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Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses

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BRINGING COHERENCE TO MENS REA ANALYSIS FOR SECURITIES-RELATED OFFENSES

MICHAEL L. SEIGEL*

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I. INTRODUCTION

Over half a century ago, the drafters of the Model Penal Code (MPC) demonstrated revolutionary lucidity when tackling the centuries-old problem of defining and applying the principle of mens rea in the criminal arena.\(^1\) Prior to that moment in legal history, judges and academics certainly understood that mens rea—that is, a culpable mental state—is a necessary component of moral blameworthiness, and thus, a requirement for criminal punishment.\(^2\) Exactly how to describe mens rea, however, remained elusive. Early legislatures and common-law courts often used terms like "malicious,"\(^3\) "wicked,"\(^4\) or "depravity of the will"\(^5\) to describe the requisite intent of particular crimes. Later, lawmakers and courts started to use more modern terminology—such as "intentional,"\(^6\) "reckless disregard,"\(^7\) and "willful"\(^8\)—to describe mens rea. In the United States, some jurisdictions, including the federal courts, developed a system that divided crimes into two broad mens rea categories—those requiring specific intent and those requiring merely general intent—in an effort to solve most mens rea-related interpretive issues.\(^9\) None of these developments, however, have made a significant


\(^2\) See, e.g., Dane C. Miller et al., Can Probation Be Revoked When Probationers Do Not Willfully Violate the Terms or Conditions of Probation?, FED. PROBATION, June 1999, at 23, 23 (noting that the concept of mens rea is centuries old).

\(^3\) See Regina v. Cunningham, 2 Q.B. 396 (Crim. App. 1957) (involving a statute that used the term "maliciously").

\(^4\) See id. at 396-97 (reporting that the trial court interpreted "malicious" to mean "wicked").

\(^5\) WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 21 (3d ed. 1769).


\(^7\) See, e.g., id. § 33(a) (making it a crime to place an explosive substance in a motor vehicle with "reckless disregard" for the safety of human life).

\(^8\) See, e.g., id. § 1350(c) (making it a crime to "willfully" certify a noncompliant report).

\(^9\) See United States v. Nix, 501 F.2d 516, 517-18 (7th Cir. 1974) (indicating that this division is the "traditional analysis" for a federal case).
contribution to clearing up the massive confusion surrounding these concepts.10

Early courts also recognized the difference between a defendant’s mens rea concerning the circumstances surrounding the defendant’s actions and the defendant’s mens rea regarding whether those actions constitute a crime, thus establishing the doctrines of mistake of fact and mistake of law. In general, they held that a reasonable mistake of fact could be a defense to criminal charges,11 while “ignorance or mistake of law [was] not a defense.”12 Courts, however, have neither consistently applied nor fully developed these doctrines;13 confusion on the precise distinction between the two has reigned.14

In what can only be described as a rare moment of collective genius, the MPC drafters cut through this legacy of incoherence.15 Their historic accomplishment occurred on several discrete fronts: First, the drafters developed a system of four levels of mens rea designed to replace all other mens rea terms and to reflect the varying blameworthiness of the criminal actor.16 Second, and equally important, they recognized that an element of mens rea effectively “attaches” to each of the other material elements of any given crime—the actus rei and attendant circumstances—and that the requisite mens rea for each of these elements may in fact be different.17 Third, the MPC drafters precisely articulated the distinction between mistake of fact and mistake of law, and clarified the relationship between these concepts and mens rea.18 Finally, they established a set of default rules for determining the correct mens rea element to apply when specific mens rea terms are missing from a statute.19

13. See WAYNE R. LAFAVE, CRIMINAL LAW 283-85 (4th ed. 2003). For example, many courts have failed to understand that the reasonableness requirement—often attached to mistake-of-fact defenses—makes sense only if the requisite mens rea is negligence. See id. at 284.
14. See id. at 282-83.
15. This Article is not the first to applaud the MPC drafters for their contributions to this area. See, e.g., Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 STAN. L. REV. 681, 685 (1983).
16. MODEL PENAL CODE § 2.02(2) (1962).
17. See id. § 2.02(1).
18. See id. §§ 2.02(9), 2.04(1).
19. See id. § 2.02(3)-(5).
The MPC's "all new, all differentiated, mens rea scheme was widely hailed as a significant advance, and rightly so."20 In the forty years following its inception, the MPC had a revolutionary influence on the development of American criminal law.21 As of 1983, the MPC had impacted the revision of the criminal codes in thirty-six states;22 by 2002, that number had risen to roughly forty.23 In addition, just about every law school's criminal-law course uses the MPC and its mens rea provisions as a central teaching tool.24 Despite all this, many legal actors inexplicably continue to ignore the MPC's insight into mens rea doctrine. A half century after the appearance of the MPC, there is simply no excuse for courts, legislatures, and scholars to waste their time using meaningless mens rea terms such as "willful";25 to employ the simplistic but ineffective distinction between specific- and general-intent crimes;26 to fail to see that mens rea questions are element-specific;27 or to misapprehend mistake-of-law questions for ones presenting mistake of fact.28

Participants in the federal arena are among the actors who have completely disregarded the perspicacity of the MPC.29 From Congress

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23. DUBBER, supra note 20, at 6.
27. See Robinson & Grall, supra note 15, at 683-85 (noting that, although most jurisdictions have adopted some form of element analysis, vestiges of offense analysis remain); infra notes 88-94 and accompanying text (discussing the consistent use of offense analysis).
28. See infra text accompanying notes 194, 219-29 (illustrating the frequent confusion of these types of mistakes).
29. Although there have been many attempts to bring about a wholesale revision of the federal criminal code based in part on the MPC, none have succeeded. See Ronald L. Gainer, Federal Criminal Code Reform: Past and Future, 2 BUFF. CRIM. L. REV. 45, 92-139 (1998). Some believe that this failure is not necessarily a bad thing.
and the Supreme Court on down, incoherence remains the name of the game.\textsuperscript{30} Nowhere is this problem more pronounced than in the interpretation of securities-related crimes. There are several reasons for this: First, in the securities realm, the distinction between unlawful conduct that is subject to private action or civil enforcement by the Securities and Exchange Commission (SEC) and unlawful conduct that constitutes a crime largely depends on whether the perpetrator acted "willfully."\textsuperscript{31} Given the vast array and complex nature of securities-related offenses, and the infinite variety of potentially criminal fact patterns, a lot rests on the interpretation of this one word.\textsuperscript{32} Second, securities-related crimes often straddle the line between malum in se and malum prohibitum, making mistake-of-law defenses potentially germane. Courts look to the term "willful" to decide the viability of these defenses as well.\textsuperscript{33} Third, civil securities-related cases, including those interpreting the term "willful" as it appears in the civil context, are generally considered precedent for criminal securities-related cases.\textsuperscript{34} Not surprisingly, all of this has led to multiple and conflicting interpretations of this lone and humble word.


\textsuperscript{30} \textit{See infra} text accompanying notes 211-72. This is not to say that the federal courts do not look for help from the MPC and its mens rea concepts in deciding cases. \textit{See} DUBBER, \textit{supra} note 20, at 7. The point is that ad hoc use of the MPC as an occasional source of persuasive authority does not result in coherence.

\textsuperscript{31} Section 24 of the Securities Act of 1933 (Securities Act) provides that any person who "willfully violates" any of its provisions, or any SEC rule or regulation promulgated thereunder, or who willfully makes a misstatement or omission of a material fact in any registration statement filed under the Securities Act, is guilty of a felony. 15 U.S.C. § 77x (2000). Section 32(a) of the Securities Exchange Act of 1934 (Exchange Act) likewise makes it a felony to willfully violate any of its provisions, or any SEC rule or regulation promulgated thereunder, or to willfully and knowingly make any false or misleading material misstatement in any application, report, or document required to be filed under the Exchange Act. \textit{Id.} § 78ff(a) (2000 & Supp. II 2004).

\textsuperscript{32} \textit{See infra} text accompanying notes 275-304.

\textsuperscript{33} \textit{See, e.g.}, United States v. Brown, 578 F.2d 1280, 183-85 (9th Cir. 1978) (determining that a defendant who engaged in fraud cannot use a mistake-of-law defense regarding whether the instrumentalsities at issue were "securities"). It turns out that there is more than one level of mistake-of-law defense, a critical point one misses unless one hones in on the mistake of law at issue and examines this defense with great care. \textit{See infra} notes 131-34 and accompanying text.

\textsuperscript{34} \textit{See} Margaret V. Sachs, \textit{Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934}, 2001 U. ILL. L. REV. 1025, 1041-42 (describing the Supreme Court's use of civil and criminal securities cases as precedent for each other).
Additionally, because the bulk of securities regulation is civil, most securities-law experts are not experts in criminal law. They recognize, of course, that “willfulness” has different meanings in different circumstances, and also that courts divide as to its proper interpretation under the same circumstance. Beyond this, however, securities-law academics and other commentators have not done much more than set out simple descriptions of the status quo or make relatively unsophisticated arguments that willfulness should have some particular meaning, usually taken from case law—such as acting “not merely ‘voluntarily’ but with a bad purpose” or acting with knowledge of the physical consequences but without knowingly breaking the law. They have, in addition, staked out different positions as to whether it should have (or has) the same or different meanings in civil and criminal usage. All told, none of these individuals have indicated any understanding of the fundamentals of mens rea under the MPC; and, certainly, none have attempted to apply these fundamentals to bring coherence to this extremely important area of the law.

35. See Eric L. Talley, Cataclysmic Liability Risk Among Big Four Auditors, 106 COLUM. L. REV. 1641, 1662 (2006) (“Although most of the public enforcement of federal securities laws is done through the civil and administrative powers of the SEC, federal law allows for broad criminal enforcement of the Securities and Exchange Acts.”).

36. See infra Part III.B.


40. Compare, e.g., Sachs, supra note 34, at 1025 (arguing for the “core principle”—that prohibitions in hybrid statutes should be limited to one interpretation), with Jed S. Rakoff & Howard W. Goldstein, RICO Civil and Criminal Law and Strategy § 7.07[3] (1989 & Supp. 2006) (concluding that there is a presumption in hybrid statutes that Congress intends to require a mens rea element for civil actions but not for criminal ones).
As shocking as it may seem to criminal-law aficionados, this Article represents the very first effort to bring coherence to mens rea analysis for securities-related offenses. It rests on the underlying principle that the general methodology for defining and applying mens rea set out by the MPC is not a matter of preference, ideology, or interpretive choice; rather, it is a matter of logical necessity and essential to a clear understanding of the choices that face legislatures and courts contending with securities-related crimes. Part II of the Article sets out MPC methodology in some detail. Part III describes the present state of mens rea analysis (or lack thereof) in the securities arena. Part IV applies the methodology of Part II to the problems identified in Part III, demonstrating the potential for coherence in this area of the law.

II. UNDERSTANDING MENS REA

One of the foundational principles of the American criminal-justice system is that punishment is only appropriate if a person acts voluntarily (actus reus) and with some level of intention (mens rea) to bring about or risk the harm that a penal statute sought to prevent.41 The reasons for this principle stem from the two traditional purposes of punishment: retribution and deterrence.42 Retribution is the deontological notion that a person who commits a crime deserves to be punished.43 The converse of this proposition—employing retribution as a limiting principle—is equally true. A person who fails to act voluntarily (such as by way of reflex or subject to duress) simply should not be punished.44 Likewise, a person who has no level of intention (such as one whose mental illness prevents comprehension of reality) merits treatment, not punishment.45 Fundamental fairness dictates these results.

Deterrence involves the prevention of future criminal activity by the defendant (specific deterrence) and others (general deterrence).46 A

41. See LAFAVE, supra note 13, at 239, 243.
42. See Doe v. Miller, 405 F.3d 700, 720 (8th Cir. 2005) (noting that retribution and deterrence are the “traditional aims of punishment”).
44. See MODEL PENAL CODE § 2.01 (1962) (requiring a voluntary act for criminal liability).
46. The father of deterrence theory is Jeremy Bentham. See Jeremy Bentham, Principles of Penal Law, in 1 THE WORKS OF JEREMY BENTHAM 396, 402 (John
person who causes harm without any level of mens rea whatsoever—that is, a person who has exercised all due care—cannot be deterred from acting in the future by being punished now. Because punishment would be futile, imposing it would undermine confidence in and respect for the criminal law.

Accepting the necessity of mens rea as a prerequisite to finding an individual guilty of a crime and pinpointing exactly what is meant by mens rea, however, are two very different things. Courts and commentators long ago recognized the importance of mens rea, but they were extremely slow in peeling away its layers and comprehending its intricacies. It was not until the American Law Institute published the first draft of the MPC in 1955, which intelligently sorted out mens rea issues, that significant progress was made on this front. The importance of this development is incalculable: a cogent understanding of the logic of mens rea is a necessary prerequisite to the identification and evaluation of the mens rea-related policy choices available to the legislatures that draft criminal statutes and the courts that interpret them.


47. Some have argued that deterrence is ineffective even when the actor has the mens rea of negligence. See Glanville Williams, Criminal Law: The General Part § 43, at 122-23 (2d ed. 1961) ("Again, the deterrent theory, which is normally accepted as a justification for criminal punishment, finds itself in some difficulty when applied to negligence. . . . Even if a person admits that he occasionally makes a negligent mistake, how, in the nature of things, can punishment for inadvertence serve to deter?").


50. See Robinson & Grall, supra note 15, at 683, 685.

In what has been called the "most significant and enduring achievement of the Code's authors," the MPC discarded the "eighty or so culpability terms found in [prior] criminal codes" and distilled them into four coherent levels of intentionality. The most culpable state of mind is purpose—defined as the situation in which it is the defendant's "conscious object to engage in conduct . . . or to cause . . . a result" prohibited by a statute. Obviously, when the result is a prohibited harm, the fact that the defendant consciously desires to bring it about entails extraordinary culpability. It should be noted that purpose is rarely the required mens rea for the commission of a crime.

The second most blameworthy mens rea level is knowledge. According to the MPC, "A person acts knowingly with respect to . . . the nature of his conduct or the attendant circumstances [when] he is aware that his conduct is of that nature or that such circumstances exist." Similarly, a person acts knowingly with respect to a result of the offensive conduct when that person is "aware that it is practically certain that [the] conduct will cause such a result." Knowledge differs from purpose in that it does not contain any element of motivation. Indeed, the defendant may affirmatively want to avoid the prohibited harm, but if the defendant is practically certain that it will occur despite hopes and prayers, the defendant has knowledge. It is safe to say that

51. Id. at 691.
52. Id. at 692.
53. MODEL PENAL CODE AND COMMENTARIES § 2.02(2). In fact, the drafters of the MPC were so keen on making a clean break from the past that they refused to use the term "mens rea," and employed the word "culpability" in its place. See id. § 2.02(2) cmt. 1, at 230 (including the term "mens rea" in a list of concepts that historically had obscured the requirement of culpability). This Article uses "mens rea" in its traditional sense, and "culpability" to mean "blameworthiness."
55. MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 2, at 234 ("It is true, of course, that the distinction [between purpose and knowledge] is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient.").
56. MODEL PENAL CODE § 2.02(2)(b).
57. Id. § 2.02(2)(b)(i).
58. Id. § 2.02(2)(b)(ii).
59. MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 2.
60. See id.
knowledge is the most ubiquitous mens rea requirement in federal criminal law.\textsuperscript{61}

The third level of mens rea identified by the MPC is recklessness. Under MPC section 2.02(2)(c), a person acts recklessly “when he consciously disregards a substantial and unjustifiable risk” that the circumstances specified by the statute exist or that the conduct at issue will result in the harm sought to be prevented by the statute.\textsuperscript{62} Unlike a person who acts purposely or knowingly, one who acts recklessly is subject to punishment not for the intended action, but simply for the risk created.\textsuperscript{63} The defendant’s conduct, however, must be “of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding citizen would observe in the actor’s situation.”\textsuperscript{64} The end result of this provision is that the fact-finder must weigh the degree of risk (balanced against any claimed justification for creating it) and the severity of the harm being risked to determine whether the defendant acted recklessly.\textsuperscript{65}

The lowest level of mens rea set out by the MPC is negligence.\textsuperscript{66} The Code provides that “[a] person acts negligently . . . when he should be aware of a substantial and unjustifiable risk” that the circumstances specified by the statute exist or that the person’s conduct will result in the harm sought to be prevented by the statute.\textsuperscript{67} Like recklessness, the negligent defendant is blameworthy because of the risk created;\textsuperscript{68} unlike recklessness, the negligent defendant is unaware of the surrounding circumstances or the harm risked, and thus is less

\textsuperscript{61.} But see Robinson & Grall, supra note 15, at 729 (claiming that recklessness is the most commonly required level of mens rea). Most federal criminal law draws a distinction between specific- and general-intent crimes. See supra note 9 and accompanying text. Specific-intent crimes usually require the equivalent of purpose as to one or more elements; general-intent crimes generally require the equivalent of knowledge. See JULIE R. O’SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 111 (2d ed. 2003) (citing United States v. Bailey, 444 U.S. 394, 405 (1980)) (asserting that “general intent,” in the context of federal law, is roughly equivalent to “knowledge” in the Model Penal Code); KADISH & SCHULHOFER, supra note 24, at 216 (stating that “general intent” typically means that the defendant “knew the nature of the acts . . . performed”).

\textsuperscript{62.} \textit{MODEL PENAL CODE} § 2.02(2)(c).

\textsuperscript{63.} \textit{MODEL PENAL CODE AND COMMENTARIES} § 2.02 cmt. 3.

\textsuperscript{64.} \textit{MODEL PENAL CODE} § 2.02(c).

\textsuperscript{65.} See \textit{MODEL PENAL CODE AND COMMENTARIES} § 2.02 cmt. 3.

\textsuperscript{66.} See \textit{MODEL PENAL CODE} § 2.02(2)(d).

\textsuperscript{67.} \textit{Id}.

\textsuperscript{68.} See \textit{MODEL PENAL CODE AND COMMENTARIES} § 2.02 cmt. 4.
culpable than an actor with such awareness. The MPC defines negligence as a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation." This distinguishes criminal negligence under the MPC from ordinary tort negligence, for which the deviation from reasonableness need not be gross.

A few comments about the MPC's culpability provisions are in order. First, it is important to note that the Code sets forth its mens rea standards for the purpose of specifying the requirements for conviction under any given criminal statute. For this purpose, the four levels of mens rea are, and should be treated as, separate and distinct. In reality, however, the levels of mens rea are merely points along a continuum of intentionality. Because mens rea resides in the defendant's mind, it is often proven through circumstantial evidence. In the process of evaluating such evidence, the fact-finder will often make inferences that "slide up" the mens rea scale.

For example, the fact-finder might conclude from the evidence that a reasonable person "should have known" of the harm risked by the defendant (negligence); that the defendant, being reasonably aware and intelligent, "must have known" of the harm risked (recklessness); and, ultimately, that the prospect of causing the harm was so high, the defendant must have known not only of the risk created, but also of the fact that the conduct in question was practically certain to cause it (knowledge). This evidential route to the conclusion that the defendant had the mens rea of knowledge must not be confused with the statute's absolute requirement of knowledge as the mens rea element the prosecution must prove beyond a reasonable doubt. Put another way, if the statute requires mens rea in the form of knowledge, the defendant must be acquitted if the fact-finder does not conclude that the defendant actually knew that the conduct would cause the harm—even if the fact-finder believes that the defendant should have been or was aware of the risk.

Another point of interest is what the MPC leaves out. There is no provision in section 2.02 for absolute or strict liability—that is, liability with no level of mens rea. This absence can be attributed to the MPC's rejection of the notion that a person may be held criminally

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69. See id.
70. MODEL PENAL CODE § 2.02(d).
71. See MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 4, at 241-42.
72. See MODEL PENAL CODE § 1.13(9)(b) (stating that culpability is a material element of an offense).
73. See id. § 2.02.
responsible without some level of mental culpability\textsuperscript{74} and of the common-law development of "public welfare offenses."\textsuperscript{75} In place of these offenses, the MPC set up a new category of pseudocrimes, called "violations," placed below felonies and misdemeanors.\textsuperscript{76} No prison sentences were associated with violations;\textsuperscript{77} presumably, the MPC drafters desired them to be more serious in terms of stigma than the enforcement of civil penalties, while not rising to the level of true crimes. This aspect of the MPC has not been influential—especially as it pertains to federal law, where the public-welfare-offenses doctrine is alive and well.\textsuperscript{78}

The second great contribution of the MPC to criminal-law analysis was its recognition that every crime can be broken down into its elements.\textsuperscript{79} One of these elements is the voluntary conduct necessary to violate the statute;\textsuperscript{80} another is the mens rea requirement.\textsuperscript{81} In addition, a statute might require proving the existence of one or more factual conditions, which the MPC calls "attendant circumstances."\textsuperscript{82} It also might require proving a particular result,\textsuperscript{83} which then implies the need to prove that the defendant's conduct caused that result.\textsuperscript{84} Additionally, the Code considers the prosecution's responsibility to negative excuse, justification, and statute-of-limitation defenses as elements of the offense, because the prosecution must ultimately overcome these nonaffirmative defenses beyond a reasonable doubt.\textsuperscript{85} Likewise, the MPC categorizes jurisdiction and venue requirements as elements because the prosecution carries the burden of proving these as well.\textsuperscript{86}

\textsuperscript{74} See id. § 2.02(1). There are a few exceptions to this statement. For example, the MPC acknowledged prevailing views of statutory rape and provided that, under certain circumstances, a defendant is strictly liable regarding the element of the victim's age. See id. § 213.6(1).


\textsuperscript{76} See MODEL PENAL CODE § 1.04.

\textsuperscript{77} See id. § 1.04 explanatory note.

\textsuperscript{78} See Park, 421 U.S. at 671-72; see also Hanousek v. United States, 528 U.S. 1102, 1102-03 (2000) (identifying the defining characteristic of a public-welfare offense as "some category of dangerous or deleterious devices that will be assumed to alert an individual that he stands in 'responsible relation to a public danger.'" (quoting Staples v. United States, 511 U.S. 600, 613 n.6 (1994))).

\textsuperscript{79} See MODEL PENAL CODE § 1.13(9).

\textsuperscript{80} See id. § 1.13(9).

\textsuperscript{81} See id. § 1.13(9)(b).

\textsuperscript{82} See id. § 1.13(9).

\textsuperscript{83} See id.

\textsuperscript{84} See id. § 2.03 (defining causation).

\textsuperscript{85} See id. § 1.13(9)(c).

\textsuperscript{86} See id. § 1.13(9)(e).
The defense, technical-limitations, and jurisdictional elements, however, are designated as "non-material" under section 1.13(10).87

B. Element Analysis

The true genius of the MPC comes in its discerning the relationship between mens rea and the other elements of a crime. In section 2.02(1), the MPC provides that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."88 In effect, the MPC authors recognized that mens rea is fundamentally different from all other elements: it does not "free-float"; rather, it "attaches to" the other material elements of the offense.89 Moreover, the mens rea requirement for various elements of an offense may, in fact, be different.90 Thus, the law might require that, to be found guilty, a defendant must know that certain circumstances exist but merely be reckless about whether the offensive conduct would cause the prohibited harm in light of these circumstances.91 After recognizing the logic of "element analysis,"92 one is forced to conclude that all talk about the mens rea requirement for a criminal offense—or "offense analysis"—is literally incoherent.93 Unfortunately, offense analysis "continues to exist as the dominant view of mens rea."94

The common-law crime of burglary can be used to illustrate element analysis. A typical definition of this crime is "knowingly enter[ing] or remain[ing] unlawfully in a building with intent to commit a crime therein," when the building is a dwelling.95 The crime, therefore, has three elements: (1) the defendant must enter or remain in a building, (2) the defendant must intend to commit a crime, and (3) the building in question must be a dwelling. As generally construed, the

87. See id. § 1.13(10).
88. Id. § 2.02(1) (emphasis added).
89. See Robinson & Grall, supra note 15, at 687.
90. See id.
91. See MODEL PENAL CODE § 2.02(2)(b)-(c).
92. See Robinson & Grall, supra note 15, at 691-700. "Element analysis provides the comprehensiveness, clarity and precision needed to give fair notice and to limit governmental discretion, as required by the legality principle." Id. at 703.
93. See MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 1 (Official Draft and Revised Comments 1985); cf. Robinson & Grall, supra note 15, at 688 & nn.32-34;
95. N.Y. PENAL LAW § 140.25 (Consol. 2007); see also FLA. STAT. § 810.02(1)(a) (2006) ("[B]urglary' means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein . . . .").
mens rea necessary to convict an individual of burglary is different as to each element.⁹⁶ For the first element, the requisite mens rea is knowledge: the defendant must knowingly enter a building.⁹⁷ For the second element, it is purpose: it must be the defendant’s conscious object to commit a crime in the building.⁹⁸ For the third element, there is no requisite mens rea, and the defendant is strictly liable on the issue of whether the building is a dwelling.⁹⁹

C. Default Rules

Lest one conclude that element analysis is hopelessly complicated—that it is a theory that is brilliant but not useful⁴⁰⁰—the MPC has a number of default rules, which make its application much simpler than might first appear.⁴⁰¹ Section 2.02(3) provides that, when a statute has left out a mens rea term in connection with any particular material element, the prosecution must prove that the defendant acted at least recklessly with respect to that element.⁴⁰² In addition, section 2.02(4) provides that, when a statute contains a mens rea requirement “without distinguishing among the material elements thereof,” the presumption is that the stated mens rea requirement applies to all material elements of the offense.⁴⁰³ This presumption can be rebutted by demonstrating that a “contrary [legislative] purpose plainly appears.”⁴⁰⁴

In theory, an element-analysis-enlightened legislature creating a criminal code would not need these default provisions; instead, it would provide the appropriate mens rea for each element of every crime.⁴⁰⁵ Alternatively, a legislature could enact a different set of default rules—for instance, by designating “knowledge” as its minimum default mens rea and providing that any mens rea element specified in a statute be interpreted to apply only to the material element immediately following

⁹⁶ See N.Y. PENAL LAW § 140.25
⁹⁷ See id. § 140.25(1).
⁹⁸ See id.; see also MODEL PENAL CODE § 2.02(2)(a) (1962).
⁹⁹ See N.Y. PENAL LAW § 140.25(2).
⁴⁰⁰ See Daniel A. Farber, The Case Against Brilliance, 70 MINN. L. REV. 917 (1986) (arguing that “thoughtfulness” is a higher virtue in the legal field); see also Daniel A. Farber, Brilliance Revisited, 72 MINN. L. REV. 367 (1987).
⁴⁰¹ See, e.g., MODEL PENAL CODE § 2.02(3)-(10).
⁴⁰² See id. § 2.02(3).
⁴⁰³ Id. § 2.02(4).
⁴⁰⁴ Id.
⁴⁰⁵ Admittedly, this would lead to long and perhaps unnecessarily complex definitions of crimes. See DUBBER, supra note 20, at 52 (calling statutes spelling out mens rea for each element “monstrous concoctions”). To avoid this, a legislature could establish default rules.
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it—and still maintain a perfectly coherent result. The requirements for a logical system are simply element analysis and levels of intentionality (graded to reflect increasing culpability). The MPC drafters adopted default rules that comported with their sensibilities and fit with prevailing norms.

It is in this vein that one must view the MPC drafters' decision to define "willfulness" as knowledge in section 2.02(8). Some commentators have pointed to this provision as evidence of what this term means, or should mean, with respect to its usage in a particular penal statute. Once one realizes that "willfulness" is not part of the MPC's mens rea lexicon, however, one should understand the fallacy of relying on section 2.02(8). The MPC drafters were well aware that the term "willfulness" appeared in a multitude of enacted criminal statutes, and they wanted to give legislatures and courts a simple method to dispose of this apparently meaningless word. For that purpose, knowledge—one level higher than the usual default mens rea of recklessness—seemed to be a reasonable translation. The MPC drafters were certainly not trying to determine how "willfulness" should be defined with respect to any specific element of any particular statute. Such a definition can only be based on the legislative history and underlying policies of the statute.

D. The Relationship Between Mens Rea and Mistake of Fact and the Distinction Between Mistake of Fact and Mistake of Law

The MPC authors made two more critical contributions to a lucid understanding of mens rea analysis: the relationship between mens rea and mistake of fact, and the distinction between mistake of fact and mistake of law. As to the former, section 2.04 of the MPC makes it clear that mistake of fact and mens rea are simply two different ways of

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107. See id.
108. MODEL PENAL CODE § 2.02(8).
110. See MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 10, at 248.
111. See id. § 2.02 cmt. 10, at 249-50.
112. See id. at 248.
113. See id. at 249.
114. See id.
talking about the same thing.115 Section 2.04(1)(a) provides that mistake "as to a matter of fact or law"116 can be used as a defense if it "negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense."117 This provision demonstrates that a defendant's "mistake" about some fact or circumstance is the same as not having the requisite mens rea regarding that fact or circumstance.118 Figuring out whether the mistake provides the defendant with a viable defense, then, depends entirely on identifying the required mens rea for the element at issue.119

Assume, for instance, that Felonious Frank is charged with passing a counterfeit note. Frank claims that he made a "mistake" because he believed that the note was genuine. If the requisite mens rea is knowledge, then the mistake is a defense—even if Frank was aware of the risk that the bill was counterfeit, or if he was blissfully ignorant of the risk but a reasonable person would have been aware.120 Next, assume that the requisite mens rea on the element of the note being counterfeit is recklessness. Now, to have a successful mistake defense, Frank must contend (and the jury must find) either that he was not aware of this risk or that he was aware but still did not act in a manner that constituted a gross deviation from the conduct of a law-abiding citizen (or both).121 Otherwise, though it may be true that Frank did not know the note was counterfeit, he was reckless, which is all that the statute requires. Finally, assume that the requisite mens rea is negligence. Now Frank must convince the jury not only that he did not know that the bill was counterfeit, but also that he was not even aware of this risk and acted reasonably under the circumstances.122

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115. See id. § 2.04 cmt. 1 (discussing the relationship between ignorance or mistake and culpability).
116. It should be noted that, in including the word "law" here, the MPC is referring to two distinct things: (1) mistakes of "legal facts" that exist outside of the criminal law arena, which are simply treated as mistakes of fact; and (2) mistakes of the criminal law, which are presumed not to be included in the definition of the crime unless the statute provides otherwise. See MODEL PENAL CODE § 2.02(9) (1962). To understand the notion of "legal fact," consider the following. A defendant who is charged with polygamy may claim that he thought he had a valid divorce from his first wife, and therefore was not aware that he was married to two people at once. His mistake regarding the validity of his divorce is one of family law, and is thus treated as a "legal fact." Under section 2.04(a), this mistake is a defense if it negates the requisite mens rea. See MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 11, at 250.
118. See MODEL PENAL CODE AND COMMENTARIES § 2.04 cmt. 1.
119. See id.
120. See MODEL PENAL CODE § 2.02(2)(b).
121. See id § 2.02(2)(c).
122. See id. § 2.02(2)(d).
The MPC also clarifies the distinction between mistake of fact and mistake of law. Section 2.02(9) provides that "[n]either knowledge nor recklessness or negligence as to whether conduct constitutes a defense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides." In other words, the presumption is that a defendant need not have any level of mens rea regarding the existence or the interpretation of the criminal law itself—the defendant is to be held strictly liable on the question of whether the conduct at issue constitutes a crime. This is an elegant way of stating that ignorance or mistake of the criminal law is no excuse.

A legislature can, of course, decide to make mistake of the criminal law a defense to a specific crime by making the definition of the criminal law an element of the crime, thereby requiring proof that the defendant had some level of understanding of the criminal law as a prerequisite to conviction. Once this is done, mistake of criminal law is treated like all other mistakes, and it is a defense if it negates the required mens rea. By defining mistake of law this way, the MPC makes it clear that a legislature is free to attach any mens rea requirement to a "definition of the criminal law" element: purpose, knowledge, recklessness, or negligence.

A real-life example of a legislatively imposed mistake-of-criminal-law element can be found in connection with federal criminal tax offenses. In United States v. Murdock, the Supreme Court held that Congress intended to add such an element to tax offenses through the use of the term "willfully." Many years later, in Cheek v. United States, the Court further determined that Congress intended to attach a mens rea requirement of knowledge to the mistake-of-criminal-law element. Thus, in criminal tax cases, the government must prove that the defendant knowingly violated the relevant portions of the tax code as a prerequisite to conviction. Because of the knowledge requirement, the defendant's mistake need not be reasonable, and it is insufficient for

123. Id. § 2.02(9).
124. See Model Penal Code and Commentaries § 2.02 cmt. 11.
125. Mistakes regarding some other area of the law—such as family or contract law—are treated as mistakes of "fact or law" under section 2.04(1)(a). In this Article, the term "mistake of fact" encompasses such mistakes.
126. See Model Penal Code § 2.02(9); see also Model Penal Code and Commentaries § 2.02 cmt. 11.
127. See Model Penal Code § 2.04(1)(a).
the government to prove merely that the defendant was aware of a risk of violating the law.\textsuperscript{130}

It is critical to recognize that there are different types of mistake-of-law defenses. The classic, "robust," version (described above) arises out of the requirement that, to be found criminally liable, the defendant must have had some level of awareness that the conduct at issue was in specific violation of the criminal law.\textsuperscript{131} Sometimes, however, a court interprets a statute to require proof only that the defendant was aware of the generally wrongful nature of the offensive conduct.\textsuperscript{132} In these cases, the prosecution need not prove that the defendant knew the conduct at issue was in violation of a specific law or even unlawful in general.\textsuperscript{133} From this requirement follows a "weak" mistake-of-law defense, one requiring the defendant to plead ignorance of the basic wrongfulness of the offensive conduct.\textsuperscript{134}

III. THE STATE OF MENS REA ANALYSIS FOR SECURITIES-RELATED CRIMES

The prosecution of securities-related crimes in the United States is undoubtedly cyclical in nature and reflects the business cycle. When the stock market is riding high, crime certainly occurs, but few complain because everyone is making money. When the market comes crashing down, there are suddenly many losers in the market who have an incentive to look for others to blame. This provides prosecutors with complainants and evidence.\textsuperscript{135} Politicians are often in the hot seat as well, accused by the public of thoughtless deregulation or of not controlling big business's ability to take advantage of the little guy.\textsuperscript{136} They respond not only by enacting new laws, but also by putting

\textsuperscript{130} See Model Penal Code § 2.02(2)(b)-(d) (defining the different levels of culpability).

\textsuperscript{131} Cheek, 498 U.S. at 200 (holding that Cheek was entitled to a mistake-of-law defense which required a showing that his action constituted a "voluntary, intentional violation of a known legal duty" (quoting United States v. Bishop, 412 U.S. 346, 360 (1973))). This Article refers to this type of mistake-of-law defense as the "robust" version, because the requirement is stringent and thus the defense is powerful.

\textsuperscript{132} See United States v. Tarvestad, 418 F.2d 1043, 1047 (8th Cir. 1969).

\textsuperscript{133} See id. (approving trial judge's instruction that defined "willfully" as "done knowingly and deliberately with bad purpose").

\textsuperscript{134} This type of mistake-of-law defense is "weak" because it provides the defendant with much less leeway than the "robust" version.


\textsuperscript{136} See id. at 431-32.

Prosecution of securities-related crime, however, is only the tip of the securities-regulation iceberg. Most securities regulation is administrative or civil in nature, achieved either through private actions filed by aggrieved plaintiffs or through enforcement actions brought by
the SEC. The SEC pursues civil actions under a variety of statutory provisions, the most important of which are found in the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act). Together with other securities-related enactments, these Acts, along with all of the rules and regulations promulgated by the SEC pursuant to its statutory authority, create a vast regulatory structure in the securities arena.

As a general matter, the Securities Act addresses the offer and sale of securities to public investors by mandating (absent an applicable exemption) the filing of a registration statement containing specified information with the SEC and the dissemination of a prospectus to investors during the distribution of securities. The Securities Act also imposes a complex liability scheme for misinformation in the prospectus, registration statement, or other communications made during the distribution of securities. Finally, it makes unlawful the failure to register nonexempt securities or transactions. The Exchange Act created the SEC and provides for the regulation of stock exchanges and securities firms. It requires periodic and event-based disclosure of key information by public companies, and prohibits manipulative stock-market practices and misleading statements in

140. See, e.g., Billy Kloos et al., Securities Fraud, 43 AM. CRIM. L. REV. 921, 980 (2006) ("[T]he SEC is the principal agency responsible for the enforcement of federal securities law . . . ").
144. See id. § 7.
145. See id. § 10.
146. See, e.g., id. §§ 8A, 9, 11, 12, 13, 16, 17.
147. See id. § 5; cf Hochfelder, 425 U.S. at 195 ("The Securities Act of 1933 was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud, and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing.").
149. See id. § 6.
150. See id. § 15.
151. See id. § 13.
152. See, e.g., id. §§ 9-10.
mandated reports and other documents. The Exchange Act also regulates margin requirements for stock purchases and insider trading in the securities of public companies. Over the years, Congress has amended and supplemented both Acts—for instance, through passing the Investment Company Act of 1940, the Investment Advisors Act of 1940, and the Sarbanes-Oxley Act of 2002.

The drafters of the Securities Act and the Exchange Act decided that civil enforcement and private causes of action were not sufficient remedies to punish and deter potential violators. Therefore, they grafted a criminal-penalties provision onto both statutes. Specifically, section 24 of the Securities Act makes it a crime to "willfully" violate any of the Act's provisions or "the rules and regulations promulgated by the Commission under authority thereof." It also criminalizes "willfully" making "any untrue statement of a material fact or omit[ting] to state any material fact required to be stated [in a registration statement] or necessary to make the statements therein not misleading." Using similar language, section 32(a) of the Exchange Act states that "[a]ny person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder" is guilty of a crime. Additionally, any person who "willfully and knowingly" makes a false or misleading statement in a required disclosure regarding a material fact is also guilty of a crime. Finally, the Exchange Act provides a partial defense for a person who is criminally convicted under a rule or

153. See id. § 18. The broad use of Rule 10b-5, 17 C.F.R. § 240.10b-5 (2006), to combat fraud and misrepresentation has significantly reduced the import of this provision. See ALAN R. PALMITER, SECURITIES REGULATION: EXAMPLES AND EXPLANATIONS § 8.3.3, at 276 (3d ed. 2005).

154. See Securities Exchange Act § 7; cf. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) ("The 1934 [Exchange] Act was intended principally to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges.").


159. Id.


161. Id.
regulation promulgated pursuant to the Act if it can be shown that "he had no knowledge of such rule or regulation."  

The drafters of these Acts, and the Congress that passed them, were operating in the criminal-law equivalent to the Dark Ages. They believed that one word, "willfully," was sufficient to convert the numerous activities prohibited by these Acts from matters of mere civil enforcement to felonies associated with potentially significant prison terms. Acting some twenty years before the publication of the MPC, they simply did not understand that the term "willfully" would ultimately be required to serve as a stand-in for purpose, knowledge, or recklessness, depending upon the circumstances, and that it would need to be applied in both mistake-of-fact and mistake-of-law settings. This understandable lack of foresight has led to confusion regarding the appropriate or required mens rea element in securities-related prosecutions. This confusion has been compounded by the fact that the numerous commentators and courts who have set out to interpret the term "willfully" under the Securities Act and the Exchange Act have ignored the tremendous progress the MPC made in the understanding of mens rea.

A. Commentators

Writing as late as 1995, Jed Rakoff concluded that "willfully" means "with evil purpose" in the criminal context, whereas in the civil context it may mean only knowingly and voluntarily, as distinguished from accidental. According to Rakoff, some courts had approved jury instructions indicating that criminal securities fraud might require "a higher level of intent than even mens rea"—in

162. Id.

163. Writing shortly after the enactment of the Securities Act and the Exchange Act, Judge William B. Herlands concluded that "willfully" meant "voluntarily" and with a "bad purpose." See Herlands, supra note 38, at 148. He stressed that it did not require proof that the defendant knew of the precise illegality of certain acts. Id. at 148-49. Further, he interpreted "willfully and knowingly"—required for guilt in connection with misrepresentations made under the Exchange Act—to include a requirement that the defendant knowingly made false or misleading statements. Id. at 149. Finally, he stated his belief that, although the Securities Act left out the word "knowingly" with respect to misrepresentations, Congress intended this requirement, and therefore it should be read into the Act. Id.

164. Interpreted in this manner, the term provides defendants with a "weak" mistake-of-law defense. See supra note 134 and accompanying text.

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particular, a "specific intent to defraud." Rakoff also determined that, at the other end of the spectrum, a few courts had flirted with a standard of "reckless disregard" as the necessary criminal-intent requirement. Reckless disregard, he contended, was really a form of willful blindness, and he argued that its use in criminal cases was erroneous. Additionally, Rakoff distinguished "reckless disregard" from two other forms of recklessness: (1) a low form, akin to gross negligence; and (2) a "higher form of 'recklessness," defined by one court in a civil case as "extreme departure from the standards of ordinary care . . . which presents a danger that is either known to the defendant or so obvious that the actor must have been aware of it." Rakoff asserted that even the higher recklessness standard "is clearly less than mens rea and has never been held to satisfy the intent requirement of a criminal securities prosecution."

Despite adequately summarizing the case law surrounding the issue of mens rea for securities offenses, Rakoff's apparent oversight of the MPC led him to conclusions as confused as those of the courts he studied. First, he referred to mens rea in the singular, as if it were a particular level of intent rather than the umbrella concept under which all levels of intent are housed. Second, he engaged in offense-based analysis, not the element-specific analysis established by the MPC. Third, Rakoff did not use the MPC's coherent definition of recklessness as an analytical tool; instead, he claimed that, "in legal parlance . . . 'reckless,' like 'willful,' has many different meanings depending on context." Additionally, he failed to notice that the judicial definition of the "higher form of recklessness" he cited misunderstood the

166. Id. at 10 (citing United States v. Klein, 515 F.2d 751 (3d Cir. 1975); United States v. Fosbee, 569 F.2d 401 (5th Cir. 1978); Foshay v. United States, 68 F.2d 205, 210 (8th Cir. 1937)).
167. See United States v. Jewell, 532 F.2d 697, 699-701 (9th Cir. 1976) (defining "willful blindness" as the rule "that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge" (citing WILLIAMS, supra note 47, § 57, at 157)).
168. Rakoff, supra note 165, at 10
169. Id. at 5 & n.28 (citing United States v. Henderson, 446 F.2d 960, 966 (8th Cir. 1971)); United States v. Amick, 439 F.2d 351, 369 (7th Cir. 1971); Ebel v. United States, 364 F.2d 127, 134 (10th Cir. 1966); Stone v. United States, 113 F.2d 70, 75 (6th Cir. 1940).
170. Rakoff, supra note 165, at 10 (citing Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977)).
171. Id.
172. Id.
173. Id.
174. Id.
relationship between a definition of recklessness (awareness of the creation of a risk) and the level of proof that would cause a jury to find that a defendant had acted recklessly under this definition (a risk so obvious that the actor must have been aware of its creation). If the actor "must have been aware of [the risk] creation," then, indeed, that actor was aware of it; the two parts of the definition collapse into one.175 Finally, Rakoff failed to distinguish between cases that employed the willfulness standard to decide matters pertaining to mistake of fact from those involving mistake of law.176

Jonathan Eisenberg made a similar set of mistakes in his 1991 article comparing the interpretation of the willfulness requirement in section 15(b)(4)(D) of the Exchange Act (which provides for civil enforcement of the Securities Act and the Exchange Act) and the same requirement in section 32(a) of the Exchange Act (which is the underpinning of criminal liability).177 Eisenberg first explained that the SEC has long taken the position that a defendant is civilly liable for violations of the securities laws as long as the defendant is aware of the offensive conduct, regardless of whether the defendant is aware of the illegality of those actions.178 The SEC first took this position in In re Thompson Ross Securities Co., which involved the sale of unregistered securities.179 The Commissioner found the defendant liable even though he had consulted counsel and believed that registration was not necessary.180 Eisenberg called this a "strict liability" interpretation of section 15(b)(4)(D).181 He contrasted this with the courts' interpretation of "willful" for purposes of section 32(a), which he said required "a high level of culpability—awareness of wrongdoing, evil purpose, or recklessness at the very least."182

Like Rakoff, Eisenberg failed to engage in element analysis, and he did not use mens rea terms precisely. Moreover, by employing MPC concepts, one can expose the fallacy of Eisenberg's main argument. The SEC's interpretation of section 15(b)(4)(D) is not one of strict

175. This assumes, of course, that the word "must" is being used to mean "was actually aware." If it is being used to mean "should have been aware" of the risk, then the standard for liability the Seventh Circuit employed in Sanders v. John Nuveen & Co. was negligence, not recklessness.
176. Id.
178. See id. at 14.
179. 6 S.E.C. 1111 (1940).
180. See id. at 1122-23.
181. See Eisenberg, supra note 177, at 17.
182. See id. at 15.
liability; rather, the requirement of "awareness" is a requirement of knowledge on the element of actus reus. In other words, the actor must knowingly sell investment instruments. It also appears to be a requirement of knowledge on the attendant circumstance that the "investment instruments" are unregistered. The refusal by the SEC and courts to include an advice-of-counsel defense is simply a refusal to make mistake of law a defense to a civil-enforcement action for the sale of unregistered securities.\textsuperscript{183} On the other hand, the criminal interpretation of willfulness, at least as Eisenberg perceived it, appears to include some measure of a mistake-of-law defense.

The difference between these two interpretations, moreover, is actually quite defensible on policy grounds.\textsuperscript{184} The SEC uses its civil-enforcement powers primarily to protect the public; this requires stopping the sale of unregistered securities regardless of the seller's understanding of any pertinent legal obligations. Congress imposed criminal sanctions, however, to punish; these sanctions arguably should be reserved for situations in which the seller had some level of intentionality with respect to violating the law.

Writing ten years after Eisenberg, Professor Margaret Sachs took a similar position on the question of whether "willfulness" means the same thing for criminal and civil purposes.\textsuperscript{185} Sachs contended that hybrid statutes that simultaneously make the same conduct subject to civil and criminal enforcement should be interpreted identically for both purposes, and called this the "core principle."\textsuperscript{186} When deciding on a specific interpretation, Sachs counseled that a court must choose a compromise interpretation that fits all contexts\textsuperscript{187} and provides fair warning to the parties.\textsuperscript{188} Applying this analysis to willfulness as used in the Securities Act and the Exchange Act, Sachs concluded that it should mean "either knowledge of illegality or knowledge of wrongfulness sufficient to make illegality likely."\textsuperscript{189}

Other than a yearning for simplicity and neatness, Sachs did not establish a convincing reason why a statute should be interpreted the same way in two very different contexts with different objectives at

\begin{itemize}
\item \textsuperscript{183} See supra notes 350-53 and accompanying text.
\item \textsuperscript{184} This Article explores this argument further in connection with an examination of the mens rea requirements for the crime of selling nonexempt securities in violation of sections 5 and 24 of the Securities Act. See infra Part IV.C.
\item \textsuperscript{185} See Sachs, supra note 34, at 1029.
\item \textsuperscript{186} See id. at 1030-32.
\item \textsuperscript{187} See id. at 1033-35.
\item \textsuperscript{188} See id. at 1035-38.
\item \textsuperscript{189} Id. at 1051.
\end{itemize}
Moreover, like the other commentators, Sachs discussed the
definition of willfulness in the very narrow context of mistake of law.
Although her definition of willfulness for this purpose may very well
make sense,\textsuperscript{191} it does not help when one needs to determine what
willfulness means as applied to a specific material element of a specific
securities-related crime. If Sachs had realized the breadth of mens rea
issues raised by the securities laws, perhaps she would not have
concluded that willfulness can and should have one universal
definition.\textsuperscript{192}

Confusion abounds even in an article written by Arthur Mathews,
who served as the Deputy Associate Director of the Division of Trading
and Markets at the SEC and led the SEC’s Office of Criminal
Reference and Special Proceedings for several years.\textsuperscript{193} Writing in
1971, Mathews first contended that “willful” in the criminal securities
context meant “no more than that the person charged with the duty
knows what he is doing.”\textsuperscript{194} This position rejected entirely the majority

\textsuperscript{190} Sachs derives her four arguments from principles of statutory
construction. \textit{See id.} at 1031. First, Congress’s decision to enact a hybrid statute using
the same terms in both civil and criminal contexts should be honored. \textit{See id.} Second,
Congress knows how to create different standards for civil and criminal liability even in
hybrid statutes; if it chooses not to, this should be understood as an intentional choice.
\textit{See id.} at 1032. Third, language appearing repeatedly in a statute is presumed to have
one meaning throughout. \textit{See id.} These arguments are not persuasive with respect to
mens rea, however, because Congress has demonstrated a lack of understanding of
mens rea and should not be presumed to have done anything intentionally on this front.
Her fourth argument, that “multiple constructions of a single provision are likely to be
unstable,” \textit{id.} at 1033, is illogical; statutory definitions are not akin to chemical
isotopes.

\textsuperscript{191} Interestingly, Sachs stakes out a middle position between the weak and
robust forms of the mistake-of-law defense. \textit{See id.} at 1037-39. It is defensible,
although the “wrongfulness sufficient to make illegality likely” language is confusing.

\textsuperscript{192} \textit{See id.} at 1029. Similarly, Beveridge, writing in 1996, posed the question
of whether nonfraudulent securities crimes were “strict liability” provisions, \textit{see
Beveridge, supra} note 37, at 48-49 & n.72, or required mens rea—defined as “not
merely ‘voluntarily’ but with ‘bad purpose.’” \textit{See id.} at 47 & n.63 (citing Herlands,
\textit{supra} note 38, at 147-48). This is a false juxtaposition. Strict liability means that the
government would not need to prove mens rea on any element of the crime. \textit{See MODEL
PENAL CODE} § 2.02 (1962). Courts have permitted strict liability in the criminal setting
only in public-welfare offenses, which securities-related cases—given their potential for
lengthy sentences—are not. \textit{Cf.} United States v. MacDonald & Watson Waste Oil Co.,
933 F.2d 35, 51-52 (1st Cir. 1991) (holding that a crime involving a penalty of up to
five-years imprisonment and a mens rea requirement of knowledge did not qualify as a
public-welfare offense).

\textsuperscript{193} Mathews, \textit{supra} note 39, at 901.

\textsuperscript{194} \textit{Id.} at 950 (quoting American Surety Co. v. Sullivan, 7 F.2d 605, 606 (2d
Cir. 1925)).
view that willfulness has a mistake-of-law component. It also appeared to conflict with the U.S. Court of Appeals for the Second Circuit's decision in *United States v. Crosby.* In *Crosby,* the court reversed the convictions of several broker-dealers upon a finding that, by relying on advice of counsel, they believed in good faith that they were not "underwriters" for purposes of the Securities Act. Mathews attempted to reconcile this holding with his prior definition of willfulness as follows:

It is submitted, however, that a more proper interpretation of the *Crosby* rationale is that the Government need not prove *actual* knowledge of the specific illegality, [that is], a bad purpose or a specific criminal intent, but rather "willfulness," [that is] a general criminal intent. The defendant may in some instances be able to rebut a showing of "willfulness" by demonstrating reliance in good faith on the advice of counsel.

This explanation is incoherent. Mathews's prior claim was that mistake of law is simply not a defense to securities crimes, but the advice-of-counsel defense used in *Crosby* was, by definition, a form of mistake-of-law defense. When employing this defense, a defendant admits to acting pursuant to an incorrect interpretation of the criminal statute but nonetheless seeks to be excused from liability for laudably consulting with counsel and attempting to ascertain in good faith the contours of the law. The contradiction between Mathews's claim and the *Crosby* holding cannot be avoided by labeling *Crosby*'s mistake-of-law defense "general criminal intent."

Mathews also discussed the definition of willfulness specifically in the context of securities-fraud cases. He stated that the government need not prove knowledge on the part of the defendant because "[r]eckless disregard or indifference as to whether the statements [underlying an allegedly fraudulent scheme] are true, can constitute sufficient 'willfulness' to sustain a section 17(a) conviction, even absent

195. See *United States v. Tarallo,* 380 F.3d 1174, 1187 (9th Cir. 2004) (noting the prevailing view); see also infra notes 338-46 and accompanying text (determining that the predominant view of willfulness is that it signifies a weak mistake-of-law defense).
196. 294 F.2d 928 (2d Cir. 1961).
197. *Id.* at 939-42.
199. See *id.* at 950.
200. See infra notes 350-53 and accompanying text.
201. See Mathews, *supra* note 39, at 954.
proof that the defendant had actual knowledge of the falsity of the statements.”

This claim contradicts Mathews’s initial statement that willfulness requires proof that the defendant acted knowingly, which equates to a mens rea of knowledge on the elements of actus reus and, presumably, the attendant circumstance of the falsity of the defendant’s representations. Knowledge, however, is not the same as reckless disregard or indifference.

Unfortunately, these relatively modern academic pundits are in good company. Professor Louis Loss, the “leading American commentator on the federal securities laws,” also failed to adequately address the interpretation of the word “willfully” in his seminal work on securities regulation. Written in 1951, the first edition of Loss’s treatise merely stated that this crucial term did not mean “with specific ‘intent to violate the law.’” Loss left open the possibility that the term might require more culpability for criminal convictions than for civil penalties, and less culpability for violations of the Securities Act’s malum prohibitum portions than for its malum in se fraud provisions; he concluded, though, that courts had thus far been inclined to give it a uniform interpretation. The second and third editions of the Loss treatise did not elaborate on this point.

B. Courts

Courts have not fared any better in their efforts to interpret “willfulness” in the many contexts in which the term arises under the

202. Id.
203. See supra note 194 and accompanying text.
204. See, e.g., MODEL PENAL CODE § 2.02 (1962).
205. Beveridge, supra note 37, at 37.
206. See LOUIS LOSS, SECURITIES REGULATION (1951).
207. Id. at 734.
208. See id.
209. See id. To the extent that Loss was thinking about mistake of law for criminal-enforcement purposes, he appears to have gotten things backward. One would presumably want to have a high mens rea standard on the issues of the existence and interpretation of the securities laws to the extent that they are merely mala prohibitum, so as to prevent them from being a trap for the unwary. Cf. Cheek v. United States, 498 U.S. 192, 199-201 (1991) (holding that tax cases need a robust mistake-of-law requirement to prevent the tax laws from becoming such a trap). On the other hand, for conduct that is malum in se, the usual rule that ignorance or mistake of law is no defense would appear to be appropriate because, by definition, the defendant would be engaging in conduct generally recognized as wrongful. See People v. Marrero, 507 N.E.2d 1068 (1987).
securities laws. In *United States v. Tarallo*, a jury convicted the defendant of participating in a classic telemarketing fraud scheme by "solicit[ing] those called to invest in various businesses whose value and operations were fictitious."\(^{211}\) Aldo Tarallo presented an equally classic defense—that, as a mere employee, he was "duped right along with the investors."\(^{212}\) He claimed that he was merely following a script and did not know that the statements he was making to potential investors were, in fact, untrue.\(^{213}\)

Tarallo's conviction included six counts of securities fraud, in violation of sections 10 and 32 of the Exchange Act and Rule 10b-5.\(^{214}\) On appeal, he argued that the district court had failed to give a proper intent instruction.\(^{215}\) Specifically, he complained that the trial court erred when it stated that an act is done "willfully" if it is done "knowingly," and that an "act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake, or accident."\(^{216}\) The trial court further stated that the defendant need not know "that his acts or omissions were unlawful."\(^{217}\) The court continued

Thus, for example, to prove a defendant guilty of securities fraud . . . based on making a false or misleading representation, the government must prove beyond a reasonable doubt that the defendant knew the representation was false or was made with reckless indifference to its truth or falsity, but it need not prove that in making the representation the defendant knew he was committing securities fraud . . . or any other criminal offense.\(^{218}\)

In these instructions, the trial court made several mens rea mistakes. First, it failed to differentiate between mistake of fact and mistake of law. In reaction to Tarallo's claimed mistake-of-fact defense,\(^{219}\) the trial court initially instructed the jury that the government need not prove that Tarallo was aware of the unlawfulness

\(^{211}\) 380 F.3d 1174, 1180 (9th Cir. 2004).
\(^{212}\) See id. at 1181.
\(^{213}\) Id.
\(^{214}\) See id. at 1180.
\(^{215}\) See id. at 1185-86.
\(^{216}\) Id.
\(^{217}\) Id. at 1185.
\(^{218}\) Id. at 1185-86.
\(^{219}\) See id. at 1181 (stating that Tarallo's defense was based on his claim that he did not "know" the statements he made were false).
of his acts—that is, that mistake of law would not be a valid defense.\textsuperscript{220} Second, in a fortunate non sequitur, the trial court addressed the mistake-of-fact issue by instructing the jury that the government had to prove that Tarallo knew the representations he made were false or that he made them with reckless indifference to their truth or falsity.\textsuperscript{221} Unfortunately, though, in this statement, the trial judge inadvertently made the same mistake as Mathews by interpreting “knowingly” to include “recklessness”\textsuperscript{222} without realizing that these are different levels of intentionality.\textsuperscript{223} The court may have erred in part because it failed to engage in element analysis, and instead confused the element of actus reus with the attendant circumstance of the falsity of the defendant’s representations.

Rather than shed light on these issues, the U.S. Court of Appeals for the Ninth Circuit further compounded the confusion. It, too, did not recognize that Tarallo’s main complaint was the failure of the trial court to give a mistake-of-fact instruction, leading it to analyze the contours of a potential mistake-of-law defense pursuant to the willfulness requirement.\textsuperscript{224} The court concluded that the prevailing interpretation of “willfully” required the prosecution to prove that Tarallo knew his conduct was “wrong” or taken with a “bad purpose” (in other words, Tarallo was entitled to a weak mistake-of-law defense),\textsuperscript{225} but it did not require proof that Tarallo knew his conduct was specifically unlawful or undertaken in violation of a particular statute, regulation, or rule (that is, Tarallo was not entitled to a robust mistake-of-law defense).\textsuperscript{226} This interpretation, however, created a potential problem in that the trial court had given the second half of this definition (the part favorable to the government) but not the first half (the part favorable to the defense).\textsuperscript{227}

The court of appeals decided that the trial court’s jury instruction—that Tarallo must have known or been recklessly indifferent to the falsity of the representations he made—cured its inaccurate interpretation of the mistake defense.\textsuperscript{228} It reasoned that, through these instructions, the court had informed the jury that it needed to find that

\begin{itemize}
  \item \textsuperscript{220} See id. at 1185.
  \item \textsuperscript{221} See id. at 1185-86.
  \item \textsuperscript{222} See id. at 1188 (“[T]o prove a defendant guilty of securities fraud . . . the government must prove beyond a reasonable doubt that the defendant knew the representation was false or was made with reckless indifference to its truth or falsity.”).
  \item \textsuperscript{223} Compare MODEL PENAL CODE § 2.04(2)(b) (1962) with id. § 2.04(2)(c).
  \item \textsuperscript{224} Tarallo, 380 F. 3d at 1186-88.
  \item \textsuperscript{225} See id. at 1187.
  \item \textsuperscript{226} See id. at 1185-87.
  \item \textsuperscript{227} See id. at 1185-86.
  \item \textsuperscript{228} See id. at 1189-90.
\end{itemize}
Tarallo recognized the wrongfulness of his actions before it could convict him.\footnote{See \textit{id.} at 1188.} Although there is some facial logic to this position, in reality, it collapsed Tarallo’s mistake-of-law and mistake-of-fact defenses into one, effectively depriving him of the mistake-of-law defense to which the appellate court said he was entitled. Properly instructed, the jury might have concluded that Tarallo knew he was making false representations, while still finding that, because he honestly believed these misrepresentations to be immaterial, he did not believe what he was doing was “wrong.”

The Ninth Circuit’s discussion of recklessness was also lacking. It relied on \textit{United States v. Farris}, a civil case interpreting section 17 of the Securities Act,\footnote{614 F.2d 634, 636 (9th Cir. 1979) (citing Securities Act § 17, 15 U.S.C. § 77q (2000)).} in holding that reckless disregard for the truth or falsity of representations was sufficient to find securities-fraud liability.\footnote{See \textit{Tarallo}, 380 F.3d at 1189.} Surprisingly, the \textit{Tarallo} court not only ignored the fact that \textit{Farris} was a civil case, but also that section 17, under which Farris was charged, does not contain a willfulness (or any other mens rea) provision.\footnote{See \textit{id.}; see also 17 C.F.R. § 240.10b-5 (2006).} It appears that the Ninth Circuit felt comfortable following \textit{Farris} because it unwittingly limited the operative impact of the term “willfulness” to the mistake-of-law context,\footnote{Cf. \textit{Tarallo}, 380 F.3d at 1189 (“‘[W]illfully’ in the context of [section 32 of the Exchange Act] is best understood to mean ‘voluntarily and knowingly wrongful,’ not ‘with the intent to violate the law.’”).} thereby making it irrelevant to the question of which mens rea should attach to the element of falsity. By failing to understand the nature of its analysis, the Ninth Circuit never engaged the various policy arguments that support and undercut its interpretation.

The court’s bewilderment in the mens rea arena caused it further difficulty when it tried to compare its position to that of the Eighth Circuit in \textit{United States v. O’Hagan}.\footnote{139 F.3d 641 (8th Cir. 1998).} On remand from the Supreme Court, the Eighth Circuit interpreted the higher court’s opinion to mean “that [section 32 of the Exchange Act] provides that a negligent or reckless violation of the securities law cannot result in criminal liability; instead, the defendant must act willfully.”\footnote{Id. at 647.} Although this language strongly suggests that the Eighth Circuit believed that a securities-fraud conviction required something more than recklessness, the \textit{Tarallo} court managed to reconcile this language with its own conclusion:

\begin{itemize}
\item \footnotetext[229]{See \textit{id.} at 1188.}
\item \footnotetext[230]{614 F.2d 634, 636 (9th Cir. 1979) (citing Securities Act § 17, 15 U.S.C. § 77q (2000)).}
\item \footnotetext[231]{See \textit{Tarallo}, 380 F.3d at 1189.}
\item \footnotetext[232]{See \textit{id.}; see also 17 C.F.R. § 240.10b-5 (2006).}
\item \footnotetext[233]{Cf. \textit{Tarallo}, 380 F.3d at 1189 (“‘[W]illfully’ in the context of [section 32 of the Exchange Act] is best understood to mean ‘voluntarily and knowingly wrongful,’ not ‘with the intent to violate the law.’”).}
\item \footnotetext[234]{139 F.3d 641 (8th Cir. 1998).}
\item \footnotetext[235]{Id. at 647.}
That statement might be read as contrary to our holding here. In context, however, the Eighth Circuit’s statement is consistent with our holding that the “willful” requirement of [section 32] does not preclude a conviction arising out of recklessness. The Eighth Circuit held, as we do, that [section 32] “simply requires the intentional doing of the wrongful acts—no knowledge of the rule or regulation is required.” Given that definition of “willful,” the Eighth Circuit’s formulation appears to be consistent with the view that a defendant could “willfully” violate [section 32] by willfully acting with reckless indifference to the truth of statements made in the course of the fraud. We therefore do not believe that our continued adherence to \textit{Farris} creates a circuit split on this question.\textsuperscript{236}

In other words, the \textit{Tarallo} court interpreted the \textit{O'Hagan} court as holding that recklessness did not result in criminal liability but willful recklessness did, thus perpetuating mens rea incoherence as recently as 2004.

\textbf{C. Additional Securities-Law Cases}

Mens rea incoherence in securities law cases has a long and storied past. Judge Henry Friendly’s frequently cited 1976 opinion in \textit{United States v. Dixon} is a prime example.\textsuperscript{237} Lloyd Dixon, Jr. was the president of a company that manufactured voting machines.\textsuperscript{238} In 1970, he took loans from the company totaling more than $65,000.\textsuperscript{239} In a series of maneuvers near the end of the calendar year, which included transferring some of the loans to his father and the company’s secretary-treasurer, Dixon brought his indebtedness down to less than $20,000.\textsuperscript{240} Dixon’s indebtedness did not appear on proxy statements made to shareholders or on the company’s annual report on the Form 10-K filed with the SEC.\textsuperscript{241} As a result, the federal government

\begin{thebibliography}{99}
\bibitem{236} \textit{Tarallo}, 380 F.3d at 1189 n.5 (quoting \textit{O'Hagan}, 139 F.3d at 647).
\bibitem{238} \textit{Dixon}, 536 F.2d at 1391.
\bibitem{239} \textit{See id.} at 1393.
\bibitem{240} \textit{Id.} at 1393.
\bibitem{241} \textit{Id.} at 1394.
\end{thebibliography}
Mens Rea Analysis

criminally prosecuted Dixon under section 32(a) for violating sections 13 and 14(a) of the Exchange Act. Dixon’s defense was that he misinterpreted the proxy rules and believed that, by getting his year-end indebtedness to under $20,000, he was exempt from any reporting requirements. In fact, the rules make clear that the reference point for reporting is not the year-end amount, but the aggregate amount at any time during the reporting period. Because this defense rested on a supposed misinterpretation of the proxy rules, it was a mistake-of-law defense.

On appeal, Dixon argued that there was insufficient evidence to prove that he acted willfully, and that the trial judge’s jury instruction on willfulness was incorrect. Judge Friendly correctly treated the matter as one involving a mistake of law, referring to his well-known formulation in United States v. Peltz that willfulness requires only “a realization on the defendant’s part that he was doing a wrongful act.” Judge Friendly conceded that the sufficiency of the evidence regarding Dixon’s knowledge of the proper interpretation of the proxy rules presented a “close” question, but he deemed it irrelevant:

We do not have here the case of a defendant manifesting an honest belief that he was complying with the law. Dixon did a “wrongful act,” in the sense of our decision in Peltz, when he caused the corporate books to show, as of December 31, 1970, debts of his father and of [the company’s secretary-treasurer] which in fact were his own.

242. Id. at 1391-92, 1394.
243. Id. at 1394.
244. See id. at 1391-93.
245. Id. at 1395.
246. 433 F.2d 48 (2d Cir. 1970).
247. Dixon, 536 F.2d at 1395 (quoting Peltz, 433 F.2d at 55). Peltz is probably the most commonly cited case for the definition of willfulness in the criminal arena. See, e.g., Koets, supra note 37, §§ 6, 8. In Peltz, Judge Friendly made it clear that a “person can willfully violate an SEC rule even if he does not know of its existence” as long as that person knows the actions are wrongful. 433 F.2d at 54-55 (quoting Herlands, supra note 38, at 149). Judge Friendly added the requirements “that the act be wrongful under the securities laws and that the knowingly wrongful act involve a significant risk of effecting the violation that has occurred.” Id. at 55 (citing MODEL PENAL CODE § 2.03 (1962)). These latter qualifications have caused lasting confusion because, although Judge Friendly meant to qualify the mens rea term “willfully,” they actually have nothing to do with mens rea. The first qualification is a jurisdictional requirement; there cannot be a violation of the securities laws unless the defendant’s actions, in fact, risked a violation under these laws. See id. The second qualification is a causation requirement, which Judge Friendly appeared to recognize by citing MPC section 2.03, but did not directly state. See id.
248. Dixon, 536 F.2d at 1395-96.
This is a conclusory statement. Dixon had, indeed, claimed an honest belief that he had complied with the proxy laws. Articulated fully, his argument would have been that he understood these rules to be technical in nature, and that he believed in good faith that they could be satisfied by paper transactions that temporarily shifted debt to others who were willing to undertake the burden. Many transactions in the business world are undertaken primarily for their regulatory or tax consequences. More importantly, however, Judge Friendly should have more carefully engaged the mens rea problem raised by Dixon’s claim. The judge substituted one kind of wrongfulness (Dixon’s admitted attempt to circumvent the proxy requirements) for another (Dixon’s purported knowledge that what he was doing was wrong). As Judge Friendly formulated in Peltz and later reiterated in Dixon, it is the latter mens rea that violates the willfulness provision.

To make this point clear, Judge Friendly’s rationale can be compared to the dubious reasoning of Judge George Wilshere Bramwell in the famous case of Regina v. Prince. Henry Prince took a woman under the age of sixteen out of the possession of her father without his consent. His defense was that he honestly and reasonably believed that she was over the age of sixteen, a point the court conceded. Nevertheless, Judge Bramwell opined that Prince should be held liable because his actions were immoral. Although Prince dealt with mistake of fact and Dixon involved mistake of law, the principle is the same. In Dixon, Judge Friendly contended that Dixon could not reasonably argue there was insufficient evidence that he knew what he was doing was “wrong,” because what he actually did was “bad.” As academics have long pointed out, this kind of analysis causes a

249. Id. at 1394 (“Dixon’s principal defense was that he thought the “SEC rules” provided for a $20,000 exemption, determined on the basis of year-end indebtedness, rather than by the highest aggregate balance during the year.”).

250. See, e.g., Ratzlaf v. United States, 510 U.S. 135, 144-46 (1994) (accepting such a defense in connection with the structuring of monetary transactions to keep them under $10,000, thereby purposefully avoiding the reporting requirements). In that case, the Court interpreted the word “willful” to mean knowing that one’s conduct was “unlawful,” as opposed to “wrong,” thus providing a slightly more robust mistake-of-law defense in this context. See id. at 137.

251. See Dixon, 536 F.2d at 1395; Peltz, 433 F.2d at 55.


253. Id. at 155.

254. Id. at 156.

255. Id. at 174.

256. See Dixon, 536 F.2d at 1395-96.
divergence between what the law actually prohibits and what the courts think it should proscribe.\footnote{257}

\textit{United States v. Custer Channel Wing Corp.} further demonstrates courts’ consistent failure to logically analyze mens rea concepts in securities cases.\footnote{258} In that case, the district court found the defendants guilty of criminal contempt for violating section 5 of the Securities Act by selling unregistered securities.\footnote{259} The defendants admitted selling the stock, but argued that they believed the sales were a private offering and thus exempt from the registration requirement.\footnote{260} The district court held that this interpretation of the securities laws was incorrect, fined the corporate defendant $5,000, and sentenced the individual defendant to 183 days in prison.\footnote{261}

On appeal, the defendants asserted that the willfulness provision required the district court to find that they had acted with “evil purpose or bad motive” in selling the unregistered securities,\footnote{262} essentially asserting a weak mistake-of-law defense. Contrary to the later decisions in \textit{Peltz} and \textit{Dixon}, the U.S. Court of Appeals for the Fourth Circuit held that “willful” meant only “that the defendant has intentionally sold or offered to sell unregistered securities through the mails or in interstate commerce.”\footnote{263} The court’s reasoning revealed its ignorance of mens rea analysis.

First, the Fourth Circuit did not appear to grasp that there are different levels of mistake-of-law defenses. It equated the need to prove bad purpose with the need to prove “specific intent to violate the [law]”;\footnote{264} however, these are two very different things.\footnote{265} Moreover, in

\begin{itemize}
\item \footnote{257} See, e.g., \textit{Williams}, supra note 47, § 69, at 189-90; \textit{George P. Fletcher, Rethinking Criminal Law} 727-28 (1978). \textit{But see} Dan M. Kahan, \textit{Is Ignorance of Fact an Excuse Only for the Virtuous?}, 96 MICH. L. REV. 2123 (1998). The trial judge never told the jury that, to convict Dixon, it had to find that he was acting with an evil motive or bad purpose. \textit{Dixon}, 536 F.2d at 1397. Defense counsel had specifically requested that the jury be charged that “willfulness, as used in this instruction, means ‘bad faith or evil intent.’” \textit{Id.} (quoting United States v. Murdock, 290 U.S. 389, 398 (1933)). Despite this, the court of appeals held that Dixon never asked for the appropriate jury instruction because he failed to point out the \textit{Peltz} decision to the trial court. \textit{Id.} at 1397-98. The unfairness of this holding is patent.
\item \footnote{258} 376 F.2d 675 (4th Cir. 1967).
\item \footnote{259} \textit{Id.} at 677. This conduct is criminal if done “willfully.” Securities Act of 1933 § 24, 15 U.S.C. § 77x (2000).
\item \footnote{260} \textit{Custer Channel}, 376 F.2d at 677.
\item \footnote{261} \textit{Id.}
\item \footnote{262} See \textit{id.} at 680.
\item \footnote{263} \textit{Custer Channel}, 376 F.2d at 680 (citing Kistner v. United States, 332 F.2d 978 (8th Cir. 1964)).
\item \footnote{264} \textit{Id.}
\item \footnote{265} See supra Part II.D.
\end{itemize}
its attempt to distinguish cases cited by the defendants, the court defied mens rea logic. The cases, United States v. Crosby266 and United States v. Dardi,267 were both similar to Custer Channel. In all three cases, the defendants were convicted of selling unregistered securities268 and argued that they had made a mistake in their interpretation of the securities laws. The Crosby defendants contended that they did not know they were “underwriters” in terms of the Securities Act,269 the Dardi defendants claimed they did not know they were selling stock for a “control group,”270 and the Custer Channel defendants asserted that they did not know that their offering was “public.”271 The Custer Channel court distinguished Crosby and Dardi by maintaining that the courts in those cases were concerned with the sufficiency of the proof of knowledge, rather than with the nature of the intent required by the word ‘willful.’ . . . Crosby was decided on the basis of insufficient knowledge. . . . [In Dardi], again, the concern appears to be with the necessary knowledge and not with an evil motive or specific intent to violate the law. We think, therefore, that these cases do not cut against those . . . which indicate that specific intent is not a requisite element of the offense.272

This reasoning—in effect attempting to isolate knowledge from intent—is flawed.

IV. PROVIDING A FRAMEWORK OF COHERENCE

Having established the unintelligible nature of mens rea analysis in the securities arena, it is time to suggest a framework for rebuilding it in light of the MPC’s analytical strides. From a systemic perspective, the project must start from scratch; however, most of the substantive interpretation of mens rea developed by the courts over the last seventy years can be preserved. The task might be described as rebuilding the internal framework of mens rea, but then reattaching the existing external facing to create an entirely new edifice.

266. 294 F.2d 928 (2d Cir. 1961).
267. 330 F.2d 316 (2d Cir. 1964).
268. See Custer Channel, 376 F.2d at 677; Dardi, 330 F.2d at 320; Crosby, 294 F.2d at 932.
269. Crosby, 294 F.2d at 938-40.
270. Dardi, 330 F.2d at 326, 331-32.
271. Custer Channel, 376 F.2d at 677.
272. Id. at 681.
The first lesson the MPC teaches is that there cannot be a singular mens rea requirement for all securities offenses, or even for a particular securities offense. Rather, to deal coherently with mens rea issues, one must engage in element analysis. This is true even though the Securities Act and the Exchange Act provide only two mens rea terms: "willfully" and "willfully and knowingly." To make sense of the vast array of securities crimes, the term "willfully" must mean different things in different contexts. Current law supports this position.

The Supreme Court has stated on numerous occasions that "[willful] is a 'word of many meanings,' and 'its construction [is] often . . . influenced by its context.' This, in turn, has been a mantra repeated in securities cases in the lower courts. The acceptance of multiple meanings for the term "willful" has permitted courts to find that it requires: (1) proof that the defendant knowingly violated a specific statutory provision in the context of the tax laws; (2) proof that the defendant was acting with an evil motive in connection with criminal securities laws; or (3) mere proof that the defendant was acting knowingly, rather than by accident or mistake, and that the defendant's conduct violated civil securities provisions. Commentators have echoed the courts' conclusion on the elasticity of the definition of willfulness, although some have argued that it should be given a singular meaning.
A fair reading of the legislative history underlying the securities laws allows for multiple interpretations. Key to this conclusion is the simple recognition that Congress passed the Securities Act in 1933 and the Exchange Act in 1934, well before the time that the MPC brought rationality to mens rea. Thus, neither the drafters of the Acts, nor the Congress that enacted them, could have known exactly what the consequences of differentiating between civil and criminal violations through use of the word "willfully" would be. Evidence of this uncertainty can be found in the congressional discussion of the term, as well as in the fact that the Securities Act simultaneously uses it in the context of civil enforcement of certain provisions.

Writing shortly after the passage of the Securities Act and the Exchange Act, Judge William B. Herlands concluded that Congress meant to require "guilty intent" for criminal prosecutions, which he defined as proof that the defendant acted voluntarily and with a bad purpose. Others have noted that Congress passed the Acts shortly

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note 109, at 172; Beveridge, supra note 37, at 60-61 (stating that "willfully" has been used in American law as an "elastic proxy for a host of mental states ranging from 'malicious' to 'not accidental'" (quoting William S. Laufer, Culpability and the Sentencing of Corporations, 71 Neb. L. Rev. 1049, 1067 (1992))); Eisenberg, supra note 177, at 17.

281. See, e.g., Sachs, supra note 34, at 1029-30 (arguing for a standard interpretation of hybrid statutory schemes); Katherine R. Tromble, Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation, 52 Vand. L. Rev. 521, 545-55 (arguing for a quasi-plain-meaning approach to interpretation).

282. The fact that the drafters of these Acts were experts in securities regulation, but not in criminal law or procedure, compounded this problem. See Herlands, supra note 38, at 139-40.


284. See Securities Exchange Act of 1934 § 15(b)(4), 15 U.S.C. § 78o (2000 & Supp. II 2004). Section 15(b)(4) authorizes the SEC to "censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer" if, among other things, the broker or dealer has (1) "willfully made or caused to be made" false material statements "in any proceeding before the [SEC] with respect to registration"; (2) "willfully violated any provisions" of the Securities Act or the Exchange Act, among others; or (3) "willfully" aided and abetted the same. See id. § 15(b)(4)(A), (D), (E).

285. See Herlands, supra note 38, at 147-48; see also Beveridge, supra note 37, at 44-46.

286. See Rakoff, supra note 165 at 10 ("When Congress enacted [section] 32(a), the Supreme Court had recently confirmed the meaning to be given to 'willfully'
after the Supreme Court handed down *United States v. Murdock*, in which the Court interpreted "willful" in the same manner. Nevertheless, the vagueness of "guilty intent" and "bad purpose" arguably allows modern courts freedom to read the mens rea requirements of specific provisions of the Securities Act and the Exchange Act in accord with MPC principles.

The situation is slightly more complicated, however, than it appears at first blush. Congress added the term "knowingly" to section 32(a) of the Exchange Act in connection with the crime of making false statements in disclosure documents filed with the SEC. Thus, the mens rea requirement for this crime is "willfully and knowingly." The significance of this addition has been subject to debate. Herlands essentially contended that it added a robust mistake-of-law requirement for this crime; he supported this argument by referring to the provision in section 32(a) that grants a partial defense for defendants who can prove a similar lack of knowledge (regarding the existence of the violated rule or regulation) in connection with all other securities crimes.

Professor Norwood P. Beveridge asserted that Congress added the word "knowingly" because there had been some question during the congressional debates whether "willfully" included the concept of "knowingly"; he contended that its addition simply clarified that the government would have to prove that a defendant knew of the falsity of the representations at issue. Translated to the language of the MPC, this understanding of the word "knowingly" is that it requires the application of a specific mens rea level (knowledge) to a specific element of the crime of making a misrepresentation to the SEC (falsity). Interpreted this way, the knowledge requirement initially appears to provide nothing more than a constraint on mens rea analysis in this very narrow context. In fact, it is potentially much more significant. If Congress added the term "knowingly" merely to clarify

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290. See id.; see also Securities Exchange Act § 32(a).
291. See Beveridge, *supra* note 37, at 44
292. See id. at 45.
293. See *MODEL PENAL CODE* § 2.02(2)(b) (1962).
294. See id. § 2.02(1) (explaining that the required mental state must exist for "each material element of the offense"); Securities Exchange Act § 32(a).
the definition of willfulness and not to differentiate between willfulness and knowledge, one could argue that "willfully" includes the concept of knowledge wherever it appears in the Acts. If this is correct, such an interpretation would significantly limit flexibility in interpreting mens rea in the securities arena. For simplicity's sake, of course, this might not turn out to be a bad thing.

Whatever the relationship between the concepts of willfulness and knowledge was in 1933, in modern times willfulness is viewed as the higher level of mens rea. Evidence to support this can be found in the Sarbanes-Oxley Act of 2002, which Congress enacted in reaction to the Enron debacle and the other securities-fraud cases arising out the burst of the tech bubble in 2000. Section 906 of the Sarbanes-Oxley Act created a new crime—entitled "Failure of Corporate Officers to Certify Financial Reports"—to punish a corporate officer who certifies the accuracy of a periodic financial report "knowing that the periodic report . . . does not comport with all the requirements [of the Act]." Violation of this provision can result in a fine of up to $1,000,000 and ten years in jail. If the corporate officer "willfully" falsely certified a report, however, the maximum penalty jumps to $5,000,000 and twenty years in jail. Thus, Congress clearly believes that willful conduct is worse than knowing conduct. Congress did not give any additional insight into its understanding of the difference between knowledge and willfulness, leaving it up to the courts to interpret these terms.

295. Although Beveridge does not assert this, his conclusion implies it. See Beveridge, supra note 37, at 64 ("[T]he statutes do not distinguish between one willful violation and another.").

296. See supra Part II.C (discussing the advantages of default rules for the purpose of simplifying mens rea analysis).


298. See Maria Pérez Crist, Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information, 58 S.C. L. Rev. 7, 13 n.25 (2006) ("In the aftermath of corporate accounting scandals involving large scale destruction of documents at WorldCom and Enron, Congress passed the Sarbanes-Oxley Act of 2002.").


300. 18 U.S.C. § 1350(c)(1).

301. Id.

302. Id. § 1350(c)(2).

Both the legislative history and common-law development of the term "willful" indicate that there exists significant flexibility in establishing its definition, providing space for courts and commentators to use the advances of the MPC's mens rea analysis in future interpretive efforts. Focusing on specific statutes is the only way mens rea analysis can be rationally pursued, because the MPC teaches that the concept of mens rea only makes sense when it is attached to a material element of a particular crime. The remainder of this Part demonstrates this analysis in connection with three specific securities offenses: securities fraud, misrepresentations to the SEC, and the sale of unregistered securities.

A. Securities Fraud

A prerequisite to analyzing mens rea is discerning the material elements of the crime in question. Securities-fraud cases are typically prosecuted under Rule 10b-5, which provides three alternative methods of committing fraud in the purchase or sale of any security: (1) employing "any device, scheme, or artifice to defraud"; (2) making an "untrue statement of material fact" or omitting a material fact necessary to ensure that statements made are not misleading; or (3) engaging in any "act, practice, or course of business which operates . . . as a fraud or deceit upon any person."

For purposes of this Article, the first and third methods of committing securities fraud can be collapsed into one: employing some kind of deceitful or manipulative scheme that operates as a fraud on others. This encompasses a wide range of dishonest behavior, such as trading in a particular stock to raise its price artificially and then dumping the stock on unsuspecting purchasers. The second method is

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305. See id. § 2.02(1).
306. See Kloos et al., supra note 140, 922-23 ("Although both the 1933 and the 1934 Act deem various types of conduct unlawful, the key authorities utilized in criminal prosecutions of securities fraud are Rule 10b-5 and section 32(a) of the 1934 Act.") (citations omitted).
308. Id. § 240.10b-5(b). This Article will refer to the second method of fraud set out in this provision as "making a misleading omission."
309. Id. § 240.10b-5(c).
310. One should note that "manipulation" is a term of art, specifically referring to activity geared toward affecting the market pricing of a security. See Heminway, supra note 139, at 385 & n.23.
distinct in that it envisions the deceitful scheme to focus on the defendant's making of false statements to potential investors.

Additionally, there are three alternative jurisdictional elements: (1) the "use of any means or instrumentality of interstate commerce," (2) the use of "the mails," or (3) the use of "any facility of any national securities exchange." Courts have also implied a mens rea element and imbued it with different meanings depending upon the type of case under consideration. In civil cases, the mens rea requirement is generally called "scienter" as a result of the landmark case Ernst & Ernst v. Hochfelder. In criminal cases, it is usually called "fraudulent intent" or an "intent to defraud," which mean essentially the same thing. In cases involving material misrepresentations (as opposed to other types of market manipulation), fraudulent intent is required, but it is sometimes said to be satisfied by proof that the defendant had "knowledge" of the falsity of the statements in question. Some courts have even held that "recklessness" on this element is sufficient to sustain a conviction. Superimposed upon the mens rea element in criminal cases, of course, is the willfulness requirement. Both courts

311. 17 C.F.R. § 240.10b-5.
312. 425 U.S. 185, 193 & n.12 (1976); see SEC v. Rocklage, 470 F.3d 1, 7 (1st Cir. 2006) ("To establish liability under the misappropriation theory, the SEC must show that Mrs. Rocklage communicated material nonpublic information, with scienter, in violation of a fiduciary duty she owed to her husband." (citing Hochfelder, 425 U.S. at 193)).
315. See, e.g., United States v. Tarallo, 380 F.3d 1174, 1189 (9th Cir. 2004) (discussing the meaning of "willfully" as applied to section 32 of the Exchange Act); United States v. Erickson, 601 F.2d 296, 305 (7th Cir. 1979); United States v. White, 124 F.2d 181, 185 (2d Cir. 1941).
316. See, e.g., United States v. Amick, 439 F.2d 351, 369 (7th Cir. 1971). The Hochfelder Court specifically left open the question whether the civil requirement of scienter would be satisfied by proof of recklessness with respect to the falsity of misrepresentations in securities fraud. See Hochfelder, 425 U.S. at 193 n.12. The vast majority of courts addressing this issue since Hochfelder have answered this question in the affirmative. See Heminway, supra note 139, at 388 & n.46 (citing cases in which federal courts have ruled that "recklessness is sufficient"). Prior to Hochfelder, some courts had held that negligence was sufficient to prove fraud on a misrepresentation theory in criminal cases. See, e.g., Stone v. United States, 113 F.2d 70, 75 (6th Cir. 1940); United States v. Schaefer, 299 F.2d 625, 630-31 (7th Cir. 1962).
317. See infra text accompanying notes 338-48, 385, 408 (discussing the mens rea element of the various fraud crimes as it attaches to the other elements, and the willfulness element as establishing a weak mistake-of-law defense).
and commentators disagree as to whether, in fraud cases, this requirement adds anything to the analysis.318

1. FRAUD THROUGH DECEIT OR MANIPULATION

The elements of securities fraud through deceit or manipulation are the following: (1) the defendant employed some kind of deceitful scheme or engaged in manipulation that operated as a fraud on others (actus reus),319 (2) the defendant carried out the deceitful scheme or manipulation in connection with the purchase or sale of securities (attendant circumstance),320 (3) the securities were purchased or sold through the use of an interstate facility, the mail, or a national security exchange (jurisdiction);321 (4) the defendant had an intent to defraud (mens rea);322 and (5) the defendant acted willfully (mens rea).323

The first task in analyzing the mens rea requirement for this type of securities fraud is to determine what “intent to defraud” means. The “scheme or artifice to defraud” language in Rule 10b-5 is identical to language found in the mail- and wire-fraud statutes,324 and courts have construed these statutes to require proof of an “intent to defraud” as well.325 A typical interpretation of this mens rea requirement necessitates proof that the defendant acted “knowingly and with the intent to deceive someone for the purpose of causing some financial loss . . . to another or bringing about some financial gain to oneself or another to the detriment of a third party.”326 This elucidation includes the word “purpose” and apparently means it in a manner consistent with its MPC definition.327 Understood this way, the “intent to defraud” requirement actually adds an additional “special” purpose element to

318. See Heminway, supra note 139, at 389 n.51 (discussing the disagreement over the relationship between the scienter requirement of a Rule 10b-5 claim and the willfulness requirement).
319. See 17 C.F.R. § 240.10b-5(a), (c) (2006).
320. See id. § 240.10b-5.
321. See id.
322. See supra notes 313-16 and accompanying text.
323. See supra note 31 and accompanying text.
324. See, e.g., 18 U.S.C. § 1341 (2000) (prohibiting the use of the mail in “any scheme or artifice to defraud”); id. § 1343 (applying the same language to wire fraud).
325. United States v. Hawkey, 148 F.3d 920, 924 (8th Cir. 1998); see also United States v. Deters, 184 F.3d 1253, 1257 (10th Cir. 1999) (approving the trial court’s instruction that “‘scheme and artifice to defraud’ means any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value”).
326. Hawkey, 148 F.3d at 924.
327. See id.
the crime: the prosecution must prove that the defendant had the conscious object of either causing financial loss to another or gaining financially at another's expense.

This special mens rea requirement should rarely pose an obstacle for the prosecution in fraud cases involving manipulation or deceit. Presumably, the vast majority of defendants who pursue a scheme to defraud consciously desired to secure a financial gain for themselves at the expense of others. Sometimes, however, a defendant might be in a position to disclaim an intention to cause another to suffer monetarily; though the defendant might have engaged in a fraudulent scheme, the defendant's hope was that the targets of the scheme would ultimately be beneficiaries of it as well. For example, a stockbroker who lies about the prospects of an investment in order to collect fees from credulous investors might truly hope that the investment does well and clients make money. When faced with cases of this kind, courts retreat from the language of purpose, making it clear that an honest belief in the ultimate success of the venture; thus the absence of a conscious object to benefit from another's loss does not constitute a valid defense. Instead, these courts essentially define "intent to defraud" as knowledge that one is participating in a deceitful or manipulative scheme.

A knowledge requirement is a very reasonable predicate mens rea for criminal liability. Therefore, the mens rea that attaches to the first element—the actus reus of engaging in a deceitful or manipulative scheme—should be knowledge. The defendant must act knowingly; mere recklessness or negligence is not sufficient proof of mens rea in connection with this element.

The second element requires that the fraud be "in connection with the purchase or sale of securities." Although one might suppose that "knowledge" is the appropriate mens rea to attach to this element as well, courts have uniformly held that a defendant who knowingly commits fraud—thereby harming or risking harm to investors—should not be able to defend on the grounds that the defendant did not know the fraud was through dealings in securities, as opposed to other instruments of commerce. In effect, they have taken the position that

328. See, e.g., Sparrow v. United States, 402 F.2d 826, 828-29 (10th Cir. 1968); Greenhill v. United States, 298 F.2d 405, 411 (5th Cir. 1962); Frank v. United States, 220 F.2d 559, 564 (10th Cir. 1955).

329. See, e.g., Sparrow, 402 F.2d at 827-29.

330. See supra note 56-61 and accompanying text.

331. 17 C.F.R. § 240.10b-5 (2006); see supra note 320 and accompanying text.

332. See, e.g., United States v. Brown, 578 F.2d 1280, 1283-84 (9th Cir. 1978) (holding that the government, in a securities-fraud case, need not prove that the defendant knew that the "object sold or offered was a security"). In other words,
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this element is jurisdictional in nature: a person who engages in fraud commits a crime; if the person uses some instrumentality of interstate commerce, it is a federal crime, such as mail or wire fraud; and if it is in connection with the purchase or sale of securities, it is the federal crime of securities fraud.

Treating this second element as "jurisdictional-only" is justifiable if the penalties for mail fraud and securities fraud are roughly equivalent. If such is the case, then the defendant is not being punished for the securities part of the fraud, and thus holding the defendant strictly liable on this element is not unfair. As it turns out, the penalties for mail fraud and securities fraud are not so dissimilar as to make the jurisdictional treatment of this element unreasonable.

The next element—requiring the government to prove beyond a reasonable doubt that the defendant's activities involved the use of an interstate facility, the mail, or a national security exchange—is plainly jurisdictional. Therefore, no mens rea attaches to it, making it incredibly easy to prove.

The last element is the willfulness requirement. The existence of this requirement in addition to the intent-to-defraud element has led to conflicting interpretations among commentators and courts. Under an MPC-based analysis—because the intent-to-defraud element distills into a knowledge requirement that attaches to the only other material element of the offense—the addition of a willfulness requirement could do one of only four things: (1) raise the knowledge requirement back up to purpose; (2) add a robust mistake-of-law defense (requiring proof that the defendant knowingly violated a specific statute, rule, or

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Brown established that a defendant need not have mens rea with respect to the element of trading securities. See id. 333. 18 U.S.C. § 1341 (2000).

334. Cf. United States v. Feola, 420 U.S. 671, 676-77 & n.9 (1975) (holding that, for the crime of assaulting a federal officer, the "federal officer" element is jurisdictional only and thus no mens rea attaches thereto).

335. Post-Sarbanes-Oxley, the penalty for mail and wire fraud for individuals is twenty-years imprisonment and a fine of $250,000 or twice the victims' loss or the defendant's gain, whichever is the greatest. See 18 U.S.C. §§ 1343, 3571(b)(3), (d). Under section 32(a), the maximum penalty for securities fraud is twenty-years imprisonment and $5,000,000. See Securities Exchange Act of 1934 § 32(a), 15 U.S.C. § 78ff(a) (2000 & Supp. II 2004). For securities fraud under the newly created statute, the maximum penalty is twenty-five-years imprisonment and a fine. See 18 U.S.C. §§ 1348, 3571 (2000 & Supp. III 2005).

336. See Palmiter, supra note 153, § 9.1.2, at 307 (noting that the interstate-commerce requirement is jurisdictional and "essentially a nonissue").

337. In the language of the MPC, it is a nonmaterial element. See Model Penal Code § 1.13(10) (1962).

338. See supra Part III.A-C.
regulation); (3) add a weak mistake-of-law defense (requiring proof that the defendant knowingly did something wrong); or (4) nothing at all. An examination of these options establishes the breadth of choice and points to the right answer.

The first option—interpreting willfulness to require proof of purpose—is not viable. Very few crimes require mens rea in the form of purpose, and securities fraud should not be among them. If a defendant knowingly acts to manipulate the securities market, the defendant is sufficiently culpable for the imposition of criminal sanctions. Through deceitful means, the defendant is either gaining or attempting to gain an unfair advantage over others, and is harming or risking harm to others. From a just-deserts or deterrence perspective, it does not matter what the defendant’s “conscious object” actually is.

On the other hand, the fourth option of giving the word “willfulness” no meaning at all would violate the fundamental principle of statutory construction that a legislature is presumed to place language in a statute for some purpose. Congress included this language in the statute because it was worried that the securities arena would become a trap for the unwary; it did not think it was appropriate for someone to go to jail if that person was unaware of the rule or regulation violated. This is a robust mistake-of-law defense: a defendant can presumably avoid confinement by showing a lack of knowledge about the crime committed, even if the defendant knew that the conduct was wrong. As at least one other commentator has pointed out, by making robust mistake of law only a partial defense, Congress could not have meant for the willfulness requirement to provide a complete defense for the

339. See Model Penal Code and Commentaries § 2.02 cmt. 2, at 234 (“It is true, of course, that this distinction is inconsequential for most purposes of liability: acting knowingly is ordinarily sufficient.”).
340. See id. § 2.02(2)(a).
341. See 82 C.J.S. Statutes § 310(c) (2006) (discussing the presumption that all statutory language “has a purpose and is to be given some effect”).
343. Id.
344. See Herlands, supra note 38, at 190-91.
very same type of mistake,\textsuperscript{345} especially because such an interpretation would render section 32(a) incoherent. Rather, it makes sense to infer that Congress intended for the willfulness requirement to provide a full defense only in situations in which the defendant was so guileless as to be wholly unaware that the offensive conduct was wrong. Willfulness in the securities-fraud context, therefore, equates to a weak mistake-of-law defense.\textsuperscript{346}

One could argue that interpreting willfulness in this manner effectively renders it meaningless because a defendant who commits fraud through market manipulation necessarily knows that the contested conduct is wrong.\textsuperscript{347} Admittedly, this will be true in the majority of cases. Occasionally, however, a defendant might be able to raise a colorable claim that, despite engaging in market manipulation, the defendant honestly believed that the conduct provided a service to others or that the defendant made sure that everyone got a "piece of the action."\textsuperscript{348} Most of the time, a jury is not likely to buy this argument, but the defense nevertheless exists, and should be available to the rare defendant who might legitimately benefit from it.

Many courts have held that good faith is a defense to securities fraud.\textsuperscript{349} Similarly, courts have often repeated the proposition that reliance on the advice of counsel is not itself a defense, but is evidence that may support a claim of good faith.\textsuperscript{350} Other courts have contended that, because good faith is the mirror image of mistake of law, good-faith instructions are unnecessary and redundant.\textsuperscript{351} To a large extent,

\begin{footnotesize}
\textsuperscript{345.} See id. at 149.
\textsuperscript{346.} Given this construction of section 32(a), it appears safe to conclude that, for mistake-of-law purposes, willfulness should always be construed as providing the weak rather than the robust version of this defense.
\textsuperscript{347.} Cf. United States v. English, 92 F.3d 909, 914-16 & n.8 (9th Cir. 1996) (holding that the absence of a willfulness instruction was not erroneous because fraud is an inherently bad act, and listing cases from other circuits holding that the willfulness requirement is generally ignored in fraud cases).
\textsuperscript{348.} See, e.g., Greenhill v. United States, 298 F.2d 405, 411 (5th Cir. 1962).
\textsuperscript{349.} See, e.g., Tarvestad v. United States, 418 F.2d 1043, 1047 (approving of the trial court’s instruction that good faith is a complete defense); United States v. Tarallo, 380 F.3d 1174, 1191 (9th Cir. 2004) (citing United States v. Amlani, 111 F.3d 705, 718 (9th Cir. 1997)) (approving of a similar “good faith” instruction).
\textsuperscript{351.} See, e.g., Beck v. United States, 305 F.2d 595, 599 (10th Cir. 1962) (holding that an instruction on intent made the trial court’s refusal to give a good-faith
these latter courts are correct. Generally speaking, acting in good faith implies an honest belief that one’s actions are in conformity with the law.352 Provided that the relevant statute makes ignorance of the law’s existence or a misinterpretation of its provisions a defense, a defendant can indeed plead the mistake in exoneration. A defendant who is entitled to only a weak mistake-of-law defense, however, gets slightly less. To be exonerated, this defendant’s “good faith” must extend not only to a belief that the contested actions were lawful, but also to a belief that they were not wrong or evil.353 Because of the risk that the nuances of a particular mistake-of-law defense might get lost in its translation to good-faith terminology, it is suggested that this terminology be avoided—at least in the weak mistake-of-law context.

One should take note of the rationality brought to the interpretation of securities fraud by deceit or manipulation through the use of MPC mens rea analysis. In effect, the MPC provides that there are three levels of mens rea operating harmoniously with respect to this crime: First, the government must prove that the defendant knowingly engaged in a scheme to defraud through deceit or manipulation. Second, it must prove that the defendant knew that the actions were wrong.354 Third, the defendant can avoid the penalty of imprisonment by demonstrating a lack of knowledge of the violated rules or regulations.355 Additionally, the defendant will be held strictly liable on all jurisdictional elements,356 including the fact that the fraud was connected with the purchase or sale of a security.357

2. SECURITIES FRAUD THROUGH MISREPRESENTATION OR MISLEADING OMISSIONS

The elements of securities fraud through misrepresentation or omission are as follows: (1) the defendant made one or more untrue statements or misleading omissions (actus reus);358 (2) the statements or misleading
omissions were material (attendant circumstance); the defendant made the statements or misleading omissions in connection with the purchase or sale of securities (attendant circumstance); (4) the securities were purchased or sold through the use of an interstate facility, the mail, or a national security exchange (jurisdiction); (5) the defendant acted with an intent to defraud (mens rea); and (6) the defendant acted willfully (mens rea).

The first issue, which arises frequently, is the interpretation of "intent to defraud" in this context. This phrase describes the mens rea that attaches to the element of making false statements. The critical question is whether the government must prove that the defendant knew that the representations were false, or whether it can rely on mere recklessness. This question is not easily answered because the language of the statute, its common-law interpretation, and policy arguments point in conflicting directions. Regarding the statutory language, it is vital to note that Congress passed the Securities Act before the MPC established the meaning of recklessness and that the word does not appear anywhere in the statute. Under these circumstances, it is difficult to argue that Congress specifically intended recklessness to be the requisite mens rea.

On the other hand, the Supreme Court left open the possibility that recklessness would be sufficient scienter in civil securities-fraud cases in Hochfelder, and every court of appeals to consider the issue has agreed that it is, indeed, sufficient. Some courts have interpreted this

359. See id.
360. See id. § 240.10b-5.
361. See id.
362. See supra notes 313-16 and accompanying text.
363. See supra note 31 and accompanying text.
364. See Dennis v. United States, 341 U.S. 494, 500 (1951) (stating that the "vast majority" of crimes in Title 18 of the U.S.C. require an inquiry into mental state, which is commonly indicated by statements similar to "with intent to").
365. See generally Paul S. Milich, Securities Fraud Under Section 10(b) and Rule 10b-5: Scintor, Recklessness, and the Good Faith Defense, 11 J. CORP. L. 179 (1986) (acknowledging that the use of recklessness as a basis for scienter is common, but arguing that it is applied inconsistently and runs counter to precedent and the common law).
367. See Nathenson v. Zonagen, Inc., 267 F.3d 400, 408 (5th Cir. 2001) ("Since [Hochfelder] . . . the "Courts of Appeals . . . have held that recklessness does satisfy the scienter requirement." (citations omitted)); see also Greebel v. FTP Software, Inc., 194 F.3d 185, 198-99 (1st Cir. 1999); Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 & n.6 (9th Cir. 1990) (listing precedents from all federal circuits except the Fourth, and providing similar district-court precedents from that circuit); Cheng et al., supra note 37, at 1087 & n.46; DONNA M. NAGY ET AL., SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS 110 (2003)
to mean that recklessness is the necessary mens rea in criminal cases as well.\textsuperscript{368} Alternatively, one could argue that the statute requires a higher mens rea for criminal punishment than for civil sanctions by pointing out that, in the civil context in which \textit{Hochfelder} was decided, no mens rea term appears in the statutory provision or the rule at issue;\textsuperscript{369} conversely, section 32(a) specifically adds the willfulness requirement for criminal prosecutions. Although it is acceptable to read recklessness into the statute in the absence of mens rea terminology, knowledge is the minimum mens rea that should be read into the statute when the term “willful” appears. Supporting this position is the fact that courts have interpreted “intent to defraud” as requiring “knowledge” in connection with fraud by deceit or manipulation cases.\textsuperscript{370}

Complicating matters further, section 32(a) uses the term “willfully” to make all violations of the Act’s provisions criminal, but it requires proof that the defendant acted “knowingly and willfully” for the crime of false statements to the SEC.\textsuperscript{371} This suggests that Congress’s decision to leave “knowingly” out of the general part of section 32(a) indicates its intent that “mere willfulness” encompasses a mens rea requirement lower than knowledge—presumably recklessness. The policy arguments also diverge regarding the level of mens rea that should attach to the element of making false representations. On the one hand, many observers have been infuriated over the last few years as a parade of highly paid corporate executives accused of participating in massive schemes to defraud investors through material misrepresentations\textsuperscript{372} defended themselves on the basis that they did not

\textsuperscript{368} See, \textit{e.g.}, United States v. Tarallo, 380 F.3d 1174, 1189 (9th Cir. 2004) (citing United States v. Farris, 614 F.2d 634, 638 (9th Cir. 1979)). These cases should not be confused with those holding that willful blindness—defined as “reckless deliberate indifference to or disregard for truth or falsity” combined with either a “conscious purpose to avoid learning the truth” or a “specific duty to discover the true facts [when the] facts tendered are suspect, and [the defendant] does nothing to correct them”—allows the inference of willful and knowing fraud. See United States v. Natelli, 527 F.2d 311, 322-23 & n.9 (2d Cir. 1975); see also, \textit{e.g.}, United States v. Weiner, 578 F.2d 757, 787 (9th Cir. 1978). Under the common law, willful blindness is an accepted substitute for knowledge. See, \textit{e.g.}, United States v. Jewell, 532 F.2d 697, 700 & n.7 (9th Cir. 1976) (quoting WILLIAMS, \textit{supra} note 206, § 57, at 159).

\textsuperscript{369} \textit{Hochfelder} involved section 10 of the Exchange Act and Rule 10b-5. See 425 U.S. at 187-88.

\textsuperscript{370} See \textit{supra} Part IV.A.1.


\textsuperscript{372} See, \textit{e.g.}, Tom Petruno, \textit{Critics of Imperial Pay Taste Success, Pressure Boards}, CHI. TRIB., May 15, 2005, § 5, at 1; see also \textit{supra} note 139.
“know” what was going on in their own companies. Although most of these defenses ultimately failed, prosecutors would surely have benefited from a lower mens rea standard, especially in cases against the highest level executives, who are in the best position to insulate themselves from the illicit activity around them. On the other hand, given the twenty-year maximum sentence, and that the line between mere puffing and dishonest representation is sometimes quite unclear, having in place an actual knowledge requirement for a section 32(a) violation protects those who are not criminally culpable.

One could also argue that the mens rea standard for criminal prosecution should, as a matter of policy, be higher than the standard for civil actions or enforcement, in light of the prospects of imprisonment and the stigma of conviction. Given that recklessness suffices in the civil context, the level of mens rea in the criminal arena should be knowledge. This would draw a bright-line distinction between the behavior that will get one sued or fined, and behavior that will land one in jail.

Ultimately, there is no right answer to this interpretive stalemate. Recklessness and knowledge are both perfectly appropriate mens rea elements for criminal liability; indeed, the former is the default position of the MPC, while the latter is the most commonly found requirement in federal criminal law. The solution boils down to which of the policy arguments one finds more persuasive. In light of the recent public-company scandals and the tendency of corporate


374. See Bajaj & Whitmire, supra note 373; Krysten Crawford, Ex-HealthSouth CEO Scrushy Walks, CNNMONEY.COM, June 28, 2005, http://money.cnn.com/2005/06/28/news/newsmakers/scrushy_outcome/index.htm (noting that HealthSouth founder and ex-CEO Richard Scrushy’s acquittal was “probably the first time that the defense of ‘I didn’t know’ . . . has worked for a former chairman or CEO” (quoting Stanley Twardy, former Conn. U.S. Att’y)); see also supra note 139.


376. See Lustiger v. United States, 386 F.2d 132, 138 (9th Cir. 1967) (noting that “seller’s puffing”—that is, “exaggeration within reasonable bounds”—is not criminal).

377. See supra note 316 and accompanying text.

378. Given the sliding-scale nature of mens rea, it is debatable whether the distinction between “knowing” and “reckless” behavior is sufficiently patent to result in a clear delineation among more and less culpable defendants.

379. See MODEL PENAL CODE § 2.02(3) (1962).

380. See supra text accompanying note 61.
officers to employ the "I didn't know" defense, interpreting willfulness to mean "reckless disregard of the truth or falsity of one's representations," amounting to conduct that is a "gross deviation from . . . that [of] a law-abiding citizen," is very appealing.

The next questions are whether mens rea attaches to the element of the materiality of the misrepresentations, and if so, what this mens rea ought to be. A statement or omission is material if there is "a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision, or if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." As previously established, to convict a defendant of securities fraud through misrepresentation or misleading omissions, the prosecution must prove that the defendant was at least reckless regarding the falsity of the contested statements. If this mens rea element is satisfied, the defendant is culpable; arguably, one would not want to permit the defendant to avoid punishment on the grounds that the defendant believed the deception to be harmless. If the jury finds that a reasonable investor would have found the defendant's misrepresentations to be important, that should be enough for criminal liability. In other words, one might be inclined to make the defendant strictly liable on the element of materiality.

The remaining elements are identical to those of fraud by manipulation and thus can be addressed succinctly. The requirements that the defendant made the statements or misleading omissions in connection with the purchase or sale of a security, and that these securities were purchased or sold through the use of an interstate facility, the mails, or a national security exchange, are jurisdictional-only, and thus no mens rea element attaches to them. The requirement of willfulness should be read to provide the defendant with a weak mistake-of-law defense.

The interpretive conclusions arrived at in this Part are undoubtedly subject to disagreement because of differing views on matters of statutory construction, legislative history, and the policy intended to be

381. See supra notes 372-74.
382. MODEL PENAL CODE § 2.02(2)(c).
384. See Heminway, supra note 139, at 388; supra notes 364-82 and accompanying text.
385. See supra Part IV.A.1 (discussing the elements of fraud through manipulation).
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promoted by the penal law. By employing MPC analysis, however, one avoids confusion, and interpretive alternatives become crystal clear.

B. Misrepresentations to the SEC in Violation of Section 32(a) of the Exchange Act

Section 32(a) gives rise to criminal liability if a person "willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder . . . which statement was false or misleading with respect to any material fact." With modern revisions, the penalty for violation of this provision is up to twenty-years imprisonment and a $5,000,000 fine for a natural person, and a fine of up to $25,000,000 for other entities. This penal statute is an extremely powerful weapon in the prosecutor's arsenal because public companies must file many reports with the SEC over the course of a year and, compared to other kinds of securities infractions, the falsity of statements are relatively easy to prove.

The elements of the crime of making false statements to the SEC are as follows: (1) the defendant made, or caused to be made, a statement (actus reus); (2) the statement appeared in an application or report required to be filed with the SEC (attendant circumstance); (3) the statement was false or misleading (attendant circumstance); (4) the statement concerned a material fact (attendant circumstance); (5) the defendant acted knowingly (mens rea); and (6) the defendant acted willfully (mens rea).

Unlike all other criminal violations of the securities laws, this one features a mens rea element of knowledge in conjunction with the willfulness requirement. This distinction makes the mens rea analysis for this provision somewhat easier than for all others. Following the MPC's default rule, when a mens rea term appears in a statute, one should presume that the term attaches to "all the material elements of the offense, unless a contrary purpose plainly appears." In this case, the legislative history reveals Congress's unequivocal intention that the

389. See id. § 32(a).
390. See id.
391. MODEL PENAL CODE § 2.02(4) (1962).
government be required to prove that the defendant knowingly made a false statement to the SEC. In MPC terms, Congress wanted the element of knowledge to attach to the making of the statement at issue, and to the false or misleading nature of that statement. For this misrepresentation crime, courts have universally agreed that mere recklessness on these elements is not enough.

The next question is whether the defendant must know, or be aware of the risk, that the misrepresentations are going to appear in a report or other document filed with the SEC. The starting point for answering this question is the default rule's presumption that the knowledge requirement would apply to this element as well. Although this also seems to make sense—as it would appear that the behavior Congress sought to deter, and the harm it intended to punish, involved interference with the SEC's ability to protect the public—precedent does not necessarily support this position. In Dixon, the defendant specifically maintained that he had been incorrectly informed of the content of the reports filed with the SEC and did not know that information about his self-manipulated indebtedness appeared in them. If the mens rea of knowledge attached to this element, such a claim would have entitled Dixon to a mistake-of-fact instruction. He did not get one, however, and the court of appeals still upheld the conviction, effectively approving of strict liability on this element.

392. See Beveridge, supra note 37, at 44-45. The legislative history demonstrates that there was some confusion or disagreement in Congress as to whether the term “willfully” would, standing alone, clearly express Congress's intention to make knowledge a requirement for section 32(a) of the Exchange Act. See Herlands, supra note 38, at 147-48 & n.24. Congress added the word “knowingly” to an amended version of this provision, apparently to reassure skeptics. See id. at 161.

393. See, e.g., United States v. Swink, 21 F.3d 852, 855-56 (8th Cir. 1994) (holding that the government had to prove that the defendant knew that the set of transactions he had engaged in was a sham, thereby leading to false statements on SEC filings); United States v. Gross, 961 F.2d 1097, 1102-03 (3d Cir. 1992) (holding that the trial judge's instruction on knowledge was sufficient despite the denial of the defendant's request for a good-faith instruction); United States v. Erickson, 601 F.2d 296, 303-04 (7th Cir. 1979); United States v. Henderson, 446 F.2d 960, 965-66 (8th Cir. 1971); United States v. Meyer, 359 F.2d 837, 839 (7th Cir. 1966); Eibel v. United States, 364 F.2d 127, 131-32 (10th Cir. 1966); United States v. Benjamin, 328 F.2d 854, 861-62 (2d Cir. 1964); United States v. Schaefer, 299 F.2d 625, 629-30 (7th Cir. 1962).

394. See Model Penal Code § 2.02(4).


397. See Dixon, 536 F.2d at 1396-98, 1402. The trial court gave a generic erroneous “knowledge” instruction—that “an act is done knowingly if done voluntarily and intentionally and not because of a mistake or accident or other innocent reason.”
Dixon is certainly not an outlier, as there is important precedent outside of the securities arena that supports holding defendants strictly liable on elements of this type. For example, in United States v. Yermian, Esmail Yermian lied on security forms, which his employer ultimately submitted to the Department of Defense, implicating the general false-statements statute. The statute dictates that a person who, “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation” is guilty of a felony. Yermian claimed that he did not know the form would be forwarded to the federal government, and he asked for an instruction that, if the jury found this claim credible, it would have to acquit. The trial court refused such an instruction, and the Supreme Court ultimately upheld its decision. In effect, the Court determined that lying was the culpable conduct Congress intended to punish, and that the additional requirement that the lie be within the authority of an agency of the United States was only jurisdictional, making defendants strictly liable on this element.

Although the very same argument could be made in the case of false statements to the SEC, one could distinguish Yermian on the ground that the false-statements statute specifically uses the phrase “within the jurisdiction of,” while section 32(a) states “in any application, report, or document” to be filed with the SEC. The former language makes it easy to conclude that Congress intended to make the requirement jurisdictional-only; the latter is more ambiguous. Because the statutory language is hardly decisive, one must consider the policies at stake. Yermian was a 5-4 decision from 1984—the height of the expansion of federal criminal law. Since that time, there has been a great deal of criticism of the tendency of Congress and the

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Id. at 1396. This was inadequate to instruct the jury that, if it believed Dixon was mistaken as to what would be included in the SEC filings, it must acquit him.

400. Yermian, 468 U.S. at 66.
401. See id. at 66, 68 (reversing the appellate court’s contrary holding).
402. See id. at 69.
404. Yermian, 468 U.S. at 63, 75.
405. See John C. Coffee, Jr., Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193, 201-19 (1991) (arguing that offensive conduct that had once been dealt with exclusively in the civil-enforcement arena was increasingly being treated as criminal in nature).
federal courts to extend federal criminal jurisdiction to an increasingly broad universe of activity.\textsuperscript{406}

Indeed, in more recent decisions, the Supreme Court has cut back on such jurisdiction.\textsuperscript{407} Confronted with the issue in the context of section 32(a), it is arguably more prudent to construe the statute narrowly, applying it only to situations in which there is evidence that the defendant knowingly misled the SEC. Otherwise, section 32(a) would join the false-statement statute as one that makes lying a federal crime if the lie happens to end up on the desk of a federal bureaucrat. If the courts find the knowledge requirement to be intolerably high, they could adopt a middle position by requiring proof of recklessness.

Determining the mens rea for the remaining elements is simple. The concept of materiality does not differ from crime to crime;\textsuperscript{408} thus, the defendant should universally be held strictly liable on the element of materiality. Finally, for the reasons discussed in connection with general securities fraud, the willfulness requirement should be read to provide defendants with a weak mistake-of-law defense.

\textbf{C. Nonexempt Sale of Unregistered Securities}

Section 5(a) of the Securities Act makes it "unlawful for any person, directly or indirectly...to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell [an unregistered] security."\textsuperscript{409} Section 24 of the Act makes this conduct a crime if it is done willfully,\textsuperscript{410} and section 4 exempts certain securities and transactions from the registration requirement.\textsuperscript{411}

The elements of the crime of willfully violating section 5(a) are as follows: (1) the defendant sold a security (actus reus); (2) neither the


\textsuperscript{408} See MODEL PENAL CODE § 1.13(10) (1962).


\textsuperscript{410} Id. § 24.

\textsuperscript{411} Id. § 4.
security\textsuperscript{412} nor the sale\textsuperscript{413} were exempt from the Securities Act (attendant circumstance); (3) the security was not registered with the SEC (attendant circumstance); (4) the defendant used instruments of interstate commerce or the mail to facilitate the sale (jurisdiction); and (5) the defendant acted willfully (mens rea).\textsuperscript{414}

In civil cases, section 5(a) imposes strict liability on sellers of securities.\textsuperscript{415} This applies to civil actions brought by purchasers to rescind the transaction pursuant to section 12(a)(1) of the Securities Act and to enforcement actions brought by the SEC under its enforcement powers.\textsuperscript{416} Individuals who control sellers are also jointly and severally liable unless they can prove that they “had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.”\textsuperscript{417} This provision effectively grants controlling individuals an affirmative defense if they can show that they exercised due care.

Strict liability for the sale of unregistered securities in the civil context is necessary and appropriate. The registration requirement is the very “heart of the Securities Act”;\textsuperscript{418} along with the prospectus requirement,\textsuperscript{419} it is the main way for the SEC to ensure that companies issuing securities provide the public with essential information and it enables the SEC to otherwise protect investors during this critical period of time. Investors who have purchased unregistered securities ought to have the right to rescind the deal, and the SEC should have the power to immediately intercede to bring the unlawful selling to a halt. Because civil enforcement is classically remedial in nature,\textsuperscript{420} it should not matter whether the defendant has any mens rea with respect to the offensive conduct.

\textsuperscript{412} Id. § 3(a).
\textsuperscript{413} Id. § 4.
\textsuperscript{414} See Tarvestad v. United States, 418 F.2d 1043, 1046-47 (8th Cir. 1969) (citing United States v. Abrams, 357 F.2d 539, 546 (2d Cir. 1966) and Kistner v. United States, 332 F.2d 978, 981 (8th Cir. 1964)).
\textsuperscript{416} See Palminter, supra note 153, § 6.2, at 192-93; id. § 12.2.1-.2, at 437-39.
\textsuperscript{417} Securities Act § 15.
\textsuperscript{418} See Palminter, supra note 153, § 4.2.1, at 109.
\textsuperscript{419} See Securities Act § 10.
\textsuperscript{420} See Helvering v. Mitchell, 303 U.S. 391, 399-400 (1938) (holding that remedial sanctions are enforceable through civil proceedings).
The same cannot be said for criminal enforcement, which seeks to punish offenders and deter future violations. According to the MPC, conviction of any crime requires some mens rea element; the common law agrees, with a narrow (and controversial) exception carved out for public-welfare offenses. The sale of unregistered securities is not a public-welfare offense because, through the operation of section 24, Congress supplied the mens rea element of "willfulness," and provided for a maximum sentence of up to five-years imprisonment.

The task at hand, therefore, is interpreting "willfully" as it applies to the elements of this crime and to the possibility of a mistake-of-law defense. Precedent in the securities arena is of little help because courts have not confronted these issues with any clarity of thought. As to the first element, it seems reasonable to assume that the government must prove that the defendant knowingly sold something. The more difficult questions are whether the government has to prove that the defendant knowingly sold a "security" and that the security and transaction were not exempt from the Securities Act. Because these questions deal with the interpretation of the criminal law itself, they technically fall within the domain of mistake of law. Phrased another way, the issue is whether a criminal defendant should be able to defend against section 5 charges on the grounds of ignorance or misinterpretation of the securities laws (that is, whether the defendant should get a robust mistake-of-law defense).

It is quite possible to envision individuals who honestly believe that they are selling "contracts," or "sales agreements," without knowledge that these constitute nonexempt securities under the definitions provided by the Securities Act and interpretative case

421. See supra notes 42-48 and accompanying text.
422. See MODEL PENAL CODE § 2.02 (1962).
424. See United States v. Park, 421 U.S. 658 (1975) (describing how a "great" public interest "warrant[s] the imposition of the highest standard of care" (quoting Smith v. California, 361 U.S. 147, 152 (1959))).
425. See United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 51-52 (1st Cir. 1991) (holding that a crime involving a penalty of up to five-years imprisonment and a mens rea requirement of knowledge did not qualify as a public-welfare offense). In addition, the MacDonald court stated that it knew of "no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute." Id. at 52 (citing Park, 421 U.S. at 674).
426. See supra Part III.B.
427. See supra Part II.D.
Note that in such cases, a defendant's motivation may be entirely innocent; section 5 does not require proof of fraud or deceit. Without a doubt, the SEC should have the power to force a defendant to cease these sales until the defendant takes the steps necessary to conform to the law and provide full protection to the public. Whether the defendant should also be criminally liable is less clear, but a case outside of the securities-law arena offers some guidance.

Staples v. United States presented the Supreme Court with the question of whether the defendant, Harold Staples, could defend his possession of an unregistered firearm on the basis that he did not know the rifle in his possession was, in fact, a firearm for purposes of federal gun laws. His rifle was a “firearm” only because it had been converted to semi-automatic action, which he denied knowing. The Court determined that Staples was entitled to this mistake-of-fact defense because mere possession of a rifle is not conduct that would put a law-abiding citizen on notice that the possession might constitute a crime. Similarly, in the context of section 5 of the Securities Act, one could argue that the mere sale of financial instruments does not put the seller on notice that the instruments might technically be securities.

Just as recklessness could be a good compromise to attach to the element of “in any application, report, or document” filed with the SEC in connection with a section 32(a) prosecution, it might be the perfect mens rea for a section 5 violation as well. A defendant who is savvy enough to risk of selling securities but who fails to clarify the exempt status of the securities or the transaction, or to register the sale with the SEC, arguably is sufficiently culpable for criminal treatment. Such a scheme would shield the truly naïve seller from criminal liability, while capturing the slick operator. There is no reason why the mens rea of recklessness cannot apply to this element.

The next element requires proof that the securities are not registered with the SEC. As in the case of selling a “security,” the question of which mens rea requirement should attach to this element has been left wide open by the courts. Assume that the defendant, Guilty Gayle, knows (or recklessly disregards the fact) that she is

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429. See, e.g., Reves v. Ernst & Young, 494 U.S. 56, 61 (1990) (determining that Congress meant to define the term “security” broadly).
430. See Securities Act § 5.
432. Id. at 603.
433. See id. at 615-16.
435. See supra notes 258-72 and accompanying text (discussing Custer Channel and related cases).
selling securities as defined by the Securities Act. It seems fair to place a heavy burden on her to discern her legal obligations regarding the registration of those securities. After all, she is sophisticated enough to know (or to be aware of the risk) that she is dealing in securities, and she is voluntarily placing those securities into the stream of commerce. If Gayle fails to carry out due diligence, she should risk prosecution for a crime. In other words, she should be strictly liable on the element of nonregistration.

While one could certainly impose a mens rea requirement on the element in question, there is support for the imposition of strict liability from another case dealing with the firearms laws. In United States v. Freed, Donald Freed was indicted for possession of an unregistered firearm. Freed argued for the dismissal of the indictment on the ground that it failed to allege he had knowledge of the registration requirement. Like Staples, Freed based his claim on the notion that ignorance with respect to one of the material elements of the offense should be a defense. Unlike Staples, however, Freed was allegedly in knowing possession of hand grenades, which the Supreme Court noted are "highly dangerous offensive weapons." The Court held that Freed would be strictly liable on the element of registration; if the jury found that he possessed something as dangerous as a grenade, Freed had the burden of determining the regulatory requirements with which he needed to comply. Thus, it refused to dismiss the indictment. A section 5(a) defendant who knowingly or recklessly sells securities is in exactly the same position as Freed, and arguably should bear the burden of understanding the pertinent regulatory environment.

The jurisdictional element of section 5 is nonmaterial, and thus no requirement of mens rea attaches to it. That leaves the questions of whether and what level of mistake-of-law defense the term "willfully" supplies to a defendant. Given that the penalty provisions of the Securities Act and the Exchange Act "grew out of the same program of securities legislation and out of the same fact finding investigation," were prepared "by the same Senate and House Committees within a

437. Id. at 607.
438. Id. at 609.
439. Id. at 607 ("The [National Firearms] Act requires no specific intent or knowledge that the hand grenades were unregistered.").
440. Id. at 609-10.
441. Id. at 610.
442. See MODEL PENAL CODE § 2.02(1) (1962).
443. See Tarvestad v. United States, 418 F.2d 1043, 1047 (8th Cir. 1969).
year of each other," and are structurally identical, a strong argument exists that willfulness means the same thing in both contexts. If so, it would import a weak mistake-of-law defense into section 5, an outcome generally supported by the case law. The few decisions to the contrary are either so conclusory or so confused as to make their holdings inscrutable.

A weak mistake-of-law defense would compliment the robust mistake-of-law defense related to the definition of a security under the Act. The government would have to prove that the defendant either knew or disregarded the risk of dealing in nonexempt securities, and that the defendant, in general, knew the wrongfulness of the conduct at issue. The defendant would have the option of pressing one of the two defenses more strongly, or both equally, depending upon the facts of the specific case.

V. CONCLUSION

Coherent mens rea analysis requires the dissection of each penal statute into its elements and a distinct examination of the level of mens rea that should attach to each element. In connection with the interpretation of a vague mens rea term, cases analyzing the meaning of the term in connection with different crimes—or even in connection with different elements of the same crime—are not controlling or even necessarily persuasive precedent. Depending upon the situation, default rules may or may not apply. This means that a statute’s language, structure, legislative history, and underlying policy must be considered in determining the requisite mens rea for every element of every crime.

444. Herlands, supra note 38, at 142-43.

445. See, e.g., Tarvestad, 418 F.2d at 1047 (holding that a trial judge’s instruction that an act is “done ‘willfully’ if it is done knowingly and deliberately with bad purpose” was sufficient); United States v. Crosby, 294 F.2d 928, 939-41 (2d Cir. 1961) (reversing convictions due to insufficient proof of intent, because the defendants had relied on the advice of counsel and thus believed that the securities they were selling did not have to be registered).

446. See, e.g., Kistner v. United States, 332 F.2d 978 (8th Cir. 1964) (consisting of a four-page opinion that dealt with a double-jeopardy collateral claim and stating the elements of a section 5 violation); United States v. Sussman, 37 F. Supp. 294 (E.D. Pa. 1941) (consisting of a three-page opinion upholding the rejection of the defendant’s requested jury instruction that the government had to prove actual knowledge that a security was being sold in violation of the law).

447. See, e.g., United States v. Custer Channel Wing Corp., 376 F.2d 675, 680 (4th Cir. 1967) (holding that a section 5 conviction does not require “evil intent” and justifying its decision, in part, on the erroneous grounds that it is a public-welfare offense).

448. See supra text accompanying notes 427-34.
This Article has demonstrated that the failure of commentators and the courts to tackle mens rea analysis head-on has resulted in lasting incoherence in the law. Unintelligible legal doctrine does not simply upset individuals who strive for elegant solutions to legal problems; it also exacts a huge, real-life toll. Juries faced with incoherent legal instructions are likely to become disillusioned about the justice system. Citizens receive inadequate guidance as to acceptable and unacceptable behavior, hampering deterrence—particularly in the securities-law arena, where one presumably finds mostly rational actors who would be deterred by clear legal rules.

Although the start-up costs of implementing a rational MPC-based mens rea scheme would not be small, the gains achieved would quickly outweigh them. Once the appellate courts determined the requisite mens rea for each element of every securities-related crime, specific and detailed pattern jury instructions could be generated to guide district courts in future cases. With proper jury instructions, defendants would have little to complain about in future appeals. This would represent a tremendous advance over the status quo—in which no circuit has crime-specific pattern jury instructions with respect to the mens rea requirements in securities cases, most provide only a vague noncontextual definition of the term “willful,” and several leave their trial courts without any guidance at all.

449. See Nesso, supra note 48, at 1359-61.
450. The Fifth Circuit defines “willfully” for all crimes as “voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.” See COMMITTEE ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS’N OF THE FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.38 (2001). The Seventh Circuit takes the exact opposite approach, defining “willful” for all securities violations as “an act . . . done knowingly and deliberately,” and stating that “the defendant need not know he is breaking a particular law.” See COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT § 4.09 (1998). The Eighth Circuit recommends that there be no instruction given on the word “willfully” in criminal cases except for those involving tax, odometer fraud, healthcare antikickback statutes, certain securities, and failure to pay child support. See JUDICIAL COMMITTEE ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 7.02 (2006), available at http://www.juryinstructions.ca8.uscourts.gov/ criminal_instructions.htm (last visited August 18, 2006). The Ninth Circuit also recommends that no instruction be given to define “willfully” unless the term appears in the statute at issue. See COMMITTEE ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT § 5.5 cmt. (2003). Its definition requires “that an act be done knowingly and intentionally, not through ignorance, mistake or accident.” Id. The Tenth Circuit does not recommend any particular definition of the term “willful”; rather, it points out that the term takes on different meaning in different contexts. See CRIMINAL PATTERN JURY INSTRUCTION COMMITTEE OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS § 1.38 (2005).
Mens Rea Analysis

A legislative solution would, of course, be even better. A review of securities cases reveals that courts are often unwilling to overturn convictions even when the trial judge's instructions were inadequate or patently wrong. This unwillingness appears to arise out of a general reluctance to reverse a case and send it back for a new trial when the evidence appears to be sufficient to sustain a conviction. Congressional clarification of mens rea terminology would avoid this very costly and time-consuming proposition. Perhaps the best solution would be for Congress to delegate the setting of mens rea requirements for all existing penal statutes to an appointed commission, much like it delegated authority to the United States Sentencing Commission to propose sentencing guidelines. This mens rea commission could look at each federal statute; propose suggested MPC-based mens rea elements based upon the statute's language, structure, legislative history, and policy implications; and suggest default rules for the general interpretive use. Congress would then have the opportunity to accept or reject these proposals.

Absent legislative intervention, appellate courts could start a project of suggesting better, more precise instructions than those delivered by trial courts, even while upholding the "old-fashioned" mens rea instructions that a trial court has delivered. Although these instructions would be dicta, trial courts would understand the significance of the message and could start implementing changes on their own. Eventually, pattern jury instructions could be developed, and higher courts could reverse cases coming from courts that failed to follow the new MPC-based jury instructions.

Securities regulation is complicated enough, and determining what constitutes a crime in this area is even more difficult. The least that the government should do is provide clear guidance on the crucial issue of

Finally, the Eleventh Circuit describes the word "willfully" in general terms to mean that "voluntarily and purposely, with the specific intent to do something the law forbids; that is, with bad purpose either to disobey or disregard the law." See COMMITTEE ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N OF THE ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS—CRIMINAL CASES § 9.1 (2003).

451. The First, Second, Third, Fourth, and Sixth Circuits do not provide a pattern instruction on the definition of willfulness.

452. See, e.g., United States v. Tarallo, 380 F.3d 1174, 1185-88 (9th Cir. 2004) (concluding that the proper interpretation of "willful" requires that the defendant knowingly committed a wrongful act, but still upholding the district court's instruction that did not mention this requirement); United States v. Dixon, 536 F.2d 1388, 1395-98 (2d Cir. 1976) (acknowledging that the trial judge's instructions regarding willfulness were erroneous in that they did not instruct the jury that it had to find the defendant had an "evil purpose," but still upholding the conviction).

criminal mens rea. Fifty years ago, the MPC made clarity possible; it is time now to realize this goal.