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Toward a Specific Intent Requirement in White Collar Crime Statutes: How the Patient Protection and Affordable Care Act of 2010 Sheds Light on the “General Intent Revolution”

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TOWARD A SPECIFIC INTENT REQUIREMENT IN WHITE
COLLAR CRIME STATUTES: HOW THE PATIENT PROTECTION
AND AFFORDABLE CARE ACT OF 2010 SHEDS LIGHT ON THE
“GENERAL INTENT REVOLUTION”

*Elizabeth R. Sheyn**

Abstract

The recent passage of the Patient Protection and Affordable Care Act of 2010, as amended by the Health Care and Education Reconciliation Act of 2010 (collectively, ACA), has altered the landscape of health care and health insurance. However, it has also served to highlight the revolution in the intent requirement for white collar crimes. In particular, the ACA lowers the intent requirement for several health care fraud statutes from “specific intent to defraud” to “general intent to deceive,” which is consistent with federal courts’ recent trend of not requiring proof of the defendant’s knowledge of the law before finding a violation of a particular statute proscribing a so-called “white collar crime.” In contrast to some of the ACA’s other substantive provisions, the constitutionality of these provisions has not yet been considered by federal courts or evaluated by scholars.

This Article describes this “intent revolution” against the backdrop of the ACA and other white collar crime statutes and offers some thoughts on why, and how, the ACA should be curbed, particularly in the context of white collar offenses.

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INTRODUCTION

The recent passage of the Patient Protection and Affordable Care Act of 2010,¹ as amended by the Health Care and Education Reconciliation Act of 2010² (collectively, ACA), has altered the landscape of health care and health insurance. However, it has also served to highlight the revolution occurring with respect to the intent requirement for white collar crimes. In particular, the ACA lowers the intent requirement for several health care fraud statutes from “specific intent to defraud” to “general intent to deceive,” which is consistent with federal courts’ recent trend of not requiring proof of a defendant’s knowledge of the law before finding a violation of a particular statute proscribing a so-called “white collar crime.” In contrast to some of the ACA’s other substantive provisions, the constitutionality of these provisions has not yet been considered by federal courts or evaluated by scholars.

This Article describes this “intent revolution” against the backdrop of the ACA and other white collar crime statutes and offers some thoughts on why, and how, the ACA should be curbed, particularly in the context of white collar offenses. First, the Article provides a background understanding of white collar crime statutes, focusing specifically on the mens rea requirement component. Second, it takes an in-depth look at health care fraud and describes typical health care fraud remedies. Third, the Article outlines the relevant portions of the ACA, touching briefly on very recent challenges to other aspects of the ACA, such as the individual mandate requirement. Finally, the Article analyzes the dangers of a lowered intent requirement broadly and, more specifically, in the context of the ACA. It also provides a suggestion regarding how these dangers should be addressed with respect to the ACA’s problematic provisions.

I. WHITE COLLAR CRIME STATUTES AND THE MENS REA REQUIREMENT

According to one scholar, a white collar crime should be defined by reference to what it is not: a crime that “(a) necessarily involve[s] force against a person or property; (b) directly relate[s] to the possession, sale, or distribution of narcotics; (c) directly relate[s] to organized crime activities; (d) directly relate[s] to such national policies as immigration, civil rights, and national security; or (e) directly involve[s] ‘vice crimes’

1. Pub. L. No. 111-148, 124 Stat. 119 (2010).
2. Pub. L. No. 111-152, 124 Stat. 1029 (2010).

or the common theft of property.”³ Several of the most common white collar crimes fitting this definition, in addition to health care fraud and related crimes, are blackmail, bribery, embezzlement, extortion, insider trading, the prohibition on kickbacks, mail fraud, money laundering, racketeering, securities fraud, and wire fraud.⁴

One of the most important aspects of a criminal offense statute is the mens rea provision, otherwise known as the “guilty mind” element, which is included in such statutes because “[t]he criminal law has traditionally required not only that the defendant cause a serious harm (the actus reus) but also that she do so with a particular state of mind—criminal intent, purpose, knowledge, belief, recklessness, or the like.”⁵ If an individual commits an act that would otherwise constitute a crime, but lacks the requisite state of mind, she typically will not be considered deserving of punishment.⁶

American criminal law has always focused on the issue of mens rea.⁷ For example, the Model Penal Code creates a presumption that a mens rea component applies to every material element in a crime, unless a statute clearly indicates otherwise.⁸ Further, as early as the 1950s, the U.S. Supreme Court, in *Morrisette v. United States*,⁹ noted the importance of the mens rea requirement by stating:

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. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory “But I didn’t mean to[.]”¹⁰

3. J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 2 (2002).

4. *See id.* at 2.

5. Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 501, 512 (2004).

6. *See id.* (“People who cause harm without such mental element ordinarily cannot be said to be ‘at fault.’”).

7. *See Staples v. United States*, 511 U.S. 600, 622 n.3 (1994) (“The *mens rea* presumption requires knowledge only of the facts that make the defendant’s conduct illegal, lest it conflict with the related presumption, ‘deeply rooted in the American legal system,’ that, ordinarily, ‘ignorance of the law or a mistake of law is no defense to criminal prosecution.’” (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991))).

8. MODEL PENAL CODE § 2.02(3) (1962).

9. 342 U.S. 246 (1952).

10. *Id.* at 250–51.

Subsequently, in *Liparota v. United States*,¹¹ the Court reaffirmed its holding in *Morissette*.¹² It noted, however, that an exception existed in those cases where the statute “rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.”¹³

However, in many white collar crime statutes, the mens rea requirement is either low or nonexistent (as in the case of strict liability offenses), and therefore, it is questionable whether persons accused of these crimes are required to be “morally culpable, or at least culpable to the extent that would justify the imposition of criminal penalties.”¹⁴

Moreover, courts are divided regarding the appropriate mens rea requirement for several white collar crime statutes. For example, the mail and wire fraud statutes are silent regarding the requisite mens rea and federal courts disagree regarding the necessary level of intent. Some courts require a general intent to deceive, while others require a specific intent to defraud.¹⁵ Additionally, other statutes use terms such as

11. 471 U.S. 419 (1985).

12. *Id.* at 425–26.

13. *Id.* at 433. Courts of appeals have “read the *Liparota* exception as limited to cases in which the risks created by the defendants’ conduct ‘may be presumed to be regulated because of their inherent danger.’” John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 211 (1991) (quoting *United States v. Nofziger*, 878 F.2d 442, 453 (D.C. Cir. 1989)).

14. Green, *supra* note 5, at 512; see also Martin Harrell et al., *Federal Environmental Crime: A Different Kind of “White Collar” Prosecution*, 23 NAT. RESOURCES & ENV’T, Winter 2009, at 3. The Harrell article highlights the lowered mens rea requirement contained in many environmental crime statutes:

One key way that environmental and other white collar cases differ is in the matter of proof. While environmental defendants are generally held to a “general intent” standard of conduct because of the nature of the regulatory program, cases in other white collar areas, such as fraud, require the government to establish that the defendant specifically intended to cheat individuals or organizations. Environmental cases sometimes involve people who set up “sham” businesses, and, in this regard, they are similar to some fraud prosecutions.

Id. at 28; cf. Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 314 (2009) (explaining that it is difficult to prosecute white collar crimes because, among other reasons, “skilled defense counsel will be effective, at least on the margins, at making the unreasonable seem reasonable, which is particularly helpful for defendants trying to establish reasonable doubt about the ambiguous areas of moral wrongdoing sometimes associated with white-collar misconduct”).

15. See *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009) (“First, and most importantly, the specific intent required under the mail and wire fraud statutes is the intent to defraud, not the intent to violate a particular statute or regulation.” (citing *United States v. Paradies*, 98 F.3d 1266, 1285 (11th Cir. 1996)); *United States v. Brown*, 459 F.3d 509, 518–19 (5th Cir. 2006) (holding that mail and wire fraud require a “specific intent to defraud, i.e., a

“knowingly and willfully,”¹⁶ and courts disagree regarding the meaning of these terms.¹⁷ The bribery statute requires that the offense be committed “corruptly.”¹⁸ Other statutes, such as the civil Racketeer Influenced and Corrupt Organization Act (RICO), require a plaintiff to demonstrate whatever mens rea is required in the provisions prohibiting the underlying “racketeering activity.”¹⁹

A relatively recent trend in the criminal law is the movement away from specific intent to general intent crimes, particularly with respect to white collar crimes.²⁰ As one scholar points out, “The courts have become increasingly receptive to allowing an inference of criminal mens rea from reckless behavior by defendants.”²¹ This change is evidenced by the decrease in use of specific intent, or “willfulness,” jury instructions and the increase in use of instructions that facilitate the inference of criminal mens rea from recklessness.²²

‘conscious knowing intent to defraud’” (quoting *United States v. Reyes*, 239 F.3d 722, 736 (5th Cir. 2001)); Geraldine Szott Moohr, *Introduction: Tax Evasion as White Collar Fraud*, 9 HOUS. BUS. & TAX L.J. 207, 219 (2009) (comparing the mens rea of general fraud statutes to that involved in criminal tax provisions). Note, however, that in *Paradies*, the U.S. Court of Appeals for the Eleventh Circuit stated that “[i]n mail fraud cases, the government need only prove that the defendant had the intent to deceive.” *Paradies*, 98 F.3d at 1285.

16. 18 U.S.C. § 1001 (2006).

17. *See* *Bryan v. United States*, 524 U.S. 184, 191–93 (1998) (holding that “in order to establish a ‘willful’ violation of a statute, ‘the Government must prove that the defendant acted with knowledge that his conduct was unlawful’” and that “unless the text of the statute dictates a different result, the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense” (footnote omitted) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)); Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 396 (1998) (explaining that courts’ decisions regarding the meaning of the term “willfully” “created a body of haphazard constructions”); Andrea Tuwiner Vavonese, Comment, *The Medicare Anti-Kickback Provision of the Social Security Act—Is Ignorance of the Law an Excuse for Fraudulent and Abusive Use of the System?*, 45 CATH. U. L. REV. 943, 947 (1996) (stating that “[t]he definition[s] of the term[s] knowingly and willfully ha[ve] been unclear in many areas of criminal law,” and that “[t]he issue is whether the prosecutor must prove that the defendant consciously and intentionally committed the act or whether the defendant knew the act was in violation of the law”) (citations omitted).

18. 18 U.S.C. § 201 (2006).

19. *See* 18 U.S.C. §§ 1961–62; Pamela H. Bucy, *Crimes by Health Care Providers*, 1996 U. ILL. L. REV. 589, 649.

20. *See* Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279, 297–99 (1991) (“The courts’ increased willingness to allow inferences of criminal mens rea from recklessness can be seen by examining the evolution of the following four jury instructions that define various issues of intent: (1) specific intent, (2) willfulness, (3) guilty knowledge, and (4) false and fraudulent.” (footnotes omitted)).

21. *Id.* at 296–97.

22. *See id.* at 303 (explaining that changes in four particular “criminal intent instructions reflect a trend toward diluting the government’s burden of proving criminal intent”: (1) “[t]he ‘specific intent’ instruction, with its emphasis on ‘purposely intending to violate the law,’ is being phased out”; (2) “[t]he ‘willfulness’ instruction’s reference to ‘specific intent to do

II. HEALTH CARE FRAUD

Before World War I, patients paid health care providers directly for their services.²³ The providers, in turn, “charged for medical care on a per-service basis, such as the amount of time spent with the patient or the type of procedure performed.”²⁴ This practice continued until the Great Depression.²⁵ Health insurance was developed as a “response to problems faced during the Depression by physicians and hospitals with an increasingly cash-strapped patient base.”²⁶ At its inception, health insurance reimbursed patients for a predetermined portion of their bills.²⁷ Eventually, insurance began to look much like it does today with physicians receiving payments directly from the insurer and the insurer

something the law forbids’ appears to be fading and is being replaced with a diluted version of ‘willfully’ that equates willfulness with ‘reckless disregard of the law’; (3) “at least in the white collar criminal cases, there is increasing use of the ‘guilty knowledge’ instruction which allows a jury to infer knowledge of facts from evidence that the defendant deliberately closed his eyes to what was obvious,” and “[t]o the extent that deliberately closing one’s eyes to the obvious is behaving ‘recklessly,’ this instruction arguably allows an inference of criminal mens rea from recklessness”; and (4) “[t]he definition of ‘false or fraudulent representation’ further facilitates inferences of criminal mens rea from recklessness by defining a false or fraudulent representation as one made with reckless disregard for truth or falsity”); see also Pamela H. Bucy, *The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 *FORDHAM L. REV.* 383, 476 n.562 (1994) (observing that “there is a growing trend in white collar criminal cases, not seen with traditional street crimes, to dilute the *mens rea* requirement” with “the increasing prosecution of regulatory offenses where strict or absolute liability suffices for criminal liability, in the willingness of courts to define ‘intentionally’ as ‘reckless disregard,’ and in the prosecution of corporations, where current standards of criminal liability contain no *mens rea* requirement”).

23. See A. Craig Eddy, *The Effect of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) on Health Care Fraud in Montana*, 62 *MONT. L. REV.* 175, 179 (2000).

24. Joan H. Krause, *The Brief Life of the Gag Clause: Why Anti-Gag Clause Legislation Isn’t Enough*, 67 *TENN. L. REV.* 1, 6 (1999).

25. See *id.*

26. *Id.*; see also Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law*, 79 *CORNELL L. REV.* 1339, 1358 (1994) (“[D]octors [around this time] would have considered the fact that their patients would pay for [expensive diagnostic tests or treatments]. When doctors did recommend a test or procedure, patients might decline on grounds that it would cost too much.”).

27. See Krause, *supra* note 24, at 6; see also Alexander M. Capron, *Containing Health Care Costs: Ethical and Legal Implications of Changes in the Methods of Paying Physicians*, 36 *CASE W. RES. L. REV.* 708 (1986). The article details how health insurance originally operated:

Because of the profession’s resistance to direct relationships between insurance companies and physicians, most payment plans developed in the indemnity format. Under this format, physicians bill[ed] patients directly for services provided and the patients [were] subsequently reimbursed by their insurance carrier, sometimes for the full amount they paid or for only a lesser “allowed” amount.

Id. at 712.

being reimbursed in accordance with a specific, predetermined fee arrangement.²⁸ The first such insurance plans were the Blue Cross/Blue Shield plans, pursuant to which “all members of a group paid the same amount for hospitalization or medical benefits without regard for their individual medical conditions or likely medical expenses.”²⁹ However, these and other early health insurance plans had the effect of leaving elderly, unemployed, self-employed, and low-income individuals without insurance.³⁰

In its nascent stage, health insurance “offer[ed] some opportunity for fraud through charging for services not provided.”³¹ This type of fraud, however, was generally relegated to state courts, as it concerned a civil matter litigated between the private third party insurers and the medical care providers.³² Health care fraud became a matter of federal concern in 1965, when Medicare and Medicaid were signed into law.³³ Both of these programs were based on the Blue Cross/Blue Shield model.³⁴ “Under Medicare and Medicaid, hospitals were paid for each service rendered according to the ‘reasonable’ cost of service rather than to a schedule of negotiated rates. Physicians’ fees were based upon ‘customary’ charges for each service rendered.”³⁵ Through Medicare and Medicaid, the federal government became a major insurer and earned the right to be a direct plaintiff in civil health care fraud cases.³⁶

The fee-for-service premise of Medicare and Medicaid led to an increase in health care fraud because these programs did not have any

28. Krause, *supra* note 24, at 6–7; *see also* Capron, *supra* note 27 (“Over time, however, many insurance programs adopted the service approach to insurance, in which enrollees’ premiums guarantee[d] them certain services such as a specified number of days of hospital care, and those providing the services agree[d] to accept the program’s allowed payment as full compensation.”); Eddy, *supra* note 23 (“[A]s America industrialized and populations concentrated, the concept of health insurance developed both as a way to share the cost of injury and as a way to attract physicians to the expanding, but somewhat undesirable, West by guaranteeing them a livable income.”).

29. Bryan Ford, *The Uncertain Case for Market Pricing of Health Insurance*, 74 B.U. L. REV. 109, 111 n.8 (1994).

30. *See* Pamela H. Bucy, *Fraud by Fright: White Collar Crime by Health Providers*, 67 N.C. L. REV. 855, 864 (1989).

31. *See* Eddy, *supra* note 23.

32. *Id.*

33. Health Insurance for the Aged Act (Medicare Act), Pub. L. No. 89-97, 79 Stat. 290 (1965) (codified as amended at 42 U.S.C. §§ 426–426a, 1395–1396d (2006)); Medicaid Act, Pub. L. No. 89-97, 79 Stat. 343 (codified as amended at 42 U.S.C. §§ 1396–1396g, 1396i–1396v (2006)).

34. *See* Eddy, *supra* note 23 (“Medicare was constructed following the Blue Cross/Blue Shield model with fee for service reimbursement by a third party payer mechanism. Part A of Medicare mimicked Blue Cross paying for hospitalization and Part B emulated Blue Shield paying for physician services.”).

35. Bucy, *supra* note 30 (citing 42 U.S.C. § 1395f(b)(1) (1982)).

36. *See* Eddy, *supra* note 23, at 180.

measures in place to guard against fraud.³⁷ Specifically, the fact that the more services physicians provide, the more they get paid by the government, encourages four types of fraud: “1) billing for services not provided; 2) billing for a service more expensive than that actually provided; 3) billing for unnecessary services; 4) paying kickbacks for referrals.”³⁸

Health care fraud prosecutions may be pursued “administratively, civilly, or criminally.”³⁹ Administrative causes of action are controlled by the rules promulgated by the Department of Health and Human Services (HHS) and state Medicaid boards; however, these rules change frequently.⁴⁰ Pursuant to the Administrative Procedure Act,⁴¹ “[t]hese actions are subject to administrative due process” and “are used primarily to bring individual providers into compliance” with the appropriate regulations.⁴² Examples of administrative claims include “actions brought by the United States Postal Service to enjoin fraudulent schemes being conducted through the U.S. mail”;⁴³ actions filed by HHS under the Civil Monetary Penalties Law for “damages caused by a provider’s fraud or to recollect payments already made to a provider and later determined to be fraudulent”;⁴⁴ actions brought by HHS and the states to terminate providers from participation in Medicare and Medicaid due to fraud or other improper actions;⁴⁵ and actions by State Boards of Registration “to revoke a provider’s professional license because of fraud by the provider.”⁴⁶

Civil actions addressing health care fraud are typically brought if administrative actions were ineffective in deterring fraudulent conduct or if a provider’s actions are particularly outrageous.⁴⁷ There are many civil remedies for health care fraud, and private individuals, insurance companies, or government entities can bring actions seeking such remedies.⁴⁸ For example, private individuals can file malpractice

37. *See id.*

38. *Id.*; *see also* PETER J. HENNING & LEE J. RADEK, THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION 161 (2011) (defining the term “kickback” and stating that “[w]hile the bribe must ‘induce or influence’ the defendant’s action, the kickback need only interfere with the person’s exercise of authority, so that the government would not have to prove a *quid pro quo* agreement that links the benefit to a particular government action”).

39. Eddy, *supra* note 23, at 181–82.

40. *See id.* at 182.

41. *See* Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2006).

42. *See* Eddy, *supra* note 23, at 182.

43. *See* Bucy, *supra* note 30, at 873 (citing 39 U.S.C. § 3005 (1982)).

44. *Id.* at 873–74 (footnote omitted); *see also* 42 U.S.C. § 1320a-7a (2006).

45. *See* Bucy, *supra* note 30, at 874; *see also* 42 C.F.R. § 1004.120 (2006).

46. Bucy, *supra* note 30, at 874.

47. *See* Eddy, *supra* note 23, at 183.

48. *See* Bucy, *supra* note 30, at 874.

lawsuits based on fraud against their health care providers⁴⁹ or they can bring *qui tam* actions pursuant to the civil False Claims Act (FCA) to recover damages caused by provider fraud.⁵⁰ Insurance companies can also bring tort and breach of contract suits against providers.⁵¹ Further, Medicare fiscal intermediaries can suspend payments to providers in order to recover previously paid amounts that were subsequently determined to be fraudulent.⁵² The federal government can file civil lawsuits under the FCA to recover damages caused by provider fraud,⁵³ while state governments, like individuals, can pursue *qui tam* actions under the FCA to achieve the same result.⁵⁴ Federal and state governments can also prosecute health care fraud civilly by using the civil RICO and money laundering statutes to obtain asset forfeiture.⁵⁵

The decision to pursue health care fraud criminally, rather than utilizing administrative or civil remedies, is usually based on a determination of whether the evidence is likely to establish guilt by only a “preponderance of the evidence” or by the higher “beyond a reasonable doubt” standard of proof. The degree of intent and the amount of damages involved are also considered.⁵⁶ Federal criminal prosecutions of health care fraud tend not to proceed under statutes specifically covering Medicare and Medicaid fraud.⁵⁷ Rather, these prosecutions typically utilize the specific statute prohibiting health care fraud⁵⁸ or general statutes proscribing mail fraud, wire fraud, or

49. *Id.*

50. *Id.*; see also 31 U.S.C. § 3730(c) (2006).

51. See Bucy, *supra* note 30, at 873.

52. See *id.*; see also 42 C.F.R. § 405.371 (2006).

53. See Bucy, *supra* note 30, at 873; see also 31 U.S.C. § 3729 (2006).

54. See Bucy, *supra* note 30, at 874; see also 31 U.S.C. § 3729 (2006). States can also bring civil actions in their own capacity to recover damages due to health care provider fraud.

55. See Eddy, *supra* note 23, at 183–84; see also Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961–68 (2006); 18 U.S.C. § 1956 (2006) (discussing money laundering).

56. See Eddy, *supra* note 23, at 184.

57. See 42 U.S.C. § 1320a-7b(a) (2006) (characterizing health care fraud in terms of false statements and representations).

58. See 18 U.S.C. § 1347 (2006); see also Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 973 (noting that the Health Insurance Portability and Accountability Act (HIPAA) contains a number of amendments to Medicare and Medicaid laws and makes health care fraud a federal crime). The health care fraud statute reads as follows:

(a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice--

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of

conspiracy.⁵⁹ Such prosecutions can also be based on the criminal FCA,⁶⁰ the False Statements Act (FSA),⁶¹ or the Social Security Act

or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

(b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

18 U.S.C. § 1347 (2006); Benson Weintraub, *The Patient Protection and Affordable Care Act of 2010 Reduces the Criminal Mens Rea Requirement for Healthcare Fraud and Increases Penalties Under the Federal Sentencing Guidelines*, WHITE COLLAR CRIME PROF BLOG (Sept. 6, 2010), http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/09/the-patient-protection-and-affordable-care-act-of-2010-reduces-the-criminal-mens-rea-requirement-for.html (citing *United States v. Abdallah*, 629 F. Supp. 2d 699, 720 (S.D. Tex. 2009)); *see also* *United States v. Choiniere*, 517 F.3d 967, 972 (7th Cir. 2008). Where the defendant was defrauding Medicare, Medicaid, and private insurance companies, the court employed the language of the health care fraud statute in the jury instructions:

Another instruction informed the jury that to convict Choiniere, the government needed to prove both that there was a scheme to defraud and that Choiniere participated in the scheme knowingly and with intent to defraud. The instruction further defined “intent to defraud” to mean “that the acts charged were done knowingly with the intent to deceive or cheat the victims in order to cause a gain of money or property to the defendant.”

Id.

59. *See* Bucy, *supra* note 19, at 591–92; *see also* 18 U.S.C. § 1341 (2006) (discussing mail fraud); *see also* 18 U.S.C. § 1343 (2006) (“Fraud by wire, radio, or television.”); Bria N. DeSalvo, Katherine M. Keith & Annette Soberats, *Health Care Fraud*, 47 AM. CRIM. L. REV. 681, 722–23 (2010) (collecting statutes).

60. *See* 18 U.S.C. § 287 (2006). The statute states:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

Id.

61. *See* 18 U.S.C. § 1001 (2006). The statute states:

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully— (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be . . . imprisoned not more than [five] years [or fined

(SSA).⁶² State criminal prosecutions of health care fraud typically reference statutes pertaining not only to Medicaid and Medicare fraud, but also to controlled substance offenses, larceny, and conspiracy.⁶³ However, as this Article focuses primarily on federal law, a detailed analysis of state criminal prosecutions of health care fraud is outside of its scope.

In addition to the statutes mentioned above, the following provisions can be used to criminally prosecute health care fraud in the federal context: (1) statutes criminalizing kickbacks (or “payments by one provider to another for referrals of patients or medical business”⁶⁴) and self-referrals,⁶⁵ “which occur when a provider refers patients to clinics or companies in which the provider has a financial interest”;⁶⁶ (2) statutes criminalizing money laundering—specifically those that criminalize the movement of illegally obtained money or the movement of legally obtained money to avoid tax or reporting obligations;⁶⁷ (3) criminal RICO;⁶⁸ (4) the general conspiracy statute⁶⁹ and the specific statute prohibiting conspiracies to submit false claims to the government;⁷⁰ and (5) the statute criminalizing theft of government property.⁷¹

With many of these statutes, the issue of whether or not the conduct in question is criminal depends on the intent of the provider.⁷² Moreover, there is not a uniform intent standard pertaining to all statutes dealing with health care fraud.⁷³ For example, to establish a

in accordance with 18 U.S.C. § 3751], or both.

Id.

62. DeSalvo et al., *supra* note 59, at 722; *see also* 42 U.S.C. § 1320a7b(a) (2006) (imposing criminal penalties for acts involving federal health care programs).

63. Bucy, *supra* note 19, at 592.

64. *Id.* at 609.

65. *See* 42 U.S.C. § 1395nn (2006).

66. Bucy, *supra* note 19, at 609.

67. *See* 18 U.S.C. §§ 1956–1957.

68. *See* 18 U.S.C. §§ 1961–1968.

69. *See* 18 U.S.C. § 371.

70. *See* 18 U.S.C. § 286.

71. *See* 18 U.S.C. § 641. The statute states:

Whoever embezzles, steals, [or] purloins . . . any record, voucher, money, or thing of value of the United States or of any department or agency thereof . . . [s]hall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property . . . does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

Id.

72. *See* Eddy, *supra* note 23, at 186.

73. *See id.* (“The definition of intent varies with the statute invoked to charge health care

violation of the criminal FCA, the government must show that: “(1) the defendant presented a false or fraudulent claim against the United States; (2) the claim was presented to an agency or contractor of the United States; and (3) the defendant *knew* the claim was false or fraudulent.”⁷⁴ The Supreme Court has held that “‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.”⁷⁵ However, the courts of appeals are divided regarding the requisite scienter for the criminal FCA.⁷⁶ Some courts hold “that deliberate ignorance can establish knowledge of falsity,”⁷⁷ while others require the satisfaction of the following, more rigorous standard: “To be false, a claim must not only be inaccurate but consciously so.”⁷⁸

Similarly, to establish a violation of the FSA, the government must prove that the defendant “(1) ‘knowingly and willfully’ (2) ‘[made] any materially false, fictitious, or fraudulent statement or representation’ (3) in a ‘matter within the jurisdiction of the executive . . . branch of the Government of the United States.’”⁷⁹ This statute’s “willfulness” requirement would seem to require the government to prove that the defendant knew that making the false statement would be a crime.⁸⁰ However, it appears that at least some appellate courts maintain that FSA cases do not require proof of a defendant’s knowledge of the law.⁸¹

fraud.”).

74. *United States v. Syme*, 276 F.3d 131, 142 n.3 (3d Cir. 2002) (emphasis added); *see also* 18 U.S.C. § 287.

75. *United States v. Bailey*, 444 U.S. 394, 405 (1980) (citations omitted); *see also* *Pierre v. Attorney Gen. of the U.S.*, 528 F.3d 180, 190 (3d Cir. 2008).

76. *See* *United States v. Dedman*, 527 F.3d 577, 595 n.9 (6th Cir. 2008).

77. *Id.* at 595.

78. *United States v. Barker*, 967 F.2d 1275, 1278 (9th Cir. 1991).

79. *United States v. Moore*, 612 F.3d 698, 700 (D.C. Cir. 2010) (quoting 18 U.S.C. § 1001(a)(2)).

80. *See id.* at 703–04 (Kavanaugh, J., concurring); *see also* *Bryan v. United States*, 524 U.S. 184, 191–92 (1998) (“As a general matter, when used in the criminal context, a ‘willful’ act is one undertaken with a ‘bad purpose.’ In other words, in order to establish a ‘willful’ violation of a statute, ‘the Government must prove that the defendant acted with knowledge that his conduct was unlawful.’” (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994))).

81. *See, e.g., United States v. Hsia*, 176 F.3d 517, 522 n.3 (D.C. Cir. 1999). The footnote acknowledges that the “willfully” requirement of § 2(b) must be proved for a criminal conviction, as the “knowingly” requirement is then inevitably proven:

Although the district judge appeared to attribute this knowledge-of-criminality requirement to § 1001’s “knowingly and willfully” language, it must, if it exists at all, be a gloss of “willfully” in § 2(b): no court adopting such a requirement has questioned the rule that knowledge of criminality need not be shown in direct § 1001 prosecutions.

Id.

The “knowingly and willfully” standard is also utilized in the so-called anti-kickback statute, pursuant to which “it is illegal for a person to ‘knowingly and willfully solicit[] or receive[] any remuneration’ for referrals for services covered by the federal government.”⁸² As was true of the previously mentioned statutes, prior to the passage of the ACA in early 2010, federal courts disagreed regarding the level of intent necessitated by the use of the term “willfully,” as it is used in the anti-kickback statute.⁸³ The same standard is employed in the health care fraud statute. To support a conviction under this statute,

the government must prove that the defendant: (1) knowingly and willfully executed, or attempted to execute, a scheme or artifice; to (2) defraud a health care benefit program or to obtain by false or fraudulent pretenses any money or property under the custody or control of a health care benefit program; (3) in connection with the delivery of or payment for health care benefits, items, or services.⁸⁴

Before the passage of the ACA, unlike all of the above-mentioned statutes, the courts of appeals seemed to agree that this statute required proof of specific intent.⁸⁵

82. *United States v. Starks*, 157 F.3d 833, 837 (11th Cir. 1998) (quoting 42 U.S.C. § 1320a-7b(b)).

83. *See United States v. Mittal*, 36 F. App’x 20, 21 (2d Cir. 2002). The court held as follows:

We have not yet decided whether, in a prosecution for a violation of the Medicare anti-kickback statute, the Government is required to prove that the defendant knew of and intended to violate that specific statute. We recognize the lack of unanimity among the other Circuits that have addressed this particular question.

Id. at 21 (citations omitted). The U.S. Court of Appeals for the Ninth Circuit applied *Ratzlaf* in a health care fraud case, holding that the element of intent required the defendants to know that their conduct was unlawful and to undertake that conduct with specific intent to commit the crime. *Hanlester Network v. Shalala*, 51 F.3d 1390, 1400 (9th Cir. 1995). Subsequently, a district court in the Sixth Circuit disagreed with the Ninth Circuit, concluding that *Ratzlaf* was distinguishable because it concerned another statute whose language was arguably more ambiguous than that of the anti-kickback statute. *United States v. Neufeld*, 908 F. Supp. 491, 494–97 (S.D. Ohio 1995); *see also United States v. Jain*, 93 F.3d 436, 440–41 (8th Cir. 1996) (distinguishing the use of the term ‘willfully’ in *Ratzlaf* with its use in the Medicare anti-kickback statute). The U.S. Court of Appeals for the Tenth Circuit, adopting an intermediate position, has required that the prosecutor prove that there is no reasonable interpretation of the rules which could render a defendant’s statements truthful. *United States v. Migliaccio*, 34 F.3d 1517, 1524 (10th Cir. 1994). Thus far, the Supreme Court has not addressed the meaning of the term “willfully” in the Medicare fraud context.

84. *United States v. Abdallah*, 629 F. Supp. 2d 699, 720 (S.D. Tex. 2009).

85. *See, e.g., United States v. White*, 492 F.3d 380, 393–94 (6th Cir. 2007); *United States*

Federal criminal prosecutions of health care fraud are also affected by the Sentencing Reform Act of 1984,⁸⁶ which created the U.S. Sentencing Commission that, in turn, promulgated the federal sentencing guidelines.⁸⁷ Although the guidelines are now advisory,⁸⁸ federal courts still generally adhere to the guidelines' recommendations at sentencing.⁸⁹ Thus, individuals convicted of health care fraud can face steep sentences in accordance with the guidelines because health care offenses "often stem from an improper billing procedure that has been repeated for multiple patients," and therefore, providers can be charged with multiple counts of the same offense.⁹⁰

III. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

The ACA⁹¹ is "the most sweeping health care legislation since the implementation of Medicare."⁹² It was designed to provide affordable health insurance coverage to a larger number of individuals than were covered by Medicare.⁹³ In an attempt to make health insurance affordable and available, the ACA permits "individuals and small businesses to leverage their collective buying power to obtain prices competitive with group plans."⁹⁴ It also "provides for incentives for expanded group plans through employers, affords tax credits for low-income individuals and families, extends Medicaid, and increases federal subsidies to state-run programs."⁹⁵ Significantly, the ACA "prohibits insurance companies from denying coverage to those with pre-existing medical conditions, setting eligibility rules based on

v. Hickman, 331 F.3d 439, 444–45 (5th Cir. 2003).

86. Pub. L. No. 98-473, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 U.S.C.).

87. See Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 752 n.63 (2010).

88. See *United States v. Booker*, 543 U.S. 220, 233–34 (2005).

89. See, e.g., *United States v. Curb*, 626 F.3d 921, 927–28 (7th Cir. 2010) ("A district judge's reasoned agreement with an advisory sentencing guideline will not be deemed unreasonable on appeal."); *United States v. Mendoza*, 543 F.3d 1186, 1193 (10th Cir. 2008) (holding that within-the-guidelines sentences are presumptively reasonable and that "when the district court adheres to the advisory [g]uidelines range,' § 3553(c)(1) 'does not impose upon district courts a duty to engage in . . . particularized analysis'" (quoting *United States v. A.B.*, 529 F.3d 1275, 1289 (10th Cir. 2008))).

90. Eddy, *supra* note 23, at 185.

91. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of the U.S. Code).

92. *Health Law Update*, KROGER BURRUS, <http://www.krogerlaw.com/HealthLawUpdate.html> (last visited Feb. 12, 2012).

93. See *id.*

94. *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 886 (E.D. Mich. 2010) (citations omitted).

95. *Id.* (citations omitted).

medical factors or claims experience, or rescinding coverage for reasons other than fraud or misrepresentation.”⁹⁶

Arguably the most well-known provision of the ACA is the so-called individual mandate requirement, pursuant to which all U.S. citizens, with some minor exceptions, must “maintain ‘minimum essential [health care] coverage’ every month beginning in 2014 in an effort to ‘lower the cost of health insurance, expand coverage, and reduce uncompensated care.’”⁹⁷ A citizen who does not comply with this requirement must pay a penalty enclosed with her tax return.⁹⁸

Not only has this provision been discussed at length by scholars and commentators,⁹⁹ but it has also been challenged numerous times at the district court level.¹⁰⁰ Further, several circuit courts have considered appeals on the issue.¹⁰¹ The U.S. Courts of Appeals for the Sixth and Eleventh Circuits were the first to issue opinions concerning the constitutionality of the individual mandate requirement. In the Sixth Circuit case, *Thomas More Law Center v. Obama*,¹⁰² the plaintiffs—a public interest law firm and four individuals—sought a determination that “Congress lacked authority under the Commerce Clause to pass the minimum coverage provision, and alternatively a declaration that the

96. *Id.* (citations omitted).

97. *Id.* (citations omitted). The court identified the congressional intent of implementing the individual mandate:

Congress found that without the Individual Mandate, the reforms in the Act, such as the ban on denying coverage based on pre-existing conditions, would increase the existing incentives for individuals to “wait to purchase health insurance until they needed care,” which in turn would shift even greater costs onto third parties. Conversely, Congress found that by “significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.”

Id. at 886–87 (citations omitted).

98. *Id.* at 890 (citations omitted).

99. See, e.g., Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, 362 NEW ENG. J. MED. 482, 482–83 (2010) (discussing the constitutionality of the individual mandate); Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 114–18 (2010) (same).

100. See Kevin Sack, *Judge Voids Key Element of Obama Health Care Law*, N.Y. TIMES, Dec. 14, 2010, at A1 (stating that, as of December 2010, there were approximately two dozen lawsuits challenging the health care law at the district court level).

101. See Kevin Sack, *Judges Weigh Limits of Health Law’s Powers*, N.Y. TIMES, June 9, 2011, at A17 (stating that the U.S. Courts of Appeals for the Fourth and Sixth Circuits had heard oral arguments in cases challenging the individual mandate); Lyle Denniston, *U.S. Resists Fast Track on Health Case*, SCOTUSBLOG (Mar. 17, 2011, 9:29 PM), <http://www.scotusblog.com/2011/03/u-s-resists-fast-track-on-health-case/> (“The Fourth Circuit, Sixth Circuit, Eleventh Circuit and, as of Thursday, the D.C. Circuit have all put health care appeals on abbreviated briefing and argument schedules, before three-judge panels.”).

102. No. 10-2388, 2011 U.S. App. LEXIS 13265 (6th Cir. June 29, 2011).

penalty is an unconstitutional tax.”¹⁰³ Judge Boyce F. Martin, joined by Judge Jeffrey Sutton, determined that the plaintiffs had standing to pursue the suit and that the court had jurisdiction over the action in accordance with the Anti-Injunction Act.¹⁰⁴ Then, Judge Sutton, joined by Judge James L. Graham, sitting by designation from the Southern District of Ohio, concluded that the penalty was not a tax “under Article I of the Constitution,¹⁰⁵ and Congress’s taxing power thus [could not] sustain it.”¹⁰⁶ Finally, Judge Sutton joined in Judge Martin’s holding that “the minimum coverage provision is a valid exercise of Congress’s power under the *Commerce Clause*.”¹⁰⁷

In the Eleventh Circuit case, *Florida v. United States Department of Health & Human Services*,¹⁰⁸ the plaintiffs—twenty-six states, two private individuals, and the National Federation of Independent Business¹⁰⁹—also challenged the constitutionality of the individual mandate and the Medicaid expansion.¹¹⁰ Judge Frank M. Hull and Chief Judge Joel F. Dubina determined, as an initial matter, that plaintiffs had standing to challenge this provision,¹¹¹ and then upheld the district court’s determination that the Medicaid expansion was not unconstitutional.¹¹² They held that the individual mandate “exceeds Congress’s commerce power”¹¹³ because “[t]he federal government’s assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits, and imperils our federalist structure.”¹¹⁴ Judges Hull and Dubina also found that the individual mandate could not be supported by Congress’s tax power, but held that it was severable from the other provisions of the ACA.¹¹⁵ Judge Stanley Marcus concurred in part and dissented in part. He would have upheld the individual mandate as

103. *Thomas More Law Ctr.*, 2011 U.S. App. LEXIS, at *3–4.

104. *Id.* at *18. The Anti-Injunction Act bars “suit for the purpose of restraining the assessment or collection of any tax.” 26 U.S.C. § 7421(a) (2006).

105. Article I of the Constitution vests certain enumerated rights in Congress. See Paul M. Schwartz & William Michael Treanor, Eldred and Lochner: *Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 *YALE L.J.* 2331, 2331 (2003).

106. *Thomas More Law Ctr.*, 2011 U.S. App. LEXIS, at *64.

107. *Id.* at *48, *52.

108. 648 F.3d 1235 (11th Cir. 2011).

109. *Id.* at 1240.

110. *Id.* at 1241. The ACA “expands Medicaid eligibility and subsidies by amending 42 U.S.C. § 1396a, the section of the Medicaid Act outlining what states must offer in their coverage plans.” *Id.* at 1261.

111. *Id.* at 1244.

112. *Id.* at 1262.

113. *Id.* at 1282.

114. *Id.* at 1312–13.

115. *Id.* at 1241.

constitutional because it falls within Congress's commerce power.¹¹⁶

Subsequent to these decisions, the U.S. Courts of Appeals for the Fourth and D.C. Circuits also issued opinions regarding the constitutionality of the ACA. The Fourth Circuit declined to rule based on the Anti-Injunction Act,¹¹⁷ and the D.C. Circuit upheld the ACA's individual mandate provision.¹¹⁸ The Supreme Court has agreed to hear the appeal from the Eleventh Circuit and is slated "to decide not only whether the mandate is constitutional but also, if it is not, how much of the balance of the . . . [ACA] must fall along with it."¹¹⁹

Aside from providing a brief background, this Article does not focus on the provisions of the ACA that specifically relate to health care coverage. Rather, it examines the parts of the ACA that have an effect on existing statutes, such as the anti-kickback statute and the health care fraud statute.

First, the ACA revises the intent requirement of the anti-kickback statute by inserting into the statute a subsection (h), which states: "With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section."¹²⁰ Commentators have suggested that "[t]his new standard will impact transactions and arrangements counseling and could potentially create significant criminal and civil fraud exposure for transactions and arrangements where there is no intent to violate the statute."¹²¹ The ACA also provides that a violation of the anti-kickback statute constitutes a violation of the civil FCA.¹²² Although the ACA specifically references the civil FCA, zealous prosecutors could attempt to apply it in the criminal FCA context. Second, the ACA clarifies the health care fraud statute's intent requirement by adding to the statute a subsection (b), which states: "With respect to violations of this section,

116. *Id.* at 1365 (Marcus, J., concurring in part and dissenting in part).

117. *Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915, at *1 (4th Cir. Sept. 8, 2011).

118. *See Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir. Nov. 8, 2011).

119. Adam Liptak, *Justices to Hear Health Care Case as Race Heats Up*, N.Y. TIMES, Nov. 15, 2011, at A1.

120. Pub. L. No. 111-148, § 6402(f), 124 Stat. 119, 759 (2010) (to be codified at 42 U.S.C. § 1320a-7b(h)).

121. Kathleen McDermott et al., *New Healthcare Fraud and Abuse and Program Integrity Provisions: Let's Fasten Our Seat Belts for the Bumpy Ride*, AHLA CONNECTIONS, May 2010, at 13, available at www.healthlawyers.org/News/Connections/CurrentIssue/Documents/2010%20Features/Feature_May10.pdf.

122. Alan J. Sobol, *Staying on Top of the Issues: New Developments for White Collar Lawyers and their Clients*, ASPATORE, 2010 WL 5312568, at *1 (Dec. 2010); see also Pub. L. No. 111-148, § 6402(f), 124 Stat. 119, 759 (2010) (to be codified at 42 U.S.C. § 1320a-7b(g)) ("In addition to the penalties provided for in this section or section 1128A, a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of subchapter III of chapter 37 of title 31, United States Code.").

a person need not have actual knowledge of this section or specific intent to commit a violation of this section.”¹²³ Additionally, the ACA provides that a violation of the health care fraud statute constitutes a false claim in violation of the civil FCA¹²⁴ and amends the definition of “federal crime of health care fraud” to include violations of the anti-kickback statute, the Federal Food, Drug, and Cosmetic Act, and the Employee Retirement Income Security Act (ERISA).¹²⁵ Relatedly, the ACA amends the federal sentencing guidelines, as they relate to individuals convicted of offenses related to any federal health care program.¹²⁶ Pursuant to this amendment, the offense level for these individuals will increase between 20% and 50% if the loss involves more than a million dollars.¹²⁷ According to some commentators, “In a highly regulated industry, with a myriad of complex regulations, these provisions effectively increase exposure for a broad array of business and regulatory activities where there is no specific intent to violate the provisions of the statute.”¹²⁸

IV. THE DANGERS OF A LOWERED INTENT REQUIREMENT IN THE WHITE COLLAR AND HEALTH CARE CONTEXTS

All of the challenges to the ACA thus far have focused on the individual mandate provision. As a result, no court has evaluated the effect of the ACA’s lowering of the intent requirement pertaining to a number of health care fraud statutes and the corresponding increase in the severity of the guidelines with respect to health care fraud offenses.

A. *The Reduction or Elimination of the Mens Rea Requirement in White Collar Crime Statutes*

The ACA is only the latest statute evincing the trend of the diminution or elimination of the mens rea requirement in criminal statutes. With respect to the health care context, prior to the enactment of the ACA, the American Recovery and Reinvestment Act of 2009 (ARRA)¹²⁹ criminalized certain HIPAA violations that were committed through willful neglect, which was not defined by the statute.¹³⁰ The

123. Pub. L. No. 111-148, § 10606(b), 124 Stat. 119, 1008 (2010); *see also* 18 U.S.C. § 1347 (2006) (proscribing health care fraud).

124. *See* Pub. L. No. 111-148, § 1313(a)(6)(A), 124 Stat. 119, 185 (2010).

125. *See* Pub. L. No. 111-148, § 10606(c), 124 Stat. 119, 1008 (2010).

126. McDermott et al., *supra* note 121, at 16.

127. *Id.*

128. *Id.*

129. Pub. L. No. 111-5, 123 Stat. 115 (2009).

130. Jon A. Sale et al., *Emerging Trends in Criminal Healthcare Law Enforcement: The Patient Protection and Affordable Care Act of 2010 Reduces the Criminal Mens Rea Requirement for Healthcare Fraud and Increases Penalties Under the Federal Sentencing Guidelines*, HEALTH L., Feb. 2011, at 20.

Health Information Technology for Economic and Clinical Health Act (HITECH), which amended HIPAA and is part of ARRA,¹³¹ defined “willful neglect” as follows: “conscious, intentional failure or reckless indifference to the obligation to comply with the administrative simplification provision violated.”¹³² Thus, the relevant level of intent suggested by this term is something close to negligence, and it does not appear that an awareness of wrongdoing is required.

Concerning white collar crime statutes in general, according to a study conducted in May 2010 by the National Association of Criminal Defense Lawyers and the Heritage Foundation, from 2005 through 2006, members of Congress proposed 446 non-violent offenses with diminished mens rea requirements. Of these, thirty-six were enacted into law.¹³³ The study also noted that in a “sharp break” with the prior tradition of requiring the government to prove that the defendant acted with a guilty mind, meaning that she knew that her conduct was unlawful or was at least on notice that she could possibly be subject to criminal liability, “the recent proliferation of federal criminal laws has produced scores of criminal offenses that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize.”¹³⁴

To satisfy due process requirements, thereby also avoiding a finding of vagueness, a statute must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”¹³⁵ The Supreme Court has consistently recognized that “the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.”¹³⁶ Thus, a specific intent requirement may allow a statute to avoid being invalidated on the grounds of vagueness while the same would not be true of a general intent provision.¹³⁷

131. See Nicolas P. Terry, *Physicians and Patients Who “Friend” or “Tweet”*: Constructing a Legal Framework for Social Networking in a Highly Regulated Domain, 43 IND. L. REV. 285, 317 (2010).

132. 45 C.F.R. § 160.401 (2010).

133. BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW, at X (2010), available at [http://www.nacdl.org/public.nsf/WhiteCollar/WithoutIntent/\\$FILE/WithoutIntentReport.pdf](http://www.nacdl.org/public.nsf/WhiteCollar/WithoutIntent/$FILE/WithoutIntentReport.pdf).

134. *Id.*

135. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see also Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 356 (2005) (describing the void-for-vagueness doctrine).

136. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979).

137. *Screws v. United States*, 325 U.S. 91 (1945). The Court reinforced the notion that a specific intent requirement would serve to help prevent challenges to the application of a statute:

[W]here the punishment imposed is only for an act knowingly done with the

Recently, in *Skilling v. United States*,¹³⁸ the Court considered the argument that another significant white collar crime statute, the honest-services fraud statute,¹³⁹ was unconstitutionally vague. Section 1346 of the statute states that “[f]or the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”¹⁴⁰

With respect to the premise of the case, Jeffrey Skilling, the former chief executive officer of Enron, and other high-ranking Enron executives were alleged to have “engaged in a wide-ranging scheme to deceive the investing public, including Enron’s shareholders, . . . about the true performance of Enron’s businesses by: (a) manipulating Enron’s publicly reported financial results; and (b) making public statements and representations about Enron’s financial performance and results that were false and misleading.”¹⁴¹ Further, these individuals allegedly “enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige.”¹⁴² The first count of the indictment charged Skilling with conspiracy to commit securities and wire fraud and specifically alleged that he had sought to “depriv[e] Enron and its shareholders of the intangible right of [his] honest services.”¹⁴³ The indictment also charged Skilling with “more than 25 substantive counts of securities fraud, wire fraud, making false representations to Enron’s auditors, and insider trading.”¹⁴⁴

Following a four-month trial, a Houston jury found Skilling guilty of nineteen counts,¹⁴⁵ including one count of conspiracy to commit honest-services wire fraud.¹⁴⁶ On appeal before the Fifth Circuit,

purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

Id. at 102.

138. 130 S. Ct. 2896 (2010).

139. 18 U.S.C. § 1346 (2006).

140. *Id.*

141. *Skilling*, 130 S. Ct. at 2908 (quoting the indictment) (internal quotation marks omitted).

142. *Id.* (quoting the indictment) (internal quotation marks omitted).

143. *Id.* (quoting the indictment).

144. *Id.*

145. See Alexei Barrionuevo, *Two Enron Chiefs Are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1.

146. *Skilling*, 130 S. Ct. at 2911. The honest-services wire-fraud charge was based on 18 U.S.C. §§ 371, 1343, 1346 (2000). Section 371 states in part that if two or more persons conspire to defraud the United States or any agency thereof “and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned

Skilling raised two questions: (1) whether “pretrial publicity and community prejudice prevented him from obtaining a fair trial”; and (2) whether “the jury improperly convicted him of conspiracy to commit honest-services wire fraud.”¹⁴⁷ The Fifth Circuit answered no to both questions and affirmed Skilling’s conviction.¹⁴⁸ Skilling then appealed the Fifth Circuit’s decision, and the Supreme Court granted a writ of certiorari.¹⁴⁹

The Supreme Court agreed with the Fifth Circuit regarding the failure of Skilling’s fair trial argument.¹⁵⁰ However, it disagreed with the Fifth Circuit regarding that court’s rejection of Skilling’s honest-services argument.¹⁵¹ The Court held that Congress had not spoken clearly enough with respect to § 1346.¹⁵² It stated that, according to its precedent, the honest-services statute should be narrowly construed, rather than invalidated.¹⁵³ The Court then went on to limit the statute’s application by holding that it could apply only to “fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived.”¹⁵⁴ If § 1346 was construed to extend beyond schemes to defraud involving bribes and kickbacks, such an extension “would encounter a vagueness shoal.”¹⁵⁵ Thus, the Court vacated the Fifth Circuit’s decision in part, determining that “[b]ecause Skilling’s alleged misconduct entailed no bribe or kickback, it d[id] not fall within § 1346’s proscription.”¹⁵⁶

not more than five years, or both.” 18 U.S.C. § 371. Section 1343 provides in part that anyone who has devised “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,” and who “transmits . . . 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 five years, or both.” 18 U.S.C. § 1343. Finally, § 1346 states that “[f]or the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346.

147. *Skilling*, 130 S. Ct. at 2901.

148. *See id.* at 2912.

149. *Id.*

150. *Id.* at 2925.

151. *See id.* at 2935.

152. *Id.* at 2932; *see also* Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251, 252 (2010).

153. *Skilling*, 130 S. Ct. at 2928; *see also* U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 571 (1973) (“As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.”); *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) (noting “[t]he strong presumptive validity that attaches to an Act of Congress”).

154. *Skilling*, 130 S. Ct. at 2928.

155. *Id.* at 2907.

156. *Id.*

Similarly, in *United States v. Moore*,¹⁵⁷ the D.C. Circuit considered whether sufficient evidence supported the defendant's conviction for making a materially false statement, in violation of 18 U.S.C. § 1001(a)(2), because he signed a false name on a U.S. Postal Service delivery form.¹⁵⁸ The defendant admitted that he willfully signed a false name on the form, but argued that no rational factfinder "could have found the false name was 'material' to any matter within the jurisdiction of the federal Government."¹⁵⁹ The majority first held that a statement was material if it had a natural tendency to influence, or was "capable of influencing, either a discrete decision or any other function of the agency to which it was addressed."¹⁶⁰ It then upheld the defendant's conviction, noting that "a statement need not actually influence an agency in order to be material; it need only have 'a natural tendency to influence, or [be] capable of influencing' an agency function or decision."¹⁶¹

Judge Brett Kavanaugh filed a concurring opinion to discuss "one of the difficult issues that can arise in prosecutions under the ever-metastasizing § 1001—namely, the mens rea requirements for the statute, which by its text proscribes only those false statements that are 'knowingly and willfully' made."¹⁶² Judge Kavanaugh explained that the defendant had been tried twice for various drug offenses, but both trials ended in a hung jury.¹⁶³ Prior to the second trial, the government added a false statements charge under § 1001 based on the defendant's signing of the wrong name on a U.S. Postal Service delivery form; this form "contained no warning that an inaccurate statement might be a crime."¹⁶⁴ At trial, the defense did not ask for an instruction regarding knowledge, and the government was not required to prove that the defendant knew of the criminality of his conduct.¹⁶⁵ The defendant was convicted of the false statements charge and was sentenced to five years in prison on this count.¹⁶⁶

In light of this case, Judge Kavanaugh noted that "§ 1001 prosecutions can pose a risk of abuse and injustice" because this provision "applies to virtually any statement an individual makes to virtually any federal government official—even when the individual making the statement is not under oath (unlike in perjury cases) or

157. 612 F.3d 698 (D.C. Cir. 2010).

158. *Id.* at 699–700.

159. *Id.* at 700.

160. *Id.* at 701.

161. *Id.* at 701–02 (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)).

162. *Id.* at 702 (Kavanaugh, J., concurring).

163. *See id.*

164. *Id.* at 702–03.

165. *Id.* at 703.

166. *Id.*

otherwise aware that criminal punishment can result from a false statement.”¹⁶⁷ Judge Kavanaugh therefore argued that requiring “proof that the defendant knew that making the false statement would be a crime” could “mitigate the risk of abuse and unfair lack of notice in prosecutions under § 1001 and other regulatory statutes.”¹⁶⁸ In doing so, Judge Kavanaugh relied on the Supreme Court’s opinion in *Bryan v. United States*¹⁶⁹ and the Court’s subsequent decisions on point.¹⁷⁰ Nevertheless, Judge Kavanaugh agreed with the majority’s decision affirming the defendant’s conviction because the defendant never argued “that the term ‘willfully’ in § 1001 requires proof of the defendant’s knowledge of the law, and he did not challenge the jury instructions on that basis.”¹⁷¹ Judge Kavanaugh cautioned, however, that where the defendant raises the issue, it is likely that the district court would have to give “a willfulness instruction that requires proof that the defendant knew h[er] conduct was a crime,” and that, in other cases involving § 1001, where the government is unable to prove that the defendant knew of the unlawfulness of her conduct, “it would seem inappropriate and contrary to § 1001’s statutory text to impose criminal punishment.”¹⁷²

Additionally, in *Flores-Figueroa v. United States*,¹⁷³ the Court considered whether a federal criminal statute forbidding “[a]ggravated identity theft,” which imposed “a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes *if, during (or in relation to) the commission of those other crimes, the offender ‘knowingly transferr[ed], possesse[d], or use[d], without lawful authority, a means of identification of another person,’*” required the government to show that the defendant knew that the “means of identification” belonged to “another person.”¹⁷⁴ The defendant admitted that he had intended to obtain phony identification numbers, but denied

167. *Id.*; see also *United States v. Yermian*, 468 U.S. 63, 82 (1984) (Rehnquist, J., dissenting) (stating that § 1001 can be used to punish “the most casual false statements so long as they turned out, unbeknownst to their maker, to be material to some federal agency function . . . [making] ‘a surprisingly broad range of unremarkable conduct a violation of federal law’” (quoting *Williams v. United States*, 458 U.S. 279, 286 (1982))).

168. *Moore*, 612 F.3d at 703 (Kavanaugh, J., concurring).

169. See *supra* note 80 and accompanying text.

170. See *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 n.9 (2007) (“[W]e have consistently held that a defendant cannot harbor such criminal intent unless he acted with knowledge that his conduct was unlawful.”) (internal quotation marks omitted); *Dixon v. United States*, 548 U.S. 1, 5 (2006) (holding that the term “willfully” “requires a defendant to have acted with knowledge that his conduct was unlawful”) (internal quotation marks omitted).

171. *Moore*, 612 F.3d at 704 (Kavanaugh, J., concurring).

172. *Id.*

173. 129 S. Ct. 1886 (2009).

174. *Id.* at 1888 (quoting 18 U.S.C. § 1028A(a)(1) (2006)) (internal quotation marks omitted).

having knowledge that the numbers actually belonged to another person.¹⁷⁵ The Court agreed with the defendant and held that § 1028A(a)(1) required the government to prove “that the defendant knew that the means of identification at issue belonged to another person.”¹⁷⁶ This holding was premised on the basic rules of grammar and the most natural meaning of the statute’s plain language.¹⁷⁷ Moreover, Justice Samuel Alito pointed out in his concurring opinion that when interpreting a criminal statute like this one, “it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense, but it must be recognized that there are instances in which context may well rebut that presumption.”¹⁷⁸ In this case, Justice Alito pointed out that the government had not rebutted this presumption because it had “not pointed to contextual features that warrant[ed] interpreting [the aggravated identity theft statute] in a similar way” as the other statutes where the courts had held that the government did not need to prove the “knowingly” intent as to every element of the crime.¹⁷⁹

B. *The Constitutionality of the ACA’s Provisions Relating to Mens Rea and Sentencing*

The ACA’s clarification that health care fraud is a general intent crime greatly favors the government, which has shown an increased interest in pursuing this and other health care-related offenses.¹⁸⁰ At the

175. *See id.* at 1889.

176. *Id.* at 1894.

177. *See id.* at 1890–94.

178. *Id.* at 1895 (Alito, J., concurring).

179. *Id.* at 1896.

180. From 2008 until 2010, the government has been increasing the number of new criminal health care fraud investigations that it has opened. In 2008, for example, “U.S. Attorneys’ Offices opened 957 new criminal health care fraud investigations involving 1,641 potential defendants. Federal prosecutors had 1,600 health care fraud criminal investigations pending, involving 2,580 potential defendants, and filed criminal charges in 502 cases involving 797 defendants.” THE DEP’T OF HEALTH AND HUMAN SERVICES AND THE DEP’T OF JUSTICE HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM, ANNUAL REPORT FOR FY 2008, at 1 (2009), available at <http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2008.pdf>. Additionally, “the Department of Justice (DOJ) opened 843 new civil health care fraud investigations and had 1,311 civil health care fraud matters pending.” *Id.* By contrast, in 2010, the DOJ “opened 1,116 new criminal health care fraud investigations involving 2,095 potential defendants. Federal prosecutors had 1,787 health care fraud criminal investigations pending, involving 2,977 potential defendants, and filed criminal charges in 488 cases involving 931 defendants.” THE DEP’T OF HEALTH AND HUMAN SERVICES AND THE DEP’T OF JUSTICE HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM, ANNUAL REPORT FOR FISCAL YEAR 2010, at 1 (2011), available at <http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2010.pdf>. Further, the “DOJ opened 942 new civil health care fraud investigations and had 1,290 civil health care fraud matters pending at the end of the fiscal year.” *Id.*

same time, the ACA has increased the sentences for these offenses. Several aspects of the changes brought about by the ACA are troubling. For example, it has overturned years of precedent with one fell swoop. Moreover, it has potentially exacerbated the vagueness of statutes relating to health care crimes.

The constitutionality of the lowered intent standard in the anti-kickback and health care fraud statutes will be analyzed in much the same way as the constitutionality of the honest services fraud statute, the FSA, and the aggravated identity theft statute. Although Congress appears to have “spoken clearly” in this case, the general intent requirement, when applied to the anti-kickback and health care fraud statutes, nevertheless leaves the statutes open to attack on charges of vagueness.

Broadly speaking, the principles advanced in the ACA, specifically the reduction of the culpability requirement for several white collar crime statutes, may “undermine the moral basis of the criminal law.”¹⁸¹ First, as some scholars have noted, this development “denies fair notice, invites arbitrary and discriminatory enforcement, and violates the separation of powers principle that has traditionally denied federal courts the power to make common law crimes.”¹⁸² As the Supreme Court held in *Lanzetta v. New Jersey*,¹⁸³ “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”¹⁸⁴ Additionally, in *Grayned v. City of Rockford*,¹⁸⁵ the Court reasoned that

because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague

181. Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1558 (1997); see also Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 49 (1995) (asserting that “the normalizing power of the criminal law is enhanced when the law’s meaning can be easily ascertained” and that when courts are “satisfied that a criminal statute overcomes due process hurdles posed by allegations of vagueness and overbreadth,” they “will feel less compelled to incorporate gross generalizations about ‘traditional innocence,’ and the precise facts that are likely to be understood as putting average people ‘on notice’ when the fundamental question of legislative intent can be resolved by simpler means”).

182. Coffee, *supra* note 13, at 207.

183. 306 U.S. 451 (1939).

184. *Id.* at 453.

185. 408 U.S. 104 (1972).

laws may trap the innocent by not providing a fair warning.¹⁸⁶

Thus, persons should not be prosecuted if the statute allegedly proscribing their actions does not “give fair warning of the conduct that it makes a crime.”¹⁸⁷

Further, many scholars argue that there should be a close link between “the criminal law and behavior deemed morally culpable by the general community” because a substantial deviation between these two factors could threaten the legitimacy of the criminal law.¹⁸⁸ To that end, the government must prove that the defendant had both an “evil-meaning mind” and an “evil-doing hand.”¹⁸⁹ One of the main functions served by this requirement is that persons who are reasonably mistaken about, or do not know, the law are not (unduly) punished. While it is difficult to argue that a person who has killed someone did not know that she was violating the law, it is easy to understand that a person who was fishing in a local lake without a license might not have known that she was committing a crime.¹⁹⁰ When a statute—like the one criminalizing fishing without a license—prohibits conduct that a reasonable person would not know is unlawful, the mens rea requirement must compensate for the lack of fair notice. A heightened mens rea standard will ensure that only the person who knew that she was violating the statute would be punished.

Additionally, a vague statute, according to some commentators, can be considered a “de facto delegation[] of criminalization authority to the courts” because courts must “provide the specificity the legislature has not.”¹⁹¹ This delegation of authority is problematic in several respects. First, because common law crimes typically do not provide fair notice,¹⁹² which reduces the likelihood of compliance and thereby diminishes the deterrent effect of the crime,¹⁹³ most states have

186. *Id.* at 108.

187. *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964).

188. *See Coffee*, *supra* note 13, at 198.

189. *Morrisette v. United States*, 342 U.S. 246, 251 (1952); *see also* David C. Gray, *Extraordinary Justice*, 62 ALA. L. REV. 55, 59 (2010).

190. *Cf.* Donald Braman et al., *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1548–49 (2010) (describing “moral” wrongdoing, such as “hitting, stealing, or refusing to share an abundant good, for example” and conventional wrongdoing, such as “wearing pajamas to school or work, swearing, or eating lunch while standing up, for example” and comparing the distinction between these terms to “the legal distinction between acts that are traditionally described in legal parlance as mala in se and mala prohibita”).

191. *Robinson*, *supra* note 135, at 365.

192. *Id.* at 340; *see also* *McBoyle v. United States*, 283 U.S. 25, 25, 27 (1931) (reversing a conviction because the defendant did not have adequate notice that the term “motor vehicle” included airplanes).

193. *See Robinson*, *supra* note 135, at 340.

abolished common law crimes¹⁹⁴ and federal law does not recognize them.¹⁹⁵ Punishment for common law crimes can also be inconsistently applied due to their imprecision, leading to a lack of uniformity in the law and allowing for potential abuses of judicial discretion.¹⁹⁶ Second, there is little need for courts to create law, given that this sphere is well-controlled by the legislature. Third, the legislature is the preferred means of law creation, as opposed to the courts, because, at least under the traditional view, “legislatures . . . faithfully represent popular norms, and hence accurately define the universe of serious norm-breakers, while prudish old judges seek to impose their unrepresentative values on an unfortunate population.”¹⁹⁷ Moreover, because the legislative branch is “most directly accountable to the people, only the legislature [can] validate the surrender of individual freedom necessary to [the]

194. *See id.* at 339.

195. *Liparota v. United States*, 471 U.S. 419, 424 (1985) (“The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.” (citing *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812))).

196. *See Robinson*, *supra* note 135, at 341; *see also Smith v. Goguen*, 415 U.S. 566, 575 (1974) (stating that vague statutory language “allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law”); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”); *Freedman v. Texaco Marine Servs., Inc.*, 882 F. Supp. 580 (E.D. Tex. 1995). The court explained the need for uniformity in legal terminology as follows:

[W]hen the language being construed is subject to only one plausible interpretation or “fair reading,” uniformity of application and unanticipated costs will dwindle in significance. However, when the language is vague and subject to many reasonable interpretations, uniformity of application and the unanticipated costs associated with each interpretation will become more telling.

Id. at 583–84; *see also* Brian C. Harms, *Redefining “Crimes of Moral Turpitude”: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 269–70 (2001) (“Because of concerns for lack of notice and uniformity, many people have raised challenges to the common law approach to defining ‘crimes involving moral turpitude.’”); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 201, 214 (1985) (highlighting “the potential for arbitrary discriminatory enforcement of the penal law and the resort to legal formalism as a constraint against unbridled discretion” and noting that “[t]he risk involved is that judicial particularization of the broad rubrics of common-law authority will be too ‘subjective,’ too closely grounded in the facts of the case at hand, [and] insufficiently abstracted from the personal characteristics of the individual defendant”).

197. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 576 (2001); *see also United States v. Bass*, 404 U.S. 336, 348 (1971) (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”).

formation of the social contract.”¹⁹⁸

Finally, vague criminal statutes may fail to deter criminal activity.¹⁹⁹ Specifically, as scholars have pointed out, “[w]hen the law is unclear, persons who are considering some action may not realize that they are in danger of violating criminal laws. In those circumstances, people do not stop to weigh the benefit of the conduct against the risk of being caught and punished.”²⁰⁰ Vagueness is particularly detrimental to white collar crime statutes, because conduct criminalized by these statutes “is often based on ethical lapses, betrayals of trust, and deceptions that are not always [understood to be] crimes.”²⁰¹ Conversely, vague laws can over-deter by inhibiting persons from performing perfectly legal acts.²⁰² As Justice Thurgood Marshall pointed out, in the First Amendment context, “When one must guess what conduct or utterances may lose him his position, one necessarily will ‘steer far wider of the unlawful zone’ For ‘[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions.’”²⁰³

The ACA creates problems for defendants not only in the guilt or innocence phase, but also in the penalty phase of the judicial process. It contains congressional mandates directing the U.S. Sentencing Commission to issue guidelines containing more severe penalties for health care fraud.²⁰⁴ Considered on their own, the use of these mandates is problematic, as they undermine the Commission’s independent rulemaking authority to criminalize certain conduct and to impose minimum and maximum sentences for a variety of offenses.²⁰⁵ As the

198. Jeffries, *supra* note 196, at 202.

199. Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 HOUS. L. REV. 591, 606 (2006).

200. *Id.*

201. *Id.*

202. See Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1539 (2005) (“Uncertainty breeds caution and restraint. . . . [I]n some contexts uncertainty can over-deter useful activities.”). See generally John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984) (discussing the impact of uncertain legal standards).

203. *Arnett v. Kennedy*, 416 U.S. 134, 230 (1974) (Marshall, J., dissenting) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

204. See Pub. L. No. 111-148, § 10606(a)(2)(B), 124 Stat. 119, 1007 (2010).

205. As the Supreme Court has noted, “the Commission fills an important institutional role: It has the capacity courts lack to ‘base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.’” *Kimbrough v. United States*, 552 U.S. 85, 108–09 (2007) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (2007) (McConnell, J., concurring); see also *Rita v. United States*, 551 U.S. 338, 350 (2007). The Court articulated the role the Commission would play:

Supreme Court held in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁰⁶ when Congress explicitly leaves a gap for an agency to fill, “there is an express delegation of authority to the agency.”²⁰⁷

The mandates direct the Commission to amend the guidelines and policy statements that apply to individuals who have been convicted of federal health care offenses “involving [g]overnment health care programs to provide that the aggregate dollar amount of fraudulent bills submitted to the [g]overnment health care program shall constitute prima facie evidence of the amount of the intended loss by the defendant[.]”²⁰⁸ Further, the mandates require the Commission to amend the guidelines by instituting a scheme of offense level enhancements based upon the amount of loss involved in the federal health care fraud offense.²⁰⁹ A two-level enhancement would be imposed if the loss is between one and seven million dollars, a three-level increase would be imposed if the loss is between seven and twenty million dollars, and a four-level increase would be imposed if the loss is not less than twenty million dollars.²¹⁰

Acting in accordance with the ACA, the Commission published a notice of its request for public comment²¹¹ to implement the ACA’s directives regarding health care fraud offenses.²¹² In giving effect to the ACA’s directives, the Commission proposed adding two provisions to § 2B1.1, both of which would apply to cases “in which the defendant [was] convicted of a Federal health care offense involving a Government health care program.”²¹³ The first provision consists of a set of sentence enhancements that would apply depending on the

The Commission’s work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. . . . The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Id.; see also *United States v. Booker*, 543 U.S. 220, 264 (2005) (“[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”).

206. 467 U.S. 837 (1984).

207. *Id.* at 843–44.

208. U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES 1 (2011), available at http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_2_A-C.pdf.

209. *See id.*

210. *See id.*

211. Sentencing Guidelines for United States Courts, 75 Fed. Reg. 41,927, 41,927 (July 19, 2010).

212. *Id.* at 41,928.

213. *See* U.S. SENTENCING COMM’N, *supra* note 208, at 2.

amount of loss, with the most significant difference from the directive being that “tiers of the enhancement [would] apply to loss amounts ‘more than’ the specified dollar amounts rather than to loss amounts ‘not less than’ the specified dollar amounts to ‘ensure reasonable consistency’ as required by the directive[s].”²¹⁴ The second provision consists of a new special rule for determining intended loss in these types of cases. Pursuant to this rule, “the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted.”²¹⁵ Additionally, the proposed amendment defines the terms “Federal health care offense” and “Government health care program” in the commentary to § 2B1.1.²¹⁶ “Federal health care offense” is defined in accordance with 18 U.S.C. § 24 to mean “a violation of, or a criminal conspiracy to violate (1) section 669, 1035, 1347, or 1518 of this title”; or “(2) section 287, 371, 664, 666, 1001, 1027, 1341, 1343, or 1954 of this title if the violation or conspiracy relates to a health care benefit program.”²¹⁷

“Government health care program,” in this context, means “any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole, or in part, by federal or state government.”²¹⁸ Examples of such programs, according to the proposed amendment, include Medicare, Medicaid, and the Children’s Health Insurance Program.²¹⁹

Further, the proposed amendment changes the wording of Application Note 3(A) to § 3B1.2 (Mitigating Role) to state that a defendant who is accountable “for a loss amount under § 2B1.1 that greatly exceeds the defendant’s personal gain from a fraud offense, and who had limited knowledge of the scope of the scheme” can still be eligible for a mitigating role adjustment.²²⁰ Finally, the proposed amendment establishes that a person who commits the crime of making a false statement in connection with the marketing or sale of multiple employer welfare arrangements under ERISA, a new offense created by the ACA, can be imprisoned for a term of no more than ten years.²²¹

The proposed amendment raises several concerns. First, its treatment of the terms “loss” and “relevant conduct” is inconsistent with

214. *Id.* at 1.

215. *Id.* at 2.

216. *See id.*

217. 18 U.S.C. § 24(a)(1)-(2) (2006).

218. U.S. SENTENCING COMM’N, *supra* note 208, at 2.

219. *See id.*

220. *Id.*

221. *See id.*

that used by the guidelines. Generally, loss and relevant conduct are relegated to the province of judicial determination and involve an in-depth factual inquiry.²²² As a post-*Booker v. United States*²²³ case stated, “The Guidelines do not present a single universal method for loss calculation under § 2B1.1—nor could they, given the fact-intensive and individualized nature of the inquiry.”²²⁴ However, the ACA’s directive states that prima facie evidence of the amount of intended loss is “the aggregate dollar amount of fraudulent bills submitted to the Government health care program.”²²⁵ Thus, it appears that the ACA is attempting to circumvent the traditional means of determining loss and relevant conduct through its directives. By way of a remedy, one commentator has suggested that the best practice would be to recognize that programs like Medicare and Medicaid pay only 80% of the amount billed (or the amount of the intended loss under the ACA),²²⁶ and that the fraud guidelines provide “myriad credits, offsets, and exclusions from the loss calculus.”²²⁷ Otherwise, when they go into effect, the new guidelines will likely lead to significant sentencing disparities and resulting litigation.²²⁸

222. See *United States v. Jones*, 641 F.3d 706, 712 (6th Cir. 2011) (“When applying section 2B1.1(b)(1) to determine the amount of loss, the district court ‘need only make a reasonable estimate’ of the amount. The United States’s burden is to prove the amount of loss by a preponderance of the evidence.”) (citations omitted); *United States v. Isiwele*, 635 F.3d 196, 203 (5th Cir. 2011) (noting the need for a “fact-specific, case-by-case inquiry into the defendant’s intent in determining ‘intended loss’ for sentencing purposes” in the health care fraud context); *United States v. Moon*, 513 F.3d 527, 541 (6th Cir. 2008) (“Thus, where provided by the Guidelines, a district court may examine relevant conduct to determine the applicable Guidelines range, even if not captured as an element of the offense of conviction.”); *United States v. Miller*, 316 F.3d 495, 504 (4th Cir. 2003) (holding that the amount fraudulently billed to Medicare or Medicaid is “prima facie evidence of the amount of loss [the defendant] intended to cause,” but “the amount billed does not constitute conclusive evidence of intended loss; the parties may introduce additional evidence to suggest that the amount billed either exaggerates or understates the billing party’s intent”).

223. 543 U.S. 220 (2005). *Booker* held that the guidelines were not binding on federal courts. *Id.* at 233–34; see also Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CAL. L. REV. 47, 90 (2011).

224. *United States v. Zolp*, 479 F.3d 715, 718 (9th Cir. 2007).

225. See U.S. SENTENCING COMM’N, *supra* note 208, at 2.

226. See *United States v. Nachamie*, 121 F. Supp. 2d 285, 293 (S.D.N.Y. 2000) (“The intended loss figure is the capped amount that Medicare typically pays per procedure code, reduced by 20%.”).

227. Sale et al., *supra* note 130, at 23 (citation omitted).

228. See *Cunningham v. California*, 549 U.S. 270 (2007). The Court set out a non-exhaustive list of requirements that sentencing courts must consider:

Under the post-*Booker* federal sentencing system, . . . sentencing courts must take account of the general sentencing goals set forth by Congress, including avoiding unwarranted sentencing disparities, providing restitution to victims, reflecting the seriousness of the offense, promoting respect for the law,

The sentencing aspects of the ACA also raise broad concerns. White collar offenders are generally less likely to recidivate.²²⁹ Thus, the ACA's focus on retributive sentencing undermines the traditional sentencing paradigm, which balances a number of sentencing purposes,²³⁰ and may create unwarranted disparities between white

providing just punishment, affording adequate deterrence, protecting the public, and effectively providing the defendant with needed educational or vocational training and medical care.

Id. at 300 (Alito, J., dissenting) (citations omitted); *see also* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1319–20 n.139 (2006), explaining that the

most notable effort to impose consistency on the litigation process is reflected in the passage of the Sentencing Reform Act of 1984, which required federal sentencing judges to consider the “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” and required judges to follow, in most cases, the Sentencing Guidelines established by the United States Sentencing Commission, . . .

but that the Supreme Court subsequently held that the Guidelines were “unconstitutional because they caused sentences to be increased on the basis of offense characteristics that were not found by a jury beyond reasonable doubt, and . . . that the Guidelines could not be treated as mandatory.” *Id.* (citations omitted); *see also* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1326–27 (2005) (footnotes omitted). It has yet to be determined whether the implementation of the guidelines has aided in furthering uniformity among the district courts or has in fact increased sentencing disparities:

The available evidence suggests that the guidelines have succeeded in reducing judge-to-judge disparity within judicial districts. On the other hand, researchers have found significant disparities between sentences imposed on similarly situated defendants in different districts and different regions of the country, and interdistrict disparities appear to have grown larger in the guidelines era, particularly in drug cases. The question of whether the guidelines reduced or exacerbated racial disparities in federal sentencing remains unresolved.

Id.

229. *See* Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 758 (2007) (“White collar offenders, especially those coming from the corporate arena, are usually first offenders. Additionally, there is little likelihood of recidivism. The individual seldom can resume a position of power that would allow for continued criminality of this nature.”); *see also* U.S. SENTENCING COMM’N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 30 (2004), available at http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf (stating that the recidivism rate of persons convicted of fraud offenses is lower than that of persons convicted of drug trafficking, larceny, firearms, robbery, or any other offenses).

230. *See* Gall v. United States, 552 U.S. 38, 50 n.6 (2007) (listing the factors that a district court must consider in sentencing a defendant, which include: (1) “the nature and circumstances of the offense and the history and characteristics of the defendant”; (2) the need for the sentence

collar defendants on a nation-wide basis.²³¹

Given the problems associated with the ACA provisions described above, as well as the increase in litigation concerning purportedly vague white collar crime statutes, it is likely that the aspects of the ACA touching on white collar crime will also come under fire. To avoid this result, Congress should overturn, or return to their previous state, those sections of the ACA that lower the intent requirements of the anti-kickback and health care fraud statutes, as well as those that amend the federal sentencing guidelines as they pertain to individuals convicted of offenses related to any federal health care program.

CONCLUSION

Although federal courts have been preoccupied with the other provisions of the ACA, particularly the individual mandate requirement, there has been no examination of the provisions of the ACA that have lowered the intent requirement for several health care fraud statutes from specific intent to general intent and that have changed the sentencing guidelines as they relate to persons violating the relevant health care fraud laws. These provisions are consistent with the overall trend toward general intent, rather than specific intent, as a prerequisite to a finding of a violation of a particular statute proscribing a white collar crime. This Article describes the so-called “intent revolution” in the context of several white collar statutes, including those affected by the ACA, evaluates the pitfalls of a lowered intent requirement in white collar crime statutes, and calls upon Congress to overturn the portions of the ACA discussed herein.

(a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”; (b) “to afford adequate deterrence to criminal conduct”; (c) “to protect the public from further crimes of the defendant”; and (d) “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in [the] most effective manner”; (3) “the need to avoid unwarranted sentence disparities”; and (4) “the need to provide restitution to any victim” (quoting 18 U.S.C. § 3553 (2010) (internal quotation marks omitted))).

231. See James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173, 180 n.36 (2010) (“In considering the direction to avoid unwarranted disparities under 28 U.S.C. § 3353(a)(6), sentencing courts principally consider national disparities, not intra-case disparities.”).

