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SEARCHING FOR CULPABILITY, PUNISHING THE
GUILTY, AND PROTECTING THE INNOCENT:
SHOULD CONGRESS LOOK TO THE MODEL PENAL
CODE TO STEM THE TIDE OF FEDERAL
OVERCRIMINALIZATION?

David Dailey⁺

Wade Martin, a resident of Sitka, Alaska, received a jarring visit from state police.¹ Martin had been charged with violating the Marine Mammal Protection Act and pled guilty because, according to his lawyer, the government would not be required to prove that he had any criminal intent when making the sale.² The federal Marine Mammal Protection Act allows coastal Native Alaskans to trap and hunt certain protected species and sell them to fellow natives, an exemption that is not provided for any other group.³ Martin, a native coastal Alaskan familiar with the requirements of this particular federal statute, sold ten sea otters to someone he believed was a native, but who was actually a non-native.⁴ Martin was fined \$1,000 and sentenced to two years probation.⁵ Despite Martin's innocent mistake and the fact that the government did not need to prove that Martin intended to break the law, he was now a convicted criminal.

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1. Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J., Sept. 27, 2011, <http://online.wsj.com/article/SB10001424053111904060604576570801651620000.html>.

2. *Id.* The relevant penalty states:

Any person who knowingly violates any provision of this subchapter or of any permit or regulation issued thereunder (except as provided in section 1387 of this title) shall, upon conviction, be fined not more than \$20,000 for each such violation, or imprisoned for not more than one year, or both.

16 U.S.C. § 1375(b) (2012).

3. Fields & Emshwiller, *supra* note 1. Specifically, the exemption provides: "That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption." 16 U.S.C. § 1371(b)(2).

4. Fields & Emshwiller, *supra* note 1. The law requires covered mammals sold to non-natives be converted into handicrafts first. 16 U.S.C. § 1371(b)(2).

5. Fields & Emshwiller, *supra* note 1.

The two basic elements of a crime are *actus reus* and *mens rea*.⁶ However, strict liability offenses and general welfare offenses remove the government's burden to prove *mens rea*, which means a culpable or morally blameworthy state of mind.⁷ Fundamentally, the *mens rea* required for common law offenses—murder, rape, robbery, burglary, trespass, and conversion of property—are widely known and, generally, considered to be accepted by society.⁸ State legislatures have codified these common law offenses and, even where the statutes are silent with regards to the requisite intent, courts routinely infer that the common law intent to these crimes remains intact.⁹

At the federal level, a similar approach is applied when Congress codifies a typical common law offense but fails to include a specific intent element.¹⁰ However, state legislatures and Congress have increasingly enacted criminal offense statutes that are not found in the common law.¹¹ It is estimated that there are at minimum 4,450 offenses at the federal level that carry a criminal penalty¹² and at least 10,000 (and maybe as many as 300,000) federal regulations that also carry criminal sanctions.¹³ Several states have adopted the Model Penal Code's

6. See JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 127 (5th ed. 2009) (explaining that *actus reus* is the physical action of the crime, while *mens rea* is the mental component).

7. *Id.* at 176–77.

8. See *Morissette v. United States*, 342 U.S. 246, 251–52 (1952) (recognizing intent as a fundamental component of a criminal offense).

9. *Id.* at 252.

10. *Id.* at 262.

11. JAMES A. STRAZZELLA, AMERICAN BAR ASSOCIATION, TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, *THE FEDERALIZATION OF CRIMINAL LAW 7–10* (1998), available at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf. The report commented that Congress is limited by the Constitution in making conduct a federal crime and generally, Congress may only criminalize activities in the following three areas: (1) conduct that “interfere[s] with the core functions of the federal government” (for example, treason, controlling national borders, and protecting government currency); (2) “[l]egislation essentially based on a federal relationship to the site of the crime” (such as crimes that take place “on the high seas,” or “apply[ing] standards for certain federal lands and American Indian reservations,” and other areas “where only the federal government can effectively legislate”); and (3) “criminaliz[ing] [] conduct on a Commerce Clause basis.” *Id.* at 45–46.

12. John S. Barker, *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND., June 26, 2008, <http://www.heritage.org/Research/LegalIssues/lm26.cfm>. According to a recent study by the Congressional Research Service at the Library of Congress, between 2008 and 2013, 439 new criminal offenses were added to the United States Code, averaging almost 89 new criminal offenses a year. Memorandum from Alison M. Smith, Legislative Attorney, Cong. Research Serv., & Richard M. Thompson II, Legislative Attorney, Cong. Research Serv., to Crime, Terrorism, Homeland Security & Investigations Subcommittee (H. Judiciary) (June 23, 2014).

13. See STRAZZELLA, *supra* note 11, at 10 (discussing criminal sanctions included within federal regulations); see also Barker, *supra* note 12 (juxtaposing the various statistics regarding federal regulations that carry criminal penalties). In prepared testimony before the House Judiciary Committee's Overcriminalization Taskforce, Steven Benjamin, the President of the National Association of Criminal Defense Lawyers, cited a report by the Department of Justice Office of Legal Education that stated “that ‘a majority of [federal] offenses fail to protect the innocent with

(MPC) default *mens rea* provisions to address overcriminalization at the state level—but no similar provision exists at the federal level.¹⁴ Numerous journal articles have been written on the topic of overcriminalization at the federal level.¹⁵ Organizations, including the American Bar Association, the Heritage Foundation, and the National Association of Criminal Defense Lawyers, have called on Congress to address the issue of overcriminalization.¹⁶

Congress may finally be heeding the calls for reform. On May 7, 2013, the House Committee on the Judiciary established a bipartisan task force to study the issue of overcriminalization at the federal level and to propose remedies.¹⁷ Advocates for reform at the federal level have advanced several specific recommendations including enacting default *mens rea* rules similar to the MPC, codifying the common law rule of lenity, requiring sequential referral to the House and the Senate Judiciary Committees of any bill that would create new or modify existing criminal offenses or penalties, and requiring Congress to include accompanying reports explaining the justification, costs, and benefits of any new criminal offense or penalty proposed.¹⁸

adequate *mens rea* requirements, [and] many of them are so vague, far-reaching, and imprecise that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish.” *Defining the Problem and Scope of Over-criminalization and Over-federalization: Hearing Before the H. Comm. on the Judiciary, Over-Criminalization Task Force*, 113th Cong. 7 (2013) (written statement of Steven D. Benjamin, President of the National Association of Criminal Defense Lawyers) (quoting BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW X (2010), available at <http://www.nacdl.org/criminaldefense.aspx?id=10287&terms=withoutintent>) http://judiciary.house.gov/_files/hearings/113th/06142013/Benjamin%2006142013.pdf. Norman Reimer, the Executive Director of the National Association of Criminal Defense Lawyers pointed out that “Congress frequently turns hundreds, even thousands, of administrative and civil regulations into strict liability criminal offenses by enacting just *one* law that criminalizes ‘knowing violations’ of said regulations or provides blanket regulatory authority enforceable with criminal penalties.” *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the H. Comm. on the Judiciary, Over-Criminalization Task Force*, 113th Cong. 7 (2013) [hereinafter *The Need for a Meaningful Intent*] (written statement of Norman L. Reimer, Executive Director, National Association of Criminal Defense Lawyers (NACDL)) (citation omitted), <http://judiciary.house.gov/hearings/113th/07192013/Reimer%2007192013.pdf>.

14. See *infra* Part I.D. (discussing the MPC’s default *mens rea* provision).

15. See, e.g., Barker, *supra* note 12; Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, 28 CRIM. JUST. 4 (2013); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Geraldine Szott Moohr, *Playing With The Rules: An Effort To Strengthen The Mens Rea Standards of Federal Criminal Laws*, 7 J.L. ECON. & POL’Y 685 (2011); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012).

16. See *supra* note 13.

17. Press Release, U.S. House of Representatives Comm. on the Judiciary, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization (May 5, 2013), <http://judiciary.house.gov/index.cfm/2013/5/housejudiciarycommitteecreatesbipartisantaskforceonovercriminalization>.

18. See WALSH & JOSLYN, *supra* note 13, at 27–30. This Comment will evaluate the first two recommendations—a default *mens rea* rule and codifying the rule of lenity—because they will

This Comment will first explore the issue of *mens rea* at the federal level and the federal courts' understanding of *mens rea* in federal criminal offenses. Next, the Comment will discuss the federal courts' interpretation and use of the rule of lenity to interpret statutes that are silent as to *mens rea* for an offense. Further, this Comment will review the MPC's default *mens rea* provisions and the application of these provisions in various states. The Comment will analyze two proposed recommendations from various organizations that urge Congress to enact legislation that would codify the rule of lenity and enact some form of a default *mens rea* provision. Finally, this Comment will propose the appropriate language for a federal default *mens rea* provision.

I. MENS REA: A CRITICAL MATERIAL ELEMENT SOMETIMES NEGLECTED

A. Intent: The "essential element of a crime"¹⁹

To be held liable for a crime, one must have committed the physical components (*actus rei*) combined with the particular state of mind required for the wrongful act (*mens rea*).²⁰ Generally, a defendant will not be found guilty for an offense if he or she did not have the requisite mental state required by the common law or the statute.²¹ Justice Robert Jackson described the necessity of *mens rea* as no "provincial or transient notion," and stated that "an injury can amount to a crime only when inflicted by intention" and that it was the "duty of the normal individual to choose between good and evil."²²

Nearly every state codified common law crimes and, when those statutes omitted the intent requirement, the general presumption was that the requisite intent was so obvious that it was unnecessary to expend additional words in the language of the statute specifically addressing intent.²³ At the federal level, there is no criminal code per se, but most of the criminal statutes are codified

have a greater and more immediate impact on addressing overcriminalization at the federal level. The institutional reforms in Congress will only deter or limit the future codification of criminal offenses or penalties.

19. RONALD A. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 60 (1957).

20. BLACK'S LAW DICTIONARY 41 (9th ed. 2009). *Mens rea* is Latin for a guilty mind. *Id.* at 1075. It is the mental state the defendant must have had at the time when committing the "social harm" or *actus rei* elements defined in the offense. DRESSLER, *supra* note 6, at 150.

21. DRESSLER, *supra* note 6, at 150.

22. *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

23. *Id.* at 252 (observing that when "state[s] codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation").

under Title 18 of the United States Code.²⁴ Federal criminal offenses are “solely creatures of statute” and it is Congress’ province to define each element.²⁵

Congress often neglects to include an intent requirement when codifying a common law offense or creating a new criminal offense.²⁶ When determining the mental state of a federal crime, the Supreme Court has recognized that “construction of the statute and of inference of the intent of Congress” is required.²⁷ In *Morissette v. United States*, a World War II veteran and scrap iron collector was convicted of knowingly converting spent bomb casings that were technically U.S. military property.²⁸ Morissette loaded, crushed, and transported the spent casings without attempting to conceal his actions.²⁹ When the government opened an investigation, he voluntarily told his story and admitted everything, claiming that he had no intention of stealing and genuinely believed the spent casings were abandoned property.³⁰ He was subsequently convicted and appealed on the grounds that he did not have the requisite criminal intent to be convicted.³¹ The appellate court found that this particular federal offense required no element of criminal intent because Congress failed to include it in the statute.³² The Supreme Court reversed, holding that, unless specified by Congress, when Congress passes an act “merely adopting into federal statutory law a concept of crime already so well defined in common law” it “presumably knows and adopts the cluster of ideas that were attached” to the common law offense.³³

24. See Moohr, *supra* note 15, at 687 (labeling Title 18 “the nominal federal criminal code”). Congressman Robert C. “Bobby” Scott, the ranking member of the Over-Criminalization Task Force, has observed that the federal criminal code “is neither thoughtful nor is it organized in a way that gives citizens fair notice of which behavior is lawful and which might land them in jail.” *Criminal Code Reform: Hearing Before the H. Comm. on the Judiciary, Over-Criminalization Task Force*, 113th Cong. 3 (2014) (statement of Rep. Robert C. “Bobby” Scott, Member, H. Comm. on the Judiciary).

25. *Liparota v. United States*, 471 U.S. 419, 424 (1985) (citing *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812)).

26. See Luna, *supra* note 15, at 708.

27. *United States v. Balint*, 258 U.S. 250, 253 (1922). Where Congressional intent is crystal clear, the Court has recognized there is very little room for either a court or an administrative or regulatory agency to interpret legislative intent. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

28. *Morissette*, 342 U.S. at 247–48.

29. *Id.*

30. *Id.* at 248.

31. *Id.* at 248–49.

32. *Id.* at 250.

33. *Id.* at 262–63. Justice Jackson further stated that when Congress codifies a common law offense, the silence as to *mens rea* “may warrant quite contrary inferences than the same silence in creating an offence new to general law, for whose definition the courts have no guidance except the Act.” *Id.* at 262.

B. Non-Common Law Federal Offenses and Mens Rea—Sometimes an Afterthought?

For non-common law offenses, the Supreme Court has stated that generally “a defendant must know the facts that make his conduct illegal.”³⁴ In *Staples v. United States*, a man was convicted of unlawful possession of an unregistered machine gun in violation of the National Firearms Act.³⁵ The defendant claimed he had no idea that his AR-15 rifle, a semiautomatic weapon, which did not need to be registered pursuant to the National Firearms Act, had been modified to fire automatically.³⁶ The modification made the rifle an automatic weapon or a machine gun as defined by the law and thus it required registration.³⁷ The offense statute was “silent concerning the *mens rea* required for a violation.”³⁸ The Court held that “absent a clear statement from Congress that *mens rea* is not required” it would not “interpret any statute defining a felony offense as dispensing with *mens rea*.”³⁹

In *United States v. United States Gypsum Co.*, the Supreme Court affirmed that the state must prove *mens rea* in order to convict an individual of committing a crime.⁴⁰ *Gypsum*, in part, concerned whether there was a *mens rea* requirement in a criminal antitrust offense under the Sherman Antitrust Act.⁴¹ The federal government charged the Gypsum Company, a manufacturer of a laminated type of wallboard, with conspiracy to fix prices in violation of the Sherman Antitrust Act.⁴² The defendants challenged the jury instructions, which charged that “if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.”⁴³ The Supreme Court held that a “defendant’s state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and

34. *Staples v. United States*, 511 U.S. 600, 619 (1994). The Court qualified this for cases where “dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement.” *Id.* at 618–19.

35. *Id.* at 603–04.

36. *Id.* at 603.

37. *Id.*

38. *Id.* at 605.

39. *Id.* at 618.

40. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978) (stating that “[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence” (alteration in the original) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)) (internal quotation marks omitted)).

41. *Id.* at 426.

42. *Id.* at 426–27.

43. *Id.* at 434. The government argued that this jury instruction was consistent with previous Supreme Court decisions holding that an agreement by sellers to share pricing information violates the Sherman Antitrust Act if such an agreement has either the purpose or the effect of price stabilization. *Id.* at 435.

cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.”⁴⁴ Further, the Court stated that Congress would need to do “far more than the simple omission” of an intent requirement in order to dispense with *mens rea*.⁴⁵

The Supreme Court’s holdings in *Morissette*, *Gypsum*, and *Staples* stand for the rule that *mens rea* should only be dispensed in limited circumstances or when expressly dispatched by Congress. As a result, much uncertainty remains as to when a law-abiding citizen becomes a criminal.

C. The Rule of Lenity and Ambiguity in the Law—Sometimes a Defendant’s Only Defense

The common law rule of lenity “requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”⁴⁶ The rule expresses an important principal in criminal law that no one should be punished for violating an ambiguous statute whose commands or prohibitions are unclear.⁴⁷ The rule also encourages legislatures to be clear when enacting criminal offenses or penalties to ensure that courts do not take it upon themselves to provide their own visions of clarity.⁴⁸ This has the added benefit that courts are not taking it upon themselves to expand or change statutes without the direct consent of the people’s elected representatives.⁴⁹

In *United States v. Santos*, the Supreme Court applied the rule of lenity in interpreting a federal money laundering statute.⁵⁰ The defendant operated a lottery and employed several individuals who collected bets from gamblers, received a commission, and delivered the rest of the money collected to the defendant.⁵¹ The defendant challenged his conviction, contending that the

44. *Id.* at 435.

45. *Id.* at 438.

46. *United States v. Santos*, 553 U.S. 507, 514 (2008); *see also* *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (observing that “before a man can be punished as a criminal under the federal law his case must be ‘plainly and unmistakably’ within the provisions of some statute (quoting *United States v. Lacher*, 134 U.S. 624, 628 (1890)); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (stating that “[a]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed”); *United States v. Bass*, 404 U.S. 336, 347–49 (1971) (arguing that ambiguities in criminal statutes “should be resolved in favor of lenity” and the legislatures, not the courts should determine what is criminal because “criminal punishment usually represents the moral condemnation of the community” (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

47. *Santos*, 553 U.S. at 514.

48. *Id.*

49. *Id.*; *see also* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 916–17 (2004) (discussing the impact of the rule of lenity on the legislatures and the electorate).

50. *Santos*, 553 U.S. at 513–14.

51. *Id.* at 509.

money collected was receipts and not profits.⁵² The issue before the Court was whether “criminal proceeds” in the federal money laundering statute means “receipts” or “profits.”⁵³ Searching for a precise meaning, the Court determined that the ordinary meaning of “proceeds” can include both “profits” and “receipts.”⁵⁴ Further frustrating matters, the Court also found that Congress defined the term in other criminal provisions to mean either “profits” or “receipts.”⁵⁵ The Court held that such an interpretive tie must benefit the defendant, because of the Court’s findings of ambiguity regarding the use of the word elsewhere in the same statute.⁵⁶

In *United States v. Thompson/Center Arms Co.*, a tax levied under the National Fire Arms Act, which carried criminal penalties for failing to comply with the Act’s provisions and imposed such penalties without proof of willfulness or knowledge, was challenged on the basis of ambiguity.⁵⁷ Specifically, the defendant challenged what it meant to “make” a firearm covered under the Act.⁵⁸ The defendant manufactured pistols, which were not a covered category of firearms, and packaged the pistols with conversion kits.⁵⁹ The kits allowed consumers to convert the pistols into short-barrel rifles, which were a covered category of firearms.⁶⁰ The Court stated that it was necessary to invoke the rule of lenity because the statute “has criminal applications that carry no additional requirement of willfulness.”⁶¹

In *Ratzlaf v. United States*, the Court used the rule of lenity to read a *mens rea* requirement into a federal statute requiring banks to file reports with the Secretary of Treasury if the bank is involved in a cash transaction exceeding \$10,000.⁶² The statute also made it illegal to structure such transactions in order to avoid the reporting threshold.⁶³ The defendant, needing to pay a Nevada casino \$100,000 for a gambling debt, was charged with “structuring transactions” in violation of the Act for purchasing \$100,000 total in cashier’s

52. *Id.* The defendant based his position on the United States Court of Appeals for the Seventh Circuit’s interpretation of the money laundering statute, arguing that the law’s “prohibition of transactions involving criminal ‘proceeds’ applies only to transactions involving criminal profits, not criminal receipts.” *Id.* at 510 (citing *United States v. Scialabba*, 282 F.3d 475, 478 (7th Cir. 2002)).

53. *Id.* at 515.

54. *Id.* at 511.

55. *Id.* at 511–12.

56. *Id.* at 514.

57. *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 507–08, 517 (1992).

58. *Id.* at 508, 517.

59. *Id.* at 508.

60. *Id.* The same conversion kit could also be used to convert the pistol into a long-barrel rifle, which was also not covered by the statute. *See id.* at 507.

61. *Id.* at 517.

62. *Ratzlaf v. United States*, 510 U.S. 135, 136–37 (1994) (explaining that the term “willfully” requires “something more”).

63. *Id.* at 136.

checks.⁶⁴ Each check was just under the \$10,000 reporting threshold and all of them were purchased from several different banks.⁶⁵ The trial court instructed the jury “that the Government had to prove [the] defendant’s knowledge of the banks’ reporting obligation and his attempt to evade that obligation, but did not have to prove [the] defendant knew the structuring was unlawful.”⁶⁶

The defendant was found guilty and argued on appeal that his conviction for “willfully violating” the statute could not stand “solely on the basis of his knowledge that a financial institution must report currency transactions in excess of \$10,000 and his intention to avoid such reporting.”⁶⁷ Agreeing with the defendant, the Supreme Court held that in order to convict under the statute, “the jury had to find [the defendant] knew the structuring in which he engaged was unlawful.”⁶⁸ Congress, disagreeing with the Supreme Court’s interpretation of the statute, subsequently amended the law to dispense specifically with the intent requirement necessary to prove such a violation.⁶⁹

D. *Attacking Overcriminalization Head On: The Model Penal Code’s Default Mens Rea Provision*

The drafters of the MPC sought to ensure that criminal convictions could only be achieved by proving an intent element for each offense.⁷⁰ This goal was achieved, in part, by adopting a default *mens rea* provision.⁷¹ The MPC *mens rea* provision, section 2.02(3), states that “[w]hen 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.”⁷²

Section 2.05 exempts the culpability requirements of section 2.02(3) from offenses resulting in nothing more than fines or other civil penalties or if the legislature specifically dispenses with an intent requirement.⁷³ However, the

64. *Id.* at 137.

65. *Id.* at 137.

66. *Id.* at 137–38.

67. *Id.*

68. *Id.* at 149.

69. *Aversa v. United States*, 99 F.3d 1200, 1205 n.4 (1st Cir. 1996) (citing the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160 (codified as amended at 31 U.S.C. § 5322(a)(2012))).

70. See MODEL PENAL CODE § 2.02 (Official Draft and Revised Comments 1985) (providing the different levels of culpability).

71. *Id.*

72. *Id.* § 2.02(3). The kinds of culpability mentioned—purposely, knowingly and recklessly—are defined in subsection 2 of section 2.02. *Id.* § 2.02(1). The drafters commented that subsection 3 simply adopts the “basic norm” that had been “regarded as the common law position.” *Id.* § 2.02 cmt. 5 (Tentative Draft No. 4 1955). The drafters specifically left out negligence as a default culpability because of the “exceptional basis of [such] liability” and stated that “it should be excluded unless explicitly prescribed.” *Id.*

73. *Id.* § 2.05 explanatory note.

drafters stated a preference that strict liability should be reserved for non-criminal offenses.⁷⁴ Under the MPC, “violations are not [] crimes [as defined by] section 1.04(5) and cannot result in a sentence of probation or imprisonment.”⁷⁵ The drafters commented that section 2.05 is a “frontal attack on absolute or strict liability in the penal law, whenever the offense carries the possibility of criminal conviction, for which a sentence of probation or imprisonment may be imposed.”⁷⁶

E. Default Mens Rea—An Effective Overcriminalization Safety Valve

Fourteen states have adopted a *mens rea* provision either identical or very similar to the MPC’s section 2.02(3).⁷⁷ Additionally, eight states have adopted provisions similar to both the default *mens rea* provision and section 2.05.⁷⁸ These statutes require legislatures to specifically dispatch with an intent requirement in order to create a strict liability offense.⁷⁹ The success of the default *mens rea* provision in these states varies and the application of these provisions is not always as consistent as the MPC’s drafters envisioned.⁸⁰

1. Default Mens Rea as a Defense Against Strict Liability in Texas

Texas adopted a provision similar to the MPC’s default *mens rea* provision. Section 6.02 of the Texas Penal Code provides that if an offense does not prescribe a culpable mental state, and the legislature has not specifically

74. *Id.*

75. *Id.* The Model Penal Code defines a violation as follows:

An offense defined by this Code or by any other statute of this State constitutes a violation if it so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code that now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

Id. § 1.04(5).

76. *Id.* § 2.05 cmt. 1 (footnote omitted).

77. See JOHN S. BAKER, JR., MENS REA AND STATE CRIMES 18–65 (2012), available at http://www.fed-soc.org/library/doclib/20120904_Baker2012Website.pdf (surveying the impact of the MPC’s *mens rea* provisions on state criminal codes).

78. *Id.* at 18–49. These states are Alaska, Arkansas, Delaware, Hawaii, Kansas, Missouri, Oregon, and Pennsylvania. *Id.*

79. *Id.* (discussing the eight states’ statutory language and case law regarding *mens rea*).

80. See, e.g., *Johnson v. State*, 739 P.2d 781 (Alaska Ct. App. 1987); *Coleman v. State*, 671 S.W.2d 221 (Ark. Ct. App. 1984); *Upshur v. State*, 420 A.2d 165 (Del. 1980); *State v. Whitney*, 912 P.2d 596 (Haw. Ct. App. 1996); *State v. White*, 28 S.W.3d 391 (Mo. Ct. App. 2000); *State v. Eldred*, 564 N.W.2d 283 (N.D. 1997); *Middleburg Heights v. Bowman*, No. 05-01156, 2006 WL 3028463 (Ohio Ct. App. Oct. 26, 2006); *State v. Turner*, 953 S.W.2d 213 (Tenn. Crim. App. 1996).

dispensed with it as it relates to any material element, then “intent, knowledge, or recklessness suffices to establish criminal responsibility.”⁸¹

Texas courts have shown a willingness to use the default *mens rea* provisions, except with certain offenses lacking *mens rea*. In general, strict liability offenses, such as statutory rape and driving while intoxicated (DWI), are often attacked for failure to include a *mens rea* requirement or a lack of a specific dispensation of one.⁸² But Texas courts rarely subject these offenses to the default *mens rea* provision, even if the legislature did not specifically dispense with it.⁸³ For example, in *Byrne v. State*, the defendant sought to have his statutory rape conviction overturned.⁸⁴ He argued that section 6.02 imposed a *mens rea* requirement on Texas’ statutory rape law and that he did not have a culpable state of mind because he did not know the girl was underage.⁸⁵ The Texas statutory rape law does not require the State to prove a culpable mental state with regard to the victim’s age and the legislature did not specifically dispense with a *mens rea* requirement for this material element.⁸⁶ However, the court found that in the thirty-seven years the default *mens rea* provision had been law in Texas, courts consistently upheld strict liability sex crimes—particularly sex crimes committed by adults against minors—notwithstanding section 6.02.⁸⁷

Historically, with regard to other strict liability offenses, defendants charged with a DWI have made several attempts to set aside their convictions on the grounds that the DWI offense does not require a culpable mental state and the State should have to prove some *mens rea* component.⁸⁸ Texas courts have

81. TEX. PENAL CODE ANN. § 6.02(b) (West 2013). Unlike the MPC, the Texas default *mens rea* provision refers to “intent” rather than acting “purposely.” *Id.*

82. See *Byrne v. State*, 358 S.W.3d 745, 751–52 (Tex. Ct. App. 2011) (discussing arguments by the defendant-appellant that his statutory rape conviction should be overturned because the state failed to establish a *mens rea* component); *Chunn v. State*, 923 S.W.3d 728, 729 (Tex. Ct. App. 1996) (noting that the court did not believe the legislature intended to include a *mens rea* requirement in the DWI statute).

83. See cases cited *supra* note 82.

84. *Byrne*, 358 S.W.3d. at 747.

85. *Id.*

86. *Id.* at 752.

87. *Id.* But see *State v. Howard*, 172 S.W.3d 190, 191–94 (Tex. Ct. App. 2005) (overturning a Dallas City Code violation criminalizing touching at “sexually oriented businesses” for failure to include a culpable mental state).

88. See, e.g., *Palacio v. State*, No. 01-95-01561-CR, 1997 Tex. App. LEXIS 5857, at *2 (Tex. Ct. App. Oct. 30, 1997) (citing *Chunn v. State*, 923 S.W.2d 728 (Tex. Ct. App. 1996)) (deciding that “the Legislature did not intend to require a culpable mental state for DWI offenses”); *Sanders v. State*, 936 S.W.2d 436, 438 (Tex. Ct. App. 1996) (holding that the DWI statute did not require a culpable mental state even during the period of time that the offense was transferred from the civil statutes to the criminal code, which was before the legislature specifically exempted several offenses including DWI from the default *mens rea* provision); *Pope v. State*, No. 01-95-0187-CR, 1996 Tex. App. LEXIS 4697, at *4 (Tex. Ct. App. Oct. 24, 1996) (citing *Chunn*, 923 S.W.2d at 728–29) (holding that the State was not required to prove a culpable state of mind with regards to appellant-defendant’s challenge to his DWI); *Chunn*, 923 S.W.2d at 729 (holding that the Texas legislature clearly did not intend to require a culpable state of mind when it removed the DWI

generally held, without addressing the fact that the legislature did not explicitly dispense with *mens rea*, that a DWI offense did not require a culpable state of mind because intoxication impairs judgment.⁸⁹ The courts believe that if such a burden was required, most intoxicated drivers would escape conviction as a direct result of “their diminished capacity to formulate a criminal intent.”⁹⁰ However, due to defendants using the default *mens rea* provision as a defense, the Texas legislature eventually amended the DWI offense to explicitly dispense with a *mens rea* element.⁹¹

2. *Bear Gallbladder and Cocaine Sales—Offenses Outside Oregon’s Criminal Code and Default Mens Rea*

Oregon adopted provisions similar both to the MPC’s default *mens rea* provision and the MPC section 2.05, which excludes violations outside the state’s criminal code.⁹² Oregon’s default *mens rea* statute, contained in section 161.115(2) of the Oregon Revised Statutes, states that “if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence.”⁹³ A violation exclusion similar to the MPC’s can be found in section 161.105, which establishes that a culpable state of mind is not required if the offense “constitutes a violation” or is “an offense defined by a statute outside the Oregon Criminal Code [and] clearly indicates a legislative intent to dispense with any culpable mental state requirement.”⁹⁴

Oregon courts use a straightforward approach when applying the default *mens rea* statute.⁹⁵ The courts are also eager to interpret the violation exception,

offense from the civil statutes to the criminal code, as emphasized by the legislature’s enactment of a subsequent statute exempting certain offenses from section 6.02); *Ex Parte Ross*, 522 S.W.2d 214, 219 (Tex. Ct. App. 1975) (holding that despite the legislature’s enactment of the default *mens rea* provision, section 6.02, the legislature did not intend to require proof of a culpable mental state for certain offenses in the civil code including DWI).

89. *Aguirre v. State*, 928 S.W.2d 759, 760 (Tex. Ct. App. 1997).

90. *Id.*

91. *Sanders*, 936 S.W.2d at 437.

92. See OR. REV. STAT. ANN. § 161.105(1)(b) (West 2013).

93. OR. REV. STAT. ANN. § 161.115(2) (West 2013). Similar to Texas, Oregon includes the *mens rea* term “intentionally” instead of the MPC’s “purposely.” *Id.* The Oregon statute is also broader than the MPC in that it also includes “criminal negligence” in the default *mens rea* provision. *Id.* The commentary on the proposed Oregon Criminal Code stated that the default *mens rea* provision “will do away with the problem that now often arises when a statute defining a crime fails to prescribe a required culpable state of mind.” See *State v. Fitch*, 543 P.2d 20, 21 (Or. Ct. App. 1975) (applying the default *mens rea* provision to Oregon’s criminal trespass statute and reading into the statute that “a person commits the crime of criminal trespass . . . if he ‘intentionally, knowingly, recklessly or with criminal negligence’ ‘enters or remains unlawfully in a dwelling’”).

94. OR. REV. STAT. ANN. § 161.105(1).

95. See *State v. Taylor*, 561 P.2d 662, 663 (Or. Ct. App. 1977) (overturning a lower court’s dismissal of charges of driving with a suspended license for lack of the “necessary element of mental culpability” because the offense is statutorily defined outside the criminal code and no

which permits the legislature not to require *mens rea* for violations enacted outside the state's criminal code.⁹⁶

In *State v. Cho*, a man “was convicted of offering to purchase the gall bladder of a bear” in violation of Oregon’s wildlife protection law and was fined.⁹⁷ He was sentenced to thirty days in jail and two years of probation.⁹⁸ The defendant challenged his conviction, arguing that the state failed to prove a culpable state of mind, or alternatively, that the offense was a violation, not a misdemeanor, and, therefore, his sentence should not have included a lengthy jail or probation sentence.⁹⁹ The Supreme Court of Oregon, applying the violation exception in section 161.105, found that in order for the legislature to enact a criminal offense outside the state’s criminal code, the legislature must “provide[] that [the] offense is not a violation, and for the offense to clearly indicate a legislative intent to dispense with the culpable mental state requirement.”¹⁰⁰ Because violation of the wildlife protection law carried a criminal penalty, the court stated that, pursuant to section 161.105, a culpable mental state is required unless the legislature specifically dispensed with the requirement.¹⁰¹ The court could not find any “indication of a legislative intent to dispense with a [*mens rea* requirement] for a breach of [the state’s] wildlife [protection] law.”¹⁰² Therefore, the court held that in order to commit a crime under this particular wildlife protection law, “a person must act with a culpable mental state.”¹⁰³

In *State v. Rutley*, a man was convicted of violating an Oregon statute criminalizing the delivery of certain controlled substances.¹⁰⁴ In this case, the defendant sold cocaine to an undercover police officer within 1,000 feet of a school.¹⁰⁵ The trial court held that the defendant’s knowledge of whether he was

mental state is required pursuant to Oregon’s default rules permitting the legislature to omit *mens rea* for violations); *State v. Hash*, 578 P.2d 482, 484 (Or. Ct. App. 1978) (holding that the offense of unlawful possession of a firearm by a convicted felon contained no express culpable mental state, did not meet any of the exceptions under § 161.05, and was subject to the default *mens rea* provision for each material element of the offense); *State v. Gartzke*, 592 P.2d 1040, 1041 (Or. Ct. App. 1979) (holding that the offense of criminal nonsupport of a child did not include an express culpable mental state and thus required application of the Oregon default *mens rea* provision).

96. See cases cited in *supra* note 95.

97. *State v. Cho*, 681 P.2d 1152, 1154 (Or. 1984).

98. *Id.*

99. *Id.*

100. *Id.* at 1156.

101. *Id.*

102. *Id.* at 1157.

103. *Id.* The state argued that the intent of the legislature when enacting Oregon’s wildlife protection laws was to “represent a substantial government interest in the preservation of wildlife.” *Id.* The court agreed, but failed to see how that supported the state’s contention that these laws are strict liability crimes and held that a substantial state interest in the preservation of wildlife cannot substitute for the need for clear legislative intent to dispense with a *mens rea* requirement for a breach of these laws. *Id.*

104. *State v. Rutley*, 171 P.3d 361, 361 (Or. 2007).

105. *Id.*

within 1,000 feet of a school was not a necessary element.¹⁰⁶ However, the court of appeals disagreed and held that proving knowledge would be necessary to convict.¹⁰⁷ The Oregon Supreme Court reversed, holding that while the offense was enacted outside the criminal code, the legislature clearly intended “to give drug dealers a reason to locate the 1,000-foot school boundary and stay outside it—by punishing the failure to do so as the most serious of crimes.”¹⁰⁸ Oregon’s Supreme Court further concluded that the omission of *mens rea* for the attendant circumstances that would bring the defendant within this offense was obviously “purposeful” on the part of the legislature.¹⁰⁹ The court found that the legislature clearly indicated its intent to dispense with *mens rea*.¹¹⁰

3. Securities Fraud and Cutting Too Much Timber Without Consent— Default Mens Rea in Illinois

Illinois also adopted a provision similar to the MPC’s default provision and has developed a fairly consistent approach to its application.¹¹¹ Section 4-3 of the Illinois Criminal Code states that an individual “is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states” of intent, knowledge, or recklessness.¹¹²

In *People v. Whitlow*, the defendants were charged and convicted of twelve counts of conspiracy, theft, and other violations of Illinois Securities Law.¹¹³ The defendants challenged their convictions based on the statutory silence regarding the culpable mental state in the various sections of the Securities Law.¹¹⁴ The Illinois Supreme Court noted that the securities law provisions at issue were silent as to whether a culpable state of mind was necessary to

106. *Id.*

107. *Id.* at 361–62.

108. *Id.* at 365. The court further commented that “requiring a knowing mental state with regard to the distance element would work against the obvious legislative purpose, in that it would create an incentive for drug deals *not* to identify schools, and *not* to take into consideration their distance from them in engaging in their illegal activity.” *Id.*

109. *Id.*

110. *Id.* The court also commented that “no mental state is logically required for a distance element.” *Id.*

111. See *People v. Leach*, 279 N.E.2d 450, 452 (Ill. App. Ct. 1972) (holding that the default *mens rea* statute required the state to prove a culpable state of mind because mob action is an offense punishable by incarceration and there was no clear legislative intent to impose absolute liability); see also *People v. Abdul-Mutkabbir*, 692 N.E.2d 756, 759 (Ill. App. Ct. 1998) (holding that the offense of falsely representing oneself as a licensed attorney is not an absolute liability offense and because the legislature did not state a required mental state of culpability and provided no language to explicitly dispense with *mens rea*, the default *mens rea* provision must apply).

112. 720 ILL. COMP. STAT. ANN. 5/4-3 (West 2013). This section of the Illinois statute references the sections that define the mental states rather than listing the three separately. *Id.*

113. *People v. Whitlow*, 433 N.E.2d 629, 631 (Ill. 1982).

114. *Id.* at 633.

convict.¹¹⁵ Applying the default *mens rea* provision, the court stated that if the charged provisions of the Securities Act were not absolute liability offenses, then a culpable mental state was required.¹¹⁶

In *People v. Langford*, the defendant was charged with a Class 4 felony violation of the Timber Buyers Licensing Act for cutting and appropriating timber without the consent of the timber grower.¹¹⁷ The defendant pleaded guilty to a misdemeanor offense under the same Act.¹¹⁸ The trial court imposed the maximum sentence, ordering the defendant to serve one year in county jail.¹¹⁹ The defendant unsuccessfully moved to have his guilty plea withdrawn arguing that the state “failed to allege a mental state.”¹²⁰ The appellate court reversed holding that the Act did not include a culpable mental state and that it was not an absolute liability offense as argued by the state.¹²¹ The appellate court stated that “[a]bsolute liability cannot be imposed for an offense for which the offender may be jailed unless the legislature clearly indicated its intent to require that result.”¹²² The court could not find any support in the text of the Act or its legislative history for the contention that the offense was an absolute liability offense.¹²³

III. RULE OF LENITY VS. THE MODEL PENAL CODE: WHICH APPROACH IS MOST EFFECTIVE TO STOP OVERCRIMINALIZATION?

A. *The Rule of Lenity is Insufficient in Its Case-By-Case Application*

Advocates for reform have urged that codifying the common law rule of lenity “would reduce the risk of injustice stemming from criminal offenses that lack clarity or specificity.”¹²⁴ The Supreme Court has shown that it is not shy in applying the rule when statutes are ambiguous or vague.¹²⁵

115. *Id.* at 633.

116. *Id.* at 633–34. In determining which of the four default mental states to apply, the court looked at the federal Securities Act of 1933, which is very similar to the Illinois Securities Act. *Id.* However, the federal securities law requires a person to have acted “willfully.” *Id.* at 633–34. The court ultimately determined that “knowing” was most analogous, adopting reasoning from the U.S. Supreme Court that the essential elements of securities offenses require a mental state that “embraces intentional or knowing misconduct.” *Id.* at 634.

117. *People v. Langford*, 552 N.E.2d 274, 275 (Ill. App. Ct. 1989).

118. *Id.*

119. *Id.*

120. *Id.* at 276.

121. *Id.*

122. *Id.*

123. *Id.*

124. WALSH & JOSLYN, *supra* note 13, at 28. Walsh and Joslyn state that “[t]he rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant. Adding the rule of lenity to federal law would serve the rights of all defendants at every stage of the criminal process.” *Id.*

125. *See supra* notes 46–69 and accompanying text.

Santos and *Thompson/Arms* both illustrate the application of this approach, because they address an ambiguity with a particular word or clarify the *mens rea* element in a statute.¹²⁶ Advocates for codification of the rule of lenity correctly argue that the Supreme Court's use of the rule "is consistent with the traditional rules that all defendants are presumed innocent and that the government bears the burden of proving every element of a crime beyond a reasonable doubt."¹²⁷

Further, the Court's use of the rule of lenity in favor of the criminally accused will force Congress to review already enacted criminal offenses in light of the Court's interpretation, which will compel debates and votes on either a fix or a clarification of Congress' original intent.¹²⁸ The ultimate goal of many advocates is for Congress, and legislatures generally, to review the criminal offenses codified and to clarify their intent when the average citizen, and her lawyer, are left dumbfounded that she has been charged with a crime that she had no idea she committed.¹²⁹

As seen in *Ratzlaf*, the Supreme Court used the rule of lenity to read a *mens rea* requirement into a monetary reporting and anti-structuring of transactions statute with criminal penalties in favor of the defendant.¹³⁰ The defendant was aware of the reporting requirements for large transactions, but unaware that structuring payments to avoid the reporting threshold was in contravention of the law.¹³¹ Congress, disagreeing with the Supreme Court's interpretation of the statute, acted swiftly to amend the law clarifying that no *mens rea* was required to prove a violation of structuring payments to avoid the reporting threshold.¹³²

126. See *United States v. Santos*, 553 U.S. 507, 514 (2008); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 508 (1992).

127. WALSH & JOSLYN, *supra* note 13, at 28. Walsh and Joslyn point out that the Supreme Court has called the rule of lenity "a fundamental rule of statutory construction." *Id.* In *United States v. Bass*, the Court referred to the rule as a "wise principle[] this court has long followed." 404 U.S. 335, 347 (1971). Nevertheless, Walsh and Joslyn state that:

[d]espite the Supreme Court's statements, the rule has not been uniformly or consistently applied by the lower federal courts, and adding it to federal law would serve the rights of all defendants at every stage of the criminal process, not just those who have the means and opportunity to successfully appeal their convictions to the Supreme Court.

WALSH & JOSLYN, *supra* note 13, at 28.

128. WALSH & JOSLYN, *supra* note 13, at 28; see also Price, *supra* note 49 at 915–16 (examining the impact of the judiciary's use of the rule of lenity on the legislative and executive branches).

129. See *id.* at 29 (discussing the benefits of compelling Congress to draft "*mens rea* requirements that are no broader than necessary to allow conviction of only those who are truly culpable or blameworthy"); see also Price, *supra* note 49 at 916–17 (stating that "[t]he rule of lenity ensures that legislators must take [a] more exacting path" when drafting legislation that criminalizes conduct).

130. *Ratzlaf v. United States*, 510 U.S. 135, 137–38 (1994).

131. *Id.* The Court reiterated "the venerable principle that ignorance of the law generally is no defense to a criminal charge." *Id.* at 149. However, in order to convict *Ratzlaf*, "the jury had to find [the defendant] knew the structuring in which he engaged was unlawful." *Id.*

132. Courtney J. Linn, *Redefining the Bank Secrecy Act: Currency Reporting and the Crime of Structuring*, 50 SANTA CLARA L. REV. 407, 510–11 (2010) (stating that "[w]hen Congress

Although Congress' amendment to the law was contrary to the view that *mens rea* should generally be required when criminal sanctions are applied, *Ratzlaf* at least made Congress aware that it was not being clear enough when it drafted the statute.¹³³

The pitfall of the rule of lenity is that it is often a court's last resort when interpreting the statutory language of an offense.¹³⁴ Courts traditionally first consider each and every aspect of the statute at issue, how its text relates to other provisions, and then determine the intention of the legislature.¹³⁵ The logical analysis is to look for the plain meaning first, and then delve into the legislative history of a statute. However, in his plurality opinion in *United States v. Santos*, Justice Scalia advocated for dispensing of the legislative history inquiry and determining immediately whether a statute is on its face ambiguous and then applying the rule of lenity.¹³⁶ Granted in instances where mental culpability is at question in a criminal offense, such an application of the rule of lenity may be appropriate.¹³⁷ Ultimately, a codified rule of lenity may not be enough to distract courts from the traditional avenues of statutory interpretation and will likely only be applied for the most ambiguous of statutes on a case-by-case basis.

B. The Model Penal Code's Default Mens Rea Provision Has Helped Stem the Tide of Overcriminalization at the State Level When Properly Applied

The Model Penal Code's default *mens rea* provisions are stemming the tide of overcriminalization at the state level in states that have adopted these provisions but not necessarily at the expense of overturning commonly accepted strict liability offenses. Advocates for reform argue that enacting a default *mens rea* statute at the federal level "would help law-abiding individuals know in advance which criminal offenses carry an unavoidable risk of criminal punishment and safeguard against *unintentional* legislative omissions of *mens rea* requirements."¹³⁸ Additionally, advocates point out that Congress, like state legislatures that have adopted the default rule, "would remain free to enact strict

overruled *Ratzlaf* and relaxed the *mens rea* elements of the structuring offense, it increased the danger that the structuring statute could be misused" (emphasis added).

133. See *id.* (discussing Congress' reaction to the *Ratzlaf* decision).

134. *United States v. Santos*, 553 U.S. 507, 513 (2008) (explaining the Court's application of the rule of lenity); see also Price, *supra* note 49, at 890–91 (analyzing the rule of lenity's place in the statutory interpretation hierarchy).

135. Price, *supra* note 49, at 890–91.

136. *Santos*, 553 U.S. at 513–14.

137. *Morissette v. United States*, 342 U.S. 246, 252 (1952).

138. WALSH & JOSLYN, *supra* note 13, at 27. The report's authors state that enacting a default *mens rea* provision is "perhaps the most straightforward and effective reform." *Id.* A federal default *mens rea* provision "would greatly reduce the disparities that exist among the federal courts in the interpretation and application of *mens rea* requirements, and thereby result in the fairer, more consistent application of federal criminal laws." *Id.* at 27.

liability offenses even after this reform is implemented, but to do so, it would have to make its purpose clear in the express language of the statute.”¹³⁹

States that have adopted similar or identical provisions to the MPC’s default rules preserve the legislature’s ability to enact strict liability offenses without expressly dispatching *mens rea* for certain offenses. Several cases interpreting Texas’ default *mens rea* provision involved defendants’ failed attempts to attack common strict liability offenses, such as statutory rape and driving while intoxicated.¹⁴⁰ For instance, in *Byrne v. State*, the Texas Court of Appeals dismissed an attempt to require the state to prove that the defendant had actual knowledge that the girl involved was underage.¹⁴¹ The court based its holding on the fact that no court in Texas had ever applied the default provision to the offense of statutory rape in the decades following the adoption of the default provision, rather than whether the state legislature specifically dispatched a culpable mental state element.¹⁴² When asked to apply the default rules to a DWI offense, which lacked a specific *mens rea* requirement and no specific language dispensing it, Texas courts declined to apply the default *mens rea* provision because requiring a culpable state of mind for DWI would make the offense meaningless given that intoxication impairs judgment.¹⁴³ This application is logical because, if the court required the government to prove that the intoxicated individual drove while intoxicated purposely, knowingly, or at least recklessly, then the accused would be allowed to get off by simply testifying: “I had no idea I was too drunk to drive.”¹⁴⁴

For the types of regulatory offenses that may carry a criminal penalty, the MPC’s default *mens rea* rules have proven to be an effective tool to protect those without a morally blameworthy state of mind.¹⁴⁵ This was effectively the case in *State v. Cho*, where the defendant was convicted of violating Oregon’s wildlife protection laws by attempting to purchase a bear gallbladder.¹⁴⁶ The Oregon Supreme Court used the state’s default provisions almost exactly as envisioned by the drafters of the MPC for such an offense.¹⁴⁷ Finding that the Oregon legislature had not specifically dispatched with *mens rea* and that the criminal offense was outside the criminal code, the court held that the legislature would have to specifically make the offense a strict liability offense if that was

139. *Id.* Other than highlighting the relevant provisions of the MPC, Walsh and Joslyn do not propose what a federal default *mens rea* provision would look like exactly.

140. *See supra* Part I.E.1.

141. *Byrne v. State*, 358 S.W.3d. 745, 747 (Tex. Ct. App. 2011).

142. *Byrne*, 358 S.W.3d. at 749–50.

143. *See supra* note 88 and accompanying text.

144. *See* *Florance v. State*, No. 05-08-00707-CR, 2009 Tex. App. LEXIS 3188, at *12–14 (Tex. Ct. App. May 8, 2009) (concluding that the legislature intended to dispense with *mens rea* for the offense of drinking while underage despite neglecting to do so specifically).

145. *See supra* Part I.D.

146. *State v. Cho*, 681 P.2d 1152, 1154 (Or. 1984).

147. *See id.* at 1156–57; *see also supra* notes 70–76 and accompanying text.

the legislature's intent.¹⁴⁸ Because the legislature had failed to do so, applying the default *mens rea* provision was necessary.¹⁴⁹ Such an application by federal courts to the numerous regulatory offenses that carry criminal penalties could prevent the type of public welfare offenses that are too obscure to not require *mens rea*. Generally, the states that have enacted a default *mens rea* provision use it to draw a bright line between offenses that do not carry a criminal sanction and those that do.¹⁵⁰

IV. THE MODEL PENAL CODE'S DEFAULT MENS REA PROVISION IS THE BEST CURE FOR THE AILS OF OVERCRIMINALIZATION AT THE FEDERAL LEVEL

A default *mens rea* provision may not be as clear-cut or easy to draft at the federal level, but nevertheless it may be a more effective approach to solving the problem of federal overcriminalization.¹⁵¹ Codification of the rule of lenity may be a good supplemental safeguard, but courts should not be so quick to dispense with legislative intent, especially if the legislative history can help the court reach a reasonable meaning.¹⁵²

An issue with creating a default *mens rea* provision is that the exact wording in the MPC may not work well at the federal level.¹⁵³ Congress would have to determine which *mens rea* term or terms should be the default.¹⁵⁴ Additionally, Congress would also need to determine the precise meaning of the chosen default term.¹⁵⁵ Congress generally includes an intent element of "knowingly," which the Supreme Court has interpreted to only mean "requir[ing] proof of knowledge of the facts that constitute the offense."¹⁵⁶ Congress sometimes also

148. *Cho*, 681 P.2d at 1156.

149. *Id.* at 1157.

150. *See supra* Part I.E.

151. Moohr, *supra* note 15, at 704. Moohr also comments that "[t]raditionally, courts find ambiguity only after first using other interpretive devices to divine Congress's intent in enacting the statute." *Id.* at 709. Generally, a statute's alleged ambiguity would only be addressed after exhausting every other statutory interpretive tool. *Id.* at 709.

152. *See Moohr, supra* note 15, at 709. Justice Souter has indicated that the Court will use the rule of lenity after exhausting other factors that help determine the legislative intent. *Id.*

153. This primarily stems from the differences and inconsistency in terminology of *mens rea* terms throughout the U.S. Code. *See The Need for a Meaningful Intent, supra* note 13, at 10–11 (statement of Dr. John S. Baker, Jr., Visiting Professor, Georgetown Law School; Professor Emeritus, LSU Law School), available at http://judiciary.house.gov/_files/hearings/113th/07192013/Baker%2007192013.pdf.

154. *See Moohr, supra* note 15, at 704 (stating that "[i]f Congress is genuinely concerned about the integrity of the *mens rea* element, it will specifically identify and define what culpability standard is sufficient to protect those not blameworthy for violating a criminal law"). Others have pointed out that the reforms in the Model Penal Code came about "during a relatively short and historically exceptional period, when reform efforts were politically welcome and eventually embraced by lawmakers." Luna, *supra* note 15, at 731.

155. Moohr, *supra* note 15, at 702–03.

156. *Dixon v. United States*, 548 U.S. 1, 5 (2006) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)) (internal quotation marks omitted).

uses the term “willfully,” which generally also requires a showing that the defendant “acted with knowledge that his conduct was unlawful.”¹⁵⁷ However, some advocates for reform suggest that if Congress were to adopt a default *mens rea* provision, it should use the *mens rea* term “willfully” because it is more universally understood.¹⁵⁸ Additionally, a default *mens rea* requirement may give federal prosecutors pause before overzealously prosecuting people based on federal laws lacking *mens rea* that allow for easier convictions.¹⁵⁹

A federal default *mens rea* provision may have very well saved Wade Martin, the Alaskan Native, discussed at the beginning of this Comment, who unknowingly violated the federal Mammal Protection Act, from criminal prosecution.¹⁶⁰ Martin was aware of his obligations under the law, which prohibited the sale to non-natives, and understood that the Alaskan native exception only applied to sales between Alaskan natives.¹⁶¹ If the federal government had been required to prove that Martin either “knowingly” or “willfully” sold sea otters to a non-native, federal prosecutors may have relented in their pursuit of criminal charges against Martin. It would have been more appropriate in Martin’s case to simply fine him for the violation thus putting him on notice to better verify his patrons. A default *mens rea* provision likely would have prevented the criminalization of such an allegedly honest mistake.

Congress and state legislatures have shown that they are not shy about overturning a court’s decision when it contradicts what the legislatures perceived to be the legislatures’ original intent.¹⁶² A default provision may force Congress to carefully consider and draft new criminal offenses if Congress knows that failure to either specifically make the new offense strict liability, or explain why

157. *Id.* (quoting *Bryan*, 524 U.S. at 193) (internal quotation marks omitted).

158. *The Need for a Meaningful Intent*, *supra* note 13, at 7 n.12 (written statement of Norman L. Reimer, Executive Director, National Association of Criminal Defense Lawyers). According to Reimer, NACDL found that both “willfully” and “knowingly” have the problem of having many meanings, but NACDL argued that “‘willfully’ is more protective, and more universally understood, than the term ‘knowingly.’” *Id.* Also, NACDL stated that federal courts have held that “‘willfully’ requires proof that a person acted with knowledge that her conduct was . . . unlawful.” *Id.*

159. *The Need for a Meaningful Intent*, *supra* note 13, at 7–9 (statement of Dr. John S. Baker, Jr., Visiting Professor, Georgetown Law School; Professor Emeritus, LSU Law School). In his testimony, Baker cited the federal prosecutorial power under the federal Migratory Bird Treaty Act, which “textually does not provide a *mens rea*.” *Id.* at 7. Further, Baker observed that a plain reading of the Act “literally makes almost any contact with a migratory bird unlawful.” *Id.* Although it may be a stretch to claim that prosecutors would be so overzealous in their authority, Baker states that lower federal courts have disagreed as to whether unintentional conduct is actually covered by the Act. *Id.* at 7–8. Baker notes that some will argue that prosecutors may only use the Act to go after “the bad guys,” but he proposes the question: “[H]ow does one identify the ‘bad guys’ under a statute having a criminal penalty, but no *mens rea*?” *Id.* at 8. Baker posits what many advocates for reform argue that “[i]nnocent individuals must rely on Congress to represent and protect them by ensuring that a *mens rea* is required for criminal punishment.” *Id.*

160. *See supra* notes 1–5 and accompanying text.

161. *See supra* notes 1–5 and accompanying text.

162. *See supra* notes 62–69 and accompanying text.

no *mens rea* should be required, will subject the new offenses to the default provisions. As the Supreme Court stated in *Staples*, “absent a clear statement from Congress that *mens rea* is not required,” it would not “interpret any statute defining a felony offense as dispensing with *mens rea*.”¹⁶³ A culpable state of mind is a key requisite of a criminal offense and Congress should always try to better justify its actions when it muddles the contours of *mens rea* or it fails to even specify the *mens rea* when Congress enacts new offenses.¹⁶⁴

A. Federal Default Mens Rea Provision—a Proposal

A federal default *mens rea* provision would have to differ substantially from the provision in the MPC.¹⁶⁵ Section 2.02(3) of the MPC states: “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 purposefully, knowingly or recklessly with respect thereto.”¹⁶⁶

A federal default *mens rea* provision should adopt “willfully” as the default term.¹⁶⁷ While the Supreme Court has stated that “willfully” is “a word of many meanings” and its use is usually dependent on the context in which it is used,¹⁶⁸ the Court stated that at a minimum, in criminal law, “a ‘willful’ act is one undertaken with a ‘bad purpose.’”¹⁶⁹ Drawing from Supreme Court jurisprudence and academic conjecture, a sufficient definition of “willfully” for purposes of a federal default *mens rea* provision could be: *An individual acts “willfully” when acting with knowledge that the action or conduct is prohibited by law.*¹⁷⁰

163. *Staples v. United States*, 511 U.S. 600, 619 (1994).

164. *See supra* Part I.A.

165. *The Need for a Meaningful Intent*, *supra* note 13, at 10–11 (statement of Dr. John S. Baker, Jr., Visiting Professor, Georgetown Law School; Professor Emeritus, LSU Law School).

166. MODEL PENAL CODE § 2.02(3) (Official Draft and Revised Comments 1985).

167. In testimony before the House Overcriminalization Taskforce, Reimer pointed out that using “willfully” in a statute would at a minimum separate those who act knowingly and with a bad purpose. *The Need for a Meaningful Intent*, *supra* note 13, at 7 n.12 (written statement of Norman L. Reimer, Executive Director, National Association of Criminal Defense Lawyers).

168. *See Bryan v. United States*, 524 U.S. 184, 191 (1998) (stating that the word “willfully” is often “a word of many meanings” and context is key to its construction); *United States v. O’Hagan*, 139 F.3d 641, 647 (8th Cir. 1998) (stating that “‘willfully’ simply requires the intentional doing of the wrongful acts—no knowledge of the rule or regulation is required”); *United States v. Peltz*, 433 F.2d 48, 54 (2d Cir. 1970) (commenting that an individual can violate a law “even if he does not know of its existence”). *See also* Katherine R. Tromble, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 VAND. L. REV. 521, 538–39 (1999) (pointing out that sometimes the Supreme Court’s interpretation of a “statute’s *mens rea* standard as ‘willfully’ [is] in contradiction to Congress’ use of the term ‘knowingly’ in the statute” because the Court “believes Congress drafted [the statute] poorly”).

169. *See supra* note 169.

170. *See supra* note 169.

A federal default *mens rea* provision should include specific language that directs judges and federal prosecutors to apply the default provision.¹⁷¹ Additionally, it should be required that the default *mens rea* provision be applied to criminal sanctions, outside of Title 18, lacking a *mens rea* unless specifically dispensed with by Congress.¹⁷² This application would help curtail strict liability offenses and would force Congress to review such offenses on a case-by-case basis to decide whether to dispense with *mens rea*.¹⁷³

Combining the MPC's approach, the proposed definition of "willfully," and what many advocates agree a federal default provision would require to be effective, a proposed federal default *mens rea* provision may look like the following:

Sec. XXX Default Culpability

(1) *Definition of Default Mental State*—For the purposes of default culpability, an individual acts 'willfully' when acting with knowledge that the action or conduct is prohibited by law.

(2) *Applicability within this Title*—When the culpability sufficient to establish a material element of an offense is not prescribed by a provision establishing a criminal offense within this title, such element is established if a person acts willfully with respect thereto.

(3) *Applicability outside this Title*—When the culpability sufficient to establish a material element of an offense carrying a criminal penalty is not prescribed by a provision outside of this title for an offense established outside of this title, such element is established if a person acts willfully with respect thereto unless explicit legislative intent to dispense with any culpable mental state requirement is provided for within the section establishing the offense.

The proposed language in subsection 2 makes only minor adjustments to the draft language of the MPC's default *mens rea* provision but it should be effective at the federal level.¹⁷⁴ The language of subsection 2 does not necessarily apply to the numerous offenses within Title 18 that contain no *mens rea* requirement. Additionally, the language, if adopted, would require the default *mens rea*

171. See WALSH & JOSLYN, *supra* note 13, at 27 (stating that such a provision would "grant a criminal defendant the benefit of the doubt when Congress has failed to adequately and clearly define the *mens rea* requirements for criminal offenses and penalties").

172. WALSH & JOSLYN, *supra* note 13, at 28–29. This would also follow closely to section 2.05 of the Model Penal Code, which exempts the culpability requirements of section 2.02(3) for offenses resulting in nothing more than a fine, or other civil penalty ("violations" under the MPC), or if the legislature specifically dispenses with an intent requirement to provide for strict liability. See *supra* notes 73–76 and accompanying text. One may arguably extend the basic default *mens rea* provision in Title I of the United States Code so that it applies to all 51 sections. However, Congress may signal that its primary goal is to address the overcriminalization of criminal offenses and offenses carrying criminal sanctions outside of Title 18 by including the provision in the primary federal criminal title, Title 18.

173. WALSH & JOSLYN, *supra* note 13, at 28–29.

174. See *supra* note 166.

element to be read into any offense in Title 18 that prescribes no *mens rea*. This option is in line with the recommendations of many advocates for reform, but could lead to problems initially.¹⁷⁵ For example, it is possible that someone might challenge the federal statutory rape offense as a strict liability crime.¹⁷⁶ Congress could, however, add language specifically exempting these strict liability offenses within Title 18 from the application of the default *mens rea* provision.¹⁷⁷

Subsection 3 simply requires that Congress explicitly acknowledge that it did not intend to require a *mens rea* element when it enacts certain regulatory criminal offenses outside of Title 18. The language of subsection 3 attacks the crux of the federal overcriminalization problem—criminal sanctions for regulatory offenses outside of Title 18, such as the criminal penalty contained within the Mammal Protection Act.¹⁷⁸ In order to enact a strict liability offense outside of Title 18, Congress would specifically have to dispense with the *mens rea* element. If Congress failed to do so, the default *mens rea* provision would kick in and hopefully deter unnecessary criminal prosecutions of individuals who did not “willfully” break the law.

Congress will ultimately have to determine the best legislative language to enact, but it is clear that a default *mens rea* provision will be a key reform to address federal overcriminalization. Backing for a federal default *mens rea* provision is gaining support among key members of both parties on the House Over-Criminalization Task Force, including the Chairman of the House Judiciary Committee.¹⁷⁹ However, as experts on the issue have pointed out, it will be difficult to draft a default *mens rea* provision that can work with federal criminal law, as well as the numerous related regulatory offenses.¹⁸⁰

175. See WALSH & JOSLYN, *supra* note 13, at 27.

176. See *supra* Part I.E.1. Such challenges would very likely be as ineffective as attempts made at the state level, but may nevertheless burden courts initially.

177. See *Regulatory Crime: Solutions: Hearing Before the H. Comm. on the Judiciary, Over-Criminalization Task Force*, 113th Cong. 30–31 (November 14, 2013), available at http://judiciary.house.gov/_cache/files/1f22a094-0f62-49d9-9927-21f85174be11/113-61-85566.pdf (during questioning of the witnesses, Dr. John S. Baker and Mr. Lucian E. Dervan, both suggested that Congress could specifically list offenses that would be excluded from a federal default *mens rea* provision).

178. See *supra* notes 1–5 and accompanying text.

179. *Regulatory Crime*, *supra* note 177, at 4. House Judiciary Committee Chairman Bob Goodlatte stated: “I think there is wide bipartisan agreement that the Judiciary Committee should consider enacting a default *mens rea* standard for the federal Code.” *Id.*

180. *Id.* at 32–33. During questioning at the November 14, 2013 House Over-Criminalization Task Force Hearing, Dr. John S. Baker, Jr., stated that drafting a precise default *mens rea* provision for the federal level will be incredibly difficult but nevertheless a necessary reform to address the problem. *Id.* At a subsequent hearing, Steven Benjamin stated that “[a]bsent a meaningful criminal intent requirement, an individual’s other legal and constitutional rights cannot adequately protect that individual from unjust prosecution and punishment for honest mistakes or engaging in conduct that they had no reason to know was wrongful.” *The Crimes on the Books and Committee Jurisdiction: Hearing Before the H. Comm. on the Judiciary, Over-Criminalization Task Force*,

V. CONCLUSION

The prevalence of overcriminalization at the federal level remains a significant issue. Reforms have been proposed and it is incumbent on Congress to act.¹⁸¹ Enacting a default *mens rea* provision at the federal level, while it may have shortcomings, will be the most effective method to resolve the problem. Overcriminalization at the state level appears to be less rampant where states have adopted the default *mens rea* provisions of the MPC. Default provisions will protect those without a guilty mind from being convicted as criminals. Additionally, they will have the added benefit of forcing Congress to draft new criminal offenses carefully if it does not want the offense to fall within the confines of the default provisions.

113th Cong. 7 (2014) (written statement of Steven D. Benjamin, on behalf of National Association of Criminal Defense Lawyers), available at http://judiciary.house.gov/_cache/files/03f42488-3df1-434b-8734-46a56398f26e/benjamin-testimony.pdf.

181. On February 5, 2014, the House Judiciary Committee reauthorized the Over-Criminalization Task Force through August 5, 2014 and it is expected that the Task Force will release a formal final report in late summer or fall of 2014. See generally *Markup of Ratification of Subcommittee Memberships; Resolution, Reauthorization of the Over-Criminalization Task Force; and, H.R. 2919, the "Open Book on Equal Access to Justice Act," Before the H. Comm. on the Judiciary*, 113th Cong. (2014) (Resolution establishing the House Committee on the Judiciary Over-Criminalization Task Force of 2014), available at <http://www.judiciary.house.gov/index.cfm/hearings?ID=C3F2E6BD-07EF-4F3A-9257-3868C6CA7A79>. In testimony at the last hearing of the Over-Criminalization Task Force, Steven Benjamin underscored the urgent need for Congress to address this problem, stating that "[o]vercriminalization in America has a direct impact on commerce, free enterprise, and innovation. It also erodes the public's confidence in a fair and just criminal justice system." *The Crimes on the Books and Committee Jurisdiction*, *supra* note 180, at 3 (written statement of Steven D. Benjamin, on behalf of National Association of Criminal Defense Lawyers).