have used criminal sanctions as a means of enforcing regulations for the public good. For a discussion of strict liability criminal offenses, see supra notes 52-80 and accompanying text.

170 Nofziger, 878 F.2d at 455 (Edwards, J., dissenting).
quirement for the communication offense. As for the other elements of the statute, including the requirement that the subject of the communication be a matter "of direct and substantial interest," the dissent did not explicitly decide what state of mind should be required. It suggested that strict liability is inappropriate, but it did not say which elements require a state of mind.

In fact, the clear consequence of the dissent's analysis is that there is no state of mind required for parts (1) - (3) of the offense. The jury instruction did not require the jury to find that Mr. Nofziger possessed any state of mind as to whether the matter was of direct and substantial to the White House. The crucial part of the instruction read: "To find the defendants guilty, you must find . . . that the particular matters alleged . . . were of both direct and substantial interest to the White House . . . ." Because it would sustain the jury's verdict, the dissent would not require that the prosecution prove that the defendant possess any state of mind as to elements (1) - (3).

This Comment agrees with the dissent's conclusion that subsection 207(c) is not ambiguous; "knowingly" does not apply to the entire subsection, but only to the appearance offense. This Comment disagrees, however, with the consequence of the dissent's analysis—requiring no state of mind as to the elements specified in parts (1) - (3). This Comment argues that courts should require a state of mind where none is expressed, instead of holding defendants strictly liable for liability elements.

IV. Correct Identification and Resolution of the Ambiguities in Subsection 207(c)

The foregoing analysis of the majority opinion in Nofziger shows that it incorrectly identified the ambiguities in the statute. This Part identifies the statute's true ambiguities and resolves them using the analytical framework suggested in Part II(B).

Excess generality does not trouble subsection 207(c). None of the words in the statute are so general so as to make it impossible to limit the conceivable number of references. A possible problem with vagueness exists, involving the meaning of the phrase "direct and substantial."
In *Nofziger*, this argument was relegated to footnote in the dissent. The majority did not consider this issue. As a practical matter, any vagueness defects in subsection 207(c) are cured by the creation and operation of the Office of Government Ethics (OGE). The purpose of the OGE is to advise former officials regarding possible violations of subsection 207(c). If a covered employee is uncertain about whether some contact is prohibited, the OGE will issue an interpretive opinion. Thus, the statute is not facially unconstitutional due to any vagueness.

A. Identifying and Resolving the Syntactic Ambiguity

Rather than vagueness or generality, the real problem with subsection 207(c) lies in its ambiguities. The statute is not semantically ambiguous, because no single word in the statute has a double meaning.

The subsection's difficulties begin with its syntactic ambiguities. The *Nofziger* majority viewed the ambiguity in terms of the following question: “whether . . . Congress has manifested an unambiguous intent to impose strict liability for the communication offense by limiting the reach of ‘knowingly’ to the appearance offense.” The majority answered its own question when it found “nothing . . . that will support the government’s contention that the subsection unambiguously limits the reach of ‘knowingly’ to the appearance clause.”

The majority's erroneous framing of the issue drove its result. If the reach of “knowingly” stops after the appearance offense, then in the majority's view there is no applicable state of mind term for the rest of the offense. This would have the effect of making subsection 207(c) strict as to parts (1) - (3). The majority wanted to avoid this result because strict liability interpretations of criminal statutes have a “generally disfavored status.” Thus, the majority felt compelled to extend “knowingly” throughout the statute. This may be the correct answer to the question asked by the majority—but the majority asked the wrong question. As noted by Justice Frankfurter, “[i]n law . . . the right answer usually depends on putting the right question.”

argued that strict liability standards in the First Amendment context are unconstitutional. Brief for Amicus Curiae at 28-33, *Nofziger* (No. 88-3058).

In *Nofziger*, the dissent forcefully noted: “I find no merit in appellant’s or amicus’ seemingly half-hearted claims that there is insufficient evidence in the record to support a conviction, or that the Ethics in Government Act may be constitutionally infirm. In my view, these claims border on frivolous.” *Nofziger*, 878 F.2d at 460 n.4 (Edwards, J., dissenting).


For a discussion of the different types of ambiguity, see *supra* notes 43-46 and accompanying text.

See *supra* note 44 and accompanying text.

Recall that the definition of a syntactic ambiguity is an uncertainty of reference. See *supra* note 45 and accompanying text.

*Nofziger*, 878 F.2d at 446. See also *supra* notes 122-123 and accompanying text.

*Id.* at 452.

*Nofziger*, 878 F.2d at 452 (quoting Liparota v. United States, 471 U.S. 419, 426 (1985) (citations omitted)).

Estate of Rogers v. Commissioner, 320 U.S. 410, 413 (1943).
An examination of the grammatical structure of the sentence provides the answer to the correct question. In terms of punctuation, the appearance offense is set off with commas. When a phrase is set aside with commas and a conjunction, the phrase should be read independently of other phrases. When the phrase beginning with “knowingly” is read independently, “knowingly” cannot modify the subsequent phrase.

This does not mean, however, that there is no state of mind for the communication offense. Rather, the communication offense has its own state of mind—“with intent to influence.” This is a separate and distinct state of mind from “knowingly.” Courts and statutes commonly interpret intent to mean that “the actor either has a purpose to do the thing or [to] cause the result specified or believes that his act, if successful, will cause that result.” “Intent to influence” is effectively equivalent to the Model Penal Code’s “purpose” state of mind, which is a higher degree of culpability than the “knowingly” requirement. Thus, the phrase “with intent to influence” is a valid state of mind term which provides the communication offense with its own state of mind requirement. The answer to the proper question—whether “knowingly” modifies the communication offense at all—is no. The reach of “knowingly” is limited to the appearance offense.

An application of the suggested analytical framework also provides the answer to the correct question. The initial step is to analyze sub-

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187 In United States v. Ron Pair Enters., Inc., 109 S. Ct. 1026 (1989), the Supreme Court interpreted § 506(b) of the Bankruptcy Code, which provides: “to the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges . . . .” 11 U.S.C. § 506(b) (1988). In construing this statute, the Court noted:

This reading is also mandated by the grammatical structure of the statute. The phrase “interest on such claim” is set aside by commas, and separated from the reference to fees, costs, and charges by the conjunctive words “and any.” As a result, the phrase “interest on such claim” stands independent of the language that follows.

Ron Pair Enters., 109 S. Ct. at 1030-31. To analogize to § 207(c), the phrase beginning with “knowingly” reads like this: “[Whoever], knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or . . . .” Note that there is a comma immediately preceding “knowingly,” and that a comma is inserted immediately after the description of the appearance offense. This second comma is followed by the word “or.” Thus, the entire phrase describing the appearance clause is set off with commas, and it is separated from the clause describing the communication offense by the conjunction “or.” Therefore, the reach of “knowingly” should be limited to the phrase in which it appears.

188 See supra notes 96-97 and 100 and accompanying text discussing the difference between knowledge and purpose.

189 Minn. Stat. Ann. § 609.02 (subd. 9)(3) (West 1987); see also Wis. Stat. Ann. § 939.23(3) (West 1982). State statutes are an appropriate place for federal courts to turn when attempting to define terms in federal statutes. The Supreme Court noted recently in Mississippi Band of Choctaw Indians v. Holyfield, 109 S. Ct. 1597, 1608 (1989) that the fact that we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine “the ordinary meaning of the words used.” Well-settled state law can inform our understanding of what Congress had in mind when it employed a term it did not define.

This is particularly true in criminal law, since state and federal laws are directed to a common problem: the jurisprudence of crime. The resolution of this problem is a matter of shared responsibility between the states and the federal government. The common goal justifies the practice of federal courts borrowing state definitions for criminal law terms.

190 For a summary of the steps of analysis, see supra text following note 119.
section 207(c) element-by-element, and classify the elements as conduct, surrounding circumstances or results. The first element is a conduct element: "acts . . . or otherwise represents." The second element is also a conduct element: "makes." Both elements describe conduct that a covered employee may not be able to do. Since both elements are conduct elements, the required state of mind must be at least knowing. The next step is to see if a state of mind term immediately modifies or introduces the element. In this case, both elements are immediately preceded by a state of mind term. "Acts" is immediately introduced by "knowingly," and "makes" is immediately introduced by "with intent to influence." Since both elements are modified, then the construction ends here, and the expressed terms should be applied.

Both examination of grammar and application of the suggested framework produce the same logical result. The distinction between an appearance offense and a communication offense is logical because the impropriety of a communication is less than that of an appearance. Because the possibility of improper influence is greater when a former employee lobbies his former agency in person, Congress would require a lesser degree of culpability for a conviction. The defendant in such a case need not have possessed any intent to influence; simply appearing is enough. Conversely, for the communication offense, Congress may well have wanted a greater degree of culpability for a conviction. Mere communication with an official's former agency is not enough—the communication must be made with the intent to influence the agency.

B. Identifying and Resolving the Contextual Ambiguity

In addition to the syntactic ambiguity, subsection 207(c) also contains a contextual ambiguity. The contextual ambiguity arises from a second question: How do the statements defining the appearance and communication offenses relate to parts (1), (2), and (3) of the subsection? Neither state of mind expressed in the subsection ("knowingly" or "intent to influence") immediately modify these three elements of the offense. The dissent's reasoning eliminates the requirement of a state of mind for these elements. This conclusion is invalid because it conflicts with the Senate Report:

The contact must be on a matter of business. Casual, social communication, such as "cocktail party" conversation, is not included unless it relates to a pending matter of business.

Subsection (c) further excludes contacts concerning matters of a personal and individual nature, such as personal income taxes and pension benefits. That form of self-representation is reasonable and to be expected.


Recall that contextual ambiguity arises when there is uncertainty as to how a statement is affected by another statement. See supra note 46 and accompanying text.

The three additional conditions of § 207(c) are: (1) the communication must be to the employee's former agency; (2) it must relate to a proceeding or other "particular matter"; and (3) the matter must be one that is either "pending" before the agency or in which the agency has an interest that is both "direct" and "substantial." 18 U.S.C. § 207(c) (1988).
with the assumption that a state of mind will be read into the definition of an
offense.\footnote{194}{See supra note 113 and accompanying text.}

Application of the suggested analytical framework\footnote{195}{See supra text following note 119.} will resolve the contextual ambiguity and determine the proper state of mind. The first step is to analyze the rest of the subsection element-by-element. Two conduct elements have already been identified. Parts (1) - (3) are readily identified as elements that serve as surrounding circumstances.\footnote{196}{Parts (1) - (3) read as follows:
(1) the department or agency in which he served as an officer or employee thereof, and
(2) in connection with any . . . particular matter, and
(3) which is pending before such department or agency or in which the department or
agency has a direct and substantial interest . . .
18 U.S.C. § 207(c) (1988).} These elements describe circumstances that must be present before criminal liability is incurred. The elements that are surrounding circumstances are then classified so as to determine if a state of mind is required for them. The surrounding circumstance elements that do not require a state of mind relate to jurisdiction, grading, venue, or a question of law.\footnote{197}{None of the three relate to venue or to a question of law. Neither do any relate to grading, since there is no lesser offense which is dependent on the existence or non-existence of one of the elements. All three are, to some extent, jurisdictional, since their presence serves to bring the defendant into the federal system. The question, though, is whether they are "jurisdictional only."\footnote{198}{The three are not, since in the absence of any one there is no crime. Thus, the three are all surrounding circumstance elements related, in part if not entirely, to liability. Because they are liability elements, a court should require that state of mind be proven for them.\footnote{199}{Because the elements are surrounding circumstances, the correct state of mind to require is recklessness.\footnote{200}{In sum, the proper state of mind requirements are "knowingly" for the conduct element of "acts . . . or represents," "intent to influence" for the conduct element "makes (communication)," and recklessness for the surrounding circumstance elements described in parts (1) - (3).} the department or agency in which he served as an officer or employee thereof, and
in connection with any . . . particular matter, and
which is pending before such department or agency or in which the department or
agency has a direct and substantial interest . . .
18 U.S.C. § 207(c) (1988).} None of the three relate to venue or to a question of law. Neither do any relate to grading, since there is no lesser offense which is dependent on the existence or non-existence of one of the elements. All three are, to some extent, jurisdictional, since their presence serves to bring the defendant into the federal system. The question, though, is whether they are "jurisdictional only." The three are not, since in the absence of any one there is no crime. Thus, the three are all surrounding circumstance elements related, in part if not entirely, to liability. Because they are liability elements, a court should require that state of mind be proven for them.\footnote{199}{Because the elements are surrounding circumstances, the correct state of mind to require is recklessness.\footnote{200}{In sum, the proper state of mind requirements are "knowingly" for the conduct element of "acts . . . or represents," "intent to influence" for the conduct element "makes (communication)," and recklessness for the surrounding circumstance elements described in parts (1) - (3).} the department or agency in which he served as an officer or employee thereof, and
in connection with any . . . particular matter, and
which is pending before such department or agency or in which the department or
agency has a direct and substantial interest . . .
18 U.S.C. § 207(c) (1988).}}

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in connection with any . . . particular matter, and
which is pending before such department or agency or in which the department or
agency has a direct and substantial interest . . .
18 U.S.C. § 207(c) (1988).}}

The next step is to apply any express state of mind term that immediately modifies the element. None of the three are so modified. Lacking an express state of mind modifier, the next step is to apply the assumption that some state of should be read in.\footnote{200}{Because the elements are surrounding circumstances, the correct state of mind to require is recklessness.\footnote{201}{For an explanation of this assumption, see supra notes 113-119 and accompanying text.}} Because the elements are surrounding circumstances, the correct state of mind to require is recklessness.\footnote{201}{For an explanation of this assumption, see supra notes 113-119 and accompanying text.}
V. Application of the Analytical Framework to the Amended Subsection 207(c)

Congress amended subsection 207(c) when it passed the Ethics Reform Act of 1989, part of which provided for “the first comprehensive reform of ethics laws in more than a decade.” After January 1, 1991, subsection 207(c) will read, in relevant part, as follows:

[A]ny person [who is a covered government employee] and who, within 1 year after the termination of his or her employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

Section 216, a completely new provision, contains the following criminal penalties:

The punishment for an offense under [section 207] . . . of this title is the following:

(1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.

(2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.

The new subsection differs in focus from the existing subsection because it eliminates the requirement that the contact relate to a matter “in which such department or agency has a direct and substantial interest.” The new subsection instead requires that the contact relate to a matter “on which such person [the former employee] seeks official action.” The new subsection focuses less on the role of the department lobbied but more on the goal of the person lobbying.

The new subsection also changes the state of mind requirements. Nevertheless, the legislative history explaining these changes is

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203 162 CONG. REC. S15,953 (daily ed. Nov. 17, 1989) (statement of Sen. Levin). Senator Levin continued, noting that the “ethics portion” of the bill imposes some tough new standards on Members of Congress, and on our staffs, and it strengthens existing ethics laws that apply to all three branches. It addresses key ethics issues ranging from postemployment lobbying restrictions to financial disclosure, to gifts and travel restrictions.

. . . [F]or the first time, through this bill we would bring Members of Congress and top congressional staff under the postemployment lobbying restrictions of 18 United States Code section 207.

Id. at S15,953-54.


sparse. The only extended discussion of the changes made in subsection 207(c) is in the floor remarks of Senator Carl M. Levin, co-sponsor of the bill. Senator Levin specifically referred to the *Nofziger* decision, noting that the D.C. Circuit's interpretation does not reflect congressional intent. . . . There is no requirement, here, that the former employee *know* that the particular matter on which he or she is lobbying was a matter of interest or was pending before the subject agency or department. Thus, we are able to set the record straight on this matter.

In its attempt to "set the record straight," Congress instead succeeded in enacting a statute that is as ambiguous as the one it replaced.

A. Identifying the Ambiguities in the Revised Subsection

The revised subsection contains two ambiguities. It is syntactically ambiguous because the reader is uncertain how far down the sentence "knowingly" travels. A court interpreting the subsection is faced with the question of which elements "knowingly" modifies. The new subsection initially defines the prohibited conduct ("makes . . . any communication . . . or appearance") and then lists other elements. For example, another element of the offense is that the subject of the communication must be a matter "on which such person [the former employee] seeks official action." An interpretive problem arises because the language of the statute does not specify if the prosecution must prove that the former employee *knew* that the subject of the communication involved official action.

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207 "The Act was moved through Congress in a couple of weeks, and no committee or conference reports were prepared." Murdock, *Finally, Government Ethics as if People Mattered: Some Thoughts on the Ethics Reform Act of 1989*, 58 GEO. WASH. L. REV. 502, 503 (1990).

208 162 CONG. REC S15,954 (daily ed. Nov. 17, 1989) (statement of Sen. Levin) (emphasis added). The complete text of Senator Levin's comments on the changes to § 207(c) reads:

> One matter we have addressed [in making the changes] in this section has to do with the knowing standard. In the recently decided case involving former Presidential aide Lyn Nofziger, the court of appeals held that under the current law, the word "knowing" modified all the elements of the offense including the provision that the particular matter was pending before the subject department or agency or that the agency had a direct and substantial interest in the particular matter. That judicial interpretation does not reflect congressional intent. We correct that misinterpretation in this bill by including a knowing standard only for the act of making the communication with the intent to influence and state that the offense is committed if the former employee *knows* that the subject of the communication involved official action.

209 See supra note 45 and accompanying text.


211 Consider the factual scenario where an ex-employee contacts his former agency to gain information on the specifics of a contract on which that agency is taking bids. The ex-employee's firm has yet to make a bid, and the ex-employee does not know if his firm will decide to make a bid. Thus, the
The ambiguity in the new subsection is similar to the ambiguity in the statute at issue in Liparota v. United States\textsuperscript{212} penalizing "whoever knowingly uses, transfers, acquires, alters, or possesses [food stamps]... in any manner not authorized by this chapter..."\textsuperscript{213} In that case, the Court decided that "knowingly" applied to all the elements that followed it. Applying this precedent to interpret the new subsection would, however, seem to contradict the little legislative history that discusses the change. The drafters of the new subsection revised the law to eliminate the requirement that the former employee know the nature of his communication.

The revised subsection is also semantically ambiguous. It specifies that the punishment for violating the subsection is found in 18 U.S.C. § 216, the new penalty section. The new section establishes misdemeanor penalties for "engag[ing] in the conduct constituting the offense," and felony penalties for "willfully engag[ing] in the conduct constituting the offense."\textsuperscript{214} The state of mind term "willfully" is semantically ambiguous because courts have interpreted it as meaning either a purpose to break the law or simply knowledge of one's conduct.\textsuperscript{215}

An application of section 216 to subsection 207(c) produces two alternative interpretations of what the prosecution must prove to impose felony penalties. One alternative would require that an ex-employee "knowingly make[], with the intent to influence, any communication." with the purpose to break the law. The other alternative would require that an ex-employee "knowingly make[], with the intent to influence, any communication." with knowledge of his own conduct. Either alternative is possible. The application of this semantic ambiguity to a subsection that is already syntactically ambiguous creates a gordian knot for a court faced with the task of determining the states of mind required by the statute.

B. Resolving the Ambiguities in the Revised Subsection

An application of the suggested analytical framework resolves the ambiguities and identifies the states of mind required by the new subsection. The initial step is to apply element-by-element analysis and classify the elements as conduct, surrounding circumstances, or results. The new subsection contains two conduct elements: (1) "makes... any communication to"; and (2) "makes... appearance before." The subsection contains five surrounding circumstance elements. The contact must be: (1) "within 1 year after the [former employee's] termination"; (2) "before any officer or employee of the department or agency in which such person served within 1 year before such termination"; (3) "on behalf of any other person (except the United States)"; (4) "in connection

\textsuperscript{212} 471 U.S. 419 (1985).
\textsuperscript{215} \textit{See supra} note 44.
with any matter on which such person [the former employee] seeks official action”; and the action sought must be (5) “by any officer or employee of such department or agency.”

The next step is to determine which elements require a state of mind. The determination for the two conduct elements is simple: all conduct elements require a state of mind of at least knowledge.\(^{216}\) Whether the five surrounding circumstance elements require a state of mind depends on their role in the offense. Elements that are a basis for liability for the substantive offense require a state of mind; elements that determine jurisdiction, grading, venue, or a question of law do not require a state of mind.\(^{217}\) None of the five elements serve as a basis for jurisdiction, grading,\(^{218}\) or venue, and none relate to a question of law. Thus, all five are liability elements, and absent expressed legislative intent, a state of mind must be proven for each element.\(^{219}\)

The next step is to determine if a particular state of mind term immediately modifies or introduces the element. The conduct elements are immediately modified by “knowingly . . . with the intent to influence.” Because there is no intervening conduct element between the term “knowingly” and the phrase “with the intent to influence,” as there was in the original subsection 207(c), the two state of mind terms can be read together, and treated as one unified state of mind.\(^{220}\) Because the conduct elements are modified by express terms, the construction ends here, and a court should apply the expressed terms.

The determination of the appropriate state of mind for the five surrounding circumstance elements is not as straightforward as it was for the two conduct elements. The revised subsection does not contain a term that immediately modifies any of the five surrounding circumstance elements. Thus, it does not specify a state of mind for these elements.\(^{221}\) The analytical framework of this Comment fills this void. A court should utilize the assumption that the state of mind of recklessness be proven for surrounding circumstance elements that serve as a basis for liability. In interpreting subsection 207(c), a court should require the prosecution to prove, for example, that the former employee is at least reckless with respect to whether the subject of his communication is one on which official action is sought.

\(^{216}\) See supra note 114 and accompanying text.

\(^{217}\) See supra text accompanying notes 108-09.

\(^{218}\) The offense does have different grades of punishment, but the higher felony punishment is based on the presence of “willfulness,” not on the presence of an additional surrounding circumstance.

\(^{219}\) See supra notes 113-14 and accompanying text.

\(^{220}\) The terms create a unified state of mind because in this sentence, “knowingly” modifies not only “makes” but also “intent to influence.” Thus, the former employee must knowingly intend his action. The employee must know that he seeks to influence his former agency. This level of state of mind was envisioned by Judge Edwards in his dissenting opinion in Nožiger when he noted that “‘intending to influence’ and ‘knowingly intending to influence’ are different standards.” United States v. Nožiger, 878 F.2d 442, 460 n.3 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989) (Edwards, J., dissenting) (emphasis in original).

\(^{221}\) See supra notes 118-19 and accompanying text for an explanation of the process for determining whether a section “specifies” a state of mind.
An application of the suggested analytical framework also resolves the semantic ambiguity caused by the word "willfully" in section 216. The ambiguity exists because "willfully" can be interpreted to mean either "knowingly" or "with a purpose to break the law."\textsuperscript{222} A major source of the analytical framework is the Model Penal Code § 2.02, and it can assist in resolving the ambiguity because it addresses the meaning of "willfully" in an offense definition. The relevant paragraph notes that "a requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears."\textsuperscript{223} If the term "willfully" in section 216 is read as meaning "knowingly," the resulting interpretation is not meaningful. When the two sections are read together, while assuming that "willfully" means "knowingly," felony penalties are imposed on a former employee who "[knowingly] engages in the conduct constituting the offense,"\textsuperscript{224} and the conduct is itself "knowingly mak[ing], with the intent to influence, any communication."\textsuperscript{225} One of the two "knowingly" modifiers is redundant, and if one was excised the section would have the same meaning. Read this way, section 216(a)(2) has the same meaning as section 216(a)(1), even though (a)(1) does not contain "willfully" as a modifier.

This interpretation of section 216(a)(2) violates the principle of statutory construction which holds that a given section should be interpreted to give each word and phrase meaning.\textsuperscript{226} The interpretation also contradicts the legislative history of section 216. Section 216 is a new section of the criminal code, and it was added to "create alternative felony, misdemeanor, and civil penalties for Sections 203, 204, 205, 207, 208, and 209."\textsuperscript{227} Formerly, subsection 207(c) only provided for felony penalties. If a statute imposes alternative penalties, it should also specify alternative levels of criminal culpability.

To give section 216(a)(2) meaning, the term "willfully" should be interpreted to justify the imposition of the more severe felony penalties. Interpreting "willfully" as meaning "with the purpose to break the law" provides the necessary justification. This interpretation follows section 2.02(8) of the Model Penal Code, which conditioned interpreting "willfully" as "knowingly" on the absence of an apparent purpose "to impose further requirements." The heightened penalties of section 216(a)(2) exhibit a purpose to impose a further requirement; in this case, section 216(a)(2) imposes the further requirement on the prosecution to prove that the former employee made a communication with the purpose of breaking the law.

In sum, the proper state of mind requirements for the revised subsection are "knowingly . . . with the intent to influence" for the conduct

\textsuperscript{222} See supra text accompanying note 215 and note 44.
\textsuperscript{223} Model Penal Code § 2.02(8) (Official Draft and Revised Comments 1985).
\textsuperscript{224} 18 U.S.C.A. § 216(a)(2) (West Supp. 1990) (substituting "knowingly" for "willfully").
\textsuperscript{226} See supra note 135.
elements of "makes . . . any communication" and "makes . . . appearance," recklessness for the five surrounding circumstance elements, and a purpose to violate the subsection for the imposition of section 216(a)(2) felony penalties.

VI. Conclusion

The opinions of the court in Nofziger are symbolic of the fundamental problems involved in interpreting the federal criminal code. The revisions of subsection 207(c) are symbolic of the fundamental problems involved in drafting the federal criminal code. Neither statutes nor case law provide a useful principle to guide courts when they interpret the thousands of disparate provisions contained in Title 18. Over ten years ago, in United States v. Bailey, the Supreme Court took the first tentative steps toward filling the void. The states are leaders in this area, with a majority of states modernizing their criminal codes and regularizing their methods of statutory interpretation over the last thirty years. A similar development has not occurred with the federal criminal code, in spite of the fact that the federal criminal justice system possesses the capacity for reform.

228 444 U.S. 400 (1980).
230 The recent enactment of the Federal Sentencing Guidelines demonstrates that federal criminal law can be reformed. The Comprehensive Crime Control Act of 1984 created the United States Sentencing Commission, and it gave the Commission "broad authority to review and rationalize the sentencing process." Federal Sentencing Guidelines § 1A2, U. S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 1 (1990 ed.) [hereinafter MANUAL]. Pursuant to this goal, the Commission structured the Guidelines so that after the Introduction, but before the chapters describing the details of the Guidelines, there is a Part entitled "General Application Principles." The longest and most detailed guideline in this part relates to "Relevant Conduct (Factors that Determine the Guideline Range)." Guidelines § 1B1.3. The guideline in force in 1988-89 required that the sentencing court evaluate the conduct in light of several factors:

(a) . . . Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, [and] (ii) specific offense characteristics . . . shall be determined on the basis of the following: . . .

(3) all harm or risk of harm that resulted from the acts or omissions specified . . . if the harm or risk was caused intentionally, recklessly, or by criminal negligence [; and] . . .

(4) the defendant's state of mind, intent, motive and purpose in committing the offense . . .

Guidelines § 1B1.3(a), id. at 360 (amendment effective January 15, 1988) (emphasis added). Note how the Guidelines clearly specify the state of mind levels that a court should consider, with the lowest state being negligence. Although this Comment argues that the lowest state of mind that should apply to any of the attendant circumstances is recklessness, this guideline provides a parallel in sentencing to what this Comment proposes in substantive offenses.

The recent D.C. Circuit decision in United States v. Burke, 888 F.2d 862 (D.C. Cir. 1989), correctly applied these guidelines to require the prosecution to show a minimum state of mind of negligence before the sentence could be increased. Guideline § 2D1.1(b) calls for a two level increment in sentencing if the defendant possessed a firearm. The trial court did not require the prosecution to prove that the defendant knew he possessed the gun, only that the defendant possessed it. Burke, 888 F.2d at 865. The court decided that

[1] Possession without proof of knowledge will result in an enhancement only when the Government proves that the defendant was reckless or criminally negligent in order to show that he should have been aware that he was in possession of a weapon.

Id. at 868 (emphasis in original). In reaching this conclusion, the court reasoned that "[i]f though section 2D1.1(b) itself is silent as to scienter, section 1B1.3—which supplies 'general application principles'—is not." Id. at 866. Courts can utilize principles of general application if the courts recognize such principles. The analytical framework outlined by this Comment supplies the general
The need for reform is obvious, the opportunity is manifest; however, courts are apparently unwilling to introduce reform, and Congress is seemingly unable to legislate reform. The analytical framework utilized by this Comment provides a workable model for interpreting federal criminal statutes. The Nofziger decision represents a lost opportunity for a respected federal appellate court to initiate the necessary reform for the determination of mens rea in federal criminal law. The Congressional revision of subsection 207(c) demonstrates the continued need for a comprehensive model to guide the drafting and interpretation of federal criminal laws.

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