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Mens Rea Reform: A Brief Overview

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Summary

Criminal justice reform has played a major role in the congressional agenda over the past several Congresses, with sentencing reform bills making up the majority of the legislative action on this issue. However, some reformers have also highlighted the need to strengthen the *mens rea* requirements in federal law. *Mens rea*, Latin for "guilty mind," is the mental state the government must prove to secure a conviction. For instance, some laws require that the prosecution demonstrate that the defendant *intentionally* have committed the act in question—that is, committing the act with the conscious desire for the harmful conduct to occur—while others require that the act be done *knowingly* or with *reckless disregard* of the harm it may pose. Some modern statutes require no *mens rea* at all; these are commonly referred to as strict liability offenses.

Unlike the Model Penal Code, which includes four categories of "culpability" or moral blameworthiness, the Federal Criminal Code, found largely in Title 18, does not create uniform *mens rea* standards. Instead, each statute may or may not contain a *mens rea* element depending on the statute. Supplementing the statutory text, the Supreme Court has developed a set of presumptions to apply when a *mens rea* term is omitted. However, the Court has applied these rules in a somewhat ad hoc fashion depending on a variety of factors, including the origin of the offense in question (e.g., common law or statutory); the severity of the penalty imposed; and the purpose behind the law (e.g., penal or regulatory).

In an effort to bring greater clarity to this area of criminal law, Senator Orin Hatch and Representative James Sensenbrenner have introduced, respectively, the Mens Rea Reform Act of 2015 (S. 2298) and the Criminal Code Improvement Act of 2015 (H.R. 4002). Although they take different approaches, these bills aim to create a uniform *mens rea* standard across federal law. On January 20, 2016, the Senate Judiciary Committee held a hearing on S. 2298; no further action has been taken on this bill. The House Judiciary Committee held a markup of H.R. 4002 on November 18, 2015, and ordered the bill to be reported to the full House.

Some have argued that strengthening federal *mens rea* standards would permit corporate actors to evade prosecution under federal statutes aimed at protecting the health, safety, and welfare of the citizenry—including environmental and workplace laws. Proponents have countered that the bills are not designed to simply protect corporate wrongdoers, but are intended to ensure that any person is not prosecuted for a crime he did not intend to commit.

To provide context for this debate, this report provides a brief background on the history of *mens rea*, including an exploration of the Supreme Court's default *mens rea* rules; analyzes the various bills that intend to create new default rules; and applies these rules to various existing federal criminal offenses.

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Introduction

Criminal justice reform has played a major role in the congressional agenda over the past several Congresses, with sentencing reform bills making up the majority of the legislative action on this issue.[1] However, some reformers have also highlighted the need to strengthen the *mens rea* requirements in federal law. *Mens rea*, Latin for "guilty mind," is the mental state the government must prove to secure a conviction.[2] For instance, some laws require that the prosecution demonstrate that the defendant *intentionally* committed the act in question—that is, committing the act with the conscious desire for the harmful conduct to occur—while others require that the act be done *knowingly* or with *reckless disregard* of the harm it may pose. Some modern statutes require no *mens rea* at all; these are commonly referred to as strict liability offenses.

Unlike the Model Penal Code, which includes four categories of "culpability" or moral blameworthiness,[3] the Federal Criminal Code, found largely in Title 18, does not create uniform *mens rea* standards. Instead, each statute may or may not contain a *mens rea* element depending on the statute. Supplementing the statutory text, the Supreme Court has developed a set of presumptions to apply when a *mens rea* term is omitted. However, the Court has applied these rules in a somewhat ad hoc fashion depending on a variety of factors, including the origin of the offense in question (e.g., common law or statutory); the severity of the penalty imposed; and the purpose behind the law (e.g., penal or regulatory).

In an effort to bring greater clarity to this area of criminal law, Senator Orin Hatch and Representative James Sensenbrenner have introduced, respectively, the Mens Rea Reform Act of 2015 (S. 2298)[4] and the Criminal Code Improvement Act of 2015 (H.R. 4002).[5] Although they take different approaches, these bills aim to create a uniform *mens rea* standard across federal law. On January 20, 2016, the Senate Judiciary Committee held a hearing on S. 2298;[6] no further action has been taken on this bill. The House Judiciary Committee held a markup of H.R. 4002 on November 18, 2015, and ordered the bill to be reported to the full House.

Some have argued that strengthening federal *mens rea* standards would permit corporate actors to evade prosecution under federal statutes aimed at protecting the health, safety, and welfare of the citizenry—including environmental and workplace laws.[7] At the January 20 Senate Judiciary Committee hearing, Assistant Attorney General Leslie Caldwell argued that "[a]pplying a default mens rea to these statutes might insulate culpable individuals, especially senior corporate executives, who deliberately close their eyes to what otherwise would be obvious to them."[8]

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[1] *See, e.g.*, Smarter Sentencing Act, S. 502, H.R. 920, 114th Cong. (2015); Justice Safety Valve Act of 2015, S. 353, H.R. 706, 114th Cong. (2015).

[2] *See* BLACK'S LAW DICTIONARY (10th ed. 2014) ("The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.").

[3] The Model Penal Code (MPC) is a set of model provisions created by the American Law Institute for adoption by the states. *See generally* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.1(b) (2d ed. 2003). The MPC sets forth and defines four "minimum requirements of culpability": purposely, knowingly, recklessly, and negligently. *See* MODEL PENAL CODE § 2.02.

[4] S. 2298, 114th Cong., 1st Sess. (2015).

[5] H.R. 4002, 114th Cong. 1st Sess. (2015).

[6] *See The Adequacy of Criminal Intent Standards in Federal Prosecutions: Hearing Before the Senate Judiciary Committee*, 114th Cong., 2nd Sess. (2016) [hereinafter Senate Judiciary Hearing].

[7] *See* Editorial Board, *Don't Change the Legal Rules on Intent*, N.Y. TIMES (Dec. 5, 2015), *available at* http://www.nytimes.com/2015/12/06/opinion/sunday/dont-change-the-legal-rule-on-intent.html?_r=0.

[8] Senate Judiciary Hearing, *supra* note 6, at 3 (written statement of Leslie Caldwell, Assistant Attorney General), (continued...)

Proponents have countered that the bills are not designed to simply protect corporate wrongdoers, but are intended to ensure that persons are not prosecuted for a crime they did not intend to commit or know they were committing.[9]

To provide context for this debate, this report provides a brief background on the history of *mens rea*, including an exploration of the Supreme Court's default *mens rea* rules; analyze the various bills that intend to create new default rules; and applies these rules to various existing federal criminal offenses.

Background

A criminal offense usually consists of both a prohibited act (the "*actus reus*") and a guilty mind (the "*mens rea*").[10] That is, in order to secure a conviction, the prosecution must prove beyond a reasonable doubt that the defendant both committed the harmful act and did so with the requisite mental state. One of the primary bases of criminal law—moral culpability—can be found embedded within the concept of *mens rea*: one must have *intended* to commit the act to be sufficiently blameworthy. This notion was observed by Justice Robert Jackson:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[11]

Whether an offense requires proof of a *mens rea* element is primarily a question of statutory interpretation: did Congress intend to include a *mens rea* element when drafting the statute?[12] This is so, the Supreme Court has observed, because the "definition of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."[13] However, the express language of a criminal statute is not always clear (1) which mental element should apply to a particular statute; or (2) to which elements of the crime a *mens rea* element should apply. To remedy this lack of textual clarity, the Court has applied a set of *mens rea* presumptions, which can be rebutted by evidence that Congress intended otherwise.

The Supreme Court has held, for instance, that, absent a contrary intent from Congress, federal courts should apply the presumption that a defendant "know the facts that make his conduct illegal" if the offense is lacking such a "knowing" *mens rea* element.[14] The 1952 case *Morisette v.*

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available at https://www.judiciary.senate.gov/imo/media/doc/01-20-16%20Caldwell%20Testimony.pdf.

[9] *See* John Malcolm, *The Pressing Need for Mens Rea Reform*, THE HERITAGE FOUNDATION (Sept. 1, 2015), *available at* http://www.heritage.org/research/reports/2015/09/the-pressing-need-for-mens-rea-reform#_ftn1.

[10] LaFave, *supra* note 3, at § 5.1.

[11] Morisette v. United States, 342 U.S. 246 (1952).

[12] *See* Staples v. United States, 511 U.S. 600, 604 (1994).

[13] Liparota v. United States, 471 U.S. 419 (1985).

[14] *See* Staples, 511 U.S. at 619 ("Silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal."); *Id.* at 620 (Ginsburg, concurring) ("Although the word 'knowingly' does not appear in the statute's text, courts generally assume that Congress, absent a contrary indication, means to retain a *mens rea* requirement."); United States v. Bailey, 444 U.S. 394, 408 (1980) ("[T]he cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction. Accordingly, we hold 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."); Morisette v. United States, 342 U.S. 246, 270-71 (1952) (continued...)

United States cemented this principle in federal criminal jurisprudence.[15] There, the defendant challenged his prosecution under a federal theft statute, claiming that he did not intend to steal government property, as he believed the shell casings he removed from a bombing range—which served as the basis of his prosecution—were abandoned by the federal government.[16] The district court judge, however, refused to instruct the jury on the defendant's alleged innocent intention, instead permitting the jury to presume intent based on the act itself.[17] The Court reversed the appellate court, which had upheld the district court judgment, and held that the government should have been required to demonstrate that the defendant "must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion."[18]

This approach was later applied in *Staples v. United States* to require the government to prove the defendant knew the attributes of a firearm he possessed that brought it within the registration requirements of the National Firearms Act.[19] In that case, the defendant was prosecuted for possessing an unregistered machinegun in violation of 26 U.S.C. § 5485(d). The defendant asserted at trial that the government was required to prove that he *knew* the gun in question had the characteristics that brought it within the statute—namely, its capability of firing automatically—but the district court refused to provide such an instruction to the jury, and the appeals court affirmed his conviction.[20] With no explicit *mens rea* element found in the text of the statute, Justice Thomas, writing for the majority, weighed three factors in determining whether the presumption of a *mens rea* element should apply. First, the Court looked to the nature of the device regulated, and found that possessing a firearm did not pose the same level of danger as other instances where the Court declined to impose a *mens rea* element (e.g., possessing grenades or controlled substances). Second, and tied to the first factor, the Court found that firearms are not sufficiently dangerous to put an owner on notice of the federal registration requirements. Third, the majority looked to the severity of the penalty, and found that Congress would likely not intend to forgo the *mens rea* requirement where it imposed a penalty of up to 10 years' imprisonment.[21] Based on these three factors, the Court held that the government must prove that the defendant knew the facts that made his otherwise lawful conduct unlawful—that is, that he knew he possessed a firearm subject to the registration requirements.[22]

The Court has held that the presumption of a *mens rea* element does not apply, however, in the context of certain so-called public welfare or regulatory offenses. In one of the earliest cases applying this theory, *Balint v. United States*, the Court upheld the application of a federal drug offense that contained no *mens rea* element to a defendant who claimed that he had no knowledge of the nature of the substance he was selling.[23] The Court noted that reviewing courts should look to the purpose of the statute to determine if the *mens rea* element should be omitted.[24] In *Balint*,

(...continued)

("[K]nowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion.").

[15] Morisette v. United States, 342 U.S. 246 (1952).

[16] *Id.* at 248-49.

[17] *Id.* at 249-50.

[18] *Id.* at 270-71.

[19] *Staples*, 511 U.S. at 618-19.

[20] *Id.* at 604.

[21] *Id.* at 616-17.

[22] *Id.* at 618-19.

[23] United States v. Balint, 258 U.S. 250, 254 (1922).

[24] *Id.* at 252.

the fact that the "emphasis of the statute" was "upon achievement of some social betterment rather than punishment of the crimes" helped persuade the Court that the *mens rea* element could properly be omitted from the statute. Similarly, in *United States v. Dotterweich*, the Court rejected the application of a *mens rea* element to a criminal provision of the Federal Food, Drug, and Cosmetic Act, noting that 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."[25]

In addition to interpreting certain statutes to require a *mens rea* element where one was not explicitly included in the text, the Court has also applied an existing *mens rea* element to all elements of a statute where a statute was unclear as to which elements it should apply. For instance, in *United States v. X-Citement Video, Inc.,* the Court held that unless congressional intent indicates otherwise, "the standard presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."[26] Based on an interpretation of Congress's intent, the federal courts have found that this presumption did not apply in various contexts, including public welfare offenses[27] and jurisdictional elements.[28]

Distilling this case law, a reviewing court would likely assess several factors for deciding whether to presume a *mens rea* element in the face of statutory silence. First, a court will ask whether the crime is of common law or statutory origin. In *Morisette*, Justice Jackson noted how the common law origins of the federal theft statute dictated that a *mens rea* element should be required:

> Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.[29]

Put another way, in the face of statutory silence, it is presumed that Congress intended to borrow common law concepts, including *mens rea*, when it enacts a crime found at common law, like the theft statute in *Morisette.*

Second, a court likely would assess the severity of the penalty imposed by the statute. In reading the firearms statute in *Staples* to require a *mens rea* element, Justice Thomas placed significant weight on the fact that the offense carried with it a potential 10-year penalty. He observed that

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[25] *See* United States v. Dotterweich, 320 U.S. 277, 284 (1943); *see also* United States v. Wilson, 565 F.3d 1059, 1068-69 (8th Cir. 2009) (rejecting application of *mens rea* element to age of victim under child pornography statute, and noting that "the background assumption of *mens rea* is inappropriate for some strict liability sex crimes, such as statutory rape ... [and that] [t]he analogy of [child pornography] producers to statutory rapists serves to overcome the background presumptions of *mens rea* and scienter"); United States v. Martinez-Morel, 118 F.3d 710, 716 (10th Cir. 1997) (rejecting application of "knowingly" *mens rea* element to reentry element under 8 U.S.C. § 1326(a), which concerns the unauthorized reentry of an alien into the United States, noting that § 1326 was considered to be a "regulatory measure" that "indicate[d] a presumption of strict liability.").

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

[27] *See* United States v. International Minerals Chemical Corp., 402 U.S. 558, 559 (1971) (rejecting application of "knowingly" *mens rea* element to violation of Interstate Commerce Commission regulation); United States v. Billie, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987) (rejecting application of "knowingly" *mens rea* element in Endangered Species Act to the specific type of species killed by defendant).

[28] *See* United States v. Feola, 420 U.S. 671, 677 n.9 (1975) ("[T]he 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.); *see also* United States v. Yermian, 468 U.S. 63 (rejecting application of *mens rea* element to jurisdictional element in 18 U.S.C. § 1001); United States v. Cooper, 482 F.3d 658, 668 (4th Cir. 2007) (rejecting application of *mens rea* element to jurisdictional element in various criminal provisions of the Clean Water Act).

[29] *Morisette*, 342 U.S. at 262.

"where, as here, 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."[30] Similarly, in outlining the characteristics of public welfare offenses, Justice Jackson noted in *Morisette* that "penalties commonly are relatively small, and conviction does not [pose] grave damage to an offender's reputation."[31]

Third, a court likely would assess the purpose of a statute to determine if a *mens rea* element should attach. For instance, where the purpose behind a statute is to *punish* a wrongdoer—such as the failure to register a firearm,[32] the improper use of food stamps,[33] or the theft of government property[34]—the Supreme Court has said that the *mens rea* presumption should apply. However, where the primary intent is to protect the health, safety, and welfare of the populace—such as prohibiting the possession of a grenade[35] or shipping misbranded drugs in interstate commerce[36]—the Court has not required a *mens rea* element.

Legislation to Create Default *Mens Rea* Rules

In assessing whether a *mens rea* element should attach to a certain offense, the courts primarily focus on congressional intent: did Congress intend to include a *mens rea* element when a statute is silent or, alternatively, did Congress intend to apply an existing *mens rea* element to every element of the offense? Note that the Court's default rules are judicial presumptions. If a statute provides for a *mens rea* element, that provision would control, and the presumption would not apply. Several bills introduced in the 114th Congress would create such a set of default rules, obviating the need to rely on the Court's presumptions. The Mens Rea Reform Act of 2015 (S. 2298) and the Criminal Code Improvement Act of 2015 (H.R. 4002) would create a set of default *mens rea* rules that would apply across the United States Code. After analyzing the text of each bill, this report addresses how these bills might be interpreted to apply to various federal offenses.

Mens Rea Reform Act of 2015 (S. 2298)

The Mens Rea Reform Act of 2015, introduced by Senator Orin Hatch, would provide as follows:

> (b) DEFAULT REQUIREMENT.—Except as provided in subsections (c) and (d), a covered offense shall be construed to require the Government to prove beyond a reasonable doubt that the defendant acted—
>
> (1) with the state of mind specified in the text of the covered offense for each element for which the text specifies a state of mind; and
>
> (2) willfully, with respect to any element for which the text of the covered offense does not specify a state of mind.
>
> (c) FAILURE TO DISTINGUISH AMONG ELEMENTS.—Except as provided in subsection (d), if the text of a covered offense specifies the state of mind required for commission of the covered offense without specifying the elements of the covered offense to which the state

[30] *Staples*, 511 U.S. at 618-19.

[31] *Morisette*, 342 U.S. at 256.

[32] *Staples*, 511 U.S. at 618-19.

[33] Liparota v. United States, 471 U.S. 419, 434 (1985).

[34] *See* Morisette, 342 U.S. at 273.

[35] *See* United States v. Freed, 401 U.S. 601, 609 (1971).

[36] *See* United States v. Dotterweich, 320 U.S. 277, 281 (1943).

> of mind applies, the state of mind specified shall apply to all elements of the covered offense, unless a contrary purpose plainly appears.[37]
>
> (d) [Enumerated exceptions].

On January 20, 2016, the Senate Judiciary Committee held a hearing on S. 2298.[38] No further legislative action has been taken on this bill.

S. 2298 appears to contemplate the following procedure:[39] first, a reviewing court may be called upon to assess whether one of the exceptions in subsection (d) applies. If so, the other provisions of the bill's *mens rea* framework would not appear to apply. If none of the exceptions in subsection (d) applies, the court would likely move on to subsection (c). If the covered offense contains a *mens rea* element, the court is instructed to apply it to each element of the offense, unless a contrary purpose plainly appears (for example, if the element is jurisdictional[40]). If the statute does not have a *mens rea* element, the court would likely move on to subsection (b) and apply the *mens rea* of "willfully" to each element of the offense.[41]

Criminal Code Improvement Act of 2015 (H.R. 4002)

The Criminal Code Improvement Act of 2015, introduced by Representative James Sensenbrenner, would provide as follows:

> **§ 11. Default state of mind proof requirement in Federal criminal cases**
>
> If no state of mind is required by law for a Federal criminal offense—
>
> (1) the state of mind the Government must prove is knowing; and
>
> (2) if the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful.[42]

On November 18, 2015, the House Judiciary Committee held a markup on H.R. 4002, and voted to report the bill out of committee on a voice vote.[43] Representative Sensenbrenner observed at the markup that H.R. 4002 "creates a default mens rea standard for federal criminal laws which

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[37] S. 2298, 114th Cong. (2015).

[38] *See The Adequacy of Criminal Intent Standards in Federal Prosecutions: Hearing Before the Senate Judiciary Committee*, 114th Cong. (2016).

[39] The uncertain nature of this text was highlighted by at least one witness at the Senate Judiciary Hearing on January 20, 2016. Senate Judiciary Hearing, *supra id.* (statement of Leslie Caldwell, Deputy Attorney General, Dep't of Justice) ("It is entirely unclear whether a default mens rea would apply to all elements of a criminal offense or only to certain (as-yet unspecified) elements.").

[40] *See* United States v. Feola, 420 U.S. 671, 676 n.9 (1975) (recognizing 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").

[41] Subsection (b)(1) states that "the state of mind specified in the text of the covered offense" shall apply to "each element for which the text of the covered offense specifies a state of mind." However, it appears that subsection (c) would apply if the offense specified a *mens rea* element, apparently rendering subsection (b)(1) superfluous.

[42] H.R. 4002, 114th Cong. (2015).

[43] *See Markup of H.R. 2830; H.R. 3713; H.R. 4002; H.R. 4003; H.R. 4001; H.R. 4023 Before the House Judiciary Committee*, 114th Cong. 53 (2015) [hereinafter House Judiciary Markup], *available at* https://judiciary.house.gov/wp-content/uploads/2016/02/11.18.15-Markup-Transcript.pdf.

will apply in the limited situation where federal law does not provide an intent requirement."[44] However, if enacted into law, H.R. 4002 might raise several interpretive questions.[45]

First, it is not precisely clear from the bill's text as to when the threshold trigger "no state of mind is required by law" is met. As several commentators have questioned,[46] does "required by law" mean that the *mens rea* element must be found in the *text* of the statute, or would a judicial interpretation that requires such an element also qualify under this requirement? Additionally, if the text contains a *mens rea* element, but does not explicitly state to which of the offenses elements it should apply, does this qualify as having a state of mind required?

Second, H.R. 4002 does not plainly state to which elements of the crime the "knowing" *mens rea* default requirement is intended to apply. Criminal offenses typically have various elements, some of which the *mens rea* attaches to, some of which it does not. It is possible that a court would have to make a determination as to which elements to apply the default *mens rea* element "knowing."

Third, under subsection (2), it appears that a court might have to discern in what instances "a reasonable person" would not know or would not have reason to know his actions were illegal.[47] Generally, when a federal statute uses the phrase "knowing," the defendant must know the facts that make his or her conduct illegal. However, subsection (2) would also require that in certain instances the government must prove that the defendant "knew or had reason to believe [his] conduct was unlawful." This is triggered if the "offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful." Accordingly, it would appear that if a court finds that a reasonable person would not know his conduct was illegal, the government would have to prove that the defendant knew or had reason to know his conduct was illegal.

If enacted into law, it appears the bill would be applied as follows: first, a reviewing court would have to determine if a state of mind was required by law. This report proceeds under the assumption that "required by law" means required by the enacted text of the underlying criminal statute and not simply required by application of judicial presumptions. If the text of the criminal offense already requires proof of *mens rea*, H.R. 4002 would not apply. If the text of the offense does not plainly require a *mens rea* element, the court would likely apply a "knowing" *mens rea*. Lastly, it appears a court would need to assess to which elements the knowing *mens rea* element would apply, a question not answered by the text of the statute.

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[44] *Id.* at 56.

[45] *See, e.g.*, Senate Judiciary Hearing, *supra* note 39 (statement of Leslie Caldwell, Deputy Attorney General, Dep't of Justice) (commenting on H.R. 4002, noting "[i]f enacted, prosecutors would find themselves embroiled in litigation over whether an offense contains a 'state of mind' requirement sufficient to avoid application of the default rule.").

[46] See Orin Kerr, *A Confusing Proposal to Reform the "Mens Rea" of Federal Criminal Law* (Nov. 25, 2015), *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/25/a-confusing-proposal-to-reform-the-mens-rea-of-federal-criminal-law/; Senate Judiciary Hearing, *supra* note 39 (statement of Leslie Caldwell) ("It also is unclear whether the 'required by law' language would codify existing judicial interpretations of federal statutes, or invalidate those precedents entirely. Even if the 'required by law' phrasing would codify judicial interpretations, it is not clear whether that would include decisions by the Supreme Court, appellate courts, or district courts, or directives set forth in model jury instructions and endorsed by courts.").

[47] *See Markup of H.R. 2830; H.R. 3713; H.R. 4002; H.R. 4003; H.R. 4001; H.R. 4023 Before the House Judiciary Committee*, 114th Cong. 53 (2015) (statement of Representative John Conyers) ("In cases where a reasonable person in similar circumstances would not know or have reason to know that conduct is unlawful, the bill would further require proof that the defendant knew or had reason to believe that their conduct was unlawful.") *available at* https://judiciary.house.gov/wp-content/uploads/2016/02/11.18.15-Markup-Transcript.pdf.

Application of Legislation to Existing Offenses

To get a better sense of how the Mens Rea Reform Act and the Criminal Code Improvement would function in practice, this section will apply the *mens rea* provisions in each bill to existing offenses found in Federal Criminal Code, including both traditional and regulatory/public welfare offenses.

Traditional Federal Crimes

18 U.S.C. § 1341 (Mail Fraud)

Section 1341, Title 18, United States Code, provides, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office ... any matter or thing whatever to be sent or delivered by the Postal Service ... shall be fined under this title or imprisoned not more than 20 years, or both.[48]

The essential elements of a mail fraud violation are "(1) a scheme to defraud; (2) use of the mails to execute the scheme; and (3) the specific intent to defraud."[49] As to the *mens rea* under §1341, the federal circuit courts generally hold that the defendant must "knowingly" devise a scheme to defraud and the scheme must have been devised "with the intent to defraud,"[50] or as some courts phrase it, with the "specific intent to defraud."[51] Neither the knowing nor specific intent requirements can be located in the text of the statute, but appear to be imputed from an understanding of the common law.[52] The United States Court of Appeals for the Fifth Circuit has noted that "government need not establish that the defendant used the mails himself or that he actually intended that the mails be used. The government need only prove that the scheme depended for its success in some way upon the information and documents which passed through the mail."[53] Under this formulation, the defendant need have no knowledge or intent that the mail would be used to further the fraud. Finally, the government must prove "materiality of the falsehood."[54] The model jury instructions used for the materiality element require a *mens rea* of knowing or reckless disregard:

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[48] 18 U.S.C. § 1341.

[49] United States v. Floyd, 343 F.3d 363, 371 (5th Cir. 2003).

[50] United States v. Price, 623 F.2d 587, 591 (9th Cir. 1980) ("Participation in furtherance of a fraudulent scheme does not, by itself, justify a conviction unless the defendant's knowledge of the fraudulent purpose can be shown."); United States v. Stephens, 571 F.3d 401, 404 (5th Cir. 2009) ("To prove a scheme to defraud, the Government must show fraudulent activity and that the defendant had a conscious, knowing intent to defraud"); United States v. Gold Unlimited, Inc., 177 F.3d 472, 478 (6th Cir. 1999); 2A FEDERAL JURY PRACT. & INSTR. § 47.03 (6th ed.).

[51] United States v. Akpan, 407 F.3d 360, 370 (5th Cir. 2005).

[52] *See* Perlman v. Zell, 185 F.3d 850, 854 (9th Cir. 1999) ("The word 'fraud' in the mail-fraud statute means deliberate, material misrepresentations. No fraud, no mail fraud.") (internal citation omitted).

[53] *Akpan*, 407 F.3d at 370.

[54] Neder v. United States, 527 U.S. 1, 25 (1999). Citing to the Restatement (Second) of Torts, the Supreme Court has defined "materiality" as follows:

> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
>
> "(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable

(continued...)

> The term "false or fraudulent pretenses, representations, or promises" means a statement or an assertion which concerns a material or important fact or a material or important aspect of the matter in question and that was either known to be untrue at the time that it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and made or used with the intent to defraud. A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.[55]

Applying S. 2298, it appears that a court could read § 1341 as not "specifying" any *mens rea* in the text.[56] As such, subsection (b) of the *mens rea* framework in S. 2298 would appear to apply, as it addresses instances where the text of the underlying criminal statute does not supply a *mens rea* element. Accordingly, it appears that "willfully" would apply to each element.

Applying H.R. 4002 to § 1341, it would appear that the default *mens rea* of "knowing" would apply, and the court would have to determine to which elements it should apply, using general rules of statutory construction and the Supreme Court's case law on *mens rea* default rules (e.g., the presumption that a *mens rea* element applies to all elements of the crime). Finally, a court would have to determine whether "a reasonable person" should have known his acts were unlawful.

18 U.S.C. § 1343 (Wire Fraud)

Section 1343, Title 18, United States Code, provides, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.[57]

The elements of wire fraud are: (1) a scheme to defraud; (2) use of the wires in furtherance of the scheme; and (3) the specific intent to defraud.[58] Again, like the mail fraud statute, the wire fraud statute requires "materiality of the falsehood."[59] As to the *mens rea* of § 1343, the defendant must knowingly devise or knowingly participate in the scheme or artifice to defraud with the intent to defraud another.

The plain text of the bills suggests that they would, if enacted, result in identical analyses as the mail fraud statute, save for the different jurisdictional hook (use of the wires instead of the mail).

(...continued)

> man would not so regard it."

Id. at 22 n.5 (quoting RESTATEMENT (SECOND) OF TORTS § 538)).

[55] FEDERAL JURY PRACTICE, *supra* note 51, at § 47.03.

[56] One could argue that a court might treat the phrases "*intending* to devise a scheme or artifice to defraud" or "for the *purpose* of executing such scheme ... places in any post office" as specifying a *mens rea* standard. In that case, subsection (c) of the *mens rea* framework in S. 2298 would apply, and knowing would still apply to the element of devising the scheme to defraud and the scheme would still have to be done with intent or specific intent to defraud. However, these phrases do not appear to be used in the traditional *mens rea* sense of intending for a certain harm to occur, but rather speak to the desire to engage in the fraudulent scheme in the first place.

[57] 18 U.S.C. § 1343.

[58] United States v. McNeil, 320 F.3d 1034, 1040 (9th Cir. 2003); United States v. Smith, 39 F.3d 119, 122 (6th Cir. 1994).

[59] Neder v. United States, 527 U.S. 1, 25 (1999).

18 U.S.C. § 1344 (Bank Fraud)

Section 1344, Title 18, United States Code, provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.[60]

Section 1344(1) requires the government to prove: "(1) the defendant knowingly executed or attempted to execute a scheme or artifice to defraud a financial institution; (2) the defendant had the intent to defraud a financial institution; and (3) the bank involved was federally insured."[61] Section 1344(2) requires the same proof as to the first and third elements, but as to the second, the government need not prove that the defendant intended to defraud a bank, but only that a scheme was devised and that it resulted in the defendant obtaining funds owned by or under the custody or control of a financial institution.[62]

Applying S. 2298 to the bank fraud statute would appear to result in the following construction: it appears subsection (c) of the bill's *mens rea* framework would apply, as there is some *mens rea* in the text—"knowingly" executing or attempting to execute a scheme or artifice—but it is not clear from the text if the existing *mens rea* element was intended to apply to subsequent elements. If the *mens rea* framework in S. 2298 were applied to the statute, it would appear that the government would still have to prove that the defendant knowingly executed the scheme to defraud. Although subsection (c) normally would require this knowing element apply to all the following elements, subsection (d) of the *mens rea* framework in S. 2298 provides an exception to this rule. Subsection (d)(1)(c)(iii) provides that subsection (c) should not apply if it would "lessen the degree of mental culpability that the Government is required to prove with respect to that element under ... precedent of the Supreme Court of the United States."[63] The Supreme Court has observed that the defraud-a-financial-institution element in § 1344(1) requires *intent* to defraud the institution.[64] Thus, this intent requirement would continue to apply to this second element, as otherwise, subsection (c) would lower the required *mens rea*. As such, subsection (c) of the bill would require intent to be proven for prosecutions under § 1344(1). Applying subsection (c) to the third element of § 1344, it would appear that the defendant would have to know that the bank was being federally insured. The definition of "knowing" in S. 2298 includes the defendant's awareness of "attendant circumstances" and the bank's status as federally insured would arguably qualify was an attendant circumstance.[65] Because § 1344(2) does not currently require intent to obtain funds from a bank, and because the statute contains a *mens rea* element, it would appear that knowing would apply to all elements in a prosecution under § 1344(2).

Because both § 1344(1) and (2) both contain a mens rea element, as the "knowingly executes" requirement in the prefatory clause applies to both subsections (1) and (2), the default rules

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[60] 18 U.S.C. § 1344.

[61] *See* United States v. Flanders, 491 F.3d 1197, 1212 (10th Cir. 2007).

[62] *Id.*

[63] S. 2298, § 2, 114th Cong. (2015).

[64] Loughrin v. United States, 134 S. Ct. 2384, 2391 (2014).

[65] S. 2298, § 2.

established by H.R. 4002 would be inapplicable, and the bill, if enacted, would appear to have no bearing on a reviewing court's construction of the underlying statute.

21 U.S.C. § 841(a) (Drug Trafficking)

Section 841(a), Title 21, United States Code, provides:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> **(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> **(2)** to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.[66]

There are several offenses included within this language, including manufacturing, distributing and dispensing a controlled substance and the possession of a controlled substance with the intent to manufacture, distribute, or dispense the substance.

Manufacture, Distribute, or Dispense

To obtain a conviction for the manufacture, distribution, or dispensing of a controlled substance, the government must prove that the defendant (1) knowingly or intentionally manufactured, distributed, or dispensed a controlled substance, and (2) knew it was a controlled substance.[67]

Applying subsection (c) of the *mens rea* framework in S. 2298 would appear to result in the same construction as is currently applied: knowingly or intentionally would apply "down the line" to both the distribution element and the element requiring that the substance being distributed is a controlled substance. Similarly, because § 841(a) already contains a *mens rea* element, H.R. 4002 would not apply, and the current construction would stand.

Possession with Intent to Manufacture, Distribute, or Dispense

To prove a violation of possession with intent to distribute under § 841(a), the government must prove that the defendant (1) knowingly possessed a controlled substance; (2) knew that the substance was a controlled substance; and (3) intended to distribute some or all of this controlled substance.[68]

Applying S. 2298, because there is a *mens rea* element in § 841(a), it would appear that subsection (c) of the bill's *mens rea* framework would apply. Thus, "knowing" would still attach to the possession element and intent would still attach to the distribution element. Although there are two *mens rea* elements in this statute—knowing and intent—it would appear that knowing would still apply to the fact that the substance was a controlled substance, as knowing generally applies to real world facts, as opposed to intent, which generally applies to a person's purpose or desire for a result to occur. These same elements would seem to apply to the sale, distribution, or intent to distribute or dispense a counterfeit substance under § 841(a)(2). Because § 841(a) contain a *mens rea* element, the default rules established by H.R. 4002 would be inapplicable, and

[66] 21 U.S.C. § 841(a).

[67] *See* United States v. Houston, 406 F.3d 1121,1123 (9th Cir. 2005); FEDERAL JURY PRACTICE, *supra* note 51, at § 64.03.

[68] United States v. Jaras, 86 F.3d 383, 386 (5th Cir. 1996) (possession with intent to distribute marijuana); United States v. Innie, 7 F.3d 840, 844 (9th Cir. 1993) (possession with intent to distribute methamphetamine).

the bill, if enacted, would appear to have no bearing on a reviewing court's construction of the underlying statute.

21 U.S.C. § 844(a) (Simple possession)

Section 844(a), Title 21, United States Code, provides, in relevant part:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter.[69]

To prove a violation of § 841(a), the government must prove "1) knowing, 2) possession, 3) of a controlled substance."[70] Thus, to be found guilty under § 844(a), an individual has to knowingly possess a controlled substance, and must know that the substance he or she possesses is a controlled substance.[71]

Applying subsection (c) of the *mens rea* framework in S. 2298, the same results would apply as under current law: a "knowing" *mens rea* would apply to both the possession element and the fact that the thing possessed was a controlled substance. Because § 844(a) already contains a *mens rea* element, H.R. 4002 would not apply, and the current construction would stand.

Regulatory Offenses

Regulatory or public welfare offenses are ones whose aim is to regulate private actors in an effort to protect the health, safety, and welfare of the general public. Because there are numerous regulatory offenses in the Code, this report applies the two default *mens rea* bills to selected offenses found in the following categories of regulatory crimes: environmental, economic, and consumer protection.

Clean Water Act

The enforcement section of the Clean Water Act, codified at 33 U.S.C. § 1319(c), contains several criminal offenses.[72] These offenses are tiered based upon the mental state of the defendant: a more severe penalty is imposed for those who commit a proscribed act "knowingly" versus those who commit the prohibited act "negligently."[73] Under § 1391(c)(2), any person who "knowingly violates" various provisions of the Clean Water Act—for instance, violating effluent limitations under § 1311—is subject to "a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both."[74] The federal circuit courts have interpreted § 1391(c)(2) to require that the prosecution prove knowledge as to each element of the offense; however, the defendant need only have knowledge of the facts constituting the offense, and need not know he was violating the law.[75] The reasoning supporting this conclusion

[69] 21 U.S.C. § 844.

[70] United States v. Steen, 55 F.3d 1022, 1031 (5th Cir. 1995).

[71] United States v. Holloway, 774 F.2d 527 (6th Cir. 1984).

[72] 31 U.S.C. § 1319.

[73] *Id.* § 1319(c)(1)-(2).

[74] *Id.* § 1319(c)(2).

[75] *See* United States v. Hopkins, 53 F.3d 533, 538-39 (2d Cir. 1995); United States v. Sinskey, 119 F.2d 712, 715 (8th Cir. 1997); United States v. Weitzenhoff, 35 F.3d 1275, 1286 (9th Cir. 1993).

differs among the circuits.[76] Regardless of the reasoning behind their conclusions, the courts have required knowledge as to each element of the offense for criminal liability to attach under § 1391(c)(2), but not knowledge of the illegality of the conduct.

Applying S. 2298 to § 1319(c)(2) would appear to result in the same result as current law.[77] Because § 1319 contains a *mens rea* element "knowing," subsection (c) of S. 2298's *mens rea* framework would direct that it be applied to each element of the offense. Because § 1319(c)(2) contains a *mens rea* element, the default rules established by H.R. 4002 would be inapplicable, and the bill, if enacted, would appear to have no bearing on a reviewing court's construction of the underlying statute.

Under § 1391(c)(1), any person who "negligently violates" various enumerated provisions of the Clean Water Act is subject to "a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both."[78]Applying subsection (c) of the *mens rea* framework in S. 2298 to § 1319(c)(1), it appears that the government would be required to prove negligence as to each element. Because § 1319(c)(1) contains a *mens rea* element, the default rules established by H.R. 4002 would appear to be inapplicable, and the bill, if enacted, would appear to have no bearing on a reviewing court's construction of the underlying statute.

[76] In construing 33 U.S.C. § 1319(c), the United States Court of Appeals for the Second Circuit relied on what it called a "presumption of awareness of regulation" based upon the Supreme Court's interpretation of similar "knowingly violates" language in *United States v. International Minerals & Chemical Corp*. *Hopkins*, 53 F.3d at 538; *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971). Relying on prior cases interpreting public welfare offenses, the Supreme Court in *International Minerals* reasoned that where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *International Minerals*, 402 U.S. at 565. Because the Clean Water Act regulates similar subject matter concerning public health and safety and employed analogous "knowingly violates" language, the Second Circuit concluded that "the government was required to prove that [the defendant] knew the nature of his acts and performed them intentionally, but was not required to prove that he knew that those acts violated the CWA." *Hopkins*, 53 F.3d at 541. The United States Court of Appeals for the Eighth Circuit, on the other hand, seemed less focused on the nature of the conduct regulated (obnoxious waste materials), and more on how the statute was constructed: "In construing other statutes with similar language and structure, that is, statutes in which one provision punishes the 'knowing violation' of another provision that defines the illegal conduct, we have repeatedly held that the word "knowingly" *modifies the acts constituting the underlying conduct*. United States v. Sinskey, 119 F.3d 712, 715 (8th Cir. 1997) (emphasis added).

[77] An argument could be made that, in some instances, the *mens rea* framework in S. 2298 would not apply to specific violations of the various existing offenses assessed in this report. The term "covered offense" in the bill expressly does not include "any offense that involves conduct which a reasonable person would know inherently poses an imminent and substantial danger to life or limb." S. 2298, § 2, 114th Cong. (2015). It is not clear whether the focus should be on offense as written in law, or on the specific, factual commission of the crime. The text suggests the former for at least two reasons. First, all of the other subsections delineating excluded offenses are written with reference to statutes and not the commission of those offenses. Second, the exclusion in question uses the term "*inherently* poses an imminent and substantial danger," suggesting the crime itself in the abstract would in and of itself pose a risk of danger to others. That being said, the text does not make clear at which level of abstraction an "offense" should be assessed. If based on the commission of the offense, the statutes assessed in this report could be committed in a way as to pose an imminent and substantial risk to life or limb, and, thus, would fall outside of the statute.

[78] *Id.* § 1319(c)(2).

Federal, Food, Drug, and Cosmetic Act

The enforcement section of the Federal Food, Drug, and Cosmetic Act (FDCA), codified at 21 U.S.C. § 333, contains several criminal offenses.[79] Seemingly the most litigated criminal provision of the FDCA is § 333(a), which provides:

> (a) Violation of section 331 of this title; second violation; intent to defraud or mislead
>
> (1) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.
>
> (2) Notwithstanding the provisions of paragraph (1) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.[80]

With § 333(a)(1), Congress created a misdemeanor criminal offense for, among other things, the "introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded."[81] In doing so, Congress dispensed with a *mens rea* requirement, creating a strict liability offense in which a culpable state of mind is irrelevant. In a significant public welfare offense case, the Supreme Court long-ago upheld this criminal provision in *United States v. Dotterweich*.[82] There, the Court observed that imposition of criminal penalties under the FDCA is permissible even without "consciousness of wrongdoing" on the part of the defendant.[83] "In the interest of the larger good," the Court noted, the FDCA "puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[84] Thirty years later, the Court reaffirmed its *Dotterweich* ruling in *United States v. Park*, holding that a defendant could be found liable so long as he had, "by reason of his position in [a] corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."[85] Thus, to prove a violation of § 333(a)(1), the government must prove: (1) the defendant held a position of responsibility in the company; (2) the company introduced into interstate commerce or delivered for introduction into interstate commerce the named product; and (3) the product was adulterated or misbranded at the time of its introduction or delivery for introduction.[86] Prosecutions under § 333(a)(2), on the other hand, which carry with it a potential three-year term of imprisonment, require the government to prove the three foregoing elements and also that the defendant had the "intent to defraud or mislead."[87]

Applying S. 2298 to § 333(a)(1), it appears that the government would be required to prove that the defendant "willfully" violated the statute. First, none of the exceptions in subsection (d) of the *mens rea* framework of S. 2298 appear to apply. Second, there is no existing *mens rea* element in

[79] 21 U.S.C. § 333.

[80] *Id.* § 333(a).

[81] *Id.* § 331(a).

[82] United States v. Dotterweich, 320 U.S. 277 (1943).

[83] *Id.* at 284.

[84] *Id.* at 281.

[85] United States v. Park, 421 U.S. 658, 673-74 (1975).

[86] FEDERAL JURY PRACTICE, *supra* note 51, at § 63:03.

[87] *See* 21 U.S.C. § 333(a)(2); United States v. Beech-Nut Nutrition, 871 F.2d 1181, 1195 (2d Cir. 1989); *see generally* Eileen Kennelly & Rebecca Shapiro, *Federal Food and Drug Act Violations*, 36 AM. CRIM. L. REV. 693 (1999).

the underlying offense precluding application of subsection (c). Finally, under subsection (b), "willfully" would apply to each element of the offense since the statute does not specify the requisite *mens rea*. It should be noted that "willfully," as defined in S. 2298, means that the defendant "acted with knowledge that the person's conduct was unlawful."[88] The first and third elements of the underlying offense (being an employee of the company and the fact the product was adulterated or misbranded, respectively) do not appear to be unlawful in and of themselves without the introduction of the product into the stream of interstate commerce. Thus, it is not clear how "willfully" should be applied to these elements. A court could conclude that the willful element applies only to the act of introducing the product into interstate commerce as it would seem that a "contrary intent plainly appears."[89] Applying S. 2298 to § 333(a)(2), it appears that subsection (c) of the *mens rea* framework would require that the "intent to defraud or mislead" element apply to each element of the offense. Like § 331(a)(1), and for the same reasons, it is uncertain how this *mens rea* element should apply to the first and third elements of the offense.

Applying H.R. 4002 to § 331(a)(1), because the text does not contain a *mens rea* element, the default *mens rea* "knowing" would apply, and a reviewing court would have to examine how this default *mens rea* requirement applies to the three elements comprising the offense described in § 331(a)(1). Additionally, under H.R. 4002, the court would have to assess whether a reasonable person would know or have reason to know that there conduct was unlawful, and if so, the government would have to prove the defendant knew or had reason to know that his conduct was unlawful.

National Firearms Act

The National Firearms Act imposes a registration requirement for "firearms," which are defined in the statute to include, among other things, "short-barreled" shotguns, machineguns, certain silencers, and certain destructive devices.[90] Under the Act, all qualifying firearms must be registered in the National Firearms Registration and Transfer Record maintained by the Secretary of the Treasury. Failure to register such a firearm is a criminal offense punishable by a fine not more than $10,000, 10 years imprisonment, or both.[91]

In *United States v. Staples*, the Supreme Court addressed whether the act required proof that the defendant "knew the characteristics of his weapon that made it a 'firearm' under the Act [.]"[92]In its analysis, the Court noted that the statute was silent concerning the *mens rea* required for a violation, but that "silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element."[93] The government argued that like *United States v. Freed*, in which the Court held that *mens rea* requirement was not applicable to prosecution for possession of a hand grenade under the Act, machineguns are "highly dangerous devices that should alert their owners to the probability of regulation."[94] The Court rejected this argument noting that there is a long history of lawful possession of firearms in the United States.

[88] S. 2298, 114th Cong., 1st Sess. (2015).

[89] *Id.*

[90] 26 U.S.C. §§ 5841 (registration requirements), 5845(a)(6) (definition of "firearm").

[91] 26 U.S.C. §§ 5861(d) (criminal offense); 5871 (penalty).

[92] *Staples*, 511 U.S. at 602.

[93] *Id.* at 605.

[94] *Id.* at 610.

Ultimately, the Court held that the government must prove that the defendant knew of the characteristics of the weapon that brought it under the Act.[95]

Applying S. 2298 to this provision to this Act, it appears that the *mens rea* requirement would be elevated to the "willfully" standard. First, none of the exceptions in subsection (d) of the bill's *mens rea* framework would apply. Second, subsection (c) would not seem to apply as the statute does not contain an existing *mens rea* standard. Instead, subsection (b) would seem to require that "willfully" would apply to each element of the offense, such that the defendant knew that their possession of the unregistered firearm was unlawful under the Act, and not simply that he knew of the characteristics of the gun.

Applying H.R. 4002, because the act does not contain a *mens rea* requirement, the default knowing element would apply, and a reviewing court likely would have to determine to which elements it should apply. Further, the court would have to assess whether a reasonable person would know or have reason to know that there conduct was unlawful, and if so, the government would have to prove the defendant knew or had reason to know that his conduct was unlawful under the statute.

Sherman Act

Section 1 of the Sherman Act, codified at 15 U.S.C. § 1, makes it illegal for any person to make a contract or engage in a combination in restraint of trade or commerce.[96] This statute provides for criminal enforcement of a fine not exceeding $100,000,000 if the violator is a corporation, or, if any other person violates the statute, $1,000,000, or by imprisonment not exceeding 10 years, or both.[97] Although the text of the offense does not contain an express *mens rea* requirement, the Supreme Court read one into it in *United States v. U.S. Gypsum Company*.[98] In that case, the Court rejected the government's argument that Section 1 of the Sherman Act should be construed as a strict liability offense, instead holding that "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 cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices."[99] Looking to general common law principles to decide which *mens rea* standard should apply, the Court held that the government need only prove that the "defendant's conduct was undertaken with knowledge of its probable consequences" and need not show that the "disputed conduct was undertaken with the 'conscious object' of producing such effects."[100]

Applying S. 2298 to Section 1 of the Sherman Act, it appears that the default *mens rea* of "willfully" would apply. First, Section 1 of the Sherman Act does not contain an express *mens rea* requirement, precluding application of subsection (c) of the *mens rea* framework of the bill. Because there is no express *mens rea* in statute, a reviewing court would likely move on to subsection (b) of the *mens rea* framework established by S. 2298 and apply the willfully standard to each element. Thus, violators would have to have acted with knowledge that their conduct was unlawful under the act.

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[95] *Id.* at 619.

[96] 15 U.S.C. § 1.

[97] *Id.*

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

[99] *Id.* at 435.

[100] *Id.* at 444 n.21.

Applying H.R. 4002 to Section 1 of the Sherman Act, it appears that the "knowing" element would apply, as the text of Section 1 does not contain an express *mens rea* element. However, it appears that a court would still need to assess which elements the default "knowing" *mens rea* element would apply. Further, the court would have to assess whether a reasonable person would know or have reason to know that his conduct was unlawful, and if so, the government would have to prove the defendant knew or had reason to know that his conduct was unlawful under the statute.

Section 2 of the Sherman Act, codified at 15 U.S.C. § 2, makes it a felony to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" interstate trade.[101] The Supreme Court has construed Section 2 to require the demonstration of two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[102] Under this interpretation, the government must prove that the defendant had the specific intent to form a monopoly.[103]

Under S. 2298, it appears that the "willfully" *mens rea* requirement element would apply to each element. Because there is no express *mens rea* element in the text of Section 2 of the Sherman Act, subsection (c) of the bill's *mens rea* framework would not apply. Applying subsection (b) of the framework would result in willfully applying to both elements.

Under H.R. 4002, it appears that the "knowing" element would apply as the text of the Sherman does not contain an express *mens rea* element, and a reviewing court would have to determine to which elements within the underlying offense it should apply. Again, a court would have to assess whether a reasonable person would know or have reason to know that there conduct was unlawful.

Federal Mine Safety and Health Act (MSHA)

The criminal provisions of the Federal Mine Safety and Health Act (MSHA), codified at 30 U.S.C. § 820, provide that "[a]ny operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title" shall be subject to a fine of not more than $250,000, or by imprisonment for not more than one year, or by both. Section 820(c) provides that "any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same" criminal penalties as the corporate operator under § 820(d). According to DOJ, the government must prove three elements to establish a violation under § 820(d): "(1) the defendant is an operator of a coal or other mine which is subject to the Act, (2) the defendant violated a mandatory health or safety standard or an order of withdrawal at that mine, and (3) the violation was willful."[104]

Applying subsection (c) of the *mens rea* framework in S. 2298 to § 820(d), it appears that the *mens rea* term "willfully" would apply to each element of the offense. The only apparent change

[101] 15 U.S.C. § 2.

[102] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481 (1992) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)).

[103] *See* American Key Corp. v. Cole Nat. Corp., 762 F.2d 1569, 1579 n.8 (1985).

[104] *See* DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 2018, *available at* https://www.justice.gov/usam/criminal-resource-manual-2018-msha-willful-violation-mandatory-health-or-safety-standard-or.

from current law would be the altered definition of "willfully." Under the Sixth Circuit's definition of willful, which DOJ has called "the leading case on the intent requirement of this statute,"[105] the act must be "done knowingly and purposely by a coal mine operator who, having a free will or choice, either intentionally disobeys the standard or recklessly disregards its requirements."[106] However, S. 2298 would seem to require that the defendant act "with knowledge that the person's conduct was unlawful," and does not permit a reckless disregard instruction.

Applying H.R. 4002, the default *mens rea* of knowing would not appear to apply as the statute already requires a willful *mens rea* element.

Occupational Safety and Health Act (OSHA)

The Occupational Safety and Health Act (OSHA) contains several criminal enforcement provisions. Under 29 U.S.C. § 666(e), "[a]ny employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both."[107] Applying subsection (c) of S. 2298's *mens rea* framework to § 666(e), it would appear that willfully would apply to each element of the offense. The default *mens rea* contained in H.R. 4002 would seem not to apply to § 666(e), as it already contains a *mens rea* element.

Under 29 U.S.C. § 666(f), it is unlawful for any person to give "advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees," and a violator is subject to a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

Applying S. 2298, it would appear that subsection (b) of the bill's *mens rea* framework would apply, as the statute does not contain an express *mens rea* element. Thus, the government would have to prove that the defendant willfully violated the statute. Applying H.R. 4002, it appears that the "knowing" element would apply as § 666(f) does not contain an express *mens rea* element. However, a court would still have to determine to which elements of § 666(e) it should apply. Further, the court would have to assess whether a reasonable person would know or have reason to know that his conduct was unlawful, and if so, the government would have to prove the defendant knew or had reason to know that his conduct was unlawful.

Under 29 U.S.C. § 666(g), it is unlawful to **"**knowingly make[] any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter," and the violator is subject to a fine of not more than $10,000, or by imprisonment for not more than six months, or both.[108] Applying subsection (c) of S. 2298's *mens rea* framework, it appears that that "knowing" element would apply to each element of the crime. The default *mens rea* contained in H.R. 4002 would appear not to apply to § 666(e), as it already contains a *mens rea* element of "knowing."

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[105] *Id.*

[106] United States v. Consolidation Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974).

[107] 29 U.S.C. § 666(e).

[108] 29 U.S.C. § 666(g).

Conclusion

The Mens Rea Reform Act of 2015 (S. 2298) and the Criminal Code Improvement of 2015 (H.R. 4002) would create a set of default *mens rea* rules that would apply to offenses across the United States Code, largely supplanting *mens rea* presumptions employed by the courts. In some instances, these bills would raise the *mens rea* standard currently required by law. For example, applying S. 2298 to the mail and wire fraud statutes would appear to require that the government prove that the defendant committed the act with the heightened *mens rea* of "willfully," rather than "intentionally and knowingly" as is currently required. Likewise, applying both bills to a provision of the Federal Food, Drug, and Cosmetic Act that outlaws the introduction of adulterated or misbranded food or drugs into interstate commerce would modify this crime from a strict liability offense, in which the government need not prove any *mens rea*, to one in which the government would have to prove either knowledge (H.R. 4002) or willfulness (S. 2298).

In some instances, application of the bills to the same statute would appear likely to create diverging *mens rea* standards. For instance, applying S. 2298 to various provisions of the Sherman Act would appear to require that the defendant have committed the offense willfully, while H.R. 4002 would seem to require that the defendant have committed the act knowingly.

Conversely, the bills would arguably lower the *mens rea* standard necessary for a conviction under some criminal statutes. For example, applying H.R. 4002 to the mail and wire fraud statute would arguably lower the *mens rea* standard from knowingly and intentionally to simply knowingly engaging in the proscribed conduct. In many instances, however, the resulting construction would remain the same regardless of which bill's *mens rea* framework was employed. For instance, application of both bills to a provision of the Clean Air Act that prohibits persons from "negligently violating" the act would result in the same conclusion: the government would still have to prove that the offender negligently violated the statute.

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