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JUDICIAL EXPLOITATION OF MENS REA
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Robert Batey

INTRODUCTION

American jurisdictions take two basic approaches to the mental requirement for a crime. A majority of the states and the federal system continue to apply the framework developed by the common law, allowing courts to construe crimes as requiring specific intent, general intent, strict liability, or one of the seemingly infinite shades of meaning along the continuum upon which these three concepts reside. A substantial minority use the structure reflected in section 2.02 of the Model Penal Code, which deploys five discrete levels of culpability—purpose, knowledge, recklessness, negligence, and strict liability—according to relatively strict rules of judicial construction.

As in other legal fields, one would expect the common law approach to mens rea to have settled most of its significant issues long ago. Surprisingly, however, there are important fundamental
mens rea questions that still have no clear answers: How should a court determine whether a particular criminal statute requires specific intent, general intent, or strict liability? And how should a court define those concepts? The persistence of such basic questions despite literally centuries of judicial attention suggests that courts have kept the answers vague, in order to maximize their power to define the mental requirement for crimes as they see fit. One purpose of this Article is to describe these attempts to maximize judicial power.

Judicial usurpation of the legislature’s prerogative to define crimes seriously undermines the principle of legality, our societal commitment to prospective legislative definition of criminal offenses. Reacting in part to this concern, the drafters of the Model Penal Code proposed, and numerous states subsequently adopted, a culpability structure with relatively clear definitions of mens rea requirements and rules about how and when to read these requirements into criminal statutes. Unfortunately, many courts in states implementing the Model Penal Code’s methodology continue to flout its dictates, again in an apparent attempt to construe individual crimes according to the courts’ policy preferences. The second major purpose of this work is to describe this development.

Part I of this Article discusses the common law methodology as exposed in recently decided cases. Part I.A.1 considers opinions deciding whether a particular criminal statute requires specific intent or general intent; Part I.A.2 discusses cases choosing between either specific or general intent on the one hand and strict liability on the other. Part I.B examines the varying definitions recent court decisions have given the slippery concept of general intent, while Part I.C explores the shades of meaning attributed to specific intent.

This work’s much shorter Part II deals with the Model Penal Code approach, acknowledging that many recent decisions show fidelity to the Code’s culpability rules. However, Part II also discloses the

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2. See generally Peter W. Low et al., Criminal Law: Cases and Materials 29-44 (2d ed. 1986) (indicating that the “principal of legality” is a widely accepted statement of an ideal that prohibits the “retroactive definition of crime” and places the creation of crime definition with the legislature).
strong judicial propensity to ignore those rules, with regard to minimum culpability and strict liability, and to the definitions of recklessness, negligence, purpose, and knowledge. The parallelism between these decisions and those under the common law approach suggests a single cause for this whole range of legal phenomena: a judiciary unwilling to leave the definition of mental requirement to the legislature.

I. THE COMMON LAW APPROACH

Though common law courts have struggled with the concept of mens rea for several centuries, they are not appreciably closer to resolving basic questions such as when a particular crime requires proof of specific intent, general criminal intent, or no mens rea. Further, the courts following the common law approach continue to disagree on how to define both general intent and specific intent.\(^3\) Recently decided cases, from the United States Supreme Court and other American jurisdictions using the common law methodology, disclose each of these confusions.

A. Specific Intent, General Intent, or Strict Liability

An assumption underlying the common law approach to mens rea is that legislatures are not careful in specifying the mental requirements of particular crimes.\(^4\) Courts assume that legislatures have injected (or failed to inject) mens rea terms into statutory definitions of crimes with little thought to the precise implications of their actions; instead, it is the courts that should determine those implications, through construction of the terms used (or not used).\(^5\)

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3. There even appears to be some disagreement about how to define strict liability, which requires no particular mens rea. See Staples v. United States, 511 U.S. 600, 607 n.3 (1994) (attempting to distinguish "public welfare offenses" from "[true] strict liability" crimes).
4. See generally LOW ET AL., supra note 2, at 198-99.
5. The habits of legislatures—inserting streams of adverbs (e.g., "willfully, wantonly, and recklessly") into criminal statutes to connote some sort of mental requirement, or enacting crimes with very serious penalties but without any mens rea language—have long invited such an assumption. See id. It was not until some states implemented the Model Penal Code approach that legislative activity truly began to undercut this assumption.
So the courts, rather than the legislature, decide whether a particular statute should require specific intent, general intent, strict liability, or some variation on one or more of these three themes. In doing so, judges are highly influenced by their own policy preferences when construing criminal statutes.

1. Specific Intent Versus General Intent

In the absence of clear statutory language, courts in jurisdictions following the common law approach must frequently determine whether a crime requires any specific intent, such as the intent “permanently to deprive” typically required for larceny and other theft offenses, or the easier-to-prove general intent, which is typically inferred from the defendant’s voluntary conduct. For crimes with common law antecedents or analogues, history ought to provide the answer to this question. When historical research proves unavailing, a test implied by Oliver Wendell Holmes in The Common Law may provide reliable results. Holmes’ test provides that specific intent should be required when the criminalized act does not reflect the harm society ultimately seeks to prevent (as in attempt and larceny). But a survey of recent cases wrestling with the issue shows little adherence to these, or any other, principles; it is far easier to explain the results according to the prevailing judges’ opinions about how easy it should be to prove the crime.

The Supreme Court’s June 2000 decision in Carter v. United States is exemplary. The Court divided five to four over whether the federal bank robbery statute requires specific intent or general intent, with the majority—the “conservative” bloc of Justices Rehnquist,

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6. See generally Morissette v. United States, 342 U.S. 246 (1952) (equating criminal intent to steal with wrongfully depriving another of property in their possession). For a discussion of the possible definitions of specific intent at common law, see infra Part I.C.

7. See generally Regina v. Faulkner, 13 Cox C.C. 550 (1877). For a discussion of the possible definitions of general intent at common law, see infra Part I.B.

8. See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 65-75 (1881), excerpted in LOW ET AL., supra note 2, at 230-31; see also LOW ET AL., supra note 2, at 140 (distinguishing, for another purpose, among crimes defined in terms of “the harm ultimately feared” and those that “do not require actual harm as a condition of liability”).

O'Conner, Scalia, Kennedy, and Thomas—favoring the less demanding standard. The majority, in an opinion by Justice Thomas, found little guidance in the language of the statute:

Whoever, by force or violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank . . .

While acknowledging that a "presumption in favor of scienter" exists in federal criminal law, the majority reasoned that this presumption "requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" Justice Thomas determined that "[i]n this case, . . . a general intent requirement suffices to separate wrongful from 'otherwise innocent' conduct," obviating the need for the specific intent "to steal or purloin" for which Carter argued.

The four dissenters, in an opinion by Justice Ginsburg, relied more on the historical relationship between robbery and larceny to conclude that bank robbery, like bank larceny, should require a specific intent. Invoking the rule that "courts should ordinarily read federal criminal laws in accordance with their common-law origins if Congress has not directed otherwise," Ginsburg set forth in simple terms the origins of robbery in larceny:

10. The precise issue in Carter was whether bank larceny under 18 U.S.C. § 2113(b) (1994) was a lesser offense included within bank robbery under 18 U.S.C. § 2113(a), therefore requiring that the jury in Carter's bank robbery trial also be instructed on the lesser included offense. See Carter, 530 U.S. at 259-63. The majority determined that because bank robbery required only general intent, it did not include bank larceny, which all the Justices agreed was a specific intent crime. See id. at 267-72.
14. This is the specific intent language in the bank larceny statute, 18 U.S.C. § 2113(b), which Carter argued was a lesser offense included within bank robbery. See Carter, 530 U.S. at 259.
15. See 530 U.S. at 275-89 (Ginsburg, J., dissenting).
16. Id. at 277 (Ginsburg, J., dissenting) (citing Neder v. United States, 527 U.S. 1, 21 (1999)).
At common law . . . robbery was an aggravated form of larceny . . . .

. . . The elements of common-law larceny were also elements of robbery. First and most essentially, robbery, like larceny, entailed an intentional taking. . . . Second, . . . the taking in a robbery had to be "felonious," a common-law term of art signifying an intent to steal.17

Finding nothing in the adoption of the bank robbery statute to contradict this historical relationship, the dissenters would have accepted Carter’s argument that the statute requires a specific intent.18

Because most agree that history is an appropriate guide for deciding whether a statute enforcing a common-law crime requires specific or general intent, the dissenters in Carter had by far the stronger argument. The Carter majority, however, apparently felt bound by no such rule;19 instead, Justice Thomas and his colleagues opted for what they considered the more effective reading of the statutory language, within the broad perimeters of the "presumption of scienter."20 As the majority noted, most federal circuit courts have reached a similar result,21 suggesting the primacy of such "legislative" reasoning in cases of this sort.

17. Id. at 278 (Ginsburg, J., dissenting).
18. "There is no indication at any point . . . that Congress meant to install new conceptions of larceny and robbery severed from their common-law foundations." Id. at 280 (Ginsburg, J., dissenting).
19. The majority rejected the relevance of the common law understanding of robbery for the somewhat ludicous reason that "robbery" does not appear in the statute. See id. at 263-68. But see id. at 276-77 (Ginsburg, J., dissenting) (noting that the title of 18 U.S.C. § 2113, "Bank robbery and incidental crimes," is relevant to the statute's interpretation).
20. The majority touted its general intent interpretation as necessary to reach cases like United States v. Lewis, 628 F.2d 1276 (10th Cir. 1980), where the defendant took money at gunpoint from a bank teller in order to be arrested so that he could return to federal prison. See Carter, 530 U.S. at 271. But see id. at 283-84 (Ginsburg, J., dissenting) (doubting that Lewis would escape conviction under a specific intent interpretation of the statute).
21. See id. at 270 n.8 (citing United States v. Gonyea, 140 F.3d 649, 653-54 & n.10 (6th Cir. 1998) (collecting cases)) (noting that many Courts of Appeal have construed § 2113(a) to contain a general intent component); see also United States v. Burdeau, 168 F.3d 352, 356 (9th Cir. 1999) (similarly construing 18 U.S.C. § 2111 (1994)).
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Other Supreme Court opinions illustrate the same reasoning at work. *Posters 'N' Things, Ltd. v. United States*, a 1994 decision, considered the mens rea requirement of a now-superseded federal statute making it a crime "to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia." The statute's only indication of a mental requirement was its definition of "drug paraphernalia": "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance." The defendants argued that the statute's "primarily intended or designed for use" language required the government to prove the defendant's subjective intent that the items sold be used with illegal drugs, a form of specific intent. In support of this argument the defendants cited the Supreme Court's 1982 decision in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, which construed the similar phrase "designed or marketed for use with illegal cannabis or drugs" in a municipal ordinance as requiring proof of the defendant's subjective intent.

Despite this previous interpretation—made more forceful by the use of the word "intended" in the federal statute, an even clearer indication of inquiry into the defendant's state of mind—and despite supportive legislative history cited by the defendants, the *Posters*
'N' Things majority rejected a "subjective-intent" reading of the definition of drug paraphernalia. Instead, the Court ruled that the definition "establishes objective standards," by "refer[ring] to a product's likely use rather than to the defendant's state of mind," a mens rea requirement more reminiscent of the common law concept of general intent. Justice Blackmun, writing for the majority, gave several less-than-persuasive reasons for the Court's holding, but the primary impetus for the decision appeared to be the perceptible increase in "War on Drugs" rhetoric between 1982 and 1994 (reflected in the Anti-Drug Abuse Act of 1986, part of which was at issue in Posters 'N' Things), and the Justices' consequent desire not to saddle federal prosecutors with the difficult burden of proving that the seller of items employable as drug paraphernalia wanted them to be used for this purpose. The result-oriented construction of the statute's mental requirement is further underlined by Justice Scalia's concurrence, joined by Justices Kennedy and Thomas, criticizing the majority for not making it even easier to prove the statute's mens rea.

Bates v. United States, a unanimous 1997 decision, once again reveals the Supreme Court using its judgment of wise policy to choose between a requirement of specific and general intent. The government charged Bates with violating 20 U.S.C. § 1097(a); Bates was an educational administrator at a for-profit institution who refused to refund Guaranteed Student Loan proceeds for withdrawn students to the relevant lenders, as required by federal law. As then

30. Id. at 518-19.
31. See id. at 519-22. Arguments of equal if not greater force appear in the court of appeals decisions that the Posters 'N' Things majority disapproves. See United States v. Mishra, 979 F.2d 301 (3d Cir. 1992); United States v. Murphy, 977 F.2d 503 (10th Cir. 1992); United States v. Schneiderman, 968 F.2d 1564 (10th Cir. 1992); United States v. 57,261 Items of Drug Paraphernalia, 869 F.2d 955 (6th Cir. 1989).
32. See 511 U.S. at 516.
33. See id. at 527-28 (Scalia, J., concurring) (arguing that mens rea for the statute may be established either through the majority's objective test, or failing that, by proof of the defendant's subjective intent). The majority rejected this interpretation. See id. at 521 n.11.
35. See id. at 27-28.
worded, the statute made it a crime to "knowingly and willfully embezzle[], misappl[y], steal[], or obtain[] by fraud, false statement, or forgery any funds, assets, or property provided . . . under" the Guaranteed Student Loan program. Though the statute contained no language requiring an intent to defraud the United States, lower courts inferred this specific intent requirement, analogizing to cases interpreting the federal statute criminalizing misapplication of bank funds, which has similar language regarding "willfully misappl[y]ing" bank assets. The concern regarding the bank funds statute is to avoid creating a "trap for the unwary" by criminalizing "every unauthorized loan by a bank officer."

The Bates Court, in an opinion by Justice Ginsburg, rejected this reading of the statute, holding that "[t]he Government need not charge or prove that Bates aimed to injure or defraud anyone." Regarding the potential trap for the unwary educational loan administrator, the Court summarily dismissed the concern:

[Section] 1097(a) catches only the transgressor who intentionally exercises unauthorized dominion over federally insured student loan funds for his own benefit or for the benefit of a third party. "[I]nnocent . . . maladministration of a business enterprise" or a use of funds that is simply "unwise," . . . does not fit within that construction.

It is not readily apparent why innocent or unwise conduct would not fit within the statutory construction. For example, a loan administrator who believed he had good cause to withhold refunds would still have intentionally exercised dominion, which might subsequently be found unauthorized, for the benefit of his educational

37. See, e.g., United States v. Kammer, 1 F.3d 1161 (11th Cir. 1993).
40. Id. at 33.
41. Id. at 31 (quoting petitioner's brief) (citation omitted) (second alteration in original).
institution. In such a case, the Court apparently hopes that federal courts will read some type of additional mens rea requirement into the statute in order to preclude prosecution—perhaps a general criminal intent, such as a failure to behave reasonably—just not the relatively stringent requirement of an intent to defraud the United States. So the Bates Court, perhaps motivated by rising concern over the financial stability of the federal student loan program, chose not to limit the government’s arsenal of prosecutorial devices with which to address the problem.

Lower federal courts have followed the Supreme Court’s lead in allowing policy preferences to influence their decisions regarding whether a particular statute requires general or specific intent. The opinions in United States v. Francis offer a good example of this process, one in which constitutional considerations also come into play. Francis allegedly made threats, across state lines, to “‘blow the victim’s head off, cut the victim up into a thousand tiny pieces, slit the victim’s throat, and kill the victim.’” Authorities charged him under 18 U.S.C. § 875(c), which prohibits “transmit[ting] in interstate or foreign commerce any communication containing . . . any threat to injure the person of another.” The district court granted the defendant’s motion to dismiss the indictment because “the government failed to charge that Francis subjectively knew or

42. Another possibility, advanced by the circuit court in Bates, was knowledge that the action violated federal law; however, the Supreme Court noted that the issue was not before it and so refused to rule on the matter. See id. at 31 n.7. In another footnote, however, the Court distinguished Ratzlaf v. United States, 510 U.S. 135 (1994), which had read a knowledge-of-illegality requirement into another federal statute. See id. at 31 n.6; see also infra text accompanying notes 241-42.


44. See Bates, 522 U.S. at 33.


46. Francis, 164 F.3d at 121 (quoting the indictment).

47. Id. (quoting 18 U.S.C. § 875(c) (1994)).
intended his communication to be threatening." Judge Sweet read this specific intent requirement into the statute because of "the heightened First Amendment concerns raised by a statute that proscribes pure speech," mentioning *Watts v. United States*, a Supreme Court opinion disapproving a conviction for threatening former President Johnson's life during a speech at a rally protesting the Vietnam War. The district court judge heightened section 875(c)'s mental requirement because of concerns about the statute's effect upon free expression, both as to Francis and more broadly, balanced against the government's negligible interest in criminalizing pure speech.

The Second Circuit reversed in an opinion by Judge Winter, with Judges Calabresi and Knapp concurring. The appellate court found that the statute, though silent with regard to culpability, should nevertheless have a mental requirement. In choosing between specific and general intent, the Second Circuit expressed a presumption in favor of the latter: "[A]bsent any express reference to intent, we would generally presume that proof only of 'general' rather than 'specific' intent is required." Finding nothing in the statute's language or legislative history to support a specific intent

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48. Id. (quoting Francis, 975 F. Supp. at 296).
49. Id. at 122 (quoting Francis, 975 F. Supp. at 295).
51. See id. at 706 (recounting the threat as: "I am not going [to Vietnam]. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." (quoting the petitioner)).
52. See Francis, 975 F. Supp. at 296. For a general discussion of how this type of balancing affects the construction of the act requirements in criminal statutes, see Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL’Y & L. 1 (1997). It is possible to argue that virtually all the cases discussed in this Article follow the general pattern previously identified: in construing mens rea, judges balance the necessity of the prosecution's proposed construction in achieving a significant state goal against the impact of that construction on protected or desirable conduct. See id. at 39-65. A significant difference separates construction of the act requirement in criminal law from interpretation of the mental requirement. In the former category, balancing can serve the principle of legality by narrowing the scope for arbitrary and discriminatory law enforcement, while the balancing discussed in this Article seems instead to increase arbitrariness and discrimination in criminal law, at least in comparison to the mens rea methodology advocated by the drafters of the Model Penal Code. See id. at 65-96.
53. See Francis, 164 F.3d at 120.
54. See id. at 121.
55. Id.
requirement, and with the weight of precedent against such a reading, the appellate court turned to the district judge's reliance on the First Amendment. Citing United States v. Kelner, a Second Circuit opinion applying Watts, the court held that as long as a distinction is made between "true threats" and those that "are conditional and made in jest," First Amendment concerns are satisfied, and heightened mens rea would not be required:

The test set forth in Kelner fully satisfies the First Amendment concerns that prompted the district court in the instant case to graft a specific-intent requirement onto Section 875(c). Because under Kelner the statute criminalizes only "true threats," there are no First Amendment concerns that require departure from the principle that a statute that does not specify a mens rea level requires only general intent.

Finding free expression adequately protected by the true threat requirement, the Second Circuit saw no need to impose a specific intent requirement.

The disagreement between the district court and circuit court in Francis may be seen as a disagreement about the value of the criminal statute enforced, as well as the constitutional right it impacts. A greater reticence to chill protected speech emerges from Judge Sweet's opinion than from the decision of Judge Winter and his colleagues. Similarly, the goals of section 875(c) seem more significant to the Second Circuit judges than they do to the district court judge, who would limit the statute's application to facts in

56. See id. at 122 (noting that only the Ninth Circuit requires specific intent).
57. See id. at 122-23.
58. 534 F.2d 1020 (2d Cir. 1976).
59. Id. at 123 (quoting United States v. Kelner, 534 F.2d 1020, 1026 (2d Cir. 1976) (stating that threats against Yasser Arafat during a visit to New York City supported conviction for violating § 875(c))).
60. Id. The court underscored the importance of the true threat requirement in a footnote: "We express no view on the position that general intent would be appropriate in the absence of a Kelner-like limitation." Id. at 122 n.1.
61. See id. at 123.
62. See supra note 52 and accompanying text.
which specific intent could be proved. These latter judgments are quintessentially legislative in nature, showing how policy choices can affect mens rea decisions.

Other recent opinions from the federal circuits also display how judgments about what the law should be affect the choice between general and specific intent. The Ninth Circuit has favored specific intent, reading such a requirement into the Hostage Taking Act, the federal statute prohibiting interstate communication of a ransom demand, and 8 U.S.C. § 1324(a)(2), which criminalizes bringing an alien into the country without official permission. Though none of these statutes contain language of specific intent, the courts in all three instances worried that the crimes would be overly broad without some sort of specific intent requirement.

63. One way of framing this disagreement regarding § 875(c)—not used by either court in Francis—is to ask what its goals are and how near the defendant has come to frustrating those goals. If the statute aims to prevent the communication of physical threats, that harm results in cases like Francis; however, if the statute strives to forestall physical injury by preventing threats, the ultimate harm—physical injury—has not yet occurred even after communication of a threat. Using the Holmes reasoning previously discussed, the law should not require specific intent if the harm § 875(c) seeks to avoid is the threat itself, but should do so if the harm the statute seeks to thwart is bodily injury. See generally HOLMES, supra note 8. Thus differing evaluations of the significance of § 875(c) by the district court and circuit court might lie behind the courts’ disagreement regarding mens rea.

64. See United States v. Fei Lin, 139 F.3d 1003, 1005-06 (9th Cir. 1998) (construing 18 U.S.C. § 1203(a) (1994)). The analogy to kidnapping, usually a specific intent offense, supports the court’s conclusion. See id. Holmes’ reasoning produces a more equivocal analysis: The statute’s act requirement, taking a hostage, is arguably the ultimate harm the statute seeks to prevent, thus implying a general intent requirement; however, one could contend that the ultimate harm is physical injury to the hostage, proof of which is not required for conviction, which would imply a specific intent requirement.

65. See id. at 1006-07 (construing 18 U.S.C. § 875(a) (1994)). In interpreting § 875(a), the Ninth Circuit referenced its previous holding that § 875(c) requires specific intent, which the Second Circuit refused to follow in Francis. Compare id., with United States v. Francis, 164 F.3d 120, 122 (2d Cir. 1999). The Holmes reasoning would apply to § 875(a) in much the same way as it applies to § 875(c). See supra note 63.

66. See United States v. Barajas-Montiel, 185 F.3d 947, 951-53 (9th Cir. 1999). Because the statute’s act requirement, effecting an illegal entry, is the ultimate harm the crime aims to avoid, the Holmes reasoning requires only general intent.

67. This concern is most clearly expressed in Barajas-Montiel:

Without a specific intent instruction, the jury does not have to consider whether a defendant intended to violate immigration laws, and therefore the jury could conceivably believe that they had to convict in a case . . . where the defendant conceded his involvement in performing the act of alien smuggling but had plausible claims that he nevertheless lacked the intent to violate the law.

Id. at 953; see also Fei Lin, 139 F.3d at 1006-07.
Other circuits have been less willing to accept defendants’ arguments for this higher level of mens rea, even when the statutory language would appear to justify it. The Third Circuit rejected a specific intent requirement for possessing the unregistered components of a destructive device, despite definitional language referring to “any combination of parts either designed or intended for use in converting any device into a destructive device.”68 In two cases involving aggressive behavior by an airline passenger, the First and Eleventh Circuits refused to read specific intent requirements into two federal statutes—simple assault69 and assaulting a flight attendant70—notwithstanding the typical black letter rule that assault is a crime of specific intent.71 Appreciation of the dangers posed by destructive devices and by unruly airline passengers probably motivated these appellate court decisions.72

Recent interpretation of 8 U.S.C. § 1326, punishing both illegal reentry into the United States after deportation and attempted illegal reentry, discloses a similar propensity to opt for general intent based on a circuit court’s judgment of wise policy, in this case corrected by invocation both of history and of Holmes’ reasoning.73 For illegal reentry, all but one of the circuits facing the issue have chosen to require only general criminal intent.74 In United States v. Gracidas-

71. See WAYNE R. LAFAVE, CRIMINAL LAW § 7.16(a) (3d ed. 2000). Bayes relies on a concept of assault that equates it to battery, which arguably justifies a mental requirement of general intent. See Bayes, 210 F.3d at 68-69; LAFAVE, supra, at § 7.15(c).
72. The Grossman court noted “the compelling statutory purpose of safeguarding flight personnel against acts interfering with the performance of their duties.” Grossman, 131 F.3d at 1452.
73. See infra notes 74-79 and accompanying text.
74. See United States v. Ortegon-Uvalde, 179 F.3d 956, 959 (5th Cir. 1999) (collecting cases (noting only the Seventh Circuit requires specific intent); United States v. Henry, 111 F.3d 111, 113-14 (11th Cir. 1997) (noting that the Seventh Circuit requires specific intent). As with the crime of bringing someone into the country illegally, the Holmes analysis suggests that illegal reentry should be a general intent crime. See supra note 66 and accompanying text.
The Ninth Circuit initially decided to follow this approach, even though the case involved attempted illegal reentry, rather than the completed crime. The court cited the "regulatory" nature of the offense as cause for departing from the historical rule that an attempt requires a specific intent—opaque reasoning explicable only by the court's evident preference that section 1326 should require no more than general intent, whether the act being prosecuted was an illegal entry or only an attempted one. A concurring opinion vigorously disagreed with this analysis, arguing that, regardless of the mens rea for the completed crime, "attempt" requires specific intent. When the Ninth Circuit reheard the case en banc, the court, with only one judge disagreeing, ruled that attempted illegal reentry was a specific intent crime, relying not only on history but also on reasoning that parallels Holmes' analysis of 120 years ago:

The reason for requiring specific intent for attempt crimes is to resolve the uncertainty whether the defendant's purpose was indeed to engage in criminal, rather than innocent, conduct. This uncertainty is not present when the defendant has completed the underlying crime, because the completed act is itself culpable conduct. When the defendant's conduct does not constitute a completed criminal act, however, a heightened intent requirement is necessary to ensure that the conduct is truly culpable.

The ultimate opinion in Gracidas-Ulibarry thus spurns policy preferences regarding the crime under review as a basis for deciding whether that crime should be one of specific or general intent, instead applying more general principles. Unfortunately, this form of judicial restraint remains rare in the federal courts, as the foregoing survey has demonstrated.

75. 192 F.3d 926 (9th Cir. 1999), modified en banc, 231 F.3d 1188 (9th Cir. 2000).
76. See id. at 929.
77. See id.
78. See id. at 932-33 (Silverman, J., concurring).
Courts in many states following the common law with regard to mens rea behave similarly when choosing between specific and general intent. Since the 1969 decision in People v. Hood, \(^80\) that "recognized that [the] conventional specific intent-general intent inquiry was inadequate," \(^81\) the California courts have explicitly relied on "other [policy] considerations," such as the undesirability of allowing voluntary intoxication to constitute a defense to a particular crime, to decide into which of these two categories of mens rea a particular crime falls. \(^82\) This distinction has led to "confusion, if not consternation," as acknowledged in the California Supreme Court decision in People v. Colantuono, holding that assault (defined as an attempt at battery) is a general intent crime; the court recognized "[t]he perception of inconsistency or illogic in this determination." \(^83\) One measure of confusion—if not of consternation, inconsistency, and illogic—is that the two justices disagreeing with the majority in Colantuono both argued that assault should require a purpose to injure; one justice felt that this requirement was consistent with the majority’s general intent holding while the other justice found it flatly inconsistent. \(^84\)

More recent California decisions show this same propensity toward seemingly arbitrary choices between specific and general intent. One intermediate appellate court held that receiving stolen goods, though previously demarcated a general intent crime, could also simultaneously be a specific intent crime. \(^85\) Another appellate court reached a similar result regarding arson, even though it too had

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82. Id. (quoting People v. Hood, 462 P.2d at 379) (alteration in original). The traditional common-law rule is that voluntary intoxication may disprove specific intent, but not general intent. See LOW ET AL., supra note 2, at 283-90.
83. Colantuono, 865 P.2d at 710. As previously developed, both history and logic support the notion that assault defined as attempted battery should be a crime of specific intent.
84. Compare id. at 715-16 (Mosek, J., concurring), with id. at 716-18 (Kennard, J., concurring and dissenting).
85. See People v. Reyes, 61 Cal. Rptr. 2d 39, 44-45 (Ct. App. 1997) (allowing voluntary intoxication defense). Receiving stolen property should require specific intent because of its historical relation to larceny and the other theft offenses that require specific intent. So the result, if not the bizarre reasoning, in Reyes is defensible.
previously been labeled general intent, in accord with the customary historical understanding of that offense.86 The California Supreme Court held, over two dissents, that accomplice liability requires specific intent, even when the crime "aided or encouraged" requires only general intent.87 In another case, the California Supreme Court unanimously found that the offense of dealing in false citizenship documents, enacted through voter initiative, was a crime of specific intent.88 In a third case, the California Supreme Court, over a lone dissenter, used the word "willfully" in a tax evasion statute to read a requirement of specific intent into the statute.89

However, "willfully" is not a talisman. In a subsequent court of appeals decision involving a sex offender registration statute, "willfully" was found not to require a specific intent to violate the registration requirement.90 Another intermediate appellate court recently ruled that a statute prohibiting the unauthorized burning of a cross on the property of another requires only general intent, despite defendant's argument, like that advanced in Francis, that the statute's impact on expressive conduct necessitated proof of specific intent, an argument bolstered by a state supreme court opinion reading specific intent into another law with a similar impact.91

87. See People v. Mendoza, 959 P.2d 735, 739 (Cal. 1998) (allowing voluntary intoxication defense). This ruling accords with the traditional common-law understanding of the mental requirement for complicity, though some contend that a majority of jurisdictions would now rule otherwise. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05(B)(3) (2d ed. 1995).
88. See People v. Rizo, 996 P.2d 27, 32 (Cal. 2000). Because the act requirement for the crime is the ultimate harm the statute seeks to avoid, this holding is questionable, and may reflect the courts' hostility to voter initiatives.
89. See People v. Hagen, 967 P.2d 563, 572 (Cal. 1998).
90. See People v. Cox, 90 Cal. Rptr. 2d 9, 14-15 (Cl. App. 1999). Failing to register falls far short of the harm society ultimately fears from former sex offenders and therefore ought to require a specific intent. See id.
91. See People v. Carr, 97 Cal. Rptr. 2d 143, 148-50 (Cl. App. 2000) (construing CAL. PENAL CODE § 11411(c) (West 1998)) (discussing In re M.S., 896 P.2d 1365 (Cal. 1995) (construing CAL. PENAL CODE §§ 422.6-7 (West 1998), which prohibits interference with another's exercise of legal rights)). Section 11411(c)'s use of recklessness as an option for proving one portion of its mental requirement—purpose is the other option, and knowledge is also required—supports the court's general intent characterization of the statute. See id. at 149-50.
Perhaps the California Supreme Court's acknowledged inconsistency in such holdings helped to justify the lower court's refusal to follow its precedent. This inconsistency emerges even in recent state supreme court decisions finding that only general intent is required. In two successive months, the court ruled that general intent will satisfy the mens rea requirements for possession of a dagger or an assault weapon, but defined the required general intents differently—making it easier for the prosecution to prove possession of the assault weapon.\textsuperscript{92} Regarding two statutes prohibiting the offering of rebates on medical fees as an inducement for patient referrals, the court opined that "if constrained to do so, we would denominate them specific intent crimes," but then astoundingly ruled that the general intent instruction given the jury was adequate because of "the general principle that . . . 'the characterization of a crime as one of specific intent [or general intent] has little meaningful significance in instructing a jury.'"\textsuperscript{93} This is true because for over three decades the California courts have drained all meaning from the terms, leaving them as mere signifiers of what the courts have decided the mens rea for a particular crime ought to be.

Courts in Florida have demonstrated similar confusion when trying to decide whether a particular crime requires specific or general intent. The Florida Supreme Court wrestled with this problem in 1998 in \textit{Frey v. State},\textsuperscript{94} in which a majority held that resisting arrest with violence is a general intent crime, despite language in the statute requiring "knowing[] and willful[]" conduct.\textsuperscript{95} There was a lengthy and eloquent partial concurrence and partial dissent, joined by

\textsuperscript{92} Compare People v. Rubalcava, 1 P.3d 52, 58 (Cal. 2000) (construing various iterations of CAL. PENAL CODE § 12020(a) as requiring "knowledge," see infra note 166), with In re Jorge M., 4 P.3d 297, 299 (Cal. 2000) (construing various iterations of CAL. PENAL CODE § 12280(b) as requiring "negligence," see infra notes 133 & 162). Because possession offenses typically require knowledge of the item possessed, see infra note 245 and accompanying text, and because knowledge comes closer to specific than to general intent, see infra notes 229-31 and accompanying text, \textit{Rubalcava} appears more correct than \textit{In re Jorge M.}, though even \textit{Rubalcava} errs in classifying its mens rea as general intent.

\textsuperscript{93} People v. Hering, 976 P.2d 210, 213, 214 (Cal. 1999) (quoting People v. Faubus, 121 Cal. Rptr. 167, 169 (Ct. App. 1975)).

\textsuperscript{94} 708 So. 2d 918 (Fla. 1998).

\textsuperscript{95} Id. at 919-20 (Fla. 1998) (construing Fla. STAT. ANN. § 843.01 (West 1993)). The precise issue in \textit{Frey} was whether the defendant's voluntary intoxication was available as a defense. \textit{See id.} at 919.
another justice, arguing for complete abandonment of the common law terminology:

Since this perplexing division between "general" and "specific" is judicially created, we should seriously consider whether now is the time to revise this ill-conceived framework. Rather than splitting hairs and attempting to draw a bright line through the murky and ill-defined netherworld that separates general from specific intent, our time would be better spent giving effect to the legislative intent behind a particular statute and focusing on the degree of culpability along the lines clearly delineated in the Model Penal Code. 6

Ignoring this plea, the Florida courts have continued to "split[]" the "hairs" between specific and general intent, adding to the "murky and ill-defined netherworld" between them. One intermediate appellate court has held that the crime of resisting arrest without violence allowed a defense based on lack of specific intent, in spite of the earlier contrary decision in Frey regarding the parallel offense of resisting with violence. Another district court of appeal disapproved instructions in a prosecution for aggravated child abuse that required only "technical[]" malice," as opposed to "actual malice," which the court defined in ways that parallel the differences between general and specific intent. On both of these questions, the courts followed more closely their own ideas of wise policy regarding the relevant

96. Id. at 921-22 (Anstead, J., concurring in part and dissenting in part).
97. There are good reasons to do so. Serious doubts exist about the courts' ability to abandon common law mens rea without some legislative warrant. Further, adoption of the Model Penal Code's approach, while an improvement, is no panacea. See infra Part II. The most important aspect of Justice Anstead's plea is its frank avowal of the current bankruptcy of the common law mens rea methodology regarding specific and general intent. See Frey, 708 So. 2d at 923-26.
98. Id. at 921-22.
99. See Cooper v. State, 742 So. 2d 835 (Fla. Dist. Ct. App. 1999) (construing Fla. Stat. Ann. § 843.02 (West 1997) which, unlike § 843.01, contains no language of knowledge or willfulness). Without using the term "specific intent," the court allowed the defendant to argue that he did not know he was being arrested. See id. at 857-58.
statute, rather than trying to neutrally determine whether the legislature intended to enact a crime of specific or general intent.\textsuperscript{101} The same is true when the Florida courts opt for a general intent requirement, as they recently did with possession of a firearm by a felon,\textsuperscript{102} aiding escape,\textsuperscript{103} trafficking in stolen property,\textsuperscript{104} and indirect criminal contempt,\textsuperscript{105} even though the historical antecedents of these crimes—possessory offenses, accomplice liability, theft, and contempt—all required various forms of specific intent.\textsuperscript{106} Judicial perceptions of the seriousness of the crimes involved seem responsible for these decisions; the fact that nonjudges might perceive less danger in contempt of court exposes exactly how result-oriented all these decisions are.

Similar sport could be made of courts in other jurisdictions. There is little rhyme or reason to the choice between specific intent and general intent in recent Michigan,\textsuperscript{107} Iowa,\textsuperscript{108} Maryland,\textsuperscript{109} and

\begin{footnotesize}
101. The court in Young, rather than following its own preferences regarding the aggravated child abuse statute, adopted the preferences dictated by the supreme court in State v. Gaylord, 356 So. 2d 313 (Fla. 1978). See Young, 753 So. 2d at 728.
104. See Glenn v. State, 753 So. 2d 669 (Fla. Dist. Ct. App. 2000) (construing Fla. Stat. Ann. §§ 812.012(7), .019(1) (West 1997), which contain language both of negligence—"should know" in § 812.019(1)—and of intent—"with the intent to" in § 812.012(7)).
106. See supra notes 28, 68, 85 & 87 and accompanying text. For a general discussion regarding contempt, see Rollin M. Perkins & Ronald N. Boyce, Criminal Law 588-602 (3d ed. 1982).

Although Sherman-Huffman and Gould appear consistent, the Gould court adopted a concept of specific intent easier for the prosecution to prove—a "constructive knowledge" standard. See id. at 145. Perhaps these definitions reflected judicial responses to the different degrees of harm: a spanking resulting in bruises in Sherman-Huffman and repeated shakings of a baby producing subdural hematomas, a bulging fontanel, deviated vision, and a seizure in Gould. Compare Sherman-Huffman, 615 N.W. 2d at 778, with Gould, 570 N.W.2d at 142.
\end{footnotesize}
Massachusetts\textsuperscript{110} decisions. Like the other decisions canvassed in this section, they illustrate that judges choose between specific and general intent based not on neutral principles, but instead on which category of mens rea they believe is most appropriate for the crime being construed, a decision decidedly more legislative than judicial.

2. Specific Intent and General Intent Versus Strict Liability

The same is true when judges choose between specific intent or general intent on the one hand and strict liability on the other. Though there are general principles about when strict liability is appropriate—for example, regulatory crimes unknown to the common law that carry relatively trivial penalties\textsuperscript{111}—courts have long ignored these principles when they do not produce the desired results.\textsuperscript{112} Recent cases illustrate this trend continuing unabated.

Vehicular offenses should present the paradigmatic case for strict liability, as traffic codes and similar legislative schemes are regulatory in nature, have no common law antecedents, and typically result only in fines or short periods of incarceration. However, intriguing questions arise when some, but not all, of these criteria are met. Illustrative is the Tenth Circuit’s decision in \textit{United States v. Unser},\textsuperscript{113} a prosecution of retired racecar driver Bobby Unser for unlawfully operating a snowmobile in a National Forest Wilderness

\footnotesize


\textsuperscript{110.} See Commonwealth v. Collier, 693 N.E.2d 673, 675-76 (Mass. 1998) (distinguishing Commonwealth v. Delaney, 682 N.E.2d 611 (Mass. 1997)) (holding that violating a protective order as defined by MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 1996), requires proof of intent when the act is performed by another in the defendant’s presence, even though no such intent is required when the act is the defendant’s own).

\textsuperscript{111.} See LOW ET AL., \textit{supra} note 2, at 291-92 (quoting United States v. Morissette, 342 U.S. 246 (1952)).


\textsuperscript{113.} 165 F.3d 755 (10th Cir. 1999).
Area.\textsuperscript{114} The court supported its decision to impose strict liability after considering a list of factors generated by Justice Blackmun when he sat on the federal circuit court:

\begin{quote}
[T]here is . . . no mention of an intent in the statute or regulation; the duty imposed is reasonable, under the circumstances, and adherence properly expected; the statutory scheme is not one taken from the common law and congressional purpose is supportive; and conviction does not gravely besmirch one’s reputation, involving only a misdemeanor.\textsuperscript{115}
\end{quote}

The only problem, as the court noted, was that the last of Blackmun’s factors, “the penalty is relatively small,” was contradicted by the penalty possibly applicable to Unser: six months’ imprisonment and a $5000 fine.\textsuperscript{116} While considering the potential punishment “not de minimis,” the Tenth Circuit held that it was not sufficient to mandate a mental requirement, specifically citing the fact that we live in an era of harsh punishment: “This 1996 offense occurred in a time frame when heavier sentences of imprisonment and fines are more common.”\textsuperscript{117} The court thus used the public’s predilection—and perhaps its own—for greater punishment as a reason to ignore one of the usual tests for the propriety of strict liability.

The Connecticut Supreme Court rendered a similar decision in 1998, rejecting the defense that the defendant did not know her license was suspended when charged with operating a motor vehicle with a suspended license.\textsuperscript{118} The potential sentence for the crime was one year’s imprisonment and a $500 fine, which stretched the

\begin{thebibliography}{99}
\bibitem{114} See id. at 757-58.
\bibitem{115} Id. at 763 (applying Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960)).
\bibitem{116} Id. (quoting Holdridge, 282 F.2d at 310). Unser’s actual sentence was a seventy-five dollar fine. See id. at 757.
\bibitem{117} Id. at 763. The court relied on United States v. Corrow, 119 F.3d 796 (10th Cir. 1997) (holding that misdemeanor violation of Migratory Bird Treaty Act, 16 U.S.C. § 707(a) (1994), is a strict liability offense, despite potential punishment of six months imprisonment and $5000 fine).
\bibitem{118} See State v. Swain, 718 A.2d 1, 2 (Conn. 1998). The court did require proof that the state had mailed the defendant a notice of the suspension. See id. at 7.
\end{thebibliography}
parameters of strict liability even further than Unser.\textsuperscript{119} Significantly, the Connecticut court emphasized the policy behind the statute, "[a] principal purpose of [which] . . . was to protect the safety of the public by eliminating the threat of drunk drivers."\textsuperscript{120} Less egregious, but generating more controversy within the deciding court, was the Minnesota Supreme Court's 2000 holding that driving with an open liquor container is a strict liability crime (resulting in a five-day suspended sentence and a $150 fine).\textsuperscript{121} Three justices dissented because the legislature had not been sufficiently clear in demonstrating its intent to eschew any mens rea inquiry; the dissenters thus showed either their greater sensitivity to the factors militating against strict liability or their belief that public policy did not require this offense to be so easy for the prosecution to prove.\textsuperscript{122}

In contrast to these vehicular offense decisions, the Supreme Court of Nebraska unanimously ruled in 1999 that being unable to see the oncoming vehicle was a defense to failure to yield the right-of-way; the court specifically rejected the contention that failure to yield was "a strict liability offense."\textsuperscript{123} This unusual holding was likely motivated by the fact that the defendant was charged with motor vehicle homicide under a statute punishing anyone who kills another, even though "unintentionally," while driving in violation of Nebraska's traffic laws.\textsuperscript{124} Rather than confront this draconian statute, the Nebraska court chose to exploit imprecision in the law of mens rea regarding strict liability in order to achieve the result it wanted.\textsuperscript{125}

The Florida Supreme Court faced an apparently similar problem in 1999, when construing a statute that penalized driving under the influence of intoxicants with a resultant death of another.\textsuperscript{126} Though

\textsuperscript{119} Swain's actual sentence was one year's imprisonment, suspended after forty-five days, and a $500 fine. \textit{See id.} at 5.
\textsuperscript{120} \textit{Id.} at 9.
\textsuperscript{121} \textit{See State v. Loge,} 608 N.W.2d 152, 154 (Minn. 2000).
\textsuperscript{122} \textit{See id.} at 159 (Anderson, J., dissenting).
\textsuperscript{124} \textit{See NEB. REV. STAT.} § 28-306(1) (1997).
\textsuperscript{125} \textit{See} 603 N.W.2d at 462.
\textsuperscript{126} \textit{See State v. Hubbard,} 751 So. 2d 552 (Fla. 1999).
the Florida statute afforded the court more leeway to impose a mental requirement than had existed in Nebraska,\textsuperscript{127} the Florida court elected not to do so, retaining “DUI manslaughter” as a strict liability crime.\textsuperscript{128} The greater public concern over driving under the influence, as contrasted with failure to yield, apparently affected the court’s decision. Yet another Florida opinion reached a contrary result, allowing involuntary intoxication as a defense to driving under the influence, even though the district court of appeal acknowledged that DUI was a “strict liability” offense and that the involuntary intoxication defense functioned “to negate intent.”\textsuperscript{129} This reasoning is nonsensical, for if DUI has no mens rea, there is no intent for involuntary intoxication to negate.\textsuperscript{130} The court’s reasoning probably reflects the feeling that being intoxicated because of an unexpected reaction to prescribed medication should not result in a DUI conviction; thus, the court manipulated the law of mens rea to reach the result it preferred.

Outside the context of traffic offenses (and other clearly regulatory regimes), the imposition of strict liability is more problematic. Several recent cases accord with this reasoning, rejecting suggestions of strict liability regarding the following crimes: the federal statute prohibiting illegal reentry after deportation,\textsuperscript{131} the California statutes penalizing the fraudulent sale of securities\textsuperscript{132} and possession of an assault weapon,\textsuperscript{133} the Florida law criminalizing the unlawful

\textsuperscript{127} Unlike the Nebraska statute, which specifically applies to “unintentional[ ]” killings, the Florida law has no such language. Compare NEB. REV. STAT. § 28-306(1) (1997), with FLA. STAT. § 316.193 (1995). Further, as the Hubbard court noted: “Under our case law for the last 75 years, simple negligence has been something of a subliminal or presumed underlying element of DUI manslaughter.” Hubbard, 751 So. 2d at 555.

\textsuperscript{128} “[N]egligence principles appear to have no utility in a DUI manslaughter prosecution under the Florida statute . . . negligence is simply the wrong prism through which the intoxicated driver’s actions should be viewed.” Id. at 563.


\textsuperscript{130} The court could have better rationalized its result by claiming involuntary intoxication as an affirmative defense, because such defenses apply even to strict liability crimes.


\textsuperscript{132} See People v. Simon, 886 P.2d 1271 (Cal. 1995).

\textsuperscript{133} See In re Jorge M., 4 P.3d 297 (Cal. 2000); supra note 92 and accompanying text.
excavation of an archeological site, the Michigan ban on sexual penetration by an HIV-infected person without prior disclosure, and the Pennsylvania prohibition on hunting with bait. Conversely, other courts have been unable to resist strict liability's siren song, reading it into statutes based more on the court's concept of what the law ought to be, rather than on accepted notions of when strict liability is proper.

For example, in *State v. Rohm*, the Supreme Court of Iowa held that the felony offense of furnishing alcohol to a minor and thereby causing the death of another is a strict liability offense, notwithstanding the fact that the court sentenced Rohm to five years imprisonment and a $150,000 civil restitution award. This holding's dubious nature is highlighted by comparison with an Iowa Court of Appeals decision rendered less than two months after *Rohm*, where the court ruled that the lesser offense of furnishing liquor to a minor was "a serious misdemeanor, . . . more than slight," and therefore cannot be a strict liability crime. The vicarious nature of the corporate defendant's criminal liability bothered the lower court, suggesting how judicial perceptions of the wisdom of a particular crime influence the strict liability decision.

A Michigan court, over a spirited dissent, recently opted for a strict liability interpretation for the crime of being a prisoner in possession of contraband. This decision reflects a judicial determination of what the law should be, rather than neutral principles, given the penal (i.e., nonregulatory) context of the crime and its similarity to possessory offenses, which almost always entail a mental

137. 609 N.W.2d 594 (Iowa 2000).
138. *See id.* at 511-14. The jury also convicted Rohm of involuntary manslaughter, but she could have received the same sentence even if found guilty only of the alcohol offense. *See id.*
140. *See id.*
requirement. Likewise, the Washington Supreme Court embraced strict liability for a statute criminalizing a police officer's unconstitutional residential search, in the face of a four-justice dissent, despite the nonregulatory context and the crime's similarity to burglary and trespass.

Following the lead of its supreme court, a Washington court of appeals subsequently held that being a convicted felon in possession of a firearm is a strict liability offense, overcomiing the potential sentence—five years imprisonment and a $5000 fine—by citing "the seriousness of the harm to the public" from a felon's firearm possession. But the Washington Supreme Court reversed, by a vote of five to four, mentioning "the harshness of the statutory penalty, . . . the absence of a showing of sufficient danger to the public to overcome the general rule favoring a mental element in felony statutes[, and] . . . the fact that entirely innocent conduct may fall within the net cast by the statute in question." Thus, the two Washington courts disagreed about the importance of the offense to the public, which largely determined whether the statute would have a mental requirement. The inconsistency reflected in all three Washington opinions, as well as in many of the cases discussed in this subpart, show how rudderless most courts are when trying to decide whether a particular crime is one of strict liability.

A final example discloses another way in which a court's policy preferences can influence the strict liability choice. In State v. Zarnke, the Wisconsin Supreme Court found itself so unsympathetic to a statute punishing the distribution of child

142. See supra notes 28, 68, 92 & 111 and accompanying text.
145. See id. at 588. The court of appeals acknowledged the existence of an affirmative defense of "unwitting possession." Id.
146. Anderson, 5 P.3d at 1252. According to the supreme court, the affirmative defense of unwitting possession, see supra note 145, did not ameliorate the problem of criminalizing innocent behavior because the burden of persuasion on that issue rested with the defendant, thus relieving the state of its constitutional obligation to prove guilt beyond a reasonable doubt. See id.
147. 589 N.W.2d 370 (Wis. 1999).
pornography that the court interpreted the crime as a strict liability offense, then struck it down as a violation of free speech rights in both the federal and state constitutions. The court chose this path despite an intermediate appellate court decision reading a mental requirement into the statute, a dissent in the state supreme court arguing for the same result, and a United States Supreme Court decision, upon which both of these opinions relied, that similarly construed the federal child pornography law. There could hardly be a better example of the practice of courts to choose between some mental requirement and strict liability based on how they want the case to come out, rather than on result-neutral principles of common law analysis.

B. Defining General Intent

Even after deciding that a particular statute requires proof of general intent, a court applying the common law of mens rea faces another choice: how to define general intent. During the course of such a decision, courts face a bewildering array of possibilities, and the choice is rendered even more difficult by the penchant of judges not to acknowledge the essentially undefined nature of the concept of general intent. Consequently, this situation leaves ample room for judges to flex the definition of general intent to achieve the results they consider appropriate regarding individual crimes and individual cases.

The Ninth Circuit's 1998 decision in United States v. Doe (R.S.W.) provides a particularly clear example of the definitional possibilities inherent in general intent and the courts' proclivity to choose among those possibilities in order to achieve what they consider the best result. R.S.W., a twelve-year-old student at a public school on an Indian reservation, set fire to a paper towel protruding

148. See id. at 374-76.
150. 136 F.3d 631 (9th Cir. 1998).
from a dispenser in a school restroom.\textsuperscript{151} Though she blew out the fire and exited the restroom, the opening of the restroom door apparently rekindled the towel, and the resulting fire considerably damaged the school.\textsuperscript{152} In juvenile court, the government charged R.S.W. with violating 18 U.S.C. § 81, which prohibits “willfully and maliciously set[ting] fire to or burn[ing] a building” on a federal reservation.\textsuperscript{153} The question the courts wrestled with in \textit{R.S.W.} was what mens rea this statute required.

All the judges agreed that at common law, arson was a crime of general intent and that therefore 18 U.S.C. § 81 should also be deemed a general intent crime;\textsuperscript{154} however, the judges differed on how general intent should be defined. The trial judge, sitting as the trier of fact in this juvenile court adjudication, found that

R.S.W. “knew what she was doing when she lit the paper towel” and “knew the likely result of her conduct would damage the school.” [The district court] concluded that “the United States had proven beyond a reasonable doubt that the defendant intended to set fire to or burn the Lame Deer High School since she was aware that an unattended fire in a building can result in the building burning.”\textsuperscript{155}

The trial judge’s reliance on what R.S.W. “knew” as “the likely result” of her conduct and on her “aware[ness]” that the building could burn because of her behavior suggests a definition of general intent as recklessness—being aware of the risk of bringing about the result prohibited by the statute but nevertheless choosing to run that risk.\textsuperscript{156}

\begin{flushright}
\textsuperscript{151} See id. at 633.
\textsuperscript{152} See id. at 633-34; id. at 640 (Fletcher, J., dissenting).
\textsuperscript{153} Id. at 634 (quoting 18 U.S.C. § 81 (West Supp. 1997)).
\textsuperscript{154} See id. at 635, 638-39.
\textsuperscript{155} Id. at 634 (quoting the district court opinion).
\textsuperscript{156} See, e.g., Regina v. Cunningham, 2 Q.B. 396 (Crim. App. 1957).
\end{flushright}
Though recklessness is a frequently used definition of general intent,\textsuperscript{157} when R.S.W. appealed her adjudication of juvenile delinquency, the appellate majority, in an opinion by Judge Schwarzer, specifically disavowed the trial judge’s definition of general intent, instead reading into 18 U.S.C. § 81 what the appellate court took to be the definition of general intent used for common law arson:

At common law . . . arson did not require proof of an intent to burn down a building, or of knowledge this would be the probable consequence of the defendant’s act. The elements of willfulness and maliciousness are established by proof that the defendant set the fire intentionally and without justification or lawful excuse.\textsuperscript{158}

Judge Schwarzer took pains to distinguish two hypotheticals suggested by the dissent—“a smoldering cigarette butt tossed into a trash can or . . . lighted candles placed too close to the drapes”—by implying that these acts would have some “justification or legal excuse,” as opposed to the majority’s counter hypothetical—“intentionally setting fire to the drapes and then walking away in the (erroneous) belief that the fire had been blown out.”\textsuperscript{159} These examples suggest that the R.S.W. majority defined general intent as intentionally committing a morally blameworthy act, i.e., one without lawful justification or excuse—in R.S.W.’s case, setting fire to the paper towel. This too is a regularly employed definition of general intent.\textsuperscript{160} Or the majority may have contemplated a slightly different concept of general intent—intentionally doing an act rendered morally blameworthy because of a lack of due care on the defendant’s

\textsuperscript{157} Model Penal Code § 2.02 reads a minimum requirement of recklessness into an offense that is silent with regard to culpability, and the commentary to that section characterizes it as “what usually is regarded as the common law position.” Model Penal Code § 2.02, at 244 (Official Draft and Revised Comments 1985).

\textsuperscript{158} R.S.W., 136 F.3d at 635.

\textsuperscript{159} Id. at 635 n.5.

\textsuperscript{160} See Lavey, supra note 71, at 238 n.62. (citing Frank J. Remington & Orrin L. Helstad, The Mental Element in Crime—A Legislative Problem, 1952 Wis. L. Rev. 644, 651 (1952)).
part (as the contrast of the hypotheticals would suggest). This latter interpretation of Judge Schwarzer’s opinion would define general intent as a form of criminal negligence, another commonly used definition.

The dissenting judge in R.S.W. offered yet another definition of general intent and the only one that might have led to an acquittal. Judge Fletcher argued that the prosecution needed to prove that R.S.W. knew that her actions would cause the school to burn and that any lesser mental state would not satisfy a requirement of general intent: “The record certainly shows that R.S.W. demonstrated a serious lack of judgment. She should have known better. She may even have been reckless. But, nothing in the record remotely suggests that she knew that her actions would cause the school to burn down.” Though the majority suggested that the dissent’s definition of general intent as knowledge would convert arson into a specific intent crime, Judge Fletcher disagreed:

While it is true that common law arson is not a “specific intent” crime, it does not follow that an arson conviction requires nothing more than the lowest form of “general intent.” The phrase “general intent” encompasses many forms of the mental state requirement not designated by “specific intent,” or “purpose.”

As authority for her definition of general intent as knowledge, Judge Fletcher offered dicta from the United States Supreme Court: “In a general sense, ‘purpose’ corresponds loosely with the common-law

161. See Remington & Helstad, supra note 160, at 651.
162. See LOW ET AL., supra note 2, at 219-27. Compare In re Jorge M., 4 P.3d 297 (Cal. 2000) (adopting negligence as the minimum mens rea for a weapons statute, see supra notes 92 & 133 and accompanying text), and People v. Simon, 886 P.2d 1271 (Cal. 1995) (adopting negligence as the minimum mens rea for a securities law violation, see supra note 132 and accompanying text), with People v. Sargent, 970 P.2d 409, 420 (Cal. 1999) (refusing to require negligence in felony child abuse).
163. R.S.W., 136 F.3d at 640 (Fletcher, J., dissenting).
164. See id. at 635 n.3.
165. Id. at 640 (Fletcher, J., dissenting).
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concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.”166

The judges in R.S.W. present four potential definitions of general intent in terms of general moral blameworthiness, criminal negligence, recklessness, and knowledge. While it is possible to offer policy reasons for and against each of these standards,167 it is important to note that judges rarely engage in such reasoning. Rather, as in R.S.W., they simply choose the definition that best accords with their notions of how easy or difficult it should be to establish general intent for the crime at issue.168

Other recent cases involving a requirement of malice demonstrate similar flexibility in conceptualizing general intent. Among arson cases, the Michigan Supreme Court in People v. Nowack169 reinstated a defendant’s conviction for felony murder based on arson by adopting the following mens rea requirement: “1) an intent to burn the dwelling house of another, or 2) doing an act in circumstances where a plain and strong likelihood of such a burning exists.”170 The court found the latter portion of the definition satisfied, which comes close to a criminal negligence concept of general intent, when the defendant’s suicide attempt by igniting the gas in his apartment complex went awry, causing the death of two others but not his own.171 A Florida court seemingly imposed a more demanding

166. Id. (quoting United States v. Bailey, 444 U.S. 394, 405 (1980)). For courts adopting a knowledge standard for general intent, see Posters ‘N’ Things v. United States, 511 U.S. 513, 522-25 (1994); United States v. Guzman-Ocampo, 236 F.3d 233, 238-39 (5th Cir. 2000) (holding that the crime of illegally being in the United States after deportation requires the defendant to have entered the country voluntarily); People v. Rubalcava, 1 P.3d 52, 56 (Cal. 2000) (holding that the crime of carrying a concealed dirk or dagger requires “willful commission of the act proscribed by law” (quoting People v. Sargent, 970 P.2d 409 (1999)); see also supra text accompanying notes 22-33.

167. See LOW ET AL., supra note 2, at 219-27 (marshaling the arguments for criminal negligence as the best definition of general intent). But see id. at 217 n.b (citing a few authorities arguing against criminal negligence).

168. Judges Schwarzer and Fletcher could object that they have chosen definitions of general intent dictated not by personal preferences, but by their historical analyses of the crime of common law arson. But given the impressive evidence each cited, it appears that the historical record would support any of the offered definitions, thus leaving the question to judicial choice of the “best” definition.


170. Id. at 85.

171. See id. at 82.
definition of general intent in T.E. v. State.\textsuperscript{172} There, a juvenile playing with "a long metal pipe with some paper burning at one end" around a wooden storage shack that subsequently burned was not sufficient evidence of the mens rea necessary for arson.\textsuperscript{173} The court reasoned that "[t]he evidence . . . does not . . . negate the reasonable hypothesis that, in playing with the lighted torch, the twelve-year-old appellant and his friends accidentally set fire to the shed."\textsuperscript{174} So even though the defendant was probably criminally negligent and engaged in intentional conduct without justification or excuse (one or both of which established general intent in Nowack and R.S.W.) neither was enough to show T.E.'s general intent.

Even within Florida, however, different definitions of malice exist. Robinson v. State\textsuperscript{175} involved a prosecution for an arson-related crime—willfully and maliciously damaging equipment used in the detection of a fire—against a defendant who stole several installed smoke detectors.\textsuperscript{176} The court rejected the defendant's argument that the prosecution must prove ill will toward the owner of the equipment—which roughly equates to treating general intent as a requirement of knowledge—instead opting for the definition of general intent "that a defendant acted intentionally and without justification or excuse."\textsuperscript{177} But in Young v. State,\textsuperscript{178} an aggravated child abuse prosecution, the court held that the malice necessary for that crime requires proof of ill will, rather than just "proof of an intentional act performed without legal justification or excuse."\textsuperscript{179}

Variations in the interpretation of terms like "malice" and "maliciously" imply that judges will vary the terms' meaning to

\textsuperscript{172} 701 So. 2d 1237 (Fla. Dist. Ct. App. 1997).
\textsuperscript{173} Id. at 1237.
\textsuperscript{174} Id. at 1238.
\textsuperscript{175} 686 So. 2d 1370 (Fla. Dist. Ct. App. 1997).
\textsuperscript{176} See id. at 1371.
\textsuperscript{177} See id. at 1372.
\textsuperscript{178} 753 So. 2d 725 (Fla. Dist. Ct. App. 2000).
\textsuperscript{179} Id. at 728. But cf. Slocum v. State, 757 So. 2d 1246, 1252 (Fla. Dist. Ct. App. 2000) (finding ill will requirement satisfied by defendant's "strapping a two-year-old who is terrified of the water into a car seat and kicking the car seat into a pool"). Slocum, eighteen, was angry because of the misbehavior of his girlfriend's two-year-old daughter. See id. at 1247. While his actions may show criminal negligence, recklessness, and extreme moral culpability, ill will toward the child is arguably lacking.
accomplish the result they seek in an individual case or a class of cases. Two recent examples further illustrate the flexibility in interpreting the term malice: the West Virginia Supreme Court’s decision in State v. Burgess,\textsuperscript{180} and the Fourth Circuit’s decision in United States v. Hassoun.\textsuperscript{181} In both cases it is plain that the appellate courts considered felony liability excessive and manipulated the mental requirement for the crimes involved in order to achieve more desirable results.

Even when courts can agree that general intent should be defined in terms of negligence, there is disagreement about the form of negligence imposed. Some courts believe that in some instances mere civil negligence will support criminal liability,\textsuperscript{182} while others adamantly hold such liability unwise and also unconstitutional.\textsuperscript{183} A further disagreement among the courts is what constitutes criminal negligence. In Hildreth v. Iowa Department of Human Services,\textsuperscript{184} the Iowa Supreme Court held that a father’s spanking of his eight-year-old daughter with a wooden spoon, leaving red marks that were detectable six days later, did not constitute child abuse because the father “could not reasonably have foreseen that the limited striking of Amanda’s buttocks would produce a physical injury.”\textsuperscript{185} The three dissenters retorted:

It seems almost ironic that the majority allows Hildreth to escape being found a child abuser. . . . People are commonly presumed to intend the natural consequences of their acts, and it

\textsuperscript{180} 516 S.E.2d 491, 494 (W. Va. 1999) (holding that defendant’s action of shooting and field dressing the calf of another was not the “malicious” killing of an animal as required by West Virginia law because no excessive cruelty was involved in the killing).

\textsuperscript{181} 199 P.3d 175 (4th Cir. 2000) (reversing defendant’s conviction for “maliciously” conveying false information regarding a bomb threat on an airplane because the trial court held that defendant’s reputation as a practical joker was irrelevant to whether he had acted with malice).


\textsuperscript{184} 550 N.W.2d 157 (Iowa 1996).

\textsuperscript{185} Id. at 160.
strikes me as preposterous to pretend Hildreth did not expect a physical injury to result from striking the child so hard with a wooden spoon as to leave her marked for days.\textsuperscript{186}

Ambiguity in the concept of general intent defined as criminal negligence allowed these judges to reach differing conclusions regarding the defendant’s liability; this difference reflects more their opinions of what liability is appropriate than their assessments of the proper definition of criminal negligence.

A series of Florida child abuse cases, each premised on a finding of culpable negligence, shows the same equivocation. \textit{State v. Ashley}\textsuperscript{187} concerned a pregnant woman who aborted her unborn fetus with a gunshot.\textsuperscript{188} There, the Florida Supreme Court reversed a district court of appeal decision that allowed the woman to be prosecuted for manslaughter of her fetus based on a theory of culpable negligence.\textsuperscript{189} A year later, in \textit{State v. Eversley},\textsuperscript{190} the same district court of appeal held that a mother who refused to wait at a hospital emergency room for treatment of her two-month-old child, who subsequently died, could be convicted of manslaughter through culpable negligence; however, the Florida Supreme Court once again reversed, finding the evidence insufficient to establish the necessary degree of negligence.\textsuperscript{191} Two years later, in \textit{Arnold v. State},\textsuperscript{192} the same district court of appeal—apparently having learned its lesson—reversed a father’s child abuse conviction for raising his child in abominable conditions\textsuperscript{193} because the state failed to prove the father was culpably negligent.\textsuperscript{194}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{186} \textit{Id.} (Harris, J., dissenting).
\item \textsuperscript{187} 670 So. 2d 1087 (Fla. Dist. Ct. App. 1996), \textit{quashed in part}, 701 So. 2d 338 (Fla. 1997).
\item \textsuperscript{188} \textit{See id.} at 1088-89.
\item \textsuperscript{189} \textit{See Ashley}, 701 So. 2d at 343.
\item \textsuperscript{190} 706 So. 2d 1363 (Fla. Dist. Ct. App. 1998), \textit{quashed in part}, 748 So. 2d 963 (Fla. 1999).
\item \textsuperscript{191} \textit{See Eversley}, 748 So. 2d 963, 964-65, 970. The Florida Supreme Court noted that a manslaughter conviction would have been appropriate under an amendment that became effective after the date of Eversley’s alleged crimes. \textit{See id.} at 968-70.
\item \textsuperscript{192} 755 So. 2d 796 (Fla. Dist. Ct. App. 2000).
\item \textsuperscript{193} The family’s mobile home was grimy, smelly, and repulsive. Garbage littered the floor, spoiled and decomposing food was strewn about, and feces were smeared on the living room floor and were piled in
\end{enumerate}
\end{footnotesize}
The differences among the judges' opinions in these cases can be rationalized as differences about the degree of negligence necessary to constitute general intent defined as criminal negligence. Some courts, however, apparently find the basic concept of criminal negligence befuddling, and consequently produce opinions that border on incoherent. A recent example is the Tenth Circuit's decision in United States v. Saffo, a conspiracy prosecution regarding pseudoephedrine, a legal drug that can be used to synthesize methamphetamine, which is a controlled substance. In response to the defendant's argument that the underlying statute regarding precursor drugs like pseudoephedrine was unconstitutional because it contained no mental requirement, the court held that "the 'knowing or having reasonable cause to believe' standard in 21 U.S.C. § 841(d)(2) imposes a constitutionally sufficient mens rea requirement." Though the "reasonable cause" language appears to establish a criminal negligence standard—punishing the defendant if the reasonable person would have known he or she was dealing with a precursor drug—the court went out of its way to say that the standard was not really negligence at all:

[T]he standard involves a subjective inquiry that looks to whether the particular defendant accused of the crime knew or had reasonable cause to believe the listed chemical would be used to manufacture a controlled substance. This requires scienter to be evaluated through the lens of this particular defendant, rather than from the perspective of a hypothetical

another room. . . . A plywood board with nails protruding outward had been left where someone could step on it. A steak knife, partially covered by a newspaper, also lay on the floor. In what appeared to be a child's room, the mattress had been so badly shredded that the coils had poked through the covering. The officer noticed a fuse box with exposed wiring and mold between the doors of the refrigerator. He heard cockroaches skittering and was bitten by fleas . . . .

Id. at 798-99.
194. See id. at 799-800.
195. 227 F.3d 1260 (10th Cir. 2000).
196. See id. at 1263.
197. Id. at 1268.
reasonable man. In this context, the "reasonable cause to believe" standard is one akin to actual knowledge.\(^{198}\)

This surprising language, apparently meant to bolster the court’s finding of constitutionality, stands criminal negligence on its head, equating it to knowledge. The court undoubtedly believed this was the best way to construe the statute, but its interpretation certainly does significant violence to the ordinary meaning of "reasonable cause to believe" and the ideas of criminal negligence associated with it.

Judicial confusion becomes even more evident when confronting a requirement of willfulness, a term so chameleon-like that it comprehends both general and specific intent.\(^{199}\) When dealing with the term "willful" in crimes typically labeled general intent, some courts equate it to knowledge,\(^{200}\) but other courts are not so sure. In Florida, vehicular homicide requires reckless conduct, which in turn must be willful, which typically denotes a knowledge requirement.\(^{201}\) However, in \textit{Lewek v. State}\(^{202}\) a Florida court recited all this law but then concluded:

In other words, the degree of culpability required to prove reckless driving is less than culpable negligence. . . . Although the Defendant need not have foreseen the specific circumstances causing the death of the victims, it is sufficient that the Defendant should have reasonably foreseen that the same general type of harm might occur if he knowingly drove his

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\(^{198}\) \textit{Id.} at 1268-69, 1269 n.7 (using the same reasoning to distinguish a contrary Tenth Circuit opinion).


\(^{202}\) 702 So. 2d 527 (Fla. Dist. Ct. App. 1997).
vehicle under circumstances that would likely cause death or
great bodily harm to another.203

Thus recklessness equals willfulness, which equals knowledge, but
all of them reflect a less demanding standard than culpable
negligence! Such incoherence bespeaks serious confusion.

Even general intent defined as knowledge frustrates the courts,
some of which bridle at a straightforward definition. In 1997, a
Florida court held that operating a motor vehicle without a valid
driver’s license requires proof of actual knowledge of the license’s
invalidity,204 two years later, another Florida court ruled that driving
with a revoked license requires proof of only constructive knowledge,
which is really a form of negligence.205 A result similar to the latter
Florida decision was reached in Colorado, where a statute specifically
defined knowledge to include “knowledge of circumstances sufficient
to cause a reasonable person to be aware” of a limitation on one’s
driving privileges.206 Further, a recent Maryland decision reached a
similar conclusion without the benefit of any similar statutory
language.207

These decisions suggest that however general intent is defined,
courts retain a great deal of flexibility in fashioning the mental
requirement for any particular general intent crime. This same lesson
is borne out by an examination of recent cases dealing with two
particular forms of general intent: the “depraved heart” finding that
will support a conviction of unintentional murder and the “want of
care” sufficient to establish involuntary manslaughter.

At common law, an unintentional killing can nevertheless qualify
as murder if it is the product of an abandoned, deprived, and

203. Id. at 531; accord Martinez v. State, 692 So. 2d 199, 200 (Fla. Dist. Ct. App. 1997) (“The
standard of proof in vehicular homicide cases is lower than the manslaughter standard.”).
206. See People v. Ellison, 14 P.3d 1034, 1035 (Colo. 2000) (construing COLO. REV. STAT. § 42-2-
138(4)(a) (2000)). The court attempted to characterize this test as something other than a negligence
standard, sparking a concurrence that criticized the attempt. See id. at 1040-41 (Costs, J., concurring in
the judgment).
malignant heart. While scholars have argued that this kind of "depraved heart" murder should require an extreme form of recklessness, courts have frequently failed to comply with this advice, instead penalizing an extreme form of criminal negligence with regard to causing death. The Michigan Supreme Court apparently ruled to this effect in People v. Goecke, as did the North Carolina Court of Appeals in State v. Gray. However, in the same year as Gray, the same North Carolina court reached the opposite conclusion in State v. Blue, perhaps reasoning differently because Blue involved a shaken baby instead of the drunk driving fatalities in Gray and Goecke. The Tenth Circuit ruled similarly to Blue in United States v. Wood, a case of surgeon malpractice in which the court found that the doctor's fatal misconduct, whether properly labeled recklessness or criminal negligence, was insufficiently extreme to justify a murder conviction. The Florida courts also seem to have imposed a high standard for depraved heart murder, with intermediate appellate courts disapproving such convictions in situations of drunk driving and mutual combat. However, the Florida Supreme Court subsequently countenanced a depraved heart conviction in the case of a shooter with bad aim, showing that the

208. See, e.g., People v. Lasko, 999 P.2d 666 (Cal. 2000).
209. See DRESSLER, supra note 87, § 31.05(B).
211. 528 S.E.2d 46 (N.C. Ct. App. 2000).
213. See id. at 274-75.
214. 207 F.3d 1222 (10th Cir. 2000).
215. See id. at 1234.
217. See State v. Brady, 745 So. 2d 954 (Fla. 1999). With its depraved heart holding in Brady, the Florida Supreme Court avoided using the transferred intent analysis on which the lower courts relied. See Brady v. State, 700 So. 2d 471 (Fla. Dist. Ct. App. 1997), quashed in part, 745 So. 2d 954 (Fla. 1999). A further complication is that the prosecution was for attempted murder, thus, raising Florida's unusual rule that the mental requirement for attempted murder is no greater than the mens rea for murder. See Brady, 745 So. 2d at 957 (discussing with approval Gentry v. State, 437 So. 2d 1097 (Fla. 1983)).
underlying concept of mens rea is sufficiently flexible to accommodate whatever result a court wants to reach.\textsuperscript{218}

An unintentional killing that fails to meet the requirements of depraved heart murder can constitute the lesser crime of involuntary manslaughter, but courts in common law jurisdictions are unclear as to what degree of criminal negligence supports a conviction for this offense. A Virginia case, \textit{Conrad v. Commonwealth},\textsuperscript{219} pointedly exemplifies the problem. There, a driver, who had been awake for twenty-two hours and repeatedly felt sleepy immediately before his accident, dozed off, hitting and killing a jogger.\textsuperscript{220} A three-judge panel of Virginia’s intermediate appellate court unanimously found the evidence insufficient to support a finding of criminal negligence: “Acts which constitute reckless driving do not necessarily equate to acts of recklessness which constitute criminal negligence necessary to support a conviction for involuntary manslaughter.”\textsuperscript{221} On rehearing en banc, a six-to-four majority of the court disagreed: “[A]ppellant’s decision to continue driving in such an impaired state was a callous act of indifference to the safety of others.”\textsuperscript{222} This disparity in application of the same mens rea requirement to the same set of facts suggests the variability of the standard as well as judicial willingness to exploit that variability in order to achieve a desired result. A similar tendency is evident in Judge Moylan’s lengthy opinion in \textit{Pagotto v. State},\textsuperscript{223} a Maryland decision disapproving a police officer’s involuntary manslaughter conviction for shooting the driver of a stopped motor vehicle.\textsuperscript{224} Florida cases also show the flexibility

\begin{itemize}
\item \textsuperscript{218} See also \textit{Commonwealth v. Woodard}, 694 N.E.2d 1277 (Mass. 1998) (affirming the trial judge’s reduction of verdict from murder to involuntary manslaughter despite defendant’s trial request that the jury not be instructed on involuntary manslaughter).
\item \textsuperscript{219} 514 S.E.2d 364, reheard en banc, 521 S.E.2d 321 (Va. Ct. App. 1999).
\item \textsuperscript{220} See \textit{Conrad}, 521 S.E.2d at 323-24.
\item \textsuperscript{221} \textit{Conrad}, 514 S.E.2d at 368; see also \textit{Forbes v. Commonwealth}, 498 S.E.2d 457, 461 (Va. Ct. App. 1998) (finding insufficient evidence of criminal negligence in an involuntary manslaughter prosecution arising out of a traffic accident).
\item \textsuperscript{222} 521 S.E.2d at 326.
\item \textsuperscript{223} 732 A.2d 920 (Md. Ct. Spec. App. 1999), aff’d, 762 A.2d 97 (Md. 2000).
\item \textsuperscript{224} Id. at 966.
\end{itemize}

\begin{quote}
\textit{[The evidence] does not show . . . such a departure from the norm of reasonable police conduct that it may fairly be characterized as “extraordinary and outrageous” . . . [I]t}
\end{quote}
of the criminal negligence standard in involuntary manslaughter prosecutions; an intermediate appellate court split over whether “excessive speed, coupled with evidence of alcohol consumption” was adequate to establish culpable negligence.\textsuperscript{225} Other courts have upheld convictions based on evidence of excessive speed\textsuperscript{226} and pulling the trigger on a gun no longer thought to be loaded,\textsuperscript{227} but disapproved one conviction based on evidence of practicing medicine without a license.\textsuperscript{228}

From the broad question of what constitutes general intent to seemingly narrower issues of how to define particular forms of general intent, the common law’s mens rea methodology allows substantial variation from crime to crime and even from case to case. This looseness is unexpected in a mature system of law. Its most likely explanation is that judges enjoy the power that the law’s flexibility gives them.

\textbf{C. Defining Specific Intent}

Common law mens rea methodology provides a clearer notion of specific intent than it does of general intent. Though some authorities do adopt a more narrow definition,\textsuperscript{229} there is growing agreement that specific intent comprehends purpose, most requirements of

\begin{quote}
\textit{does not show on the part of the law enforcement officer, even if guilty of some negligence in the performance of his duties, a \textit{mens rea} that qualifies as a “wanton and abandoned disregard of human life.”}
\end{quote}

\textit{Id.}

\begin{itemize}
\item \textbf{228.} \textit{See} Villafana v. State, 728 So. 2d 260 (Fla. Dist. Ct. App. 1999).
\item \textbf{229.} Some commentators would limit specific intent to requirements of intent to achieve an additional objective that is not a part of the crime’s act requirement, such as larceny’s intent permanently to deprive another of property. \textit{See}, e.g., WAYNE R. LAFAVE, MODERN CRIMINAL LAW 123 (3d ed. 2001). Because some purpose and knowledge requirements that apply to elements of the offense more closely resemble these additional objectives—especially in crimes where the act requirement falls short of the harm that society ultimately fears, see \textit{supra} text accompanying note 8—it seems preferable to classify them as specific intent requirements. A reader who disagrees with this characterization, and who would instead call some of the mens rea requirements discussed in this section general intent requirements, may simply mentally transfer those cases to the previous section without contravening the underlying analysis.
\end{itemize}
knowledge, and other concepts defined in terms of purpose and knowledge. So there is less judicial confusion regarding specific intent at common law—but not less manipulation. The flexibility of the various forms of specific intent allows courts to modify those mental requirements in order to satisfy their notions of wise policy. United States Supreme Court decisions over the last decade illustrate this trend, as do opinions from the lower courts in a variety of settings involving specific intent.

In *Cheek v. United States*, the Court interpreted the term “willfully” in the federal income tax evasion statute, a term, as previously noted, with many mens rea incarnations. In the tax context, it denotes a form of specific intent calling for knowledge of the requirements of criminal law: “[W]illfulness in this context simply means a voluntary, intentional violation of a known legal duty.” In *Cheek*, a five-justice majority opinion penned by Justice White read this requirement to allow a defense to tax evasion based on a good-faith belief that wages were not income, but not on a good-faith belief that the federal income tax laws were unconstitutional. Concurring in the judgment, Justice Scalia, who would have permitted both defense arguments, questioned whether the word “willfully” could bear such a recondite meaning:

I find it impossible to understand how one can derive from the lonesome word “willfully” the proposition that belief in the

230. See DRESSLER, supra note 87, § 10.06.
231. But see supra note 229.
234. See supra text accompanying notes 90-91 & 199-203.
236. 498 U.S. at 201 (quoting United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam)).
237. See id. at 201-07. For cases applying *Cheek*, see United States v. Nash, 175 F.3d 429, 436-37 (6th Cir. 1999), and United States v. Morris, 20 F.3d 1111, 1114-18 (11th Cir. 1994).
nonexistence of a textual prohibition excuses liability, but belief in the invalidity (i.e., the legal nonexistence) of a textual prohibition does not. . . . Perhaps such a test for criminal liability would make sense . . . but some text other than the mere word "willfully" would have to be employed to describe it—and that text is not ours to write.\textsuperscript{238}

Scalia thus squarely questioned the Court's authority to read the tax evasion statute in the manner chosen. However, the *Cheek* majority overrode this objection, finding the notion of specific intent embodied in willfulness ample enough to justify its conclusions regarding the best way to read the statute.\textsuperscript{239}

In 1994, the Supreme Court delivered a spate of opinions interpreting specific intent requirements in federal statutes. In *Ratzlaf v. United States*,\textsuperscript{240} involving another five-justice majority, the Court imported the tax law definition of "willfully" into a statute prohibiting the structuring of financial transactions in order to avoid currency reporting laws, thus reading a mistake-of-law defense into the statute.\textsuperscript{241} The four dissenters protested that this reading did violence to the customary understanding of willfulness outside the tax context: "[T]he term ‘willfully’ in criminal law generally ‘refers to consciousness of the act but not to consciousness that the act is unlawful.’"\textsuperscript{242} A more honest criticism would have been that willfulness is such a commodious concept that it allows courts to fashion whatever mental requirement they consider appropriate under its broad heading.

\textsuperscript{238} *Cheek*, 498 U.S. at 208-09 (Scalia, J., concurring). Two Justices dissented and another did not participate.

\textsuperscript{239} See id. at 201-07.

\textsuperscript{240} 510 U.S. 135 (1994).

\textsuperscript{241} See id. at 140-49. For cases applying *Ratzlaf*, see *United States v. Beidler*, 110 F.3d 1064 (4th Cir. 1997), and *United States v. Allah*, 130 F.3d 33 (2d Cir. 1997) (applying *Ratzlaf* to a gun prosecution).

\textsuperscript{242} *Ratzlaf*, 510 U.S. at 151 (Blackmun, J., dissenting) (quoting *Cheek*, 498 U.S. at 209 (Scalia, J., concurring)). Blackmun, who also dissented in *Cheek*, quoted Scalia, who criticized the majority approach in *Cheek* but joined the majority in *Ratzlaf*. 
JUDICIAL EXPLOITATION OF MENS REA

Four months later, the Court read a stringent knowledge requirement243 into the federal statute prohibiting possession of an unregistered machine gun, a law silent with regard to mental requirement.244 Although the Court in Staples v. United States devoted much space to whether the statute should have any mens rea, the government never truly advocated this position, instead acknowledging that the statute, like most possession offenses, required proof of knowledge245 but disputed what constituted the necessary knowledge.246 The Court determined that the law required proof that the defendant “knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun.”247 Two dissenters charged that the majority “ha[d] substituted its views of sound policy for the judgment Congress made when it enacted” the statute,248 an accusation not just of the Staples Court but also of the flexibility of the concept of knowledge required in possessory offenses.

Six months later, in United States v. X-Citement Video,249 the Supreme Court exploited another aspect of the flexibility of knowledge. Chief Justice Rehnquist, writing for the majority, strained to save a federal child pornography statute from unconstitutionality by extending a knowledge requirement in one part of the law, which prohibited “knowingly transport[ing] or ship[ping]” visual material, to another part of the statute dealing with “the use of a minor

245. See, e.g., MODEL PENAL CODE § 2.01(4) (Official Draft and Revised Comments 1985). Because possession crimes have an act requirement that falls short of the harm that society fears, under the Holmes reasoning discussed previously, the mens rea of knowledge is most properly construed as a specific intent requirement. See supra note 8 and text accompanying notes 68, 92 & 142.
246. See 511 U.S. at 621 (Ginsburg, J., concurring).
247. Id. at 602. For cases applying Staples, see United States v. Edwards, 90 F.3d 199 (7th Cir. 1996); In re Jorge M., 78 Cal. Rptr. 2d 320 (Ct. App. 1998), rev’d, 4 P.3d 297 (Cal. 2000).
248. 511 U.S. at 624 (Stevens, J., dissenting). Justice Blackmun, who dissented in both Cheek and Ratzlaf, joined Stevens’ dissent.
249. 513 U.S. 64 (1994).
engaging in sexually explicit conduct” within the material. Two Justices dissented in an opinion by Justice Scalia, who as in his Cheek opinion, emphasized how much the Court was substituting its own judgment for that reflected in the statutory language:

If one were to rack his brains for a way to express the thought that the knowledge requirement in subsection (a)(1) applied only to the transportation or shipment of visual depiction in interstate or foreign commerce, and not to the fact that the depiction was produced by use of a minor engaging in sexually explicit conduct, and was a depiction of that conduct, it would be impossible to construct a sentence structure that more clearly conveys that thought, and that thought alone... [I]t could not be clearer that [knowledge] applies only to the transportation or shipment of visual depiction in interstate or foreign commerce. There is no doubt. There is no ambiguity.

In X-Citement Video, as in Staples, the majority exploited the flexibility inherent in the concept of knowledge, one of the possible definitions of specific intent, just as it manipulated the concept of willfulness in Cheek and Ratzlaf to enforce another form of specific intent requirement. In each case the majority’s view of the best way to interpret the statute at issue, rather than neutral definitions of the variety of specific intent implemented in the crime, dictated the result.

In Cheek, Ratzlaf, Staples, and X-Citement Video, the Court’s interpretations largely favored the defendant. Two other recent Supreme Court opinions construing specific intent requirements have been more prosecution-oriented, but they still reflect a majority’s willingness to flex the mental requirement in order to achieve a desired result. In Bryan v. United States, the defendant argued for a
defense based on his ignorance of the federal statute prohibiting firearms sales without a license. However, the majority, in an opinion by Justice Stevens, read the statute to require knowledge only of unlawfulness in general. Three dissenters, again speaking through Justice Scalia, ridiculed the Court’s rule and advocated instead that “when Congress makes ignorance of the law a defense to a criminal prohibition, it ordinarily means ignorance of the unlawfulness of the specific conduct punished by that criminal prohibition.”

A year later, in Holloway v. United States, the Court found that a conditional intent satisfied the “intent to cause death or serious bodily harm” requirement in the federal carjacking statute. Once again, Justice Scalia dissented, skewering the Court’s notion of intent: “[T] is not common usage—indeed, it is an unheard-of usage—to speak of my having an ‘intent’ to do something, when my plans are contingent upon an event that is not virtually certain, and that I hope will not occur.” Though the Court was surely cleaning up Congress’ imprecise definition of the crime’s specific intent requirement, Scalia was right to criticize the majority for “sending courts and juries off to wander through ‘would-a, could-a, should-a’ land.” Of course, it is the lack of a consistent specific intent definition that permitted such excursions.

253. *See id.* at 191-95. The defendant noted the statute’s use of the term “willfully” and cited Cheek and Ratzlaf. *See id.*
254. *See id.* at 192-93, 196. The Court cited Staples and found the requirement met by Bryan’s violations of various local laws. *See id.*
255. “I would not lightly assume that Congress intended to make liability under a federal criminal statute depend so heavily upon the vagaries of local law—particularly local law dealing with completely unrelated subjects.” *Id.* at 203 (Scalia, J., dissenting); *see supra* note 254.
256. 524 U.S. at 203.
258. *Id.* at 4 n.3 (construing 18 U.S.C. § 2119 (1994)). The majority concluded that Holloway’s statement to the victim, “Get out of the car or I’ll shoot,” would satisfy the requirement. *Id.* The circuits had been split on the issue. *Compare* United States v. Randolph, 93 F.3d 656 (9th Cir. 1996) (requiring more than threat or conditional intent to satisfy the specific intent requirement), with United States v. Arnold, 126 F.3d 82 (2d Cir. 1997), *aff’d* sub nom. Holloway v. Unites States, 526 U.S. 1 (1999).
259. *Holloway*, 526 U.S. at 14 (Scalia, J., dissenting); *see supra* note 258. Justice Thomas also dissented in a separate opinion. *See* 526 U.S. at 22 (Thomas, J., dissenting).
260. 526 U.S. at 19 (Scalia, J., dissenting).
Despite the strong criticism in these Supreme Court decisions, Judge Richard Posner celebrated several of them in 1998 as protecting an important principle in American law: "It is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted was a crime, or even that it was wrongful." Citing Cheek, Ratzlaf, Staples, and Bryan, Posner argued that courts should use their power to manipulate the mental requirement in federal statutes to vindicate this principle; specifically, he contended for a knowledge-of-the-law requirement in the federal statute making it a crime for someone under a domestic violence protection order to "knowingly" possess a firearm. Ironically, no court has agreed with Posner regarding this particular crime, which shows the inconstancy with which courts use their authority to define specific intent; evidently, most judges have less interest in creating a mistake of law defense for those who possess firearms after threatening domestic violence.

Other recent lower court decisions display the same inconstancy, with courts manipulating the definition of specific intent to reach the results they desire. In conspiracy cases, which courts agree require some form of specific intent, judges flex the definition to find inadequate proof when it suits them. On the other hand, when a court wants to find specific intent, it can readily do so, as in United States v. Sharpe, where a lawyer's specific intent to assist his

262. See id. at 295-96 (construing 18 U.S.C. §§ 922(g)(8), 924(a)(2) (1994)). Posner also relied on Lambert v. California, 355 U.S. 225, 295 (1957) (voiding a felon's conviction for failure to register with police where the felon had no knowledge of registration requirement).
263. See, e.g., United States v. Mitchell, 243 F.3d 543 (4th Cir. 2001); United States v. Hutzel, 217 F.3d 966 (8th Cir. 2000); Wilson, 159 F.3d at 289.
265. For example, in United States v. Idowu, 157 F.3d 265 (3d Cir. 1998), there was evidence that the defendant knew he was agreeing to an illegal transaction but he was not sure of the precise illegality. See id. at 268. In United States v. Hernandez, 141 F.3d 1042 (11th Cir. 1998), the defendant was present when others agreed to commit murder but did not actively participate in the discussion. But see Bryan v. United States, 524 U.S. 184, 192-93, 196 (1998). Bryan, where the Court required knowledge only of unlawfulness in general, might have provided the raw material for a contrary argument. See id. 266. 193 F.3d 852 (5th Cir. 1999).
client's fraud was premised on "deliberate ignorance" of the client's activity. Further, in United States v. Palmer, the defendant's rejection of three proposed robbery sites did not deny the existence of "conditional" intent to rob in each situation.

The same flexibility of specific intent is evident in recent prosecutions for accomplice liability. The Fifth Circuit, which decided Sharpe, disapproved a deliberate ignorance instruction in the prosecution of a lawyer as an accomplice, rather than a co-conspirator, to his client's fraud, finding the evidence of specific intent insufficient. Similarly, the Sixth Circuit found that a housing department employee lacked the necessary specific intent to be an accomplice to her superior's false statements to a federal agency, even though a dissenter thought the employee was well aware of the superior's misrepresentations. Likewise, the Ninth Circuit found that one who discussed a bank robbery with eventual perpetrators, reconnoitered the bank, fled with the robbers, and tried to dispose of evidence of the crime, could be guilty as an accomplice to unarmed bank robbery, but not to the armed bank robbery the perpetrators committed, because there was no evidence of a specific intent for the robbers to use weapons or violence. However, Florida courts have affirmed accomplice convictions where the defendant tried to talk the principal out of committing the crime and where the principals coerced the defendant into assisting them. Lack of specific intent

267. Id. at 871-72. Regarding deliberate ignorance, see infra text accompanying notes 289-92.
268. 203 F.3d 55 (1st Cir. 2000).
269. See id. at 63-64. The court might have analogized to Holloway.
271. See United States v. Beckner, 134 F.3d 714, 720 (5th Cir. 1998).
273. See United States v. Coleman, 208 F.3d 786 (9th Cir. 2000); see also United States v. Graves, 143 F.3d 1185 (9th Cir. 1998) (constructing the specific intent necessary to be an accessory after the fact in a similarly generous fashion as in Coleman).
easily could have been found in either case, had the court been so inclined.

Attempt, another crime requiring specific intent, provides further examples of judicial manipulation of specific intent. In *Gudinas v. State*, the Florida Supreme Court found adequate evidence of attempted rape in defendant’s screaming at a woman in a parked car, “I want to f__ you,” while trying to enter the car. The defendant, who argued that he was seeking consensual intercourse, desisted when the victim sounded her car horn. The fact that the defendant had also been convicted of capital murder of another woman that same night, which the court affirmed, may well have influenced its finding regarding the mental requirement for attempted rape. Similarly, the court in *Zellars v. State*, affirmed a conviction for attempted aggravated battery when a twenty-three-year-old male defendant choked a fifteen-year-old female victim after an altercation at an intersection where young people were “hanging out.” On the crucial finding of a specific intent to inflict great bodily harm, one appellate judge agreed with the jury’s decision, another disagreed, and the third, after criticizing the prosecutor for not charging the case as a simple battery, voted to affirm only because the defendant “retained his grip for some two or three minutes until physically forced away by an intervening third party.” These differing responses suggest varying concepts of specific intent, which fluctuate with each judge’s perception of the propriety of convicting the defendant.

276. See United States v. Gracidas-Ulibarry, 231 F.3d 1188 (9th Cir. 2000); supra text accompanying notes 75-79; see also State v. Coble, 527 S.E.2d 45 (N.C. 2000) (holding that attempted second degree murder does not exist in North Carolina). But cf. State v. Brady, 745 So. 2d 954 (Fla. 1999) (finding that attempted second degree murder does not require specific intent).
277. 693 So. 2d 953 (1997).
278. Id. at 962 (alteration in original).
279. See id. at 962-63.
280. See id. at 959-60.
282. Id. at 346.
283. Id. at 348 (Cobb, J., concurring specially).
JUDICIAL EXPLOITATION OF MENS REA

A separate question regarding specific intent, whether transferred intent analysis is appropriate in attempt cases, has been answered with less variance in recent court decisions (the typical answer is yes) but again attests to the flexibility of specific intent. For example, a defendant with bad aim plainly does not intend to harm the person at whom he mistakenly shoots; consequently, any finding of specific intent regarding such a defendant is obviously result-oriented.

Drug possession cases, which require knowledge of the contraband possessed, also show the flexibility of this particular form of specific intent. In United States v. Butler, for example, the Eighth Circuit maneuvered through a field of conflicting precedents in similar fact situations to hold there was sufficient evidence that the defendant knew that the truck he was driving contained marijuana, even though his passenger, who pled guilty, testified that the driver did not know the nature of the hidden cargo. Though the court attempted to parse its prior conflicting decisions, a contrary ruling in Butler would have been equally as justifiable under those precedents. Thus, it would have been more forthright to acknowledge that the case law allowed the court discretion to approve or disapprove a finding of knowledge, a decision most likely based on the judges' assessment of whether the defendant deserves punishment.

Similar discretionary authority is evident in the judges' use of deliberate ignorance as a way of proving knowledge of the items


286. See supra notes 28, 68, 92, 142 & 245 and accompanying text.

287. 238 F.3d 1001 (8th Cir. 2001).

288. See id. at 1002-04 (construing United States v. Martinez, 168 F.3d 1043 (8th Cir. 1999) (finding the evidence sufficient); United States v. Turner, 157 F.3d 552 (8th Cir. 1998) (finding the evidence sufficient); United States v. Davis, 103 F.3d 660 (8th Cir. 1996) (finding the evidence insufficient); United States v. Baker, 98 F.3d 330 (8th Cir. 1996) (finding the evidence sufficient); United States v. Pace, 922 F.2d 451 (8th Cir. 1990) (finding the evidence insufficient)).
possessed, though the doctrine obviously dilutes the concept of knowledge to something akin to recklessness.\(^{289}\) The Tenth Circuit employed deliberate ignorance reasoning to uphold the conviction of the defendant, a drug “mule,” in *United States v. Delreal-Ordonez*;\(^{290}\) however, despite a dissenting judge’s invocation of the doctrine, a majority of the Fifth Circuit ignored it when considering another mule in *United States v. Reveles*.\(^{291}\) These disparate holdings reflect the courts’ ability to flex the meaning of knowledge as it suits them.\(^{292}\)

Courts also manipulate the knowledge required for possession in its possible application to other elements of the offense. Recent decisions hold that a possessor of drugs with intent to sell need not know that he is within a thousand feet of a school to be guilty of this aggravated form of the offense,\(^{293}\) nor does he even need to intend to sell within the thousand-foot radius.\(^{294}\) Similarly, drug defendants who possessed one drug, thinking it was another drug subject to a lower punishment, have received the greater punishment.\(^{295}\) If all one looks at is the concept of knowledge, each of these decisions could have gone the other way. However, the courts were looking elsewhere, most likely at their own judgments regarding what constitutes wise policy in punishing drug crimes.\(^{296}\)

No recent drug possession case better exemplifies the courts’ willingness to manipulate specific intent to achieve a desired result.

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289. See LAFAVE, supra note 229, at 144-50.
290. 213 F.3d 1263 (10th Cir. 2000).
291. 190 F.3d 678 (5th Cir. 1999).
292. See supra note 267 and accompanying text. Regarding the drug mule’s mens rea, see also *People v. Parra*, 82 Cal. Rptr. 2d 541, 543-44 (Dist. Ct. App. 1999) (holding that intent to sell requires either an intent to sell personally or an intent that someone will eventually sell the drug).
295. See *United States v. Valencia-Gonzales*, 172 F.3d 344 (5th Cir. 1999) (noting that defendant was carrying heroin, which he thought was powder cocaine); *United States v. Barbosa*, 51 F. Supp. 2d 597 (E.D. Pa. 1999) (noting that defendant was carrying crack cocaine, which he thought was heroin).
296. See also *In re Timothy F.*, 681 A.2d 501 (Md. 1996) (reversing, over a dissent, a juvenile delinquency adjudication because there was insufficient evidence that the twelve-year-old juvenile intended to distribute milk chips as crack cocaine).
than the Kansas Court of Appeals’ decision in *State v. Calvert.*
Calvert argued that he seized marijuana and drug paraphernalia from
his stepson and was arrested in possession of the items before he
could destroy them. The court rejected Calvert’s argument that
these facts constituted an affirmative defense, instead suggesting that
individuals in Calvert’s position should argue that they lacked the
necessary mens rea:

Our ruling does not prevent a defendant from presenting a
common-sense defense to a charge of a possessory crime.... To
prove possession, the State must establish that a defendant
intentionally appropriated the drug to himself or herself. The
legal necessity of an intentional appropriation adequately
protects the innocent defendant from a claim of knowing
possession of contraband.

These unexplained comments imply that someone in possession of an
item who intends to discard it can somehow not knowingly possess
the item. Ironically, such nonsensical reasoning achieves the right
result; this is how courts interpret specific intent, stretching or
contracting it to suit their purposes in the case at hand.

Theft and fraud prosecutions also require specific intent and
display the same traits as possession cases. Recent Florida theft
decisions reveal the malleability of theft’s specific intent requirement.
In *T.L.M. v. State,* an intermediate appellate court held that a
juvenile, who removed a fire extinguisher from a schoolroom wall
and threw it at a teacher’s desk, was not guilty of theft of the fire
extinguisher because he “did not have the specific intent to . . .

298. See id. at 538.
299. Id. (citation omitted). But cf. *State v. Atsbeha,* 16 P.3d 626 (Wash. 2001) (rejecting, over three
dissenting votes, evidence of mental abnormalities offered to demonstrate that defendant, charged with
possession with intent to deliver, thought he was assisting police in apprehending a drug dealer).
deprive the School Board of its property.”\textsuperscript{301} Less than four months later, in \textit{Peoples v. State},\textsuperscript{302} another Florida intermediate appellate court held that a prisoner, who took a fire extinguisher from storage and hit a correctional officer with it (as well as spraying it in the officer’s face), was guilty of theft.\textsuperscript{303} Rather than disagreeing with the conclusion in \textit{T.L.M.}, the \textit{Peoples} court attempted to distinguish the prior case in terms of how long the extinguisher was held and how it was used,\textsuperscript{304} neither of which has much to do with specific intent. A more honest explanation is that the schoolboy defendant in \textit{T.L.M.} was more appealing than the prisoner in \textit{Peoples}.\textsuperscript{305}

A similar desire to do justice despite the requirements of mens rea occurred in \textit{T.S. v. State},\textsuperscript{306} where a juvenile helped his friend scout out cars in a parking lot and then stood by as the friend entered one of them and stole a radar detector.\textsuperscript{307} The district court of appeal found that there was enough evidence to adjudicate the juvenile guilty as an accomplice to burglary of the car, but not to theft of the radar detector.\textsuperscript{308} The court, apparently wanting to soften the blow on T.S., did not explain how the juvenile could have had the specific intent necessary for burglary (that a crime be committed in the car), but not for theft (the crime evidently to be committed in that car).

Two companion appeals regarding possession of stolen property evince the flexibility of the knowledge necessary for this theft-related offense. In \textit{Jackson v. State},\textsuperscript{309} the defendant was stopped while driving a stolen car. The court held that mere possession of stolen

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\item \textsuperscript{301} \textit{Id.}\ at 751 (construing FLA. STAT. ANN. § 812.014(1) (West 1999)). The court reached this conclusion even though the Florida theft statute requires only an intent "temporarily" to deprive another of property. \textit{See id.}
\item \textsuperscript{302} 760 So. 2d 1141 (Fla. Dist. Ct. App. 2000).
\item \textsuperscript{303} \textit{See id.}\ at 1142.
\item \textsuperscript{304} \textit{See id.}\ at 1143.
\item \textsuperscript{305} For another theft case involving a less than attractive defendant (an unscrupulous contractor in hurricane-damaged south Florida), see \textit{Iglesias v. State}, 676 So. 2d 75 (Fla. Dist. Ct. App. 1996) (rejecting defendant's argument that he lacked the specific intent necessary for theft where the defendant received advance payments for performing home repairs by falsely claiming to have a state license, then claimed he thought his local occupational license was all he needed).
\item \textsuperscript{306} 675 So. 2d 196 (Fla. Dist. Ct. App. 1996).
\item \textsuperscript{307} \textit{See id.}\ at 197.
\item \textsuperscript{308} \textit{See id.}\ at 199.
\item \textsuperscript{309} 736 So. 2d 77 (Fla. Dist. Ct. App. 1999).
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property, ""not aided by other proof,"" was inadequate to establish the necessary knowledge.\textsuperscript{310} But in \textit{Youngs v. State},\textsuperscript{311} the same court found the requisite proof when the defendant pawned stolen tools the morning after they disappeared.\textsuperscript{312} Of course, this fact could lead to many inferences other than knowledge that the goods were stolen, and was thus no more probative of the necessary knowledge than was the simple possession in \textit{Jackson}. The court, however, wanted to draw a bright line that would allow it to police results in subsequent cases involving possession of stolen property, and it manipulated the concept of knowledge in order to give itself that power.

Other states' recent theft cases also demonstrate the flexibility of specific intent. In \textit{People v. Davis},\textsuperscript{313} the California Supreme Court clarified that theft extends to individuals who take store merchandise to a sales counter and seek a refund by falsely claiming previous purchase of the merchandise—despite the court's difficulties in determining exactly whom the defendant intended to deprive and of what.\textsuperscript{314} In \textit{United States v. Krinsky},\textsuperscript{315} the Sixth Circuit upheld multiple counts of embezzlement from a pension fund by equating the specific intent to deprive to "reckless disregard" of whether such a deprivation would occur, a lower standard of mens rea.\textsuperscript{316} In \textit{United States v. Coleman},\textsuperscript{317} the Second Circuit, while holding that possession of stolen mail extends to misaddressed mail, relied on a peculiar construction of the knowledge necessary for possession to limit the potentially extreme effects of its holding:

\begin{quote}
[W]e reject the suggestion that an unintended recipient of misaddressed mail could be held criminally liable . . . if the
\end{quote}

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\item \textsuperscript{310} \textit{Id.} at 84 (quoting \textit{State v. Graham}, 238 So. 2d 618, 621 (Fla. 1970)).
\item \textsuperscript{311} 736 So. 2d 85 (Fla Dist. Ct. App. 1999).
\item \textsuperscript{312} \textit{See id.} at 86-87.
\item \textsuperscript{313} 965 P.2d 1165 (Cal. 1998).
\item \textsuperscript{314} \textit{See id.} at 1166-67. The opinion admitted, "there is . . . ample authority for the result reached in the case at bar, the difficulty is in finding a rationale for so holding that is consistent with the basic principles of the law of larceny." \textit{Id.} at 1169.
\item \textsuperscript{315} 230 F.3d 855 (6th Cir. 2000).
\item \textsuperscript{316} \textit{Id.} at 861.
\item \textsuperscript{317} 196 F.3d 83 (2d Cir. 1999).
\end{itemize}
recipient acted without criminal intent sufficient to establish that he or she kept possession of the mail with a bad purpose. Criminal liability should not attach to a person merely because they know the mail was not meant for them and they kept it or disposed of it nonetheless.\textsuperscript{318}

Of course, the statute says nothing about a “bad purpose,” using only the word “knowing,” but the court needed this mental requirement in order to lessen the impact of its interpretation of “stolen” mail; thus, it simply read the requirement into the statute. An Indiana court similarly flexed the concept of knowledge in \textit{Reed v. State},\textsuperscript{319} holding that an alleged shoplifter, who suffered a transient ischemic attack (“a small stroke”), could prove “that she did not voluntarily or knowingly commit theft,” even though the state supreme court had specifically disapproved the use of mental abnormalities to disprove mens rea.\textsuperscript{320} Conversely, in \textit{United States v. Richards},\textsuperscript{321} a federal district court refused to consider evidence of more severe mental abnormalities offered to disprove the specific intent necessary for embezzlement, even though federal courts generally allow such evidence.\textsuperscript{322}

Fraud appeals reveal similar patterns. Some federal courts have construed the ambiguities in various specific intent requirements favorably to the defendant—whether knowledge of a fraud satisfies a requirement of intent to defraud,\textsuperscript{323} and whether bank fraud requires intent to harm a bank’s property rights.\textsuperscript{324} Other courts have opted for more prosecution-oriented interpretations—“intentionally” in a computer fraud statute applies to accessing the computer but not to the additional required act of damaging the computer,\textsuperscript{325} and “willfully” in an anti-kickback statute does not require knowledge

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\item[318] \textit{Id.} at 88 (construing 18 U.S.C. § 1708).
\item[319] 693 N.E.2d 988 (Ind. Ct. App. 1998).
\item[320] \textit{Id.} at 989, 992 & n.6.
\item[322] \textit{See generally id.}
\item[323] \textit{See United States v. Gabriel}, 125 F.3d 89 (2d Cir. 1997).
\item[324] \textit{See United States v. Kenrick}, 221 F.3d 19 (1st Cir. 2000).
\item[325] \textit{See United States v. Sablan}, 92 F.3d 865 (9th Cir. 1996) (construing 18 U.S.C. § 1030 (1994)).
\end{footnotes}
that the alleged transaction violated the statute.\textsuperscript{326} The flexibility of the specific intent forms employed in these statutes gave the courts discretion to draft the statutes’ mental requirements as the judges deemed best.\textsuperscript{327} The same is true of two recent Florida decisions dealing with allegedly fraudulent conduct, one holding that “constructive knowledge” would not satisfy a “knowingly” requirement,\textsuperscript{328} and another reaching the remarkable conclusion that reliance on the advice of counsel constitutes a defense to any crime requiring specific intent.\textsuperscript{329}

Judicial manipulation of specific intent requirements is also evident in other crimes. A clear example of such manipulation occurred in \textit{State v. Perkins},\textsuperscript{330} where a disgruntled litigant was charged with “intentionally” threatening a Wisconsin judge.\textsuperscript{331} Perkins made the alleged threatening comments to police, who responded to reports that Perkins was suicidal.\textsuperscript{332} When asked whether he was contemplating killing himself, the defendant responded: “[I]f I were gonna do—do myself, I’d—I’d shoot Judge Radcliffe first because he’s a brain dead son of a bitch.”\textsuperscript{333} The appellate court upheld Perkins’ conviction, holding that the statute’s intent requirement would be satisfied by proof that “the communication would be interpreted by a reasonable person as a serious expression of intent to inflict bodily harm.”\textsuperscript{334} This decision, effectively equating specific intent to criminal negligence—as well as

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\textsuperscript{326} See United States v. Starks, 157 F.3d 833, 837-38 (11th Cir. 1998) (construing 42 U.S.C. § 1320a-7b(b) (1994)) (following Bryan and distinguishing \textit{Ratafia}).
\textsuperscript{327} See, e.g., United States v. Sultan, 115 F.3d 321 (5th Cir. 1997) (finding insufficient evidence to establish the knowledge requirement for trafficking counterfeit goods); United States v. Baxt, 74 F. Supp. 2d 436 (D.N.J. 1999) (finding mental abnormalities insufficient to disprove the specific intent to make false statements in an application for a bank loan).
\textsuperscript{330} 614 N.W.2d 25 (Wis. Ct. App. 2000).
\textsuperscript{331} See \textit{id.} at 29 (construing \textit{WIS. STAT. § 940.203(2) (1996))}.
\textsuperscript{332} See \textit{id.} at 28.
\textsuperscript{333} \textit{id.}
\textsuperscript{334} \textit{id.} at 30. The court analogized its mens rea holding to federal law. See \textit{id}. This comparison is flawed because the relevant federal statute does not include the word “intentionally.” See supra text accompanying notes 45-63.
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forgoing any requirement of communication of the threat—seems best explained as a display of professional courtesy to another judge, which the flexibility of the common law term “intentionally” allowed. 335

Specific intent requirements in recent assault cases have also provided opportunities for judicial manipulation. The HIV-positive defendant in Smallwood v. State, 336 aware of his condition, attempted to rape a woman without using a condom and consequently was charged, inter alia, with assault with intent to murder. 337 The Maryland Court of Special Appeals upheld his conviction despite a persuasive dissent that the defendant’s “reckless disregard for the risk of infecting [his victim] . . . is not the same as an intent to kill.” 338 Although the Maryland Court of Appeals unanimously reversed, the fact that it took the highest court in the state to settle the meaning of specific intent on these egregious facts suggests the malleability of that concept. 339 Further evidence of the flexibility inherent in specific intent is apparent in State v. Brown, 340 where the Supreme Court of Washington held that the intent requirement for the crime of assaulting a law enforcement officer engaged in official duties does not require proof that the defendant knew he was assaulting an officer acting in an official capacity. 341

335. See also State v. J.M., 6 P.3d 607 (Wash. Ct. App. 2000) (construing knowledge requirement in harassment statute to apply to element of making a threat but not to element of evoking fear in the person threatened).
337. See id. at 748, 754. The state also charged Smallwood with attempted murder. See id. at 754.
338. Id. at 755 (Bloom, J., dissenting).
341. Id. at 328. Two recent Florida decisions interpreting the crime of assault on a pregnant woman display confusion regarding why the crime requires specific intent. V.M. v. State, 729 So. 2d 428, 429 (Fla. Dist. Ct. App. 1999), suggested the need for specific intent because of the statute’s knowledge requirement, and Firth v. State, 764 So. 2d 734, 735 (Fla. Dist. Ct. App. 2000), followed the V.M. court’s reasoning. The statute, however, requires only that the defendant “knew or should have known that the victim was pregnant,” which implies that a form of negligence will satisfy the mens rea requirement. Id. at 735 (construing FLA. STAT. ANN. § 784.045(1)(b) (West 1997)). A better reasoned approach in both decisions might have been to assert that assault itself typically requires a specific intent. See supra notes 69-71 & 83 and accompanying text.
Like assault, burglary is a specific intent crime and recent burglary opinions similarly reveal a judicial tendency to manipulate specific intent. The defendant in *People v. Kwok* entered his victim’s home, removed the door’s lock, had a key made for the lock, and then reinstalled the lock; days later he used the key to enter the home and attempted to rape and murder the victim. Convicted of burglary for the first entry, Kwok argued on appeal that he did not have the necessary specific intent to commit a crime within the victim’s home on that occasion; the California Court of Appeals disagreed, holding that the intent to later use the key to commit a crime satisfied the necessary specific intent. An apparent desire to affirm all the defendant’s convictions likely fueled this expansion of burglary’s specific intent requirement. However, a relatively appealing defendant can produce the opposite effect, as in *Calliar v. State,* where the Florida Supreme Court held that the defendant, who was seen “on school grounds attempting to break the chain of a bicycle with wire cutters and a screwdriver,” could not be convicted of possession of burglary tools without proof of an intent to use the tools to effect an illegal entry. Two dissenters agreed with the lower court that an intent to use the tools in a crime to be committed after entry should be sufficient. The flexibility of the statute’s specific intent requirement would have permitted either reading. Consequently, the judges in that case relied upon their own perceptions of what constitutes wise policy and achieves a good result to formulate their decision.

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342. *See, e.g.*, State v. Mesch, 574 N.W.2d 10 (Iowa 1997).
344. *See id.* at 44.
345. *See id.* at 46-47. The court also held that at the time of the first entry Kwok intended to steal the key from his victim, even though he was the one who had the key made and the victim never possessed it or even knew it existed. *See id.* at 44-45, 47-50. This rather ludicrous holding evinces how much the court wanted to uphold this particular defendant’s burglary conviction.
346. 760 So. 2d 885 (Fla. 1999).
347. *See id.* at 885.
348. *See id.* at 888 (Wells, J., dissenting).
Recent appellate decisions over a range of specific intent crimes in federal and state courts following the common law mens rea

349. For example, the knowledge requirement in federal environmental crimes has produced similar judicial manipulation. Circuit splits have developed regarding whether the knowledge requirement in the criminal provisions of the Clean Water Act and the Resource Conservation and Recovery (RCRA) extends to all elements of the crimes or only to some. See Stephen G. Jeffery & Jonathan Eric Berry, Recent Cases Expose Circuit Split on Mens Rea, NAT'L L.J., Dec. 1, 1997, at C11 (regarding the Clean Water Act, contrasting United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997), United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995), and United States v. Weizhenhoff, 35 F.3d 1275 (9th Cir. 1993), with United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996)) (regarding RCRA, contrasting United States v. Laughlin, 10 F.3d 961 (2d Cir. 1993), United States v. Dean, 969 F.2d 187 (6th Cir. 1992), and United States v. Dee, 912 F.2d 741 (4th Cir. 1990), with United States v. Heuer, 4 F.3d 723 (9th Cir. 1993), United States v. Baytank (Houston) Inc., 934 F.2d 599 (5th Cir. 1991), and United States v. Johnson & Towers Inc., 741 F.2d 662 (3d Cir. 1984)). Courts have also considered whether the knowledge requirement in these crimes makes ignorance of the law an excuse. See United States v. Wilson, 133 F.3d 251, 260-62 (4th Cir. 1997). In both circumstances, lower federal courts have had to contend with precedents like Cheek, Ratliff, Staples, and X-Cite:ment Video and the leeway they give judges to shape the specific intent requirements in these environmental statutes. See Wilson, 133 F.3d at 261-62 (citing all four Supreme Court cases; Jeffrey & Berry, supra, at C1 (citing Staples and X-Cite:ment Video)).

Federal courts recently confronted the same precedents in interpreting immigration statutes. The courts used the available leeway, reading the knowledge requirement in several of these statutes to require general knowledge of the illegality of one's conduct, as in Bryan. See United States v. Flores-Garcia, 198 F.3d 1119 (9th Cir. 2000); United States v. Chowdhury, 169 F.3d 402 (6th Cir. 1999); United States v. Figueroa, 165 F.3d 111 (2d Cir. 1998); United States v. Nguyen, 73 F.3d 887 (9th Cir. 1995); supra text accompanying notes 252-54; see also United States v. Hernandez-Guardado, 228 F.3d 1017, 1023 (9th Cir. 2000) (construing requirement of knowledge or recklessness in statute which prohibited transportation of an illegal alien, to necessitate proof of an intent to further the alien's illegal presence; this in turn requires a showing of "a direct or substantial relationship between that transportation and its furtherance of the alien's presence in the United States.") (quoting United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977)).

Similar judicial manipulation of varieties of specific intent is evident in federal decisions regarding money laundering. See United States v. Hill, 167 F.3d 1055 (6th Cir. 1999) (finding that the requirement of knowledge that funds are proceeds of previous unlawful activity does not include knowledge of precise nature of previous illegality); United States v. Maher, 108 F.3d 1513 (2d Cir. 1997) (same). For examples of judicial manipulation of intent in witness tampering and obstruction of justice, see United States v. Davis, 183 F.3d 231, 255 (3d Cir. 1999) (construing 18 U.S.C. § 1512(b) (1994) and holding that the jury should have been allowed to consider whether defendant's voluntary intoxication disproved his intent to "corruptly persuade"), United States v. Farrell, 126 F.3d 484 (3d Cir. 1997) (finding that corrupt persuasion requires more than an improper purpose), and United States v. Aguilar, 80 F.3d 329 (9th Cir. 1996) (finding that the knowledge requirement was not satisfied by proof of high probability of awareness). For crimes involving federal property, see United States v. Henderson, 243 F.3d 1168 (9th Cir. 2001) (holding that the willfulness requirement necessitated a showing that the defendant knew that digging an open trench on public land was unlawful), United States v. Lynch, 233 F.3d 1139, 1142-46 (9th Cir. 2000) (determining that knowing removal of an archeological resource requires awareness that the item removed is an archeological resource; identifying that federal offense as "a general intent crime"; citing Staples and X-Cite:ment Video to hold that knowledge is nevertheless required, and ruling that knowledge will be proved if the defendant "knows or has reason to know," with the latter option constituting a form of criminal negligence rather than a knowledge requirement). For examples in cruelty to animals cases, see United States v. Santillan,
methodology could also be adduced. The point should now be crystal clear: Courts manipulate the definition of specific intent and its many variations to achieve the results they desire in individual cases and across case classes.\(^{351}\)

243 F.3d 1125 (9th Cir. 2001) (finding that the knowledge requirement does not include knowledge of the specific provision violated), and *United States v. Bronx Reptiles*, 217 F.3d 82 (2d Cir. 2000) (holding that the defendant must know not only that he is transporting wild animals, but also that the conditions of transport are inhumane or unhealthful). For an example of a case involving privacy violations, see *United States v. Trabert*, 978 F. Supp. 1368 (D. Colo. 1997) (holding that the defendant must have known the disclosed information was protected by the Privacy Act, 5 U.S.C. § 522a (1994)). For examples regarding sexual abuse of children, see *United States v. Taylor*, 239 F.3d 994 (9th Cir. 2001) (holding that despite knowledge requirement in the crime of transporting a minor for prostitution, defendant does not have to know the victim is a minor), *United States v. Garcia-Lopez*, 234 F.3d 217 (5th Cir. 2000) (holding that traveling in interstate or foreign commerce for the purpose of having sex with a minor does not require that sex be one of the primary purposes of the travel), and *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000) (holding that knowing persuasion of a minor to engage in sex does not require proof of intent that the minor actually engage in sex).

350. Florida cases are illustrative of this point. Compare State v. Mancuso, 652 So. 2d 370 (Fla. 1995) (willfulness requirement in statute penalizing leaving the scene of an accident involving injury necessitates showing that the defendant knew or should have known of injury), with State v. Durus, 700 So. 2d 1223 (Fla. 1997) (willfulness requirement in new statute penalizing leaving the scene of an accident involving death necessitates showing that the defendant knew or should have known of injury, but not of death). See also Burks v. State, 766 So. 2d 468 (Fla. Dist. Ct. App. 2000) (determining that although the defendant, on his own, isolated property, appeared nude in the presence of a minor, the exposure occurred after the minor’s parent and her parent’s fiancé knew of the defendant’s nudity; therefore, the defendant’s failure to seek cover upon the minor’s arrival was insufficient proof that he knowingly committed a lewd and lascivious act); Millan v. State, 764 So. 2d 860 (Fla. Dist. Ct. App. 2000) (finding that an attorney who battered opposing counsel in courthouse elevator after court recessed for the day had necessary intent to hinder the administration of justice); Brown v. State, 764 So. 2d 741 (Fla. Dist. Ct. App. 2000) (finding that the knowledge requirement in the felony offense of driving with a suspended license means the prosecution must prove the defendant knew of suspension); Nicholson v. State, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000) (holding that despite the knowledge requirement in the crime of promoting sexual performance by a child, knowledge of the victim is not required); Cooper v. State, 742 So. 2d 855 (Fla. Dist. Ct. App. 1999) (holding that despite silence regarding mens rea, the crime of resisting arrest without violence requires knowledge that the person resisted was a law enforcement officer).

351. Nowhere is this more obvious than in the context of homicide offenses requiring specific intent. For example, specific intent to kill is quite malleable when judges are determining whether a murder defendant’s intoxication or mental abnormality is sufficient to disprove that intent. In *State v. Mitts*, 690 N.E.2d 522 (Ohio 1998), and *Jackson v. State*, 964 P.2d 875 (Okla. Crim. App. 1998), courts in Ohio and Oklahoma upheld trial judges’ decisions not to instruct the jury on voluntary intoxication, despite proof that the defendants were intoxicated at the time of the killings. Both courts found the evidence insufficient to establish a lack of capacity to form a specific intent to kill, a result which implies an easily satisfied concept of specific intent to kill. Phrasing the legal test in terms of lack of capacity to form a specific intent might justify the stringent requirements imposed on the defense. *See Mitts*, 690 N.E.2d at 527-28; *Jackson*, 964 P.2d at 885, 892; *see also LOW ET AL., supra note 2, at 286-88. However, the Ohio court immediately shifted to the different question of whether “Mitts was so intoxicated that he did not intend what he was doing when he shot the victims,” suggesting that phraseology figured little in the court’s decision. *Mitts*, 690 N.E.2d at 528. In the Oklahoma case, two
II. THE MODEL PENAL CODE APPROACH

The foregoing survey of decisions by courts using the common law mens rea methodology does not paint a pretty picture, at least not in a governmental system where a purported commitment to the principle of legality requires that the legislature define criminal laws in advance of their enforcement. The picture was equally, if not more, unflattering half a century ago when the drafters of the Model Penal

members of the five-judge panel dissented, arguing that the appellate majority, like the trial court, substituted its judgment on a question that should have gone to the jury. See Jackson, 964 P.2d at 902 (Lane, J., dissenting). Nevertheless, the California Supreme Court reached a similar result in People v. Williams, 941 P.2d 752 (Cal. 1997), even though California phrases its test as whether the defendant had a specific intent at the time of the alleged crime rather than in terms of the lack of capacity to form a specific intent. See id. at 777. California law prohibits a "diminished capacity" argument but allows a defendant to assert "diminished actuality," i.e., that because of intoxication he did not have the specific intent necessary for the crime. See id. These decisions seem to turn on the courts' reluctance to allow voluntary intoxication to disprove the specific intent to kill rather than on the language of the test.

On the other hand, when the defendant's disability constitutes a mental abnormality, some courts become more receptive. Accordingly, in State v. Ellis, 963 P.2d 843 (Wash. 1998), the Washington Supreme Court shaped the concept of specific intent so as to allow a defendant to use his history of childhood and adolescent abuse, as well as drug dependence, to attempt to disprove the specific intent to kill his mother and half-sister. See id. at 868-69.

As a final example, consider the legendary flexibility of the premeditation and deliberation components ordinarily required in first degree murder. While the standards for premeditation and deliberation are notoriously lax, courts in some states regularly disapprove guilty verdicts in first degree murder cases, based on little more than their disagreement with the finder of fact regarding the existence of these forms of the specific intent to kill. See Byford v. State, 994 P.2d 700 ( Nev. 2000) (criticizing previous decisions for failing to adequately distinguish premeditation from deliberation); State v. Guthrie, 461 S.E.2d 163 (W. Va. 1995) (criticizing previous instructions on premeditation and deliberation as unclear and adopting new ones); see also DRESSLER, supra note 87, § 31.03(C).

Code first sought to rectify the situation, by advocating relatively clear definitions of mental requirements and relatively straightforward rules regarding how to read these requirements into criminal statutes. Section 2.02 of the Model Code discarded the notions of general and specific intent, substituting in their place five levels of culpability—purpose, knowledge, recklessness, negligence, and strict liability—with explicit definitions of each of these mens rea terms. Further, section 2.02 specifies how to read a mental requirement into an offense that is silent with regard to culpability; it also indicates when strict liability is appropriate, whether a mens rea term that applies to one element of a criminal offense should be applied to other elements of the offense, and when and how mistake of law constitutes a defense.

With tools such as these, courts can more closely follow the intent of the legislature in interpreting the mens rea requirements of particular statutes and thus resist the temptation to read into those crimes the judges' own ideas of wise policy. In the jurisdictions that have adopted some version of section 2.02, many decisions illustrate such restraint. When construing a statute requiring some mens rea but silent regarding the type required—which would have forced a common law court to choose between general and specific intent—some recent opinions have willingly followed subsection 2.02(3), which reads in a minimum requirement of recklessness, apparently regardless of whether this mens rea makes a lot of sense to the


353. See MODEL PENAL CODE §§ 2.02(2), 2.04(1)(a) (Official Draft and Revised Comments 1985). Section 2.04, dealing with mistake, makes the effect of any mistake turn on the culpability definitions in § 2.02(2). See § 2.04(1)(a), (2). The Code provides a definition of willfulness but uses the concept sparingly. See § 2.02(8).

354. See id. § 2.02(1), (3), (4), (9). Subsection (1) incorporates the provisions of § 2.05 regarding strict liability. See § 2.02(1). Section 2.04 supplements the mistake of law rule enunciated in subsection (9). See § 2.04(1)(b), (3). Of course there are infelicities in section 2.02 and its related provisions, see LOW ET AL., supra note 2, at 242-44 (regarding ambiguities in subsection 2.02(4)), but they are all superior to the confusing analogous rules of the common law.

judges.\textsuperscript{356} Similarly, in recent years, some courts, faced with a choice between some mens rea and strict liability,\textsuperscript{357} have disapproved strict liability because of the Code’s rather stringent standards for its application, regardless of the judges’ views of the need for liability without fault.\textsuperscript{358} A review of recent cases from jurisdictions using the Model Penal Code’s mens rea methodology demonstrates faithful application of section 2.02’s definitions of recklessness and negligence,\textsuperscript{359} the Code’s rough analogues for the common law’s general intent,\textsuperscript{360} and of purpose and knowledge,\textsuperscript{361} which correspond to common law specific intent.\textsuperscript{362}

Such fidelity to statutorily adopted rules is heartening, but one wonders whether this behavior reflects acquiescence to legislative supremacy in drafting criminal statutes, or simply agreement in those particular cases with the legislature’s choices. Further fueling this suspicion are the many recent decisions in jurisdictions purporting to apply the Code’s mens rea methodology that flout the dictates of


\textsuperscript{357} See supra Part I.A.2.


\textsuperscript{360} See supra Part I.B.


\textsuperscript{362} See supra part I.C.
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section 2.02, apparently to achieve results that the judges find more satisfying than those required by law.

As noted, when interpreting a statute that is silent with regard to culpability, courts employing the Model Penal Code’s mens rea methodology should read in a minimum requirement of recklessness. In *People v. Wright*, after acknowledging this rule and its apparent applicability to the case at hand, the court nevertheless interpreted a statute punishing inadequate record keeping by an auto dealer as requiring “knowledge plus criminal purpose.” Thus the court turned what the common law would call a general intent crime into one requiring specific intent, perhaps expressing an opinion about the wisdom of passing such a statute in the first place. Movement in the opposite direction, and a contrasting assessment of the statute involved, appeared in *State v. Whalen*, where the Missouri appellate court brushed aside the knowledge requirement in the state’s first degree assault statute, holding that the state must prove only that the defendant “contemplated or should have contemplated” the resulting physical injury, a form of criminal negligence. A concurring opinion objected to this ruling, specifically invoking the state’s adoption of the Model Penal Code’s methodology.

Courts employing the Model Penal Code’s methodology have not always been faithful to the Code’s rules regarding strict liability, which place the burden on the legislature to clearly indicate the lack

365. *Id.* at 913 (construing statute as requiring knowledge, but then reversing the conviction on due process grounds).
366. *See also* *People v. Hickman*, 988 P.2d 628 (Colo. 1999) (reading mens rea requirement analogous to purpose into statute punishing retaliation against a witness, even though the statute was silent with regard to culpability and the legislature had previously deleted similar requirement from statute).
368. *Id.* at *4; *see also* Carthens v. State, 529 S.E.2d 617 (Ga. 2000) (acknowledging the influence of the Model Penal Code on the state’s criminal statutes, yet reading the recklessness requirement into a statute prohibiting knowing destruction of property).
of any mental requirement.\textsuperscript{370} Despite such rules, an Indiana court recently found that a statute prohibiting selling a handgun to a minor was a strict liability crime, even though the statute was silent regarding culpability.\textsuperscript{371} The Colorado Supreme Court held that mistake of age is no defense to contributing to the delinquency of a minor, despite the statute’s knowledge requirement that applied to all elements of the offense, including the minor’s age.\textsuperscript{372}

Most instructive on this issue are the meanderings of the Illinois Supreme Court. In 1995, the court held that possessing contraband in a penal institution was not a strict liability crime, even though the legislature explicitly worded the statute to clarify that a person commits this offense “regardless of the intent with which he possesses” the contraband.\textsuperscript{373} One might have surmised that the justices were trying to insulate the statute from constitutional challenge, but in 1999 the Illinois Supreme Court believed that supposed concern by construing the state’s crime of damaging or tampering with a vehicle as a strict liability offense—the statute is silent with regard to culpability—so they could strike it down on constitutional grounds!\textsuperscript{374} Decisions such as these seem driven more by the courts’ opinions of the crimes involved than by the neutral principles of statutory construction advocated by the Model Penal Code and adopted by the legislatures in Indiana, Colorado, and Illinois.

When courts in jurisdictions that have adopted the Model Penal Code’s mens rea methodology turn to the interpretation of particular levels of culpability, they show a similar willingness to deviate from the Code’s definitions. In the statutes, the principal distinction

\textsuperscript{370} “The requirements of culpability . . . do not apply to . . . offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.” \textit{Model Penal Code} § 2.05(1)(b) (Official Draft and Revised Comments 1985).


\textsuperscript{372} \textit{See} Gorman v. People, 19 P.3d 662 (Colo. 2000).

\textsuperscript{373} \textit{See} People v. Farmer, 650 N.E.2d 1006, 1010 (Ill. 1995) (construing 720 ILL. COMP. STAT. 5/31A-1.1 (1992)). There could hardly be a more explicit indication of an intent to impose strict liability than what the legislature placed in the statute.

\textsuperscript{374} \textit{See In re K.C.}, 714 N.E.2d 491 (Ill. 1999).
between recklessness and negligence—the Code’s analogues for general intent at common law—is that recklessness requires a consciousness of the risk of causing the prohibited harm, while for criminal negligence it is sufficient that the defendant should have been conscious of the risk; in both cases the defendant’s behavior must have grossly deviated from ordinary conduct.375 Despite the relative clarity of these definitions, courts in Model Penal Code states still confuse them.

For example, in People v. Reagan,376 the New York Court of Appeals unanimously quashed a charge of reckless endangerment following a deadly construction accident.377 The defendant’s crew was excavating for a sewer line when they encountered a pressurized water pipe.378 After investigation and consultation with an inspector, the defendant ordered the excavation work to continue with some precautions; however, the pipe subsequently burst, killing two workers.379 The court unanimously held that Reagan did not act recklessly because he did not consciously disregard the risk of causing death:

Reagan consulted with a City plumbing inspector before proceeding with the excavation and, upon resuming the work, cautioned the workers to avoid the pipe by moving the trench as far away from it as conditions permitted. The workers also frequently checked the location of the pipe. Thus, defendants did not disregard a risk. On the contrary, they took steps to avert it.380

While this statement might have been an effective jury argument regarding the lack of a gross deviation from ordinary care, it surely reflects a misapprehension of what constitutes the conscious

375. See MODEL PENAL CODE § 2.02(2)(c), (d) (Official Draft and Revised Comments 1985).
377. See id. at 56.
378. See id.
379. See id.
380. Id.
disregard of a risk. The very facts the court relies on demonstrate consciousness of the risk of a serious accident and the willingness to go forward in spite of that risk. While it is possible that New York’s highest court really did not understand the concept of recklessness as adopted by their legislature, it is more likely that the judges simply ignored that concept in order to nullify a prosecution about which they were highly dubious. 381

The Superior Court of Pennsylvania ruled similarly in Commonwealth v. Mastromatteo, 382 reversing a reckless endangerment conviction arising from drunken driving with a child in the car. 383 The court quoted Pennsylvania’s definition of recklessness, derived from the Model Penal Code, but spoke of the need for “other tangible indicia of unsafe driving,” 384 though the definition required no such thing. 385 Pulling in the opposite direction, but equally faithless to the statutory definition of Kentucky’s version of the Model Penal Code’s recklessness, 386 is Robertson v. Commonwealth, 387 which requires proof that the defendant “knew or should have known” of the risks of his conduct, which in essence equates recklessness with negligence. 388 Recently, in Bohannon v. State, 389 the Georgia Court of Appeals reached a similar result in

381. People v. Feldmann, 732 N.E.2d 685 (Ill. App. Ct. 2000), displays analogous judicial behavior. A young mother, who drowned her newborn, was prosecuted for first degree murder but convicted only of manslaughter. See id. at 687-88. Feldman argued on appeal that it was illogical to convict her of manslaughter when her conduct was intentional. See id. at 688. With righteous indignation directed at all the parties to the trial, the Illinois appellate court agreed that the defendant’s state of mind exceeded that required for manslaughter, but ruled that because she had asked for the manslaughter instruction, she could not now contest it. See id. at 693. While it may have been emotionally satisfying to write such an opinion, it was also wholly unwarranted, for under the Model Penal Code an intentional killing is also reckless; this results because the intentional killer is conscious of the risk of causing death and grossly deviates from ordinary conduct in running that risk. See MODEL PENAL CODE § 2.02 (Official Draft and Revised Comments 1985). For better reasoning in a roughly similar case, see State v. Beeler, 12 S.W.3d 294 (Mo. 2000).


383. See id. at 1084.

384. Id. at 1083.

385. See id. at 1085-86 (Cavanaugh, J., dissenting).

386. In Kentucky Model Penal Code recklessness is labeled wantoness, while the Code’s concept of negligence is called recklessness. See KY. REV. STAT. ANN. § 501.020(3), (4) (Michie 1999).


388. See id. (construing a requirement of wantonness; see supra note 386).

construing a statute prohibiting reckless conduct that tracks the Code’s definition of recklessness; 390 in State v. Jensen, 391 the Wisconsin Supreme Court interpreted a similar statute and reached the same result as the Kentucky and Georgia courts. 392 These decisions suggest that even with clear statutory definitions of recklessness, courts will construe criminal statutes punishing reckless conduct according to their own judgments of wise policy, rather than following the dictates of the legislature.

Murder under the Model Penal Code also comprehends recklessness—"under circumstances manifesting extreme indifference to the value of human life" 393—but, even in recent years, judges in jurisdictions adopting this or similar language have substituted negligence for recklessness, just like some of their common law colleagues. 394 For example, in State v. Davidson 395 the Supreme Court of Kansas upheld the murder conviction of a dog owner, whose poorly trained and maintained Rottweilers killed an eleven-year-old boy, because the owner "could have reasonably foreseen that the dogs could attack or injure someone as a result of what she did or failed to do." 396 Similarly, in Commonwealth v. Kellam, 397 a Pennsylvania intermediate appellate court affirmed the defendant’s murder conviction for neglecting his girlfriend’s infant child, defining malice as "act[ing] in gross deviation from the standard of reasonable care, failing to perceive that such actions might create a substantial and unjustifiable risk of death or serious..."
bodily injury."\textsuperscript{398} Undoubtedly, the facts of these cases persuaded the courts to lower the mens rea requirement for murder to a type of criminal negligence; however, this reasoning does not excuse their deviation from the standards set by statutes derived from the Model Penal Code.\textsuperscript{399}

The same criticism applies to recent decisions regarding negligent homicide, a variation on the common law’s involuntary manslaughter recommended by the Model Penal Code.\textsuperscript{400} Just as common law courts sometimes raise the standard for criminal negligence,\textsuperscript{401} courts applying the Code's definition of negligence occasionally ignore it to avoid results deemed unacceptable. For example, in \textit{Lofthouse v. Commonwealth},\textsuperscript{402} the Kentucky Supreme Court applied Kentucky's version of negligent homicide\textsuperscript{403} to a defendant who provided illegal drugs to another person who then died from an overdose.\textsuperscript{404} The majority found insufficient evidence of negligence,\textsuperscript{405} despite a dissenter who cogently argued:

I find it wholly implausible that an active drug user utilizing the type, quantity and the methods of delivery of the drugs conceded in this case would be unaware of the inherent risks through both his experience and the illegality of the activity. . . .


\textsuperscript{399} Another form of deviation in murder cases occurred in Nebraska, where the courts for several years read a malice requirement into the state’s murder statute, which follows the Model Penal Code in discarding the concept of malice—see, for example, \textit{State v. Ryan}, 543 N.W.2d 128 (Neb. 1996)—before finally accepting the legislature’s malice-less version of the crime. See \textit{State v. Burlison}, 583 N.W.2d 31 (Neb. 1998); see also \textit{John Rockwell Snowden, Second Degree Murder, Malice, and Manslaughter in Nebraska: New Juice for an Old Cup}, \textit{76 Neb. L. Rev.} 399 (1997).

\textsuperscript{400} \textit{See MODEL PENAL CODE} § 210.4(1) (Official Draft and Revised Comments 1985). Some jurisdictions following the Code nevertheless combine manslaughter and negligent homicide into a single crime usually called manslaughter. See \textit{id.} § 210.4, commentary at 88 & n.35.

\textsuperscript{401} \textit{See supra} text accompanying notes 219-28.

\textsuperscript{402} 13 S.W.3d 236 (Ky. 2000).

\textsuperscript{403} A Kentucky statute labels the Code’s concept of negligence as recklessness; thus Kentucky’s version of the Code’s negligent homicide offense is called reckless homicide. See \textit{supra} note 386.

\textsuperscript{404} \textit{See Lofthouse}, 13 S.W.3d at 237.

\textsuperscript{405} \textit{See id.} at 242.
[T]he consumption of heroin in unknown strength is dangerous to human life, and the administering of such a drug is inherently dangerous and does carry a high probability that death will occur. It is not unreasonable to conclude that the injection of heroin into the bloodstream of a human being constitutes a substantial and unjustifiable risk of death.\(^406\)

The *Lofthouse* majority apparently felt the defendant did not merit a negligent homicide conviction, but had to disregard the Code's definition of negligence, adopted by its own legislature, in order to achieve that result.\(^407\)

Just as some courts ignored the Model Penal Code's definitions of recklessness and negligence when it suited their purposes, they have also flouted the Code's rules for applying purpose and knowledge. *State v. Woods*,\(^408\) a Missouri Court of Appeals case, provides a recent example regarding a knowledge requirement. Woods, a bonding company employee seeking a bail jumper, was charged with trespassing when he forcibly entered the home of the bail jumper's girlfriend.\(^409\) Woods argued that he believed his action was lawful based on a quotation from a United States Supreme Court case that was emblazoned on his bond enforcement agent identity card.\(^410\) Despite the fact that trespass requires a defendant to "'knowingly enter[ ] unlawfully,"' the court stated that the issue was whether Woods reasonably believed his behavior was lawful,\(^411\) thus converting a requirement of knowledge into one of negligence. While this may have been a sensible way to treat a mistake-of-law argument, it is not the analysis mandated under the Model Code, which requires


\(^407\) *See id.* at 238-42.

\(^408\) 984 S.W.2d 201 (Mo. Ct. App. 1999).

\(^409\) *See id.* at 202.

\(^410\) *See id.* at 203.

\(^411\) *Id.* at 204 (quoting MO. REV. STAT. § 569.140 (1999)).
applying a mens rea term like “knowingly” to all material elements of the offense “unless a contrary purpose plainly appears.”

Willingness to ignore a knowledge requirement that apparently applies to all the elements of an offense was also evident in State v. Young, an Arizona prosecution for possession of a prohibited weapon, and State v. Engen, an Oregon drug possession case. In both of these recent opinions, appellate courts relieved the state of part of its burden of proving knowledge—that the gun was operable, that its barrel was shorter than sixteen inches, and that the drug possessed was methamphetamine—because it made sense to construe the statutes that way, even though the relevant legislatures instructed the courts otherwise by adopting the Model Penal Code’s definition of knowledge and its rules on how to apply that definition.

The courts’ spurning of the Code’s prescribed methodology regarding knowledge does not always benefit the prosecution. For example, Colorado’s prohibition on carrying a concealed weapon requires knowledge; nevertheless, in A.P.E. v. People, the state supreme court held that the statute would apply to carrying a short knife only if the state could prove that the defendant intended to use the knife as a weapon. Three justices dissented, complaining that the majority had “engrafted onto the statute an element of intent.” Similarly, in State v. Lombardo, the Indiana Supreme Court

412. See MODEL PENAL CODE § 2.02(4) (Official Draft and Revised Comments 1985). This result is reinforced by the Code’s mistake provision, which accords the same significance to mistakes of fact and law; if the mistake negates the minimum culpability required for the offense, it constitutes a defense. See id. § 2.04(1)(a).
415. See Young, 965 P.2d at 45-46.
416. See Engen, 993 P.2d at 170-71.
417. Each court quoted its state’s version of the Model Penal Code § 2.02(4), see Engen, 993 P.2d at 164; Young, 965 P.2d at 42, but then reasoned around the statutory rule. Young cited Staples, see supra text accompanying notes 243-48, in support of its holding, despite the difference in mens rea methodologies between Arizona and the federal system. See Young, 965 P.2d at 43-45.
418. 20 P.2d 1179 (Colo. 2001).
419. See id. at 1184.
420. Id. at 1189 (Kourlis, J., dissenting).
421. 738 N.E.2d 653 (Ind. 2000)
considered a statute banning the unlawful interception of telephone communications, in which a minimum mens rea of knowledge applied to most elements of the offense, but Indiana’s version of purpose applied to the element of interception. The Indiana Supreme Court justices unanimously decided “to eliminate the lesser culpability of ‘knowingly,’ so that . . . the State will henceforth be required to prove intentional, i.e., purposeful, conduct.” The type of judicial rewriting of a statute’s mens rea provisions as seen in A.P.E. and Lombardo was exactly what the drafters of the Model Penal Code—and presumably, the members of the Colorado and Indiana legislatures who adopted the Code—hoped to prevent.

Lombardo was not a first for the Indiana Supreme Court, which had previously ignored the Code’s provisions regarding knowledge in State v. Walker. There, the court construed a state statute prohibiting drug delivery within a thousand feet of a school. Although the statute’s mens rea of knowledge should have applied to all the crime’s material elements, as two dissenters argued, the majority relied on public policy reasons to hold that the distance requirement was a strict liability element. In People v. Daniels, an Illinois intermediate appellate court reached a similar result, as did the Connecticut Supreme Court in State v. Denby, where the mens rea level ignored by the court was not knowledge, but Connecticut’s version of purpose.

Like Denby, other recent decisions have disregarded the Code’s provisions regarding purpose. In State v. Mahoe, the Hawaii
Supreme Court construed a burglary statute prohibiting purposely entering or remaining in a building in order to commit a crime. The court found that one who purposely enters without permission and only subsequently decides to commit a crime does not have the mens rea necessary to commit burglary, even though he purposely remains after deciding to commit a crime. Nothing in the Code’s definition of purpose or in its application to the crime of burglary demands this tortured result.

More extreme in its flouting of the Code’s concept of purpose is the Ohio Court of Appeals’ decision in State v. Hutchinson, a prosecution for attempted aggravated murder. Hutchinson, knowing he was HIV-positive, tried to have unprotected anal sex with an eight-year-old boy. When confronted with this allegation, the defendant denied it, “saying that because he had AIDS, that would be murder and he would not do that.” The jury rejected Hutchinson’s denial and found, as Ohio law requires for attempted aggravated murder, that he acted with a purpose to kill. Astoundingly, the court upheld Hutchinson’s conviction. The court first summarized the testimony of the prosecution’s expert witness:

432. See id. at 291.
434. The Supreme Court of Colorado, in Palmer v. People, 964 P.2d 524 (Colo. 1998), also misread the concept of purpose, holding that the crime of conspiracy to commit reckless manslaughter does not exist because conspiracy requires a purpose to achieve the shared objective; the court determined that this definition was inconsistent with the recklessness necessary for reckless manslaughter. See id. at 531. Although the defendant could have been convicted of conspiracy to commit some greater homicide offense because of the proof of his purpose, there is nothing in the Code’s definitions of either purpose or recklessness that prohibits finding him guilty of conspiracy to commit reckless manslaughter. As previously discussed, supra note 381, proof of purpose necessarily satisfies a requirement of recklessness.

Colorado also uses the term “intentionally” to convey the Model Code’s concept of “purposely.”

436. See id. at 454-55.
437. See id. at 455-56.
438. Id. at 456.
439. See id.
440. See id. at 458.
Dr. Siegel testified that if an HIV positive adult male who had the AIDS syndrome were to anally rape a boy so that the boy suffered anal tears and bruising, this would be a "very, very high risk sexual situation." Adult data estimates that there is about a one in one hundred chance of contracting HIV from unprotected anal receptive intercourse with an HIV infected person. Dr. Siegel stated that the statistical risk of HIV infection is even greater where a child is anally raped by an adult.\textsuperscript{441}

This testimony establishes only that the defendant risked causing death, not that it was his purpose to do so. Nevertheless, the court concluded:

Appellant knew that he was HIV positive and possibly AIDS infected, and he attempted to anally rape an eight-year-old boy. Appellant's deliberate actions put his victim in grave risk of death. Appellant stated that because he had AIDS, having sexual intercourse with the boy would be murder . . . . Reviewing appellant's actions as well as his words, a reasonable mind could conclude beyond a reasonable doubt that appellant intended to kill.\textsuperscript{442}

Hutchinson's statement indicates that he may have been conscious of the risk, and therefore reckless, but contrary to the court's assertion, there is virtually no evidence from which a jury could find a purpose to kill. What the court accomplished was a reduction of the crime's mental requirement from purpose to recklessness, in order to affirm the conviction of a defendant the court evidently found detestable; this occurred in spite of a clear statutory definition, which was derived from the Model Penal Code and required more.

\textsuperscript{441} \textit{Id.}  
\textsuperscript{442} \textit{Id.}
CONCLUSION

The foregoing examination of recent decisions in states adopting the Code’s mens rea methodology shows that while some courts are faithful to its dictates, many are not. In this tendency, these judges mirror their colleagues in jurisdictions that still follow the common law approach to the mental requirement. Old habits are hard to break, and one of the most deeply engrained habits in the American judiciary is a propensity to treat the mental requirement adopted by the legislature for a particular crime as merely a suggestion, which is subject to change if judges think they have a better idea.

This practice, violative of the principle of legality but so widespread that it goes virtually unremarked, is certain to continue, unless every American jurisdiction adopts rules like those in the Model Penal Code—an unlikely result now, nearly forty years after the Code’s promulgation. Even assuming universal legislative adoption, judges would have to discipline themselves to follow those rules. Considering judicial behavior in the states that have already embraced the Code’s mens rea methodology, there is little reason to believe that such self-discipline will emerge. Like most human beings, judges enjoy power and are reluctant to give it up.