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COMMENTS

THE MEDICARE ANTI-KICKBACK PROVISION OF THE SOCIAL SECURITY ACT—IS IGNORANCE OF THE LAW AN EXCUSE FOR FRAUDULENT AND ABUSIVE USE OF THE SYSTEM?

The Social Security Act of 1965 established the Medicare program to cover the cost of health care services for the elderly.¹ This program provides federal funds to reimburse health care providers for the health care of individuals over the age of sixty-five who are eligible for Social Security, or individuals who are disabled or suffering from end-stage renal disease.² Although Medicare provides vital financial support for some thirty

1. Social Security Act of 1965, Pub. L. No. 89-97, 79 Stat. 286, 291 (codified as amended in scattered sections of 42 U.S.C.). Medicare was created under Title XVIII of the Act. For legislative history regarding the development of the Medicare program, see S. Rep. No. 404, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943; H.R. CONF. REP. NO. 682, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2228.

For a discussion regarding the Medicare program and its administration, see David M. Frankford, *The Medicare DRGs: Efficiency and Organizational Rationality*, 10 YALE J. ON REG. 273 (1993) (discussing Medicare reimbursement under the Prospective Payment System (PPS)); Michael Neeley-Kvarme, *Administrative and Judicial Review of Medicare Issues: A Guide Through the Maze*, 57 NOTRE DAME LAW. 1 (1981) (discussing the procedures for administrative and judicial review when determining eligibility under the program).

The federal statute and regulations governing Medicare are located at 42 U.S.C. §§ 1395-1395ccc (1988 & Supp. V 1993) and Health Care Financing Administration, Dep't of Health and Human Services, 42 C.F.R. Pts. 400-24 (1994). Additionally, the Health Care Financing Administration (HCFA) publishes operating guidelines regarding Medicare. See Carol Small Jimenez, *Medicare Overview*, in PLANNING FOR AGING OR INCAPACITY 1994: LEGAL AND FINANCIAL ISSUES 119 (PLI Estate Planning & Admin. Course Handbook Series No. D-231, 1994) (outlining the Medicare program).

2. 42 U.S.C. § 1395c (1988 & Supp. V 1993). Persons over the age of 65 not eligible for Social Security or Railroad Retirement benefits can purchase hospital insurance benefits under Medicare for a monthly fee. 42 C.F.R. § 408.20(a) (1994). The individual wishing to purchase Medicare Part A benefits must be at least 65 years old; must be a resident of the United States or a legal alien under specified circumstances; must not be eligible for hospital insurance under another provision; and must already be enrolled for Medicare Part B, or must simultaneously register for such coverage when he applies for Medicare Part A. 42 U.S.C. § 1395i-2(a) (1988); 42 C.F.R. § 408.20(b) (1994). See *infra* notes 21-23 (discussing the details of Medicare Part A and Part B).

million recipients, the program loses billions of dollars to fraud each year.³ Thus, when Congress has attempted to revamp Medicare, it has focused on issues of fraud and abuse.⁴ With the system on the brink of bankruptcy, the curtailment of fraud is paramount.⁵ Significant debate

For a general overview of Medicare coverage, see Bernard A. Poskus, *Medicare Practice: A Primer*, 24 COLO. LAW. 1789 (1995) (summarizing the Medicare system); John Bigler et al., *An Overview of Social Security, Medicare and Medicaid*, 65 N.Y. ST. B.J., Sept./Oct. 1993, at 14 (summarizing Medicare benefits and health care areas that the program covers and excludes).

The HCFA of the United States Department of Health and Human Services (HHS) operates the Medicare Program. See 42 U.S.C. § 1302 (1988); 42 U.S.C. § 1395hh (1988); 42 C.F.R. Pt. 400 (1994). Medicare participants are reimbursed for services performed on a fee-for-service basis based on the provider's cost. 42 C.F.R. § 413.5(a) (1994). Thus, all services performed are reimbursed, limited to reasonable costs. *Id.*; 42 C.F.R. §§ 413.13, .30 (1994). HCFA determines what costs are necessary for the efficient delivery of the services rendered. 42 C.F.R. § 413.30(a)(2) (1994).

3. See HEALTH, EDUCATION, AND HUMAN SERVICES, UNITED STATES GENERAL ACCOUNTING OFFICE, LONG-TERM CARE—OTHER COUNTRIES TIGHTEN BUDGETS WHILE SEEKING BETTER ACCESS (1994) (concluding that fraud in the health care industry costs federal and private insurers approximately \$100 billion per year); Joel Androphy et al., *Health Care Fraud*, 33 Hous. LAW. 35 (1995) (noting that, of approximately \$900 billion spent each year on health care, 3% to 10% of that cost is related to fraud and abuse); Dana Priest, *The Road to Health Care Reform*, WASH. POST, Jan. 26, 1993, at Health 12 (stating that the cost of medical care is so high partially because of fraud in the Medicare system); Becky J. Belke, Book Note, 24 Sw. U. L. REV. 501, (reviewing Jane M. Orient, M.D. YOUR DOCTOR IS NOT IN: HEALTHY SKEPTICISM ABOUT NATIONAL HEALTH CARE (1994)) (stating that health care fraud costs private insurers, Medicare, and Medicaid approximately \$100 billion each year, or 10% of the nation's annual health care costs); Spencer Rich, *Medicare Fraud Said to Cost Hundreds of Millions: Insurers Often Fail to Refer Patients' Complaints for Investigation, Senate Panel Is Told*, WASH. POST, Oct. 3, 1991, at A21 (noting that "hundreds of millions, if not billions, of dollars" are lost to Medicare fraud each year).

4. See Sanford V. Teplitzky et al., *1993-1994 Developments in Health Care Fraud and Abuse*, in HEALTH LAW HANDBOOK 271 (Alice G. Gosfield ed., 1995) (stating that government initiatives addressing fraud and abuse are increasing); *infra* note 5 (discussing the legislature's initiatives to combat Medicare fraud); see also Eric Pianin & John E. Yang, *House Passes Medicare Reform Bill*, WASH. POST, Oct. 20, 1995, at A1, A4; *infra* note 10 (citing the amendment enacting Medicare anti-kickback provision); *infra* note 11 (providing the text of the Medicare anti-kickback statute). Within the past few years, both the federal and state governments have made significant efforts to combat fraud. Teplitzky, *supra*, at 271. In 1993, the Office of Inspector General (OIG) invoked rules identifying business practices that were not subject to the anti-kickback provision, or "safe harbors." *Id.* at 272. In 1994, the OIG clarified the "safe harbors" with the promulgation of new rules. *Id.* at 278. The OIG also issued Special Fraud Alerts, delineating activities considered to be "suspect." *Id.* at 292. Perhaps most significantly, Congress enacted Stark II, which prohibits a physician from referring a Medicare patient to certain designated health care facilities in which the physician had a financial investment, providing civil penalties in the event of a violation. *Id.* at 295. Stark II expands the scope Stark I, which related to only clinical laboratories. *Id.*

5. See 141 CONG. REC. H13,179 (daily ed. Nov. 17, 1995) (statement of Rep. DeLay) (noting that America cannot continue to operate as it has with waste and fraud thwarting the government efforts to control costs and the Medicare program on the brink of bank-

remains within these reform efforts as to whether increasing investigative efforts or increasing criminal and civil penalties is the more effective means of preventing fraud and abuse.⁶ It is generally agreed, however, that Congress must address the problems of fraud and abuse.⁷

One form of Medicare fraud occurs when a physician refers patients to facilities in which he has an ownership interest, a so called "physician self-referral."⁸ When the physician provides self-referrals, the compensation

ruptcy); *Id.* at H13,203 (statement of Rep. Kim) (stating that one of the means by which the Republican plan intends to save the Medicare system from bankruptcy is to combat fraud and abuse); 141 CONG. REC. H10,054 (daily ed. Oct. 13, 1995) (statement of Rep. Tauzin) (noting that to prevent Medicare from going bankrupt, fraud, waste, and abuse must be reduced); *Clinton Affirms He Will Veto GOP's Medicare Plan*, 53 CONG. Q. 3223 (1995) (President Clinton stated that fraud and abuse in the Medicare program is "a serious problem"); Colette Fraley, *Historic House Medicare Vote Affirms GOP Determination*, 53 CONG. Q. 3206 (1995) (stating that the hospital insurance trust fund would be bankrupt by the year 2002 and that Republicans believe the bill the House passed on October 19, 1995 saved the Medicare program from this ultimate fate). For the text of a recent Medicare reform bill, see H.R. 2425, 104th Cong., 1st Sess. (1995) (proposing to restore the financial stability of Medicare).

6. On October 19, 1995, the House of Representatives passed a bill which, if enacted, would impose treble damages on a person who violated the anti-kickback provision. 141 CONG. REC. H10,450 (daily ed. Oct. 19, 1995) (discussing H.R. 2485). Additionally, H.R. 2485 would permit the court to impose a community service obligation on the offender. *Id.* In opposition to this bill, one member of the House argued that increasing the penalty is not a sufficient deterrent when the budget of the Inspector General, who enforces the provision, is decreased. *See id.* at H10,453 (statement of Rep. Dingell) (stating that the Democrats believe that the Republican bill, which reduces the budget of the Inspector General of the Department of Health and Human Services, eliminates protection against fraud and abuse that the statute mandates); *cf. id.* at H10,454 (statement of Rep. Stupak) (noting Republican efforts to combat fraud and abuse through the imposition of greater fines); *see also Medicare Integrity Bill is Flawed, Says HHS Inspector General*, MEALEY'S LITIGATION REPORT, Oct. 25, 1995, at 12 (noting that the Inspector General of the Department of Health and Human Services is troubled by the potential for the Medicare Integrity Bill, H.R. 2389, to weaken the ability to control Medicare fraud). The Inspector General expressed concern that the new bill raises the burden of proof in fraud cases from a showing that inducing referrals was *one* purpose of the remuneration scheme to showing that inducing referrals was *the* significant purpose of the scheme. *Id.*

7. *See* Teplitzky, *supra* note 4, at 271 (noting that every health care reform proposal introduced in 1993-1994 addressed the issues of fraud and abuse).

8. Jennifer Puryear, Comment, *The Physician as Entrepreneur: State and Federal Restrictions on Physician Joint Ventures*, 73 N.C. L. REV. 293, 294 (1994); *see also* Hanlester Network v. Shalala, 51 F.3d 1390, 1396 (9th Cir. 1995) (noting that this case was the first time physician self-referral joint ventures have been prosecuted under the anti-kickback provision). The anti-kickback provision prohibits referrals to facilities not owned by the referring physician as well, if the referral is in exchange for remuneration. *See, e.g.,* United States v. Bay State Ambulance and Hosp. Rental Serv., 874 F.2d 20, 30-31 (1st Cir. 1989) (holding that cash and a car given to a hospital executive by a private ambulatory service in exchange for an ambulance service contract, although reasonable compensation for services, constituted an inducement in violation of the anti-kickback statute); United States v. Greber, 760 F.2d 68, 72 (3d Cir.) (concluding that paying the referring physician a percentage of monies received from Medicare for diagnostic monitoring service was a violation of

received from the entity in which the physician maintains a financial interest may be in the form of "kickbacks" to the referring physician in exchange for his referrals of Medicare patients.⁹ The anti-kickback provision of the Social Security Act is intended to prevent fraud and abuse in the Medicare reimbursement system.¹⁰ This provision makes it illegal to "knowingly and willfully" solicit or offer kickbacks in return for these

the anti-kickback statute), *cert. denied*, 474 U.S. 988 (1985); *United States v. Hancock*, 604 F.2d 999, 1001 (7th Cir.) (holding that fees paid to chiropractors in exchange for referring blood tests to laboratories were "kickbacks"), *cert. denied*, 444 U.S. 991 (1979); *Polk County v. Peters*, 800 F. Supp. 1451, 1456 (E.D. Tex. 1992) (holding that a hospital's physician recruitment program violated the anti-kickback statute because it induced those physicians to refer their patients to that hospital).

This Comment focuses on the anti-kickback provision as it relates to physician self-referral arrangements. Physician self-referrals, or referrals of Medicare patients to facilities in which the referring physician has an ownership interest, are not per se violations of the anti-kickback provision. See *Hanlester*, 51 F.3d at 1396 (noting that nothing in the language of the anti-kickback provision prohibits joint ventures). There is a concern, however, that self-referrals promote fraud because they create an incentive for doctors to refer Medicare patients to their facilities for unnecessary services. See *Puryear*, *supra*, at 300 (stating that studies show that physicians with an ownership interest in a facility more frequently refer patients to the facility for services than physicians without an interest). Another concern is that physicians with an ownership interest in a facility will restrict a patient's choice of facilities. See *Androphy*, *supra* note 3, at 37 (listing "steering," the elimination of a patient's freedom to choose a facility, as a common scheme that the anti-kickback statute curbed).

One of the important aspects of the *Hanlester* decision is its holding that while the financial relationship itself is not illegal, it is a violation of the anti-kickback provision when that relationship induces the remuneration. 51 F.3d at 1398. Therefore, the fact that the number of referrals affects the return on investment, without more, is insufficient to constitute a violation of the anti-kickback provision. *Id.* at 1399.

9. See *Greber*, 760 F.2d at 71 (noting that there is concern regarding the practice of giving "kickbacks" to encourage the referral of Medicare patients). As the court in *Greber* noted, United States Attorneys testified before the congressional committee, stating that "'physicians often determine which laboratories would do the test work for their Medicaid patients by the amount of the kickbacks and rebates offered by the laboratory. . . . Kickbacks take a number of forms including cash, long-term credit arrangements, gifts, supplies and equipment, and the furnishing of business machines.'" *Id.* (quoting H.R. REP. NO. 393, 95 Cong., 1st Sess., pt. 2, at 53, reprinted in 1977 U.S.C.C.A.N. 3039, 3048-3049); see also *Puryear*, *supra* note 8, at 298 (noting that profits to referring physicians resemble kickbacks); John J. Farley, Note, *The Medicare Antifraud Statute and Safe Harbor Regulations: Suggestions for Change*, 81 GEO. L. J. 167, 169 (1992) (discussing how physicians profit from Medicare by receiving financial incentives for referring Medicare patients to a certain health care facility).

10. See Social Security Amendments of 1972, Pub. L. No. 92-603, § 242(b)-(c), 86 Stat. 1329, 1419-20 (current version codified at 42 U.S.C. §§ 1320a-7b, 1395nn (1988)); see also *Androphy*, *supra* note 3, at 35 (stating that Congress has enacted and amended several statutes to deal with fraud); Farley, *supra* note 9, at 168-71 (noting that Congress enacted the anti-kickback provision to prevent fraud and abuse in the Medicare system); *Puryear*, *supra* note 8, at 303 (noting that the Social Security Act was amended in 1972 to include the "Anti-Fraud Statute" in order to deal with the abuses of the Medicare program); *infra* note 11 (providing the text of the Medicare anti-kickback statute).

referrals.¹¹

The definition of the term knowingly and willfully has been unclear in many areas of criminal law,¹² including Medicare fraud.¹³ Courts have struggled for years with the interpretation of statutes that contain a requirement that the act be committed knowingly or willfully. The issue is whether the prosecutor must prove that the defendant consciously and intentionally committed the *act* or whether the defendant knew the act was in violation of the *law*.¹⁴

11. The anti-kickback statute provides as follows:

(b) *Illegal remunerations.*

(1) Whoever *knowingly and willfully* solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under Subchapter XVIII [42 U.S.C. §§ 1395-1395ccc] of this chapter or a State health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under Subchapter XVIII of this chapter or a State health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

(2) Whoever *knowingly and willfully* offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under subchapter XVIII of this chapter or a State health program, or

(B) to purchase, lease, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under Subchapter XVIII of this chapter or a State health care program, shall be guilty of a felony . . .

42 U.S.C. § 1320a-7b(b) (1988 & Supp. V 1993) (emphasis added).

12. See *Spies v. United States*, 317 U.S. 492, 497 (1943) (characterizing the term “willful” as a “word of many meanings” and determining its meaning for purposes of tax law); see also *Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994) (determining the meaning of the word “willfully” for purposes of currency restructuring); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (interpreting the term “knowingly” for purposes of the statute regulating food stamp fraud); *United States v. Hayden*, 64 F.3d 126, 131 (3d Cir. 1995) (determining the meaning of the term “willfully” as used in the statute regulating a felon’s use of firearms).

13. See *Hanlester Network v. Shalala*, 51 F.3d 1390, 1399 n.16 (9th Cir. 1995) (looking to the legislative history of 42 U.S.C. § 1320a-7b to clarify the term “knowingly and willfully”); Laura Ariane Miller, *The Element of Intent in 42 U.S.C. § 1320a-7b(b): An Uncertain Standard in a Sea of Uncertainty*, 2-3 (1995) (unpublished manuscript, on file with *The Catholic University Law Review*) (noting that it is unclear whether one must merely intend the result or whether one must intend to violate the law).

14. See *Ratzlaf*, 114 S. Ct. at 659 (stating that the meaning of the word “willful” is

In *Hanlester Network v. Shalala*,¹⁵ the United States Court of Appeals for the Ninth Circuit defined the term knowingly and willfully for purposes of the anti-kickback provision of the Social Security Act as requiring a "specific intent to disobey the law."¹⁶ This was the first case to

often "influenced by its context"); *United States v. Bailey*, 444 U.S. 394, 403 (1980) (noting that "[f]ew areas of criminal law pose more difficulty than the proper definition of the [state of mind] required for any particular crime"). See generally John F. Cooney, *Defenses to the Second Generation of Environmental Criminal Prosecutions*, in CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS 39, 41 (ALI-ABA Course of Study Materials 1994) (advocating that recent complex environmental legislation justifies a departure from the application of the public welfare offense doctrine, where defendants are presumed to know the law); Steve Brantley, Note, *Ratzlaf v. United States: Sometimes Ignorance of the Law is an Excuse*, 45 MERCER L. REV. 1465, 1473 (1994) (noting that there are several definitions of the term "willfulness," and, as a result of *Ratzlaf*, courts are more likely to look at the context of the term used in the statute to determine its meaning).

15. 51 F.3d 1390 (9th Cir. 1995).

16. *Id.* at 1400. This case involved a joint venture between the Hanlester Network, a partnership, and three clinical laboratories, each of which were limited partnerships. *Id.* at 1394. Hanlester offered limited partnership shares in these laboratories to physician investors. *Id.* The evidence showed that Hanlester encouraged the limited partners to refer business to the laboratories, although they were not paid based on ownership interest nor were they compensated based upon the volume of their referrals. *Id.* at 1399. Smithkline BioScience Laboratories (SKBL) entered into agreements with the laboratories to service their administrative and operational tasks. *Id.* at 1394-95. SKBL, which decided whether tests would be performed on-site or at one of the three reference laboratories, was paid the greater of a fixed fee or 80% of the laboratories' collections. *Id.* at 1395. SKBL performed 85% to 90% of tests ordered from the Hanlester labs, with the Hanlester laboratories performing the remainder themselves. *Id.* The Department of Health and Human Services notified Hanlester that it had violated the anti-kickback provision of the Social Security Act by offering to pay remunerations to physician investors to induce them to refer their patients to the laboratories in which they had an ownership interest and by soliciting and receiving remunerations from SKBL for referrals of laboratory tests. *Id.*

The Ninth Circuit considered whether the anti-kickback provision applied to physician self-referral joint ventures. *Id.* at 1396. The court first addressed whether the physician and the entity must have an explicit agreement to refer Medicare-related business in order to violate the statute. *Id.* at 1396-97. Deciding that an agreement to refer Medicare patients was not necessary to violate the statute, the court concluded that there must be an inducement, which requires an attempt to condition remunerations upon referrals. *Id.* at 1398. The court also looked at whether the anti-kickback provision was too vague to provide fair warning of illegal conduct. *Id.* at 1397-98. The court noted that the conduct must be knowing and willful. *Id.* at 1398. Thus, the statute requires that the defendant actually understand that he or she disobeyed the law, and, therefore, mitigates any vagueness. *Id.* The court concluded that the anti-kickback provision was not unconstitutionally vague. *Id.* The court further held that joint ventures did not per se violate the statute. *Id.* at 1399. Concluding that it was not illegal to encourage limited partners to refer business to the laboratories and offer physicians profits that were indirectly related to the referrals, the court noted that it was illegal to imply that the return on investment was directly related to the referrals. *Id.* Finally, the court held that the term knowingly and willfully, as applied to the anti-kickback statute, required knowledge of the law and specific intent to disobey that law. *Id.* at 1400; see also W. Bradley Tully & Patric Hooper, *Hanlester Network: An Initial Assessment*, 4 HEALTH L. REP. (BNA) 847 (1995) (analyzing the case and its implications).

define the term in the context of the anti-kickback provision.¹⁷ Because it is the only case to define the term as used in this statute, it remains unclear whether other courts will follow *Hanlester*.

That terms such as knowingly and willfully have not been defined consistently is somewhat surprising,¹⁸ because criminal law statutes use these terms frequently.¹⁹ Because the terms easily could be given a clear definition, perhaps the legislature and the courts desire to keep them ambiguous to permit flexible application of the statute in light of the specific

Hanlester is significant because it stands for the proposition that offering the potential for profit in exchange for referrals is not per se illegal. *Id.* at 848. It is when the offer of remunerations in exchange for referrals effects the physician's judgment that the statute is violated. *Id.* Additionally, the *Hanlester* decision does not affect restrictions imposed by the Stark laws or state law. *Id.* at 849; see *infra* note 38 (discussing the Stark laws). Furthermore, the defendant's good-faith belief that his conduct is not illegal is a complete defense under the anti-kickback provision as a result of *Hanlester*, regardless of whether the belief is reasonable. Tully & Hooper, *supra*, at 849. Interestingly, the HHS has decided not to file a petition for certiorari to the Supreme Court. *News at Deadline*, MODERN HEALTHCARE, Feb. 12, 1996, at 4.

17. See Miller, *supra* note 13, at 3 (noting that, before *Hanlester* was decided, no case law discussed the application of "knowingly and willfully" in the context of the anti-kickback statute). Although not decided upon, the definition of the term willfully in context of the anti-kickback provision was addressed in dicta in the Southern District of Ohio. *United States v. Neufeld*, 908 F. Supp. 491 (S.D. Ohio 1995). In *Neufeld*, the court expressly rejected *Hanlester's* application of *Ratzlaf* to the definition of the word willfully. *Id.* at 497. While not providing an alternative definition, the court stated that there is no evidence from the language of the statute or legislative history that the term willfully requires proof of knowledge of the law. *Id.* at 495-97. Unlike in the currency structuring statute addressed in *Ratzlaf*, an interpretation of the word willfully as requiring other than knowledge of the law would not deem other terms superfluous. *Id.* at 496. Additionally, accepting kickbacks is inherently evil and, thus, does not require a legal standard that protects a defendant who did not have an evil motive. *Id.* Finally, the legislative history shows Congress' concern that inadvertent actors will be prosecuted. *Id.* However, the District Court in *Neufeld* argues, a requirement that the prosecutor show that the defendant know the law is not required to prevent that result. *Id.*

18. See generally Karen M. Hansen, "Knowing" Environmental Crimes, 16 WM. MITCHELL L. REV. 987, 989 (1990) (commenting that although the term knowingly is seemingly straightforward, courts in defining the mental state required by that word have applied several meanings); Miguel Angel Méndez, *A Sisyphean Task: The Common Law Approach To Mens Rea*, 28 U.C. DAVIS L. REV. 407 (1995) (stating that because conviction and punishment depend upon proof of mental state, one would expect that the legislature and courts would define mental state precisely); Rachael Simonoff, *Ratzlaf v. United States: The Meaning of "Willful" and the Demands of Due Process*, 28 COLUM. J.L. & SOC. PROBS. 397 (1995) (explaining that despite the fact that "willfully" is one of the most common culpability requirements in statutory offenses, it is recognized as ambiguous).

19. See Bart. M. Schwartz, *Mens Rea: An Introduction, and A Particular View of The Securities, and Tax Laws*, in MENS REA—STATE OF MIND DEFENSES IN CRIMINAL AND CIVIL FRAUD CASES 127, 131-36 (PLI Litig. & Admin. Practice Course Handbook Series No. 140, 1985) (listing the terms used to describe the requisite mental state in various provisions of Title 18, where most federal criminal statutes are found; thirty-seven sections contain some derivative of the words "willfully," "knowingly," or both).

circumstances of a particular case.²⁰

This Comment discusses the definition of the term knowingly and willfully as applied to the anti-kickback provision of the Social Security Act. First, this Comment studies the Social Security Act itself, tracing its development, its language, and its legislative history. Next, this Comment examines both case law addressing the definition of the term knowingly and willfully in the context of other statutes and case law specifically addressing the anti-kickback provision. This Comment focuses on the statutes that require the mens rea element of knowingly and willfully and compares those statutes to the anti-kickback provision. It analyzes whether the term should require knowledge of the unlawfulness of the act or simply consciousness of the act itself. This Comment reviews the *Hanlester* decision and applies the facts of that case to the law applied to other statutes with similar mens rea language. Finally, this Comment examines the consequences of applying a particular definition of the term knowingly and willfully on the health care industry and business relationships in general. This Comment concludes that the *Hanlester* court's approach—requiring proof of knowledge of the law—is legally sound and consistent with public policy.

I. THE ANTI-KICKBACK PROVISION—ITS DEVELOPMENT, GROWTH, AND IMPACT

A. Statutory Development—The Legislature's Concern for Fraud

Medicare is bifurcated into programs serving different purposes.²¹

20. There is concern that the general rule that ignorance of the law is no excuse is a severe interpretation for some modern crimes. *See, e.g.*, *Cheek v. United States*, 498 U.S. 192, 199-200 (1991) (noting that tax law is so complex that those who violate the law in good faith should not be punished); *United States v. Baker*, 63 F.3d 1478, 1491 (9th Cir. 1995) (stating that an exception to the general rule that ignorance of the law is no excuse should be made for complex regulatory schemes that could result in the punishment of inadvertent violators), *cert. denied*, 64 U.S.L.W. 3502 (1996); *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828-29 (9th Cir. 1976) (holding that, as it is unclear from the statute what types of ammunition may not be exported from the country, apparently innocent conduct could be punished unless the prosecution is required to prove the defendant violated a known legal duty); Simonoff, *supra* note 18, at 407 (stating that not permitting the defense of ignorance of the law leads to a harsh result when applied to regulatory crimes not inherently immoral). Historically, common law crimes were based on immoral conduct. *Id.* It was logical, therefore, to punish an immoral act regardless of whether the actor knew it was illegal. *Id.* Today, however, many crimes, especially regulatory crimes, are not based on morality. *Id.* These crimes may not give fair warning and notice to the actor that his act is illegal. *Id.* To avoid the harsh result of punishing an actor who did not have notice that an act was criminal, courts have abandoned the general rule that one is assumed to know the law. *Id.* Instead, for a defendant to be guilty of a crime, the prosecution must show that the defendant knew the act was illegal. *Id.*

21. *See* 70A AM. JUR. 2D *Social Security and Medicare* § 450 (1987) (noting that Part

Medicare Part A, funded by social security taxes, provides for hospital care and post-operative hospital services.²² Medicare Part B, which the federal government subsidizes, provides 80% coverage of doctor's visits, lab tests, and equipment.²³ Because of the system's magnitude and the lack of effective controls,²⁴ allegations of fraud and abuse have become prevalent.²⁵ To address this problem, Congress has enacted and amended several statutes over the past few decades.²⁶ Despite attempts at statutory solutions, fraud and abuse continue to be a costly problem.²⁷

A Medicare provides hospital insurance benefits and Part B Medicare provides other health care benefits).

22. 42 U.S.C. § 1395c-1395i (1988 & Supp. V 1993). Part A covers necessary inpatient hospital costs, limited skilled nursing facilities, home health care if the beneficiary needs care on a less than full-time basis, and hospice care if the patient is expected to die within six months. See Androphy, *supra* note 3, at 35 (explaining the bifurcated Medicare system); Jimenez, *supra* note 1, at 119 (outlining the Medicare program).

23. 42 U.S.C. § 1395j-1395w (1988 & Supp. V 1993); see also 42 C.F.R. §§ 410.3, 410.10 to .68 (providing regulations addressing services covered by Part B). Part B covers physicians' services, outpatient hospital services, physical and occupational therapy, speech pathology services, durable medical equipment, supplies and prosthetic devices, ambulance services, clinical laboratory tests and treatments, and outpatient psychiatric services. *Id.* at § 410.10; see Androphy, *supra* note 3, at 35 (discussing subsidized medical insurance); Jimenez, *supra* note 1 (giving an overview of Medicare services).

24. See Randal R. Bovbjerg, *Competition Versus Regulation in Medical Care: An Overdrawn Dichotomy*, 34 VAND. L. REV. 965, 970 (1981) (discussing the lack of controls over health care costs due to the incentive to pay costs incurred rather than necessary costs); Pamela H. Bucy, *Fraud by Fright: White Collar Crime by Health Care Providers*, 67 N.C. L. REV. 855, 864 (1989) (recognizing that the Medicare fee-for-service system could serve as an incentive for doctors to provide more services); David A. Hyman & Joel V. Williamson, *Fraud and Abuse: Regulatory Alternatives in a "Competitive" Health Care Era*, 19 LOY. U. CHI. L.J. 1133, 1134-35 (1988) (noting that the fee-for-service reimbursement system rewards physicians who provide inefficient health care).

25. Androphy, *supra* note 3, at 35; see also Gil Klein, *Medicare Fraud Goes Unchecked*, TAMPA TRIB., Nov. 4, 1995, at Nation/World 4 (noting that Medicare fraud is prevalent and easy to commit under the current structure of the program); cf. William Raspberry, *Numbers That Won't Go Away*, WASH. POST, Jan. 26, 1996, at A23 (noting that Bob Packwood believes that fighting fraud and abuse in programs such as Medicare, Medicaid, and Social Security will not assist in balancing the nation's budget, because the Social Security program is one of the "cleanest and most efficient programs in the entire government"); see also *supra* notes 5-11 and accompanying text (discussing the problem of fraud and abuse).

26. Androphy, *supra* note 3, at 35-36; see *infra* notes 27-40 and accompanying text (discussing the development of the legislative response to Medicare fraud).

27. See David S. Nalven, *Medicare and Medicaid Fraud: an Enforcement Priority for the 1990s*, BOSTON B.J., Sept.-Oct. 1994, at 9 (discussing the government's aggressive stance on fighting Medicare fraud). Governmental measures to fight fraud include prosecution by the Department of Justice; exclusion from the Medicare program by the Office of Inspector General; legislation, such as the criminal sanctions under the anti-fraud and abuse provisions of the Social Security Act, and civil penalties under the False Claims Act; and administrative fines imposed by the HHS. *Id.* at 9-10; see generally, Graham Stafford, *Medicare and Medicaid Fraud and Abuse*, in PROFESSIONAL CORPORATIONS AND SMALL BUSINESSES AFTER THE TAX REFORM ACT OF 1984 253 (PLI Tax Law & Estate Planning

The Social Security Act prohibits making false statements and misrepresentations of material facts related to requirements under the Act, classifying such violations as misdemeanors.²⁸ In 1972, Congress amended the statute to prohibit the solicitation, offering, or receipt of kickbacks, bribes, or rebates as well.²⁹ The amendment, however, continued to classify such wrongdoings as misdemeanors.³⁰ In 1977, Congress enacted the Medicare Anti-Fraud and Abuse Statute, making it a felony to solicit, receive, or offer remunerations in return for Medicare patient referrals.³¹

Course Handbook Series No. 216, 1984) (proposing the means by which the government can fight health care fraud).

28. 42 U.S.C. § 1307(a) (1988).

29. Social Security Amendments of 1972, Pub. L. No. 92-603, § 242(b),(c), 86 Stat. 1329, 1419 (codified as amended at 42 U.S.C. § 1320a-7b (1988 & Supp. V 1993)); *see also* Hanlester Network v. Shalala, 51 F.3d 1390, 1396 n.7 (9th Cir. 1995) (pointing out that the 1972 amendment was limited to kickbacks, bribes, or rebates, whereas the law currently applies to any remunerations); Puryear, *supra* note 8, at 303 (discussing the statute).

30. § 242(b),(c), 86 Stat. at 1419.

31. Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142, 91 Stat. 1175, 1182 (codified as amended at 42 U.S.C. § 1320a-7b (1988 & Supp. V 1993)). This amendment redefined the crime from a misdemeanor to a felony, *Hanlester Network v. Shalala*, 51 F.3d 1390, 1396 (9th Cir. 1995), in response to a concern over increased fraud in the health care industry:

[T]here exist[s], to a disturbing degree, fraudulent and abusive practices associated with the provision of health services financed by the Medicare and Medicaid programs. . . . [F]raud in these health care financing programs adversely impacts on all Americans. It cheats taxpayers who must ultimately bear the financial burden of misuse of funds in any government-sponsored program. It diverts from those most in need, the nation's elderly and poor, scarce program dollars that were intended to provide vitally needed quality health services. The wasting of program funds through fraud also further erodes the financial stability of those state and local governments whose budgets are already overextended and who must commit an ever-increasing portion of their financial resources to fulfill the obligations of their medical assistance programs.

H.R. REP. NO. 393, 95th Cong., 1st Sess., pt. 2, at 44-45 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3039, 3047.

Congress was concerned that physicians would over-utilize the Medicare program by ordering unnecessary medical services for Medicare patients because they are motivated by the incentive of receiving profits for referrals to health care facilities in which the physicians have a financial interest. *See* Farley, *supra* note 9, at 179 (noting studies show that when a physician has a financial interest in a facility they refer more patients for tests, indicating that patients undergo unnecessary procedures); Amy L. Woodhall, Note, *Integrated Delivery Systems: Reforming the Conflicts Among Federal Referral, Tax Exemption, and Antitrust Laws*, 5 HEALTH MATRIX 181, 188 (1995) (noting that one of the anti-kickback provision's purposes was to prevent over-utilization). Unnecessary services may be ordered when physicians are enticed by kickbacks, thereby unnecessarily increasing Medicare costs. *Id.* Remunerations also may interfere with competition and distort medical costs. *Id.*; *cf.* Farley, *supra* note 9, at 175-79 (arguing that physician investments in health care facilities increase efficiency in providing health care, permit full response to changes in the health care marketplace, and provide motivation for providing high quality services because the doctor has a financial interest in the facility). Physicians motivated by kick-

The Anti-Fraud and Abuse statute resulted from Congress' belief that penalties under the 1972 amendment remained insufficient to deter illegal practices.³² Furthermore, Congress found the 1972 amendment too ambiguous and added language clarifying the definition of illegal behavior.³³

To ensure that those acting inadvertently were not held criminally liable, Congress further amended the law in 1980 to require that only violations committed "knowingly and willfully" be unlawful.³⁴ In 1987, Congress added a provision under which persons convicted of crimes related to the delivery of an item or service under the Medicare program may be prohibited from participating in the program.³⁵ Therefore, physicians participating in prohibited business ventures may be unable to accept patients covered by Medicare. To clarify which business ventures were legal and which were prohibited under 42 U.S.C. § 1320a-7b(b), Congress mandated the Secretary of Health and Human Services to develop "safe harbor regulations" defining activities permitted under the anti-kickback provision.³⁶ Most recently, Congress enacted The Ethics in

backs may interfere with a patient's choice of physicians or facilities because the physicians refer patients to facilities in which the physician has a financial interest, rather than to facilities with the highest quality care or that are convenient for the patient. Woodhall, *supra* at 188; *see supra* note 8 and accompanying text (discussing concerns regarding physician self-referrals).

32. *See* H.R. REP. NO. 393, 95th Cong., 1st Sess., pt. 2, at 53 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3039, 3055 (noting that studies concluded that misdemeanor penalties were insufficient to deter Medicare and Medicaid providers from illegal activities). The House Report further noted that current misdemeanor penalties were inconsistent with other statutes, which punished similar behavior as felonies. *Id.*

33. *Id.* at 3055-56 (stating that the existing statute was unclear as to what behavior was illegal). The bill intended to clarify behavior and financial arrangements that fell under the statute. The legislative history stated:

[The bill] would make subject to the penalty provisions any person who solicits or receives any remuneration (1) in return for referring an individual to a person for the furnishing, or arranging for the furnishing of items or services; or (2) in return for purchasing, leasing, or ordering, or arranging for or recommending the purchasing, leasing, or ordering of goods, facilities, or services. . . .

The bill would define the term "any remuneration" broadly to encompass kickbacks, bribes, or rebates which may be made directly or indirectly, overtly or covertly, in cash or in kind (but would exclude any amount paid by an employer to an employee for employment in the provision of covered items or services).

Id. at 3056.

34. Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, § 917, 94 Stat. 2599, 2625 (codified as amended at 42 U.S.C. § 1320a-7b(b) (1988 & Supp. V 1993)); *see* H.R. REP. NO. 1167, 96th Cong., 2d Sess. 59 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5526, 5572 (clarifying the law to "assure that only persons who knowingly and willfully engage in the proscribed conduct could be subject to criminal sanctions").

35. Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, § 1128, 101 Stat 680, 680-81 (codified as amended at 42 U.S.C. § 1320a-7b(a)(5) (1988 & Supp. 1993)).

36. § 14, 101 Stat at 697. For exceptions to conduct prohibited by the anti-kickback

Patient Referrals Act ("Stark I")³⁷ and The Comprehensive Physician Ownership and Referral Act of 1993 ("Stark II").³⁸ Stark I prohibits physicians from referring Medicare patients to clinical laboratories in which the physician has an ownership interest.³⁹ Stark II expands the

provision that developed as a result of that mandate, see 42 C.F.R. § 1001.952 (a)-(m) (1994). These safe harbor regulations permit payments that constitute a return on investment, rental payments for space and equipment, payments made to an agent for services, sale of a practitioner's practice to another practitioner, payments to referral services, payments or exchanges made under warranty, certain discounts, amounts paid by an employer to an employee for services, amounts paid by a vendor to a group purchasing organization, waiver of coinsurance and deductible amounts, additional coverage from another health plan and price reductions offered by a health care provider to a health plan. *Id.* All of these safe harbors are subject to certain restrictions. *Id.*; see also Androphy, *supra* note 3, at 39 (explaining the purpose of safe harbors as guidelines for doctors to ensure legality of business arrangements and to close loopholes in the statutes); Puryear, *supra* note 8, at 306-08 (discussing types of safe harbors and the corresponding requirements). Effective January, 1996, Congress amended the safe harbor regulations to provide a more-inclusive definition of "health plan" and to provide guidelines for health care providers and health plans where the health care provider is paid on an at-risk basis. Medicare and State Health Care Programs: Fraud and Abuse; Safe Harbors for Protecting Health Plans, 61 Fed. Reg. 2122-37 (1996) (to be codified at 42 C.F.R. § 1001.952).

37. Ethics in Patient Referrals Act, enacted as part of Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6204, 103 Stat. 2106, 2236-43 (codified as amended at 42 U.S.C. § 1395nn (Supp. V 1993)).

38. Comprehensive Physician Ownership and Referral Act of 1993, enacted as part of Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13,562, 107 Stat. 312, 569 (codified at 42 U.S.C. § 1395nn (Supp. V 1993)); see Puryear, *supra* note 8, at 310-13. Stark I and Stark II are named after the author, Representative Fortney H. "Pete" Stark (D-Calif), former Chairman of the House Ways and Means Subcommittee on Health. See Lisa M. Rockelli, *Physician Groups Take Opportunity to Lobby For Changes to Stark II Law*, 4 HEALTH L. REP. (BNA) 277, 278 (1995) (noting that the goal of Stark II is to limit the over-utilization of services by physicians who refer patients to facilities in which they have an ownership interest). Congressman Stark initiated the "Stark laws" to prohibit abusive arrangements and to provide clear rules for health care providers to follow. Leslie J. Gold, *HCFA Issues Final Rule, Seeks Comments on Stark I Clinical Lab Service Referrals*, 4 HEALTH L. REP. (BNA) 1245, 1246 (1995). The goal of clarity, however, has not been accomplished. *Id.*; see *infra* notes 39-40 (discussing the provisions and problems of the "Stark laws"); see also *infra* note 54 (discussing the differences between the anti-kick-back provision and the Stark laws). For a general discussion of the Stark law, its provisions, and its application, see Richard A. Blacker, "Stark" Law's Definitions Restrict Group Practices, NAT. L.J., Jan. 22, 1996, at B8.

39. § 6204, 103 Stat. at 2236 (codified as amended at 42 U.S.C. § 1395nn (Supp. V 1993)). Stark I, prohibiting the referrals of Medicare patients to clinical laboratories by physicians with a financial interest in those laboratories, became effective on January 1, 1992. *Id.* at 2242. There are several exceptions to this provision: the "personal services" exception (permitting a physician to refer a patient to a clinic in which he owns an interest if he provides or supervises the service); the "large corporation" exception (permitting self-referral in certain publicly-held corporations); and the "rural area" exception (allowing a physician to self-refer to a clinic in a rural area). 42 U.S.C. § 1395nn(b)-(d) (Supp. V 1993); see also Puryear, *supra* note 8, at 308-10 (explaining Stark I and its exceptions). Effective September, 1995, the Health Care Financing Administration implemented regulations addressing Stark I. Physician Financial Relationships with, and Referrals to Health

prohibition against self-referral to additional health care services.⁴⁰

Care Entities, 60 Fed. Reg. 41,914 (1995) (to be codified at 42 C.F.R. § 411.355-61). These regulations explain further the exceptions articulated in the legislation. See Gold, *supra* note 38, at 1245 (discussing the regulations and the exceptions of Stark I).

40. § 13562, 107 Stat. at 596 (codified at 42 U.S.C. § 1395nn (Supp. V 1993)). Stark II explicitly prohibits physicians from making referrals to designated health care facilities in which the physician maintains a financial interest. *Id.* § 1395nn(a)(1)(A). Exceptions are made if the physician, or a member of his group practice, personally provides the services, *id.* § 1395nn(b)(1), if services are performed by the physician or another physician who is a member of the same group practice and in the same building in which the referring physician furnishes other unrelated services, *id.* § 1395nn(b)(2)(A), if the services are performed in accordance with designated prepaid plans, *id.* § 1395nn(b)(3), or in other situations determined by the Secretary "not [to] pose a risk of program or patient abuse." *Id.* § 1395nn(b)(4). Designated health care services include clinical laboratories; physical therapy; occupational therapy; radiology; radiation therapy; durable medical equipment; parenteral and enteral nutrients, equipment, and supplies; prosthetics, orthotics, and prosthetic devices; home health services; outpatient prescription drugs; and inpatient and outpatient hospital services. *Id.* § 1395nn(h)(6). A violation of this law results in denial of payment by Medicare or Medicaid. *Id.* § 1395nn(g)(1). Stark II expanded Stark I's efforts to prohibit self-referrals by including additional health care services and broadening its applicability to Medicaid as well as Medicare. Gold, *supra* note 38, at 1245; see also Puryear, *supra* note 8, at 310-12 (discussing Stark II and its exceptions).

This amendment significantly effects joint ventures and other investments because, currently, most investments in medical facilities would violate Stark II if the physician makes self-referrals. Puryear, *supra* note 8, at 313. Therefore, existing investments will be forced to dissolve to avoid violating the statute. *Id.*

Stark II affects only Medicare and Medicaid patients and does not include patients insured by private sources. *Id.*; see also Rockelli, *supra* note 38, at 278 (noting that physicians are prohibited from referring Medicare and Medicaid patients for certain services to health care facilities in which the referring physician has an ownership interest). As a result, the ultimate effect of Stark II may be to induce health care providers to refuse to treat patients covered by these programs. See generally Farley, *supra* note 9, at 167-68 (discussing the economic efficiency of physicians investing in medical facilities, and potential for self-referrals being a consequence of this competitive progression in health care).

A physician violates Stark II merely by entering into a financial relationship with a facility and making referrals of Medicare and Medicaid patients to that facility for designated services. Lisa M. Rockelli, *HCFA, IG Refuse "Stark II" Moratorium But Hold Off on Reporting Requirements*, 4 HEALTH L. REP. (BNA) 189 (1995). The physician's intent is irrelevant. *Id.* This imposition of strict liability is frustrating to health care providers because the law is ambiguous. See *id.* at 189-90 (noting that the HCFA's warning to physicians to consult legal advice if he has questions about the law "reflects on the difficulty of writing regulations for such a complex statute"); *id.* at 190 (noting that most of the exceptions granted in Stark II have various limitations and conditions, making it necessary to read the full statute to understand it) (quoting John Steiner, assistant general counsel for AHA); see also *infra* note 54 (discussing the ambiguities in the anti-kickback provision). The exceptions under the law are considered "critical but confusing." Rockelli, *supra* at 190. The result of imposing strict liability on an ambiguous statute is that it will not be enforced aggressively. *Id.*

Opponents of Stark II believe it is too restrictive on the delivery and financing of health care. *Physician Groups To Seek Repeal of Major Stark II Restrictions*, 4 HEALTH L. REP. (BNA) 650 (1995). The consequence of Stark II is to micro-manage the formation of health care networks. *Id.* at 651. Stark II, it is argued, should be amended to be more

B. Judicial Interpretation of the Anti-kickback Provision

"Knowingly and willfully" generally means consciously and intentionally.⁴¹ Whether one must know and intend to act or know and intend to violate the law is unclear,⁴² however, as the courts' interpretation of these terms has varied.⁴³ The Model Penal Code defines the term knowingly as requiring the defendant to be aware of his conduct or be aware that the conduct will cause a particular result.⁴⁴ Boiler-plate jury instructions define the word knowingly as being conscious and aware of one's actions and not acting in "ignorance, mistake or accident."⁴⁵ Under the Model

sensitive to the health care market, while still addressing the concerns Stark I was initiated to address. *Id.* Proponents of the law argue that its purpose is to prevent over-utilization of the system, and that studies show that over-utilization occurs when physicians have a financial interest in the facility to which they refer patients. *Id.* Stark II apparently has not reached a balance between permitting the market to provide health care services and preventing Medicare and Medicaid abuse. See generally Rockelli, *supra* note 38, at 277-79 (discussing the goals of the law and the problems with implementing it).

41. BLACK'S LAW DICTIONARY 872 (6th ed. 1990).

42. See *Staples v. United States*, 114 S. Ct. 1793, 1796-97 (1994) (noting that whether a statute requires proof that the defendant knew the act was a violation under the statute is a "question of statutory construction"); *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994) (stating that the interpretation of the meaning of the term willful is "influenced by its context"); *Liparota v. United States*, 471 U.S. 419, 424 (1985) (noting "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute").

43. See *United States v. Hayden*, 64 F.3d 126, 128-30 (3d Cir. 1995). The court noted that the word willful can be interpreted to require either purpose to commit a prohibited act or intent to violate the law. *Id.* at 128. The Third Circuit held that for purposes of the statute regulating the possession of firearms by a felon, it should be interpreted to require proof of knowledge of the law. *Id.* at 130; see also *United States v. Daughtry*, 48 F.3d 829, 831 (4th Cir.) (distinguishing *Ratzlaf* and concluding that the term willful, for purposes of False Statements Act, requires only intent to commit the act), *cert. granted and judgment vacated on other grounds*, 116 S. Ct. 510 (1995).

44. MODEL PENAL CODE § 2.02(2)(b) (1962). Specifically, the Model Penal Code states:

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Id.

45. *United States v. Lawson*, 780 F.2d 535, 542 (6th Cir. 1985) (finding that the trial court was correct to instruct the jury that "[t]he word knowingly means that a defendant realized what he was doing and was aware of the nature of his conduct. It means that he did not act through ignorance, mistake or accident"); see also *United States v. Udofot*, 711 F.2d 831, 835-37 (8th Cir.) (holding that the term knowingly does not require proof of specific intent), *cert. denied*, 464 U.S. 896 (1983); *United States v. Arambasich*, 597 F.2d 609, 612 (7th Cir. 1979) (upholding the trial court's instruction to the jury that "[t]he word knowingly . . . means that the act was done voluntarily and purposely, and not because of

Penal Code, a person commits a crime willfully if he has the purpose of committing the act.⁴⁶ Generally, courts also have interpreted the term willfully to require consciousness of the act itself but not necessarily the unlawfulness of the act.⁴⁷ At trial, a jury typically is instructed that the term willfully is defined as acting knowingly, deliberately, and intentionally and not accidentally, carelessly, or unintentionally.⁴⁸

These general definitions support the well-founded maxim that ignorance of the law is no excuse.⁴⁹ Consistent with that maxim, courts have interpreted the term knowingly and willfully to mean only that one must intend his act and that knowledge of the illegality of the act is not required.⁵⁰ In the last twenty years, however, a line of Supreme Court cases has defined the term knowingly and willfully as requiring knowledge of the law.⁵¹ These cases focused on the language of the statute,⁵²

mistake or accident"); *see also* 1 HON. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL AND CRIMINAL § 17.04 (4th ed. 1992) (providing similar boiler-plate language to be provided to a jury).

46. *See* MODEL PENAL CODE § 2.02(8) (1962) (stating that the requirement of "willfully [sic] is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears").

47. *See, e.g.,* Ratzlaf v. United States, 114 S. Ct. 655, 664 (1994); Browder v. United States, 312 U.S. 335, 341 (1941); Potter v. United States, 155 U.S. 438, 446 (1894).

48. *E.g.,* United States v. Falk, 605 F.2d 1005, 1010 n.9 (7th Cir. 1979) (recognizing that the term willful means "deliberately and intentionally as distinguished from something which is merely careless, inadvertent or negligent"), *cert. denied*, 445 U.S. 903 (1980); United States v. Berardelli, 565 F.2d 24, 30 (2d Cir. 1977) (holding that the instruction given to the jury that the defendant must have a specific intent to commit the act was correct, and the trial court properly refused to instruct the jury that the defendant should know the law and intend to violate it); United States v. Dreitzler, 577 F.2d 539, 549 (9th Cir. 1978) (concluding that the trial judge correctly instructed the jury that "[a]n act is done willfully if done voluntarily and intentionally with knowledge that it is against the law"), *cert. denied*, 440 U.S. 921 (1979); *see also* DEVITT, *supra* note 45, § 17.05 (furnishing similar boiler-plate language to be provided to a jury).

49. *See* Cheek v. United States, 498 U.S. 192, 199 (1991) (reaffirming the deeply rooted rule that ignorance or mistake of law is no excuse in a criminal prosecution); *see also* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1029 (3d ed. 1982) (noting that the legal maxim that ignorance of the law is no excuse has "come down through the ages").

50. *See, e.g.,* United States v. Cochran, 17 F.3d 56, 61 (3d Cir.) (holding that, for purposes of the federal child pornography statute, 18 U.S.C. § 2252, the term knowingly requires a showing that the defendant knew the materials were of a pornographic nature but does not require a showing that the defendant knew that the materials were illegal), *cert. denied*, 115 S. Ct. 634 (1994); United States v. Lawson, 780 F.2d 535, 542 (6th Cir. 1985) (holding that the word knowingly means understanding the nature of the conduct for purposes of the sale or receipt of stolen goods in violation of 18 U.S.C. § 2315); *see also infra* text accompanying notes 61-67 (explaining the concept of *mens rea*).

51. *See* Staples v. United States, 114 S. Ct. 1793, 1804 (1994) (finding that a defendant cannot be convicted for possession of an unregistered machine gun under the Oklahoma statute unless the defendant knew of the gun's illegal features); Ratzlaf, 114 S. Ct. at 663 (holding that to convict a defendant of willfully violating a statute prohibiting financial

legislative intent,⁵³ protection of the inadvertent actor,⁵⁴ and the rule of lenity.⁵⁵ Furthermore, requiring that the defendant know his conduct vi-

restructuring, the defendant must know the conduct was unlawful); *Cheek*, 498 U.S. at 202-03 (stating that a defendant, who has a good-faith, although unreasonable, belief that his conduct is not illegal cannot be convicted of tax evasion); *Liparota v. United States*, 471 U.S. 419, 433 (1985) (holding that the prosecution must prove the defendant knew that his acquisition or possession of food stamps violated the statute or regulations); *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (*per curiam*) (defining willfully as "a voluntary, intentional violation of a known legal duty").

52. *E.g.*, *Staples*, 114 S. Ct. at 1796 (noting that whether a statute requires knowledge that the act is illegal is a "question of statutory construction"); *Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (stating that the starting place for the Court's inquiry into the meaning of a statute is its language); *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (noting that when interpreting statutes, the Court should start with "the language [of the statute] itself") (alteration in original).

53. *E.g.*, *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (stating that courts should turn to the legislative history only when necessary to resolve statutory ambiguity); *Liparota*, 471 U.S. at 424 (stating that the definition of the elements of a crime is "entrusted to the legislature"); *United States v. Balint*, 258 U.S. 250, 251-53 (1922) (noting that the requisite mental state of a federal crime requires an "inference of the intent of Congress").

54. *See Liparota*, 471 U.S. at 426 (concluding that a requirement that one must know the law to commit the offense is especially appropriate where any other interpretation of the statute would result in the criminalization of "a broad range of apparently innocent conduct"). This theory certainly is applicable to the anti-kickback provision. Courts have struggled with what activities result in the offering or receipt of a "kickback," see *United States v. Hancock*, 604 F.2d 999, 1001 (7th Cir.) (holding that fees from labs paid to referring physicians were kickbacks), *cert. denied*, 444 U.S. 991 (1979); what constitutes an "inducement," see *United States v. Greber*, 760 F.2d 68, 71 (3d Cir.) (holding that payments made to a referring physician that are based on the number of referrals are an inducement even though the payments were in exchange for services rendered), *cert. denied*, 474 U.S. 988 (1985); whether the kickback must be the primary purpose of the transaction, see *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989) (finding that it was permissible for a jury to convict under the anti-kickback statute even if it found that the referral of services was not a primary purpose for making payments); whether reasonable payments for services still may be considered illegal kickbacks if in exchange for referrals, see *United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 30-31 (1st Cir. 1989) (holding that to prove a violation of the anti-kickback statute it need not be shown that the payments were not reasonable for the service rendered); and whether an incentive program established to encourage physicians to use a hospital can violate the anti-kickback statute, see *Polk County v. Peters*, 800 F. Supp. 1451, 1456 (E.D. Tex. 1992) (concluding that incentive programs violate the anti-kickback provision because the programs serve as an inducement to refer patients to that hospital).

Additionally, the anti-kickback provision applies to self-referral arrangements not addressed by Stark I and Stark II. *See supra* notes 39-40 (discussing Stark I and Stark II); *see also* Lisa M. Rockelli, *Ninth Circuit Clarifies Rules In Hanlester Joint Venture Test Case*, 4 HEALTH L. REP. (BNA) 553, 554 (1995) (discussing the importance of *Hanlester* because, since the Stark laws do not reach many financial relationships, the anti-kickback provision is still important). Physicians can comply with the Stark laws and still violate the anti-kickback statute. *Id.* Because the law lacks clarity, a requirement that criminal liability attaches only if one understands that he violated the law provides comfort to physicians involved in such financial arrangements. *Id.*

55. The rule of lenity provides that ambiguity in a criminal statute should be resolved

olated a law ensures that only defendants acting with a wrongful purpose will be punished.⁵⁶

Interestingly, only one case has defined the term knowingly and willfully as it relates to the anti-kickback provision of the Social Security Act.⁵⁷ In *Hanlester Network v. Shalala*⁵⁸ the United States Court of Appeals for the Ninth Circuit defined the term knowingly and willfully as requiring "specific intent to disobey the law," adopting a definition of the word willfully applied by the Supreme Court.⁵⁹ Citing the recent Supreme Court cases supporting the proposition that the defendant must know his act is illegal, the Ninth Circuit gave little reasoning for its decision to hold the prosecution to this increased burden.⁶⁰

II. INTERPRETATION OF MENS REA REQUIREMENTS

A. *Mens Rea Generally*

Crimes can be categorized into three general classifications based on

in favor of the defendant. *Rewis v. United States*, 401 U.S. 808, 812 (1971); *see, e.g., Ratzlaf*, 114 S. Ct. at 663 (stating that if the statute's "willfulness" requirement were ambiguous, any doubt would be resolved in favor of the defendant); *Moskal v. United States*, 498 U.S. 103, 108 (1990) (stating that the rule of lenity should be employed only when there is reasonable doubt about the statute's intent after looking to the legislative history); *Liparota*, 471 U.S. at 427 (stating that the rule of lenity ensures fair warning of what constitutes criminal conduct and "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability"); *United States v. Bass*, 404 U.S. 336, 348-49 (1971) (noting that the rule of lenity should be applied only when doing so would not conflict with congressional intent).

56. *See Ratzlaf*, 114 S. Ct. at 660-62; *see also Staples*, 114 S. Ct. at 1802 (holding that the prosecution must prove that the defendant knew the law with respect to the possession of firearms because to hold otherwise would criminalize apparently innocent conduct); *Cheek v. United States*, 498 U.S. 192, 200 (1991) (noting that the Court has interpreted the term willfully as requiring the prosecution to show that the defendant knew the law to protect a person who misunderstood the law from being convicted); *Liparota*, 471 U.S. at 426-27 (concluding that, because the restrictions on the use of food stamps were so specific, the prosecution must prove that the defendant knew the law to avoid punishing an inadvertent actor).

57. *Hanlester Network v. Shalala*, 51 F.3d 1390, 1394 (1995); *see also Miller, supra* note 13, at 3 (noting that, before *Hanlester* was decided, no case law defined the term knowingly and willfully in the context of the Medicare anti-kickback statute); *see supra* note 17 (discussing *United States v. Neufeld*, 908 F. Supp. 491 (S.D. Ohio 1995), which addressed the interpretation of the word willfully as used in the anti-kickback statute without concluding upon a definition of the term).

58. 51 F.3d 1390 (9th Cir. 1995).

59. *Id.* at 1400.

60. *See id.* (accepting the definition of the word willfully prescribed by the Court in *United States v. Pomponio*, 429 U.S. 10, 12 (1976) and *Ratzlaf*, 114 S. Ct. at 657); *see infra* text accompanying notes 186-200 (analyzing the *Hanlester* holding regarding the definition of knowingly and willfully).

the requisite mens rea element.⁶¹ For strict liability crimes, criminal liability is imposed regardless of the defendant's state of mind.⁶² In contrast to strict liability crimes, the other two classifications of crimes—specific and general intent crimes—include the defendant's state of mind as an element of proof.⁶³ Specific intent crimes require that an act be done with the specific purpose of effecting a criminal outcome,⁶⁴ but does not require that he knew the result was illegal.⁶⁵ On the other hand, general intent crimes require proof that the defendant intentionally committed an act, without requiring proof that he desired a particular result⁶⁶ or intended to violate the law.⁶⁷

61. The mens rea of a crime refers to the requisite mental state. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 217 (5th ed. 1989); see also BLACK'S LAW DICTIONARY 985 (6th ed. 1990) (defining mens rea as "an element of criminal responsibility").

62. See *United States v. Bailey*, 444 U.S. 394, 404 n.4 (1980) (noting that strict liability crimes are "exceptions to the general rule that criminal liability requires an 'evil-meaning mind'"); BLACK'S LAW DICTIONARY 1422 (6th ed. 1990) (defining strict liability as liability without fault); KADISH & SCHULHOFER, *supra* note 61, at 296 (noting that strict liability statutes require no mens rea with respect to the elements of the offense).

63. See KADISH & SCHULHOFER, *supra* note 61, at 230; see also *Bailey*, 444 U.S. at 403 (explaining that this common law notion of general versus specific intent is ambiguous and that there is a movement to replace this distinction with an analysis of the mens rea).

64. For example, larceny, which requires that the defendant intended to permanently deprive the victim of his property, is a specific intent crime. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 224 (2d ed. 1986) (noting that larceny requires an "intent to steal" the property). It is not required, however, that the defendant knew such deprivation was illegal. See *Ratzlaf v. United States*, 114 S. Ct. 655, 665 n.4 (1994) (Blackmun, J., dissenting) (noting that the term specific intent does not require knowledge of the illegality; it merely requires the notion of purpose).

65. See 21 AM. JUR. 2D *Criminal Law* § 130 n.18 (1981) (noting that specific intent exists when the offender desired the prohibited result, whereas general intent exists when the prohibited result may reasonably be expected based on the circumstances, regardless of whether the offender desired to accomplish that result); see also KADISH & SCHULHOFER, *supra* note 61, at 230 (describing burglary as a specific intent crime because it requires proof that the defendant had the purpose of committing a felony inside a building); BLACK'S LAW DICTIONARY 560 (6th ed. 1991) (defining specific intent as "the intent to accomplish the precise act which the law prohibits").

Specific intent also may be defined as having an intent to engage in specific conduct, as opposed to having a specific purpose. See LAFAYE & SCOTT, *supra* note 64, at 224 (noting that specific intent can be defined in several ways, but the "most common usage . . . is to designate a special mental element which is required above and beyond any mental state"). For purposes of this Comment, specific intent refers to the intent to accomplish a specific purpose.

66. See KADISH & SCHULHOFER, *supra* note 61, at 230 (discussing trespass as a general intent crime, requiring only that the defendant knew the nature of his act, "without proof that he desired any particular further consequence"); see also BLACK'S LAW DICTIONARY 560 (6th ed. 1991) (defining general intent as "the intent to do that which the law prohibits. It is not necessary for the prosecution to prove that the defendant intended the precise harm or the precise result which eventuated").

67. See KADISH & SCHULHOFER, *supra* note 61, at 230 (noting that general intent

Whether the anti-kickback provision is defined as a specific intent crime or a general intent crime does not help determine the definition of the term knowingly and willfully.⁶⁸ If it is interpreted as a specific intent crime, the defendant may have intended to receive or offer a kickback.⁶⁹ The defendant need not have the specific purpose of violating the law to have specific intent.⁷⁰ If the anti-kickback provision is interpreted as a

crimes require only that the defendant intends to commit the act). It is not required that the defendant intends to violate the law, nor that he is aware that the law makes the act criminal. *United States v. Blair*, 54 F.3d 639, 642 (10th Cir.), *cert. denied*, 116 S. Ct. 220 (1995).

68. Because the anti-kickback provision prohibits the offering of remuneration to a person "to induce such person," the statute could be classified as a specific intent crime. *See Miller, supra* note 13, at 6-7 (quoting 42 U.S.C. § 1320a-7b(b)(2) (1988 & Supp. V 1993)) (noting that the decision in *Inspector General v. Hanlester Network, et al.*, No. CV 92-4552-LHM, 1993 WL 78,299 (C.D. Cal. Feb. 10, 1993), supports the view that the anti-kickback provision is a specific intent crime, because the use of the word "induce" suggests an "intent to exercise influence over the reason or judgment of another in an effort to cause the referral of [Medicare or Medicaid] business") (alteration in original); *see also* Robert Fabrikant, *Health Care Reform: The Use of Anti-Kickback Statutes in Private Litigation, and The Need For an Antitrust-Type Approach*, in HEALTH CARE REFORM INSTITUTE 453, 472 (PLI Commercial Law & Practice Course Handbook Series No. A-700, 1994) (classifying the anti-kickback provision as a specific intent crime because it requires proof of specific intent in order to find a criminal violation).

The distinction between specific and general intent has been made when defining terms used to prescribe the requisite mental state. In *United States v. Lizarraga-Lizarraga*, 541 F.2d 826 (9th Cir. 1976), the Ninth Circuit held that the term willful in 22 U.S.C. § 1934, regulating munitions control, required a showing of a "voluntary, intentional violation of a known legal duty." *Id.* at 828. The court compared the requirement that the prosecution prove that the defendant knew the law with the theory of specific intent. *Id.* The court noted that the term "willful" requires a showing of specific intent and analogized its conclusion to the conclusion drawn in tax law. *Id.* However, because courts and legal scholars are inconsistent with their use of the term "specific intent," and because other courts have not based its interpretation of the mens rea requirement upon this distinction, it would be inaccurate to conclude that all specific intent crimes require a showing of knowledge of the law. *See United States v. Bailey*, 444 U.S. 394, 403 (1980) (noting that the ambiguity in the definition of general and specific intent "has led to a movement away from the traditional dichotomy of intent and toward an alternative analysis of mens rea").

69. Specific intent crimes only require that the defendant intend a specific result that the law forbids. *See Otto G. Obermaier, White-Collar Crime*, in MENS REA: STATE OF MIND DEFENSES IN CRIMINAL AND CIVIL FRAUD CASES 121 (PLI Litig. & Admin. Practice Course Handbook Series No. 140, 1985) (stating that specific intent crimes require proof that the defendant committed an act with an intent to do something that is illegal). Therefore, a violation of the anti-kickback provision merely would require an intent to receive a kickback.

70. *See Morissette v. United States*, 342 U.S. 246, 270 (1952) (stating that knowing conversion, a specific intent crime, requires "knowledge of the facts, though not necessarily the law, that made the taking a conversion"); *cf. United States v. Kozminski*, 487 U.S. 931, 975 (1988) (stating that, for the crime of involuntary servitude, "[t]o establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, or knowingly failed to do an act which the law requires, purposely intending to violate the law"). This inconsistency shows that it is not the designation as a specific intent

general intent crime, it is sufficient that the defendant intended to enter into a financial relationship in which remunerations were received in exchange for referrals, and, again, intent to violate the law is not required.⁷¹

Generally, ignorance or mistake of law is a defense to the commission of an otherwise punishable crime if it negates the requisite mental state.⁷² While ignorance of the law suggests lack of awareness of the law, mistake connotes misunderstanding of the law.⁷³ Therefore, the definition of the term knowingly and willfully has an important impact on the defense of mistake. If one must know and intend to violate the law, the defendant may assert the defense that he misunderstood the law.⁷⁴ If one merely must understand and intend the act, misunderstanding the law will not negate that mental state.⁷⁵ Thus, if the anti-kickback statute is defined as requiring a showing of knowledge of the law, a defendant could use the mistake of law defense.

B. *The Court's Interpretation of Mens Rea*

Courts may interpret statutes that contain no explicit mens rea requirement to have one implicitly.⁷⁶ The Supreme Court typically has imposed a mens rea requirement when Congress has not provided one explicitly in

crime that requires the prosecution to show knowledge of the law, but the language of the specific statute itself. *See Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994) (noting that a statute must be interpreted based on its context).

71. *See supra* note 67 and accompanying text (noting that general intent does not require that one intend to violate the law).

72. MODEL PENAL CODE § 2.04(1)(a) (1962); *see* WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., 1 SUBSTANTIVE CRIMINAL LAW § 5.1, at 575-76 (1986) (noting the simplicity of the proposition that ignorance or mistake of fact is a valid defense in that it negates mens rea, a required element of a crime).

73. *See* LAFAYE & SCOTT, *supra* note 72, § 5.1, at 575-77, 585. Mistake of fact may also be justification for committing a crime. *Id.* at 575. Mistake of fact, however, will not be discussed in this Comment, as the definition of the term knowingly and willfully does not affect that defense.

74. *See Ratzlaf*, 114 S. Ct. at 665-66 (Blackmun, J., dissenting) (arguing that the majority's holding that willfulness requires knowledge of the law negates the general rule that ignorance and mistake of law is no excuse); *United States v. Zehrbach*, 47 F.3d 1252, 1261 (3d Cir.) (noting that mistake of law is a complete defense when knowledge of the law is required), *cert. denied*, 115 S. Ct. 1699 (1995).

75. *See United States v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring) (stating that "[i]f the ancient maxim that 'ignorance of the law is no excuse' has any residual validity, it indicates that the ordinary intent requirement—*mens rea*—of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy").

76. *See Posters 'n' Things, LTD. v. United States*, 114 S. Ct. 1747, 1750 (1994). In *Posters*, the defendant was convicted of violating the Anti-Drug Abuse Act of 1986, which stated:

It is unlawful for any person—

(1) 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, unless Congress affirmatively has manifested an intent to dispense with it.⁷⁷ In these cases, the Court generally requires at least a showing that the defendant had knowledge of facts that would make him conscious that the conduct probably was regulated.⁷⁸ If the courts were to dispense with a mens rea requirement entirely, apparently innocent conduct would be criminalized, because the mere occurrence of the act would make it punishable regardless of the defendant's state of mind.⁷⁹

(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or

(3) to import or export drug paraphernalia.

Id. at 1749-50 (quoting 21 U.S.C. § 857(a) (1988) (repealed 1990)). That provision did not contain a specific scienter, or state of mind, requirement. *Id.* at 1750. The Court concluded that lack of an express scienter requirement, however, did not justify the "conclusion that Congress intended to dispense entirely with a scienter requirement." *Id.* at 1752. The Court held that the statute requires that the defendant know that the customer likely will use the drug paraphernalia with drugs. *Id.* at 1753; *see also* United States v. Bailey, 444 U.S. 394, 408 (1980) (holding that the prosecution must show knowledge of the law to convict the defendant of escaping from federal custody). In *Bailey*, the defendant was convicted of violating 18 U.S.C. § 751(a), which provides that "[w]hoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined . . . shall, if the custody or confinement is by virtue of an arrest . . . be fined not more than \$5,000 or imprisoned." *Bailey*, 444 U.S. at 397 n.1 (quoting 18 U.S.C. § 751(a)). The Court noted that the omission of an explicit mens rea requirement in a statute does not impose strict liability for the crime. *Id.* at 406 n.6. The Court turned to the Model Penal Code and the proposed revision of the Federal Criminal Code for a definition of "escape." *Id.* at 408. Noting that the legislative history of § 751 did not contradict these sources, the Court held that the prosecution must show that the defendant knew that he was leaving the jail without permission. *Id.*

77. *See* *Staples v. United States*, 114 S. Ct. 1793, 1797 (1994) (stating that "silence [concerning the mens rea requirement] by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal"). Generally, the Court disfavors construction of offenses without a mens rea requirement. *See Posters 'n' Things, Ltd.*, 114 S. Ct. at 1752-53 (finding that merely because Congress did not explicitly state a mens rea requirement does not mean that Congress intended to dispense with a mens rea requirement entirely); *Liparota v. United States*, 471 U.S. 419, 425 (1985) (noting that the statute has a mens rea requirement absent indication to the contrary by Congress); *United States v. Balint*, 258 U.S. 250, 251-52 (1922) (stating that, generally, every crime has an element of scienter).

78. These statutes are said to fall under the public welfare offense doctrine. *Posters 'n' Things*, 114 S. Ct. at 1753. The public welfare offense doctrine is said to impose "strict liability," but it actually does require a showing of at least some knowledge that the conduct probably was regulated. *Id.*; *see also Staples*, 114 S. Ct. at 1798 n.3 (noting that to say the public welfare offense doctrine imposes "strict liability" is a misnomer because there is some requirement of knowledge, although knowledge that the conduct is an offense need not be shown); *infra* text accompanying notes 238-42 (discussing the public welfare offense doctrine as it relates to the anti-kickback provision).

79. *Liparota*, 471 U.S. at 425. There is a general notion that conduct should be punished when the defendant makes an inappropriate choice between good and evil. *Id.* The Court in *Liparota* used the example of a person who possesses food stamps because he

If a statute explicitly prescribes a mens rea requirement, but the mental state required is ambiguous, the Court employs a hierarchical analysis.⁸⁰ First, the Court looks to the language of the statute.⁸¹ If that language is ambiguous, the Court turns to legislative intent.⁸² If Congress' intent is unclear, the Court applies the rule of lenity, which requires an interpretation of the statute in favor of the defendant.⁸³

inadvertently received them in the mail. *Id.* at 426-27. If there were no mens rea requirement, that act would be punishable under 7 U.S.C. § 2024(b)(1), which makes it criminal to possess food stamps in an unauthorized manner. *Id.* at 426. As a result, seemingly innocent conduct becomes criminalized. *Id.* at 426-27.

80. See generally *Ratzlaf v. United States*, 114 S. Ct. 655, 659-63 (1994) (analyzing the statute to determine the meaning of the term willfully). See also *supra* note 12 and accompanying text (discussing the Court's struggle with interpreting terms used in statutes to determine the requisite mens rea).

81. *Staples*, 114 S. Ct. at 1797 (stating that the language of the statute is the starting place of the analysis); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (noting that the court must presume that the legislature intended the meaning of the words of the statute itself); *Rubin v. United States*, 449 U.S. 424, 430 (1981) (stating that when the language of the statute is clear, the court may look no further absent "rare and exceptional circumstance") (quoting *TVA v. Hill*, 437 U.S. 153, 187 n. 3 (1978) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930))).

82. *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (stating that legislative history should be referred to only to resolve ambiguity in the statute); *Liparota*, 471 U.S. at 424-25 (considering the language of the statute and then the legislative history to determine the intended meaning of the word "knowingly"); see also *supra* note 53 (discussing the examination of congressional intent to determine the requisite mens rea).

It should be noted that there is debate regarding whether legislative history should be referred to at all. Hon. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845 (1992). Some argue that legislative history does not represent Congress' intent. Compare, e.g., *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring) (recognizing that legislative history is an unreliable gauge of congressional intent); *United States v. R.L.C.*, 503 U.S. 291, 311 (1992) (Thomas, J., concurring) (noting that the use of legislative history to interpret an ambiguous penal statute against a criminal defendant is in conflict with the rule of lenity); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1005 (1992) (explaining that legislative history should not be used because it does not truly reflect Congress' intent and because it detracts from the judiciary's role in interpreting statutes) with Breyer, *supra* at 847-48 (arguing in favor of the use of legislative history to help the "court understand the context and purpose of a statute"); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (advocating the use of legislative history, noting that statutes should be interpreted "in light of their present societal, political, and legal context"); Wendy M. Rogovin, *The Politics of Facts: "The Illusion of Certainty"*, 46 HASTINGS L.J. 1723, 1754 (1995) (arguing that legislative history is an effective tool when the court is looking for a factual basis for particular legislation).

83. E.g., *Staples*, 114 S. Ct. at 1804 n.17 (stating that the rule of lenity is reserved for cases where, after looking to all other sources of interpretation, "the Court 'is left with an ambiguous statute'") (quoting *Smith v. United States*, 113 S. Ct. 2050, 2059 (1993) (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971))); *Chapman v. United States*, 500 U.S. 453, 463 (1991) (noting that the rule of lenity is applicable only where there is "grievous ambiguity or uncertainty" in the statute); *Liparota*, 471 U.S. at 427 (stating that "[a]pplication of the rule of lenity ensures that criminal statutes will provide fair warning

1. The Tax Law Exception

In analyzing the language of the statute to determine Congress' intent, the Court may look to the severity of the offense to determine the mens rea requirement. For example, in *Spies v. United States*,⁸⁴ the Court distinguished between willful failure to pay tax when due, a misdemeanor, and willful attempt to defeat and evade tax, a felony.⁸⁵ Noting that both crimes must be committed willfully, the Court considered whether the difference in punishment justified different interpretations of the meaning of the term willful for each statute.⁸⁶ The Court concluded, however, that the word willful does not mean different things in each offense.⁸⁷ In both provisions, the term willful includes an "element of evil motive."⁸⁸ The difference between a failure to pay tax when due and tax evasion is not the level of punishment, but rather, the requirement that the felony be committed with an *attempt* to evade taxes.⁸⁹ The Court found that Congress, through its use of the word attempt, intended the crime of tax evasion to require "some willful commission in addition to the willful

concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability"); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (holding that ambiguity in "criminal statutes should be resolved in favor of lenity"); see also *supra* note 55 (discussing the rule of lenity).

84. 317 U.S. 492 (1943).

85. *Id.* at 497.

86. *Id.*

87. See *id.* at 498.

88. *Id.* at 498-99. The Court noted that an affirmative willful attempt may include keeping a double set of books, making false entries, creating false documents, or other fraudulent devices. *Id.* at 499.

89. *Id.* at 498. This conclusion is consistent with the proposition that a word has the same meaning when used in several places within a statute. See *Ratzlaf v. United States*, 114 S. Ct. 655, 660 (1994) (noting that a term used within a statute several times is generally interpreted the same way each time it appears).

This idea also may rebut any argument that changing the penalty for a violation of the anti-kickback provision from a misdemeanor to a felony in 1977 affected the meaning of knowingly and willfully. See *supra* note 32 (discussing the history of the anti-kickback provision and the 1977 amendment). Interpreting knowingly and willfully as requiring knowledge of the law, as the court did in *Hanlester Network v. Shalala*, 51 F.3d 1390, 1400 (9th Cir. 1994), protects the inadvertent actor. See *Ratzlaf*, 114 S. Ct. at 663 (requiring proof that the defendant knew and intended to violate the anti-structuring statute because otherwise, the statute could be violated without an evil motive). This interpretation, however, is not intended to protect the defendant only from a *felony*. Rather, if the defendant did not know and intend to violate the law, he is protected from liability altogether. As stated in *Spies*, a willful violation requires some evil motive. *Spies*, 317 U.S. at 498; see also *United States v. Bishop*, 412 U.S. 346, 361 (1973) (holding that willfully has the same meaning in the misdemeanor and felony sections of the tax code). If the prohibited conduct is willful, whether punishable as a misdemeanor or a felony, it still is punishable. *Id.* Therefore, that a violation of the anti-kickback provision is punishable as a felony does not help in defining the term knowingly and willfully.

omissions that" are required for the crime of failure to pay tax when due.⁹⁰ The Court concluded that willful failure to pay tax is not as egregious as willful tax evasion, because tax evasion involves both intent to avoid taxes and an active attempt to do so, whereas failure to pay tax merely entails an intentional but passive neglect to pay what is rightfully due.⁹¹ *Spies* is an example where the Court looked to the language of the statute to determine the congressional intent and deferred to Congress the responsibility of defining the words in a way not apparent on the statute's face.⁹²

Similarly, *Cheek v. United States*⁹³ also involved tax evasion and failure to file tax returns.⁹⁴ The *Cheek* Court acknowledged that it is well settled that the term willful, as used in tax statutes, requires proof that the defendant knew of the legal duty and "voluntarily and intentionally violated that duty."⁹⁵ The Court held that a good-faith belief, albeit unreasonable, that the defendant was complying with the law is sufficient to negate the willfulness requirement.⁹⁶

Tax law is an example of an area where the law is ambiguous and difficult to understand.⁹⁷ To protect defendants from being convicted of a crime they inadvertently committed, the Court has "carv[ed] out an exception to the traditional rule" that ignorance of the law is no excuse.⁹⁸ Therefore, in tax law, the term willfully is understood to mean "an act done with a bad purpose"⁹⁹ or with "an evil motive."¹⁰⁰ Arguably, analysis of the anti-kickback provision is analogous to tax law in that it also is difficult to understand.¹⁰¹ Therefore, an exception to the general rule that ignorance of the law is no excuse would be justified.¹⁰²

90. *Spies*, 317 U.S. at 499.

91. *Id.*

92. *Id.*; see *supra* note 52 (discussing the analysis of the language of the statute itself to determine the requisite mens rea).

93. 498 U.S. 192 (1991).

94. *Id.* at 201.

95. *Id.*

96. *Id.* at 203.

97. *Id.* at 200.

98. *Id.*

99. *United States v. Murdock*, 290 U.S. 389, 394 (1933).

100. *United States v. Bishop*, 412 U.S. 346, 361 (1973).

101. See *supra* note 54 (discussing the courts' struggle with the interpretation of the anti-kickback provision). The courts have recognized an exception to the general rule that ignorance of the law is no excuse in ambiguous statutes other than tax law. See *infra* notes 103-26 and accompanying text (discussing other areas of the law where the court found ignorance of the law to be an excuse).

102. See *infra* note 171 (discussing the applicability of imposing a higher burden on the prosecution when the statute is ambiguous).

2. *The Recent Expanded Application of the Ignorance Defense*

In addition to the area of tax law, the Supreme Court has applied an exception to the general rule that ignorance of the law is no excuse to other areas of the law.¹⁰³ In *Liparota v. United States*,¹⁰⁴ the Supreme Court held that knowingly, as applied in a statute governing food stamp fraud,¹⁰⁵ meant that the defendant knew he acted in a manner unauthorized by statute.¹⁰⁶ To arrive at this conclusion, the Court first looked to the language of the statute and then to the legislative history.¹⁰⁷ Finding little guidance, the Court turned to the rule of lenity.¹⁰⁸ Requiring the court to favor the defendant, the rule necessitated that knowingly be interpreted to mean that the defendant must know he violated the law.¹⁰⁹

Most recently, in *Ratzlaf v. United States*,¹¹⁰ the Supreme Court held that to be criminally liable for structuring financial transactions, the defendant must have specific knowledge that his conduct was unlawful.¹¹¹

103. *E.g.*, *Staples v. United States*, 114 S. Ct. 1793, 1802 (1994) (requiring knowledge of the law to convict a defendant of possession of an unregistered gun); *Ratzlaf v. United States*, 114 S. Ct. 655, 663 (1994) (holding that willfully, as used in the currency structuring statute, requires that the defendant have knowledge that he violated the law); *Liparota v. United States*, 471 U.S. 419, 426-27 (1985) (requiring the prosecution to prove the defendant knew he violated the law related to fraudulent use of food stamps); *United States v. Baker*, 63 F.3d 1478, 1491 (9th Cir. 1995) (noting that an exception to the general rule that ignorance of the law is no excuse has been recognized for complex regulatory schemes), *cert. denied*, 64 U.S.L.W. 3502 (1996); *United States v. Fierros*, 692 F.2d 1291, 1295 (9th Cir.) (stating that ignorance of the law may be an excuse in crimes involving complex statutes), *cert. denied*, 462 U.S. 1120 (1983); *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828-29 (9th Cir. 1976) (noting the complexity of the statute regulating the exportation of ammunition, and holding that the defendant must have known the law and intended to violate it to be convicted).

104. 471 U.S. 419 (1985).

105. The statute provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons, [or] authorization cards" in any manner not authorized by the statute or the regulations shall be guilty of a crime. 7 U.S.C. § 2024(b)(1) (1994).

106. *Liparota*, 471 U.S. at 425.

107. *Id.* at 424-25. The defendant in *Liparota* was a co-owner of a sandwich shop. *Id.* at 421. He acquired food stamps without the authorization of the Department of Agriculture. *Id.* The defendant purchased these food stamps from an undercover agent at less than face value. *Id.* The issue facing the Supreme Court was whether "the Government must prove that the defendant knew that he was acting in a manner not authorized by statute or regulations." *Id.* The Court noted that, while the statute requires one to act knowingly, "Congress [did] not explicitly spell [] out the mental state required." *Id.* at 424. The Court determined that Congress intended some mental state by using the word knowingly, but "[b]eyond this, the words themselves provide little guidance." *Id.*

108. *Id.* at 427.

109. *Id.* The Court held that requiring the prosecution to prove mens rea upholds the longstanding principal that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

110. 114 S. Ct. 655 (1994).

111. *Id.* at 663.

The defendant in *Ratzlaf* was charged with violating the anti-structuring provision of 31 U.S.C. § 5324, which makes it illegal to structure transactions with the purpose of avoiding the requirement that the bank report deposits over \$10,000 to the Treasury, by making numerous deposits under \$10,000.¹¹² Analyzing the statutory language, the Court concluded that knowledge of the law was a required element of proof.¹¹³ The Court noted that § 5324 required that the defendant act with the purpose of evading the reporting requirements of § 5313(a).¹¹⁴ This reasoning suggests that "evil motive" must be present, similar to the requirement under tax law.¹¹⁵

Currency structuring can exist without an evil motive, and those situations should not be illegal.¹¹⁶ For example, one might have motives for making small deposits other than avoiding the reporting requirement, such as fear of burglary or desire to hide one's wealth from other individuals.¹¹⁷ Requiring knowledge of the law protects those who do not act with a wrongful purpose.¹¹⁸ Additionally, § 5322 imposes criminal penalties on ones who willfully violate § 5324.¹¹⁹ Because § 5324 prohibits *purposely* evading reporting requirements¹²⁰ and § 5322 requires a *willful* violation of § 5324 for criminal penalties to be imposed, it follows that

112. 31 U.S.C. § 5324(a) (Supp. V 1993). The statute states that "[n]o person shall for the purpose of evading the reporting requirements of section 5313(a) . . . with respect to such transaction . . . (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions." *Id.*; see *infra* note 119 (stating the criminal provision under 31 U.S.C. § 5322(a)).

113. *Ratzlaf*, 114 S. Ct. at 659-63.

114. *Id.* at 660.

115. See *Cheek v. United States*, 498 U.S. 192, 200 (1991) (noting that "willful" as used in criminal tax statutes requires the act to be done with a "bad purpose").

116. *Ratzlaf*, 114 S. Ct. at 660-61 (noting that not all schemes to avoid a regulation are illegal).

117. *Id.* at 661. The Court noted that there are situations where a person might attempt to avoid the reporting requirement by reducing the size of the deposits made to the bank, but the reasons for doing so lack the "evil motive." *Id.* Because the statute technically can be violated without a bad purpose, the statute should require proof of such bad purpose to convict the defendant. *Id.* Otherwise, a defendant who inadvertently violates that statute could be punished criminally. *Id.*

118. *Id.* at 660.

119. *Id.* at 662. Section 5322(a) reads: "A person willfully violating [31 U.S.C. §§ 5311-5326] or a regulation prescribed under this subchapter . . . shall be fined not more than \$250,000, or imprisoned for not more than five years, or both." 31 U.S.C. § 5322(a) (Supp. V 1993).

120. "Purposely" is defined by the Model Penal Code as follows:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

MODEL PENAL CODE § 2.02(2)(a) (1962).

knowledge of the act alone is insufficient for structuring to be a crime.¹²¹ The statutes suggest that Congress intended that the defendant must know that transactions in excess of \$10,000 must be reported and he also must know of "his duty not to avoid triggering such a report."¹²²

The Court in *Ratzlaf* noted that its analysis could stop here because the language of the statute indicated clearly that the meaning of willfully requires knowledge of the law.¹²³ The Court also noted, however, that the legislative history is ambiguous, which, if the issue could not have been decided based on the language of the statute, would require the Court to apply the rule of lenity and decide the issue in favor of the defendant.¹²⁴ Therefore, even had the statutory language not resolved the issue, the Court ultimately would have reached the same conclusion.¹²⁵ Finally, the Court concluded that its opinion was not in conflict with the maxim that ignorance of the law is no excuse because Congress may expressly deviate from that principle, as it had done in this case.¹²⁶

121. See *Ratzlaf*, 114 S. Ct. at 660-61. Subsequent to *Ratzlaf*, § 5324(c) was added, which imposes a criminal penalty for a violation of § 5324. Riegle Community Development & Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2253 (to be codified at 31 U.S.C. § 5324(c)). Therefore, § 5322, which requires that the violation be willful, no longer must be resorted to for the purpose of determining punishment for a violation of § 5324, and willfulness no longer is required for criminal liability related to a violation of § 5324. *United States v. Zehrbach*, 47 F.3d 1252, 1262 n.7 (3d Cir. 1995), *cert. denied sub nom. Mervis v. United States*, 115 S. Ct. 1699 (1995).

122. *Ratzlaf*, 114 S. Ct. at 662.

123. See *id.*

124. *Id.* at 662-63.

125. See *id.*

126. *Id.* at 663. The dissent disagreed with the majority's application of tax law to this statute. *Id.* at 663-70 (Blackmun, J., dissenting). It noted that the rule is that ignorance of the law is no excuse, *id.* at 664, and the exception to that rule is applicable only to tax law. *Id.* at 667. The dissent noted that "'willfully' . . . generally 'refers to consciousness of the act but not to consciousness that the act is unlawful.'" *Id.* at 664 (quoting *Cheek v. United States*, 498 U.S. 192, 209 (1991) (Scalia, J., concurring in judgment)). According to the dissent, the majority was incorrect in holding that the word willful would be superfluous if defined to require only knowledge of the act. *Id.* at 665. Instead, the dissent reasoned that the requirement of willful in the currency structuring statute should require that the defendant have knowledge of the *reporting requirement*, not the law that makes avoiding the requirement criminal. *Id.* at 665-66. The distinction between the general definition of willfulness, requiring knowledge of the act, and the exception, requiring knowledge of the law, should be based on "whether the statute criminalizes 'a broad range of apparently innocent conduct.'" *Id.* at 666 n.6 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)). The dissent argued that innocent conduct would not be illegal under the structuring statute, even if the word willful is interpreted as requiring knowledge of only the act, because the defendant would not have the requisite purpose of evading the reporting requirement. *Id.* Therefore, the exceptional definition of willfulness should not apply to this statute. *Id.*

3. Application of the Court's Statutory Analysis

Many courts have followed the approach of the above cases—specifically *Ratzlaf*—and held that the terms knowingly and willfully require knowledge that the act is illegal.¹²⁷ In *United States v. Wynn*,¹²⁸ the defendant was charged with currency structuring in violation of 31 U.S.C. § 5324(a)(3).¹²⁹ Applying *Ratzlaf*, the United States Court of Appeals for the D.C. Circuit held that the statute required the prosecution to show that Wynn knew his act was illegal.¹³⁰ The court noted that the acts Wynn committed in 1987 and 1988 were not illegal until 1987.¹³¹ Using this as support for the fact that Wynn was unaware that his action was illegal, the court reversed the structuring convictions.¹³²

In *United States v. Hayden*,¹³³ the United States Court of Appeals for the Third Circuit applied the *Ratzlaf* analysis to arrive at the conclusion that the word willfully, as used in the provision providing criminal penalties for the statute regulating the ownership of firearms, required knowledge of the law.¹³⁴ The court acknowledged that the term willful can be interpreted to mean either knowledge of the act or knowledge of the law.¹³⁵ The court then looked to the legislative history to interpret Con-

127. See *United States v. Hayden*, 64 F.3d 126, 130-31 (3d Cir. 1995) (holding that the term willfully should be interpreted to require knowledge of the law for purposes of the statute regarding receiving firearms while under a felony information); *United States v. Wynn*, 61 F.3d 921, 927 (D.C. Cir.) (applying the definition of the word willful used in *Ratzlaf* to a violation of currency structuring), cert. denied, 116 S. Ct. 578 (1995).

128. 61 F.3d 921 (D.C. Cir.), cert. denied, 116 S. Ct. 578 (1995).

129. *Id.* at 923; see *supra* notes 112, 119 (providing the text of 31 U.S.C. § 5324 and § 5322).

130. *Wynn*, 61 F.3d at 927. *Ratzlaf* was issued while Wynn's case was pending appeal. *Id.* Therefore, the *Ratzlaf* decision controlled the court in *Wynn*. *Id.* The court held that there was insufficient evidence to show that Wynn knew his act was illegal. *Id.* Therefore, his conviction was reversed. *Id.*

131. *Id.* at 928. The court concluded that, since Wynn's act was completely legal until 1987, the fact that he violated the anti-structuring law is insufficient to prove he had knowledge of the law. *Id.*

132. *Id.* at 929. The court, however, upheld the convictions for money laundering, transacting in criminally derived property, and conspiracy. *Id.*

133. 64 F.3d 126 (3d Cir. 1995).

134. *Id.* at 128-32. In *Hayden*, the defendant "was convicted of receiving a firearm while under a felony 'information,'" in violation of 18 U.S.C. § 922(n). *Id.* at 127. 18 U.S.C. § 924(a)(1)(D) provides the criminal penalty for violating § 922(n), making it a felony to willfully violate that section. *Id.* at 128 (citing 18 U.S.C. § 924(a)(1)(D) (1994)).

135. *Id.* at 128. This is significant because the court in *Hanlester* adopted the definition applied in *Ratzlaf* as if the *Ratzlaf* Court imposed a black letter definition of willfully. See *Hanlester Network v. Shalala*, 51 F.3d at 1390, 1400 (9th Cir. 1995) (citing *Ratzlaf* in concluding that the term knowingly and willfully requires knowledge of the law and intent to disobey that law). As the *Hayden* court pointed out, the *Ratzlaf* Court concluded that the interpretation of the word willfully requires knowledge of the law because of the specific wording of that statute. *Hayden*, 64 F.3d at 131; see also *United States v. Zehrbach*, 47

gress' intent.¹³⁶ Significantly, the court noted that Congress used the word knowingly in some provisions and the word willfully in another provision.¹³⁷ The court concluded that the use of the word willfully indicates a scienter requirement different from that required when the word knowingly is used.¹³⁸ The word knowingly generally is defined as requiring the defendant to understand the act.¹³⁹ Therefore, because the word knowingly and the word willfully are found in different provisions of the same statute, the term willfully means the prosecution must show that the defendant knew the conduct was illegal.¹⁴⁰

Other courts, such as the United States Court of Appeals for the Fourth Circuit in *United States v. Daughtry*,¹⁴¹ have distinguished *Ratzlaf* and held that the term knowingly and willfully does not require knowledge that the act is illegal.¹⁴² The *Daughtry* court held that, in the context of the false statements statute,¹⁴³ the word willfully does not require the defendant to have knowledge that the law is being violated.¹⁴⁴ The court noted that in this statute,¹⁴⁵ the word willfully relates to the false

F.3d 1252, 1262 (3d Cir.) (holding that the prosecution need not prove that the defendant knew the act was illegal in a case of bankruptcy fraud, noting that the *Ratzlaf* Court emphasized that its interpretation of the term willfully as requiring knowledge of the law was limited to the meaning of the particular statute before the Court), *cert. denied sub nom. Mervis v. United States*, 115 S. Ct. 1699 (1995).

136. *Hayden*, 64 F.3d at 129-30.

137. *Id.* at 130.

138. *Id.*

139. *Id.*

140. *Id.* This holding is consistent with the holding in *Hanlester*. See *Hanlester Network v. Shalala*, 51 F.3d 1390, 1400 (9th Cir. 1995) (ruling that the phrase knowingly and willfully requires that the defendant knew and intended to disobey the law). Because the anti-kickback provision requires the defendant to act knowingly *and* willfully, under the court's analysis in *Hayden*, willfully must mean that the defendant knows the law. See *Hayden*, 64 F.3d at 130; *United States v. Obiechie*, 38 F.3d 309, 315 (7th Cir. 1994) (concluding that the term willfully is distinct from the term knowingly because willfully requires knowledge of the law); *cf.* *United States v. Fierros*, 692 F.2d 1291, 1293 (9th Cir. 1982) (concluding that knowingly and willfully in a statute relating to harboring aliens does not require knowledge of the law; knowledge goes to the status of the alien and willfully goes to concealing aliens from detection), *cert. denied*, 462 U.S. 1120 (1983).

141. 48 F.3d 829 (4th Cir.), *cert. granted and judgment vacated on other grounds*, 116 S. Ct. 510 (1995).

142. See *id.* at 831 (noting that the language of the false statements statute can be distinguished from the language of the currency statute addressed in *Ratzlaf* because a defendant cannot make a false statement, as defined in the act, without an evil intent); see also *United States v. Hopkins*, 53 F.3d 533, 537-39 (2d Cir. 1995) (noting that the Clean Water Act requires that the defendant act knowingly, which is distinguishable from a requirement that he act willfully), *cert. denied*, 64 U.S.L.W. 3484 (1996).

143. 18 U.S.C. § 1001 (1994).

144. *Daughtry*, 48 F.3d at 831.

145. 18 U.S.C. § 1001 provides that:

[w]hoever . . . knowingly and willfully falsifies, conceals or covers up by any trick,

statement and not to the law that makes false statements illegal.¹⁴⁶ The court reasoned that the language of the false statement statute, in contrast to the language of the currency structuring statute examined in *Ratzlaf*, does not indicate that the statute can be violated only by knowing the law and intending to disregard it.¹⁴⁷ This distinction can be explained by using the "evil motive" analysis.¹⁴⁸ Unlike currency structuring, one cannot willfully make a false statement without an evil intent.¹⁴⁹ Therefore, there is no need for a mechanism to protect the inadvertent actor.¹⁵⁰

In *United States v. Hopkins*,¹⁵¹ the defendant was charged with violating the Clean Water Act,¹⁵² under which criminal liability is imposed

scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1994).

146. *Daughtry*, 48 F.3d at 831.

147. *Id.* The *Daughtry* court distinguished the false statement statute from the currency structuring statute by focusing on the word "purpose" found in the currency structuring statute. *Id.* It noted that in *Ratzlaf* the Court found that the combination of the word "purpose" and the word "willful" indicated that the meaning of "willful" required knowledge of the law. *Id.* In contrast, the false statement statute does not require that the defendant act purposely. *Id.* Therefore, the decision in *Ratzlaf* cannot be applied to this statute. *Id.*; see also *supra* note 135 (discussing the limitations of the *Ratzlaf* holding).

148. See *Daughtry*, 48 F.3d at 831 (citing *United States v. Curran*, 20 F.3d 560, 567-68 (3d Cir. 1994)) (distinguishing the requirements of the false statement statute and the requirements of the statute defining a principal in a crime, which requires an "evil intent"). In *Ratzlaf*, the Court noted that the act of currency restructuring could be committed without a bad purpose, such as for purposes of avoiding burglary or hiding your wealth from your wife. *Ratzlaf v. United States*, 114 S. Ct. 655, 661 (1994). In *Daughtry*, by contrast, the court notes that a person cannot willfully make a false statement without a bad purpose. *Daughtry*, 48 F.3d at 831. Therefore, proof of bad purpose is not necessary to convict a defendant of a violation of 18 U.S.C. § 1001. *Id.*

149. *Daughtry*, 48 F.3d at 831.

150. See *id.* (noting that § 1001 requires only that one act with knowledge that the statements were not true). Because a defendant must make a statement he knows to be false, there can be no inadvertent actor. *Id.* at 832. This outcome can be distinguished from statutes requiring knowledge of the law. For example, in *Ratzlaf*, the Court noted that a violation of the currency restructuring is not necessarily made with an evil intent. See *Ratzlaf*, 114 S. Ct. at 661 (listing two instances where the statute can be technically violated without evil intent on the part of the defendant, such as attempting to avoid the risk of being burglarized by making smaller deposits). Similarly, the anti-kickback provision may be technically violated without evil intent. See *Hanlester Network v. Shalala*, 51 F.3d 1390, 1401 (9th Cir. 1995) (noting that the management service agreement entered into by Hanlester and SKBL reflected common practices in the field, and there was no evidence that the appellants intended to violate the law; rather, the appellants believed their conduct was lawful).

151. 53 F.3d 533 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3484 (1996).

152. *Id.* at 534; see 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993) (setting forth the provisions of the Clean Water Act).

when one “knowingly violates” the Act.¹⁵³ In *Hopkins*, the trial court instructed the jury that the knowledge requirement meant only that the defendant must understand his conduct and that the defendant did not need to intend to violate the law or have specific knowledge of the statute or regulation to be convicted.¹⁵⁴ The court instructed further that the requirement of knowledge may be satisfied if the defendant “willfully or intentionally remained ignorant of relevant material facts.”¹⁵⁵ *Hopkins* appealed his conviction, arguing that the trial court should have instructed the jury that the prosecution must prove that he knew he was violating the law.¹⁵⁶

The Second Circuit confirmed the trial court’s instructions, holding that it need not be shown that the defendant knew the act was illegal.¹⁵⁷ The court reasoned that the substances the defendant used were “of the type that would alert any ordinary user to the likelihood of stringent regulation.”¹⁵⁸ The court distinguished the word knowingly from the word willfully, stating that the term willfully has been defined as requiring the defendant to be aware that he violated the law.¹⁵⁹ The court noted that in 1987, Congress amended § 1319(c)(2)(A) of the Clean Water Act, changing the term willfully to knowingly.¹⁶⁰ This provided compelling evidence that Congress intended to require only proof of knowledge of the act and not of the law.¹⁶¹

153. *Hopkins*, 53 F.3d at 537; see 33 U.S.C. § 1319(c)(2) (1988) (imposing liability for a violation of the Clean Water Act).

154. *Hopkins*, 53 F.3d at 536; see *infra* note 161 (discussing the public welfare offense doctrine).

155. *Hopkins*, 53 F.3d at 537.

156. *Id.*

157. *Id.* at 541.

158. *Id.* at 539. In this case, the defendant was the Vice President of a metal manufacturer that generated substantial wastewater. *Id.* at 534-35. He was charged with tampering with the wastewater testing and falsifying reports to the Department of Environmental Protection. *Id.* at 535. When dealing with hazardous wastes, the public welfare offense doctrine applies, which assumes that the defendant knew the area was regulated. See generally Cooney, *supra* note 14, at 41 (discussing the public welfare offense doctrine as it relates to environmental crimes).

159. *Hopkins*, 53 F.3d at 540 (citing *United States v. Murdock*, 290 U.S. 389, 396 (1933)).

160. *Id.*; see 33 U.S.C. § 1319(c)(2)(A) (1988 & Supp V 1993).

161. *Hopkins*, 53 F.3d at 540. This holding is consistent with the treatment of other environmental violations where courts have imposed what is referred to as “strict liability” under the public offense doctrine. See Cooney, *supra* note 14, at 41 (noting that in most prosecutions under the Resource Conservation and Recovery Act the government was not required to prove that the defendant knew the waste product was hazardous or that he needed a permit). “Strict liability” is actually a misnomer because there is a requirement that the defendant be conscious of his act. See *id.* at 45 (referring to the level of culpability as “a form of strict liability” and acknowledging that the government does have to prove some awareness by the defendant of his act, however slight that might be) (emphasis ad-

Whether the Supreme Court has provided certainty in the law with respect to the interpretation of the term knowingly and willfully is debatable;¹⁶² however, the Court has applied its analysis consistently.¹⁶³ Analyzing the language of the statute, legislative intent, and, if all other methods of interpretation fail, applying the rule of lenity will determine the requisite criminal state of mind.¹⁶⁴

ded). Because the acts receiving strict liability treatment are so invidious, however, it is assumed that the defendant had knowledge of his act and this knowledge need not be proved. *See id.* Thus, liability is referred to in terms of strict liability. *Id.* at 41 (referring to liability under the Resource Conservation and Recovery Act as "impos[ing] liability on what, for practical purposes, is a strict liability basis").

The public welfare offense doctrine assumes criminal liability when a reasonable person should know the conduct is subject "to stringent public regulation and may seriously threaten the community's health or safety." *Liparota v. United States*, 471 U.S. 419, 433 (1985); *see also* *United States v. Freed*, 401 U.S. 601, 609 (1971) (imposing criminal liability on a defendant possessing hand grenades, stating that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act"); *United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (holding a corporate officer criminally liable for shipping adulterated drugs even though the defendant may not have been conscious that his act was illegal). This doctrine imposes "strict liability" for violations which entail materials so obviously dangerous that it must be presumed that one is aware of the regulation. *See* Cooney, *supra* note 14, at 45 (citing *United States v. International Minerals and Chem. Corp.*, 402 U.S. 558, 565 (1971)) (noting that where dangerous or obnoxious waste materials are involved, it is assumed that the defendant was aware of the regulation); *cf. Liparota*, 471 U.S. at 433 (distinguishing food stamps from hand grenades or adulterated drugs and stating that the former do not fall under the public welfare offense doctrine).

Many environmental cases involving hazardous waste fall under the public welfare offense doctrine. *See* Cooney, *supra* note 14, at 41 (noting that courts have not required the government to show that the defendant knew the material was a hazardous waste product or that a permit was needed). More recent environmental legislation has been more ambiguous. *See id.* at 47. These regulations seem to depart from those traditionally falling under the public welfare offense doctrine and are more similar to tax law, which is interpreted to apply a more stringent standard on the prosecution. *See supra* notes 93-100 and accompanying text (discussing the interpretation of "willful" in tax law as requiring knowledge of the law). If the environmental regulations are interpreted as being as facially confusing as tax law, the courts may apply the tax law exception to these regulations as well. *See Ratzlaf v. United States*, 114 S. Ct. 655, 667 (1994) (Blackmun, J., dissenting) (noting that the definition of "willfully" as applied to tax law is considered an exception to the traditional rule that ignorance of the law is no excuse, and is applied because the tax laws are so complex).

162. *See* Cooney, *supra* note 14, at 46 (arguing that in *Liparota*, the Court did not provide the lower court with meaningful guidance for determining which crimes justified application of an exception to the rule that knowledge of the law is assumed).

163. *Id.* at 49-50 (interpreting the holdings in *Ratzlaf*, *Posters 'n' Things*, and *Staples* to show that the Supreme Court defers to Congress to change the "default setting on the mental element of a crime" and, absent action by Congress, the lower courts are not free to dispense with the normal showing of the mental state required for criminal liability).

164. *See supra* notes 81-83 and accompanying text (discussing the Court's statutory analysis).

C. Public Policy Considerations

The definition of the term knowingly and willfully has serious implications for a defendant, as it determines what the prosecution must prove,¹⁶⁵ as well as whether the defendant has any defenses.¹⁶⁶ If the court interprets these words as meaning one merely must be conscious of his act, then ignorance of the law is no excuse and the defendant can be held criminally liable even if he did not know of or intend to break the law.¹⁶⁷ Consequently, this standard reduces the prosecution's burden.¹⁶⁸

If the term knowingly and willfully is interpreted as meaning one must know he is violating the law, ignorance of the law is an excuse.¹⁶⁹ Even if the defendant knows and intends an act that violates the law, he cannot be convicted if it cannot be shown that he knew about the law.¹⁷⁰ This imposes a much greater burden on the prosecution.¹⁷¹ Additionally, under this definition mistake of law may be a defense.¹⁷² The defendant may claim that he believed that he complied with the law.¹⁷³ Because

165. Compare *United States v. Daughtry*, 48 F.3d 829, 831 (1995) (holding that the prosecution must prove only that there was an intentional act, not that there was an intentional violation of the law) with *Ratzlaf*, 114 S. Ct. at 663 (requiring the prosecution to prove that the defendant knew his legal duty).

166. See *Ratzlaf*, 114 S. Ct. at 663 (noting that ignorance of the law is no excuse unless Congress decrees otherwise); *United States v. Zehrbach*, 47 F.3d 1252, 1261 (3d Cir.) (noting that mistake of law is a complete defense when knowledge of the law is an element of the offense), *cert. denied sub nom. Mervis v. United States*, 115 S. Ct. 1699 (1995).

167. See *United States v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring) (stating that the ordinary intent requirement does not require knowledge that the act is illegal).

168. See *Ratzlaf*, 114 S. Ct. at 663 n.19 (acknowledging that requiring proof that the defendant knew the act violated the law imposes an increased burden on the prosecution).

169. See *id.* at 663 (holding that, for the currency structuring statute, Congress has mandated an exception to the rule that ignorance of the law is no excuse).

170. See *id.* (noting that the jury must find that the defendant knew his conduct was unlawful to convict under the currency structuring statute).

171. See *Cheek v. United States*, 498 U.S. 192, 201-02 (1991) (commenting that the burden of proving that the defendant knows the law requires "negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the . . . law[]"). In *Cheek*, the court held that a defendant's good-faith belief that he was not violating the law does not have to be reasonable, *id.* at 203, exemplifying the heavy burden on the prosecution. Cf. *Liparota v. United States*, 471 U.S. 419, 433-34 (1985) (requiring the prosecution to prove the defendant knew the law does not put an onerous burden on the government). Unlike *Cheek*, the *Liparota* Court held that the prosecution does not need to show that the defendant knew of a specific regulation. *Liparota*, 471 U.S. at 434. Rather, circumstantial evidence may be used to show that the defendant knew the act was illegal. *Id.*; see *Rockelli*, *supra* note 54, at 553 (noting that because of the uncertainty over what conduct is prohibited under the anti-kickback provision, requiring knowledge of the law poses "a high hurdle for the government to clear").

172. See *supra* note 74 (discussing mistake of law as a defense).

173. See *Tully & Hooper*, *supra* note 16, at 849 (noting that a good faith belief that

ignorance or mistake of law is the exception rather than the rule, Congress should indicate whether this exception should apply to the anti-kickback provision.¹⁷⁴

A second policy consideration is determining the balance between the desire to prevent fraud and abuse in the Medicare system¹⁷⁵ and the need to protect individuals from severe punishment for a crime committed inadvertently.¹⁷⁶ In 1977, Congress recognized that penalizing a violation of the anti-kickback provision as a misdemeanor did not work as a sufficient deterrent for fraud.¹⁷⁷ Therefore, Congress amended the statute to make violations punishable as a felony.¹⁷⁸ Because the statute remains unclear, and what constitutes a violation remains uncertain,¹⁷⁹ a person may be convicted of a felony for a crime the person did not understand he committed.¹⁸⁰ Characterization of the crime as a felony, coupled with a requirement that the prosecution prove that the defendant knew he violated the law, may establish the proper balance to ensure the abatement of fraud while protecting the individual.¹⁸¹

one's conduct was not unlawful is a full defense under the anti-kickback provision, regardless of whether the belief is reasonable); *supra* notes 72-75 and accompanying text (discussing mistake of law).

174. See *Ratzlaf*, 114 S. Ct. at 663 (stating that ignorance of the law is no defense to a criminal charge unless otherwise decreed by Congress).

175. See *supra* notes 5-7 and accompanying text (discussing the problem of fraud and abuse related to Medicare).

176. See *Staples v. United States*, 114 S. Ct. 1793, 1802 (1994) (noting that the statutory penalty is considered for purposes of determining whether to dispense with a mens rea requirement in a statute without an explicit mens rea). The Court in *Staples* refused to dispense with a mens rea requirement for a crime that was punishable as a felony. *Id.*; see also *Ratzlaf*, 114 S. Ct. at 660-61 (finding it reasonable to require the prosecution to prove knowledge of the law because currency structuring can be committed inadvertently); Michael L. Travers, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1320 (1995) (noting that a citizen should not be punished unless fair warning is given of what the law intends).

177. See *supra* note 32 (discussing Congress' concern that misdemeanor penalties were insufficient to deter fraud and abuse).

178. See *supra* notes 29-40 and accompanying text (discussing the amendments to the anti-kickback provision).

179. See *supra* note 54 (discussing the courts' attempts to clarify the ambiguities of the anti-kickback provision).

180. Conversely, the ambiguities in the statute may make it unenforceable, thus defeating its purpose of preventing fraud. See *Rockelli*, *supra* note 40, at 190 (noting that the Department of Health and Human Services has enforced the anti-fraud statute less aggressively because of the law's ambiguity).

181. The 8th Amendment of the Constitution prohibits excessive punishment. U.S. CONST. amend. VIII. Stated differently, punishment must be proportionate to the defendant's culpability. *Alexander v. United States*, 113 S. Ct. 2766, 2784 (1993); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2730 (1993); *Solem v. Helm*, 463 U.S. 277, 284-85 (1983). If the prosecution had a reduced burden of proof, they "undoubtedly would obtain more convictions and bring more charges under the statutes given the in-

A final consideration is the due process requirement of notice.¹⁸² It is well settled that a citizen must have fair warning of what constitutes illegal conduct.¹⁸³ Because the anti-kickback provision is so ambiguous, society arguably is not on notice as to what conduct the law prohibits.¹⁸⁴ Requiring knowledge of the law and an intent to disobey the law ensures that a defendant who lacked fair warning of the prohibited conduct is not held criminally liable in violation of due process.¹⁸⁵

III. THE HANLESTER DECISION—IGNORANCE OF THE LAW IS AN EXCUSE

In *Hanlester Network v. Shalala*,¹⁸⁶ the Ninth Circuit interpreted the term knowingly and willfully to require knowledge of a violation of the law for purposes of the anti-kickback provision of the Social Security Act.¹⁸⁷ The court, however, did not provide a detailed analysis leading to its conclusion.¹⁸⁸

The court in *Hanlester* acknowledged the hierarchical analysis the

creased likelihood of success on the merits of their cases." James Morsch, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivations*, 82 J. CRIM. L. & CRIMINOLOGY 659, 674 (1991). Therefore, increasing the mens rea requirement to knowledge of the law would reduce the number of convictions, but when the prosecutor does meet his burden, the defendant will be convicted of a felony and punished accordingly.

182. A criminal statute must be sufficiently definite in order to give notice of the prohibited conduct. *Lambert v. California*, 355 U.S. 225, 228 (1957); *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); see also *Travers*, *supra* note 176, at 1320-22 (noting that a presumption that every person knows the law in a time when the law is complex and unclear does not provide due process of law).

183. *Lambert*, 355 U.S. at 228 ("Engrained in our concept of due process is the requirement of notice."); see also *Simonoff*, *supra* note 18, at 411-12 (noting that the notion of fair warning is well grounded in the Constitution).

184. This argument was posed by the appellants in *Hanlester*. *Hanlester Network v. Shalala*, 51 F.3d 1390, 1397 (9th Cir. 1995). The court rejected the argument, stating that the scienter requirement mitigates any vagueness. *Id.* at 1397-98; see also *United States v. Neufeld*, 908 F. Supp. 491, 497 (S.D. Ohio 1995) (noting that the requirement that a violation of the anti-kickback provision be willful "eviscerates any claim of vagueness").

185. The concept of fair warning is tied to the concept of lenity, because a defendant should not be criminally liable for something he did not understand to be illegal. *Ratzlaf v. United States*, 114 S. Ct. at 655, 663 (1994). Therefore, any ambiguity should be decided in favor of the defendant, and interpreting knowingly and willfully as requiring knowledge of the law is an interpretation favorable to the defendant. *Id.*

186. 51 F.3d 1390 (9th Cir. 1995).

187. *Id.* at 1400; see *supra* note 11 (providing the language of the anti-kickback statute).

188. See *Hanlester*, 51 F.3d at 1400 (concluding that, consistent with the interpretations in *Pomponio* and *Ratzlaf*, knowingly and willfully should be defined as requiring the defendant to have the "specific intent to disobey the law").

Supreme Court employs for statutory interpretation.¹⁸⁹ It did not discuss this analysis, however, when it determined the definition of the term knowingly and willfully.¹⁹⁰ Instead, the court applied that analysis to a different issue—whether the term “in return for” required proof of an agreement.¹⁹¹ When the court turned to the issue of whether the scienter requirement should be interpreted as requiring knowledge of the law or merely knowledge of the act, it simply cited cases that defined the term knowingly and willfully as requiring knowledge of the law and concluded that knowledge of the law is required.¹⁹² The cases cited, however, do not suggest that the definition of the term willfully applied in those instances is a general definition to be applied in all situations.¹⁹³ To the contrary, those opinions note that “willfully is a word of many meanings”¹⁹⁴ and that each individual statute should be interpreted in context.¹⁹⁵ To construe these holdings as defining the word in general is

189. See *id.* at 1397 (stating that when a court interprets a statute it first should look to the statutory language, then look to the legislative history, and finally employ the rule of lenity).

190. See *id.* at 1399-1400 (interpreting the scienter requirement for the anti-kickback provision with little analysis of the statute itself).

191. *Id.* 42 U.S.C. § 1320a-7b(b)(1)(A) requires that remuneration be “in return for” referrals. 42 U.S.C. § 1320a-7b(b)(1)(A) (1988); see *supra* note 11 (providing the language of the statute). The appellants claimed that the language “in return for” suggests quid pro quo and requires a contract. *Hanlester*, 51 F.3d at 1396-97. The court looked to the language of the statute and the legislative history and concluded that an agreement is not required for a violation of the anti-kickback provision. *Id.* at 1397.

192. *Id.* at 1399-1400. The *Hanlester* court cited three cases to support its discussion of the scienter requirement: *Ratzlaf v. United States*, 114 S. Ct. 655, 657 (1994) (stating that to prove willfulness the government must prove the defendant knew his conduct was unlawful); *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (*per curiam*) (defining the term willfully as “a voluntary, intentional violation of a known legal duty”); *United States v. Dahlstrom*, 713 F.2d 1423, 1427 (9th Cir. 1983) (holding that the word willfully requires proof of specific intent to do what the law forbids), *cert. denied*, 466 U.S. 980 (1984).

193. See *Ratzlaf*, 114 S. Ct. at 657 (defining willfully, as used in the currency structuring statute, as requiring the prosecution to prove that the defendant knew his conduct was unlawful); *Dahlstrom*, 713 F.2d at 1427 (noting that willfully, as used in tax law, requires proof of a specific intent to do an act which violates the law).

194. *Spies v. United States*, 317 U.S. 492, 497 (1943); see also *Ratzlaf*, 114 S. Ct. at 659; *Pomponio*, 429 U.S. at 12 (noting that *in the context of tax law*, willfully means a “voluntary, intentional violation of a known legal duty,” inferring that the term has other meanings for other contexts); *Dahlstrom*, 713 F.2d at 1427 (stating that the Supreme Court has defined the term willfully *for purposes of the tax law* to require knowledge of the law).

195. See *Ratzlaf*, 114 S. Ct. at 659 (recognizing that the construction of “willful” is “often . . . influenced by its context”) (quoting *Spies*, 317 U.S. at 497); *Dahlstrom*, 713 F.2d at 1427 (stating that “[t]he Supreme Court has defined the term ‘willfully’ *under section 7206* to mean a ‘voluntary intentional violation of a known legal duty’”) (emphasis added).

missing the crux of the opinions.¹⁹⁶ In each case *Hanlester* cites, the court painstakingly executed its analysis to determine the meaning of willful in that particular context,¹⁹⁷ and did not provide a mandatory definition for the word.¹⁹⁸ Rather, the courts provided guidance on how to analyze a statute to determine the most appropriate definition.¹⁹⁹ Despite *Hanlester's* inadequate analysis, its conclusion is consistent with the holdings of the Supreme Court.²⁰⁰

A. Legal Analysis of the Hanlester Decision

1. The Language of the Anti-kickback Provision

Had the *Hanlester* court applied the analysis used in the cases it cited, it first would have looked to the language of the statute.²⁰¹ In looking at the language of the anti-kickback provision,²⁰² the statutory meaning of the term knowingly and willfully is ambiguous; it does not have explicit language that dictates that the defendant must know the law, as did the statute at issue in *Ratzlaf v. United States*.²⁰³ In *Ratzlaf*, the Court fo-

196. See *Ratzlaf*, 114 S. Ct. at 660 (stating that *on occasion* willfulness has been interpreted to require proof of a known legal duty).

197. *Id.* at 662-63 (discussing the language of the statute, the legislative history, and the rule of lenity); see also Travers, *supra* note 176, at 1311 (stating that the Court in *Ratzlaf* "took great pains to indicate that it was not creating a universal new definition of willfulness").

198. See *Ratzlaf*, 114 S. Ct. at 663 (noting that while the general rule is that ignorance of the law is no excuse, Congress may decree otherwise, which is what they have done with respect to 31 U.S.C. § 5322(a)).

199. See *id.* at 659-63 (explaining the analysis used in statutory construction).

200. See *supra* note 54 (discussing the appropriateness of requiring knowledge of the law in ambiguous statutes to prevent the criminalization of apparently innocent conduct, and noting that the anti-kickback provision is ambiguous); *supra* note 140 (noting that the use of both knowingly and willfully in the anti-kickback provision is evidence that Congress intended that the prosecution prove more than mere knowledge of the act); *supra* note 150 (noting that the anti-kickback provision may be violated without evil motive, thus necessitating a requirement that the defendant know the law and intend to violate it in order to prevent punishment of the inadvertent actor).

201. *Ratzlaf*, 114 S. Ct. at 662 (noting that the Court need not look to legislative history to interpret the meaning of a statute if the language of the statute is clear).

202. See *supra* note 11 (providing the language of the anti-kickback statute, 42 U.S.C. § 1320a-7b(b)) (1988 & Supp. V 1993)).

203. That the anti-kickback provision is ambiguous is evidenced by the amount of litigation related to interpreting the statute. See *supra* note 54 (summarizing case law interpreting the statute). Additionally, the Stark laws, also criticized for being ambiguous, were an effort to clarify what conduct was illegal. See *supra* note 38 (discussing the purpose of the Stark laws). The *Hanlester* opinion primarily was focused on interpreting the statute. See *Hanlester Network v. Shalala*, 51 F.3d 1390, 1397-1400 (9th Cir. 1995) (interpreting the terms "in return for," "remuneration," "induce," and "knowingly and willfully").

cused on the word "purpose" in § 5324 and "willful" in § 5322.²⁰⁴ The Court concluded that the statute requires both knowledge of the reporting requirement and knowledge of the duty not to avoid triggering the report.²⁰⁵ Noting that currency structuring is not "inevitably nefarious," the Court found that the language of the statute clearly requires that the defendant knew that he violated the law.²⁰⁶

While there is no language in the anti-kickback provision defining the meaning of the term knowingly and willfully, the language clearly indicates a heightened mens rea in this statute compared with others.²⁰⁷ The statutes analyzed above contain a mens rea requirement of knowingly *or* willfully, but not both.²⁰⁸ Congress used the phrase knowingly *and* willfully rather than the merely the word knowingly *or* the word willfully individually or no explicit mens rea requirement at all in the anti-kickback provision, which may have led the *Hanlester* court to conclude that the government had a heightened burden of proof.²⁰⁹ The term knowingly generally requires knowledge of the act.²¹⁰ Therefore, it is logical that the use of the words knowingly and willfully together require both knowledge of the act and knowledge of the law.²¹¹

2. *The Legislative History—Evidence Of Congress' Intent to Require Knowledge of the Law*

With ambiguous statutory language, the court next will review the congressional intent.²¹² In reviewing Congress' intent in enacting the anti-

204. *Ratzlaf*, 114 S. Ct. at 660 (noting that the statute "requires proof that the defendant acted with the purpose to evade the reporting requirement of Section 5313(a)").

205. *Id.* at 662.

206. *Id.*

207. *See supra* note 11 (providing the language of the anti-kickback provision); *see also supra* notes 133-40 and accompanying text (discussing *Hayden* and the conclusion that the use of knowingly *and* willfully suggests that willfully requires more than mere knowledge of the act).

208. *See, e.g., Ratzlaf*, 114 S. Ct. at 657 (addressing the definition of willfully); *Liparota v. United States*, 471 U.S. 419, 420 (1985) (interpreting the term knowingly); *Spies v. United States*, 317 U.S. 492, 494 (1943) (determining the meaning of willfully).

209. *See United States v. Hayden*, 64 F.3d 126, 130 (3d. Cir. 1995) (noting that Congress' use of both the word knowingly and the word willfully indicates that willfully has a scienter requirement distinct from that required by knowingly).

210. *See supra* notes 44-45 and accompanying text (discussing the general definition of knowingly).

211. *See Hayden*, 64 F.3d at 130 (concluding that, because the statutory language contains both knowingly and willfully, willfully means the defendant must have known that his conduct was illegal); *United States v. Obiechie*, 38 F.3d 309, 315 (7th Cir. 1994) (concluding that "the only reasonable distinction between . . . [the] 'knowingly' and 'willfully' standards is that the latter requires knowledge of the law").

212. *See supra* note 82 (discussing the use of legislative history).

kickback provision, however, the legislative history provides little guidance.²¹³ Congress apparently was concerned with protecting the inadvertent actor.²¹⁴ It remains unclear, however, whether it is the commission of the act or the violation of the law that must be inadvertent to be protected from criminal liability.²¹⁵

That Congress added the term knowingly and willfully to the statute²¹⁶ is some evidence that its intent was to require knowledge of the law.²¹⁷ This theory is especially compelling with respect to § 1320a-7b(b)(2), the section of the anti-kickback provision which involves the offering of remunerations to induce a person to refer a Medicare patient.²¹⁸ To “induce” means to “influence . . . an act or course of conduct.”²¹⁹ This term implicitly suggests some knowledge of the act or some purpose.²²⁰ It can be inferred, as the Court in *Ratzlaf* did in examining the words purpose and willful, that the combination of the word induce with the words knowingly and willfully requires more than knowledge of the act.²²¹ Section 1320a-7b(b)(1), regarding the receipt of remunerations in exchange for referrals, does not contain language such as the word induce.²²² However, the meaning of the word willfully will be the same in this provision as it is in § 1320a-7b(b)(2), regarding the offering of remunerations in exchange for referrals, because “[a] term appearing in several places in a statutory text is generally read the same way each time it appears.”²²³

213. See Miller, *supra* note 13, at 2-3 (noting that the legislative history does not make it clear whether the defendant must intend the conduct or must intend to violate the law); *infra* note 214 (providing the comments of the committee reviewing the Act).

214. See H.R. REP. NO. 1167., 96th Cong., 2d Sess. 59 (1980), reprinted in 1980 U.S.C.A.N. 5526, 5572 (stating that “[t]he Committee is concerned that criminal penalties may be imposed under current law to an individual whose conduct, while improper, was inadvertent”).

215. Miller, *supra* note 13, at 2-3.

216. See Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499 § 917, 94 Stat. 2599, 2625 (codified as amended at 42 U.S.C. § 1320a-7b(b) (1988 & Supp. V 1993)) (adding the requirement that the defendant act knowingly and willfully).

217. See *supra* note 211 (discussing the inclusion of both knowingly and willfully as evidence of a requirement that the defendant must know the law).

218. 42 U.S.C. § 1320a-7b(b)(2) (1988).

219. BLACK'S LAW DICTIONARY 775 (6th ed. 1990).

220. See *supra* notes 118-21 and accompanying text (discussing the Court's analysis of the words purpose and willful); cf. *Ratzlaf*, 114 S. Ct. 655, 660 (1994) (looking at the word purpose coupled with the word willful to conclude that willful means that the defendant must have knowledge of the law).

221. See *Ratzlaf*, 114 S. Ct. at 663 (noting that Congress has explicitly departed from the general rule that ignorance of the law is no excuse with respect to the anti-structuring statute).

222. See *supra* note 11 (providing the language of § 1320a-7(b)(1)).

223. *Ratzlaf*, 114 S. Ct. at 660 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992)); see *supra* note 11 (providing the language of § 1320a-7b(b)(1) and (2)).

There is an argument that the *act* of soliciting or offering the kickback must be knowingly and willfully, rather than the *violation of the law* that makes it illegal to solicit or offer a kickback.²²⁴ As the court found in *Daughtry*, the language of the statute does not indicate that the law is violated only if the defendant knew the law and intended to disregard it.²²⁵ In *Daughtry*, the court found that the statute was violated when the defendant knew he made a false statement, and there is no requirement that the prosecution show that the defendant knew that making a false statement violated the law.²²⁶ Because certain business arrangements are not illegal, however, it is arguable that one may violate the anti-kickback provision inadvertently, or without an "evil motive."²²⁷ This proposition rebuts the argument that one need not know the law to be convicted of the offense, as that interpretation is applicable when the statute cannot be violated without evil motive.²²⁸

3. *The Rule of Lenity*

There are compelling arguments to conclude that the legislative history shows that "knowingly and willfully" requires knowledge of the law in the anti-kickback statute.²²⁹ Thus, the analysis may end.²³⁰ Traditionally, however, courts apply the rule of lenity if the legislative history is ambiguous.²³¹ Because there is some ambiguity in the legislative history of the anti-kickback provision, the court may apply the rule of lenity. The rule of lenity prescribes that ambiguity must be decided in favor of the defendant.²³² Therefore, as in *Liparota*, a court, when analyzing the anti-

224. This is analogous to the argument the government made in *Ratzlaf*. 114 S. Ct. at 660. There, the government argued that it was sufficient that the defendant knew there was a reporting requirement and intended to circumvent the requirement. *Id.* The Court rejected that argument because it could result in the criminalization of innocent conduct. *Id.*

225. See *United States v. Daughtry*, 48 F.3d 829, 831 (4th Cir.) (recognizing that knowledge of the law is not required for a violation of the false statement statute), *cert. granted and judgment vacated on other grounds*, 116 S. Ct. 510 (1995); see also *supra* notes 141-50 and accompanying text (discussing the case).

226. *Daughtry*, 48 F.3d at 831.

227. See *supra* note 54 (discussing the ambiguity in the law and the risk of inadvertent conduct being criminalized).

228. See *supra* note 54 (discussing the difficulty that courts have had with determining whether seemingly legitimate business transactions constitute kickbacks).

229. See *supra* notes 212-28 and accompanying text (discussing the legislative history of the statute).

230. See *Staples v. United States*, 114 S. Ct. 1793, 1804 n.17 (1994) (stating that the rule of lenity is applied only when the court has looked to all other sources of interpretation and the statute remains ambiguous).

231. See *supra* note 83 (discussing the application of the rule of lenity).

232. See *supra* note 83 (discussing the rule of lenity).

kickback provision, should interpret the term knowingly and willfully to mean the defendant must know he is violating the law.²³³

The court is limited in its ability to interpret statutes, and it will not impute an unjustified meaning to a statute.²³⁴ As stated above, the language of the anti-kickback provision and its legislative history suggested to the court that Congress' intent was to require a showing of knowledge of the law.²³⁵ Additionally, the application of the rule of lenity would also have required the court to hold that a showing of knowledge of the law is required.²³⁶ Therefore, if Congress disagrees with the Ninth Circuit's interpretation of the anti-kickback provision, it must take legislative action.²³⁷

4. *The Inapplicability of the Public Welfare Offense Doctrine*

The anti-kickback provision is not the type of statute that would fall under the public welfare offense doctrine.²³⁸ The public welfare offense doctrine, which creates virtually strict liability, typically is applied to conduct which imposes a danger to the health and safety of the community.²³⁹ The Court applies the doctrine when a reasonable person should know that the conduct is subject to stringent public regulation and is a threat to the health or safety of the community.²⁴⁰ Because it is unclear what business arrangements may be legal or illegal under the anti-kickback provision, a reasonable person would not know that the particular

233. See *Liparota v. United States*, 471 U.S. 419, 433 (1985).

234. The Court must effectuate the express intent of Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). If the intent is not express, it must interpret the statute to reflect a permissible construction of the statute. *Id.*; see also *Farrar v. Hobby*, 113 S. Ct. 566, 577 (1992) (O'Connor, J., concurring) (stating that "[w]hen construing a statute, this Court is bound by the choices Congress has made, not the choices we might wish it had made").

235. See *supra* text accompanying notes 201-28 (analyzing the statutory language and legislative history with respect to the anti-kickback provision).

236. See *supra* text accompanying notes 229-33 (discussing the application of the rule of lenity to the anti-kickback provision).

237. *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1455 (1995) (noting that, while the legislature cannot change a decision of the court once made, it can affect future decisions by amending the legislation); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 714-15 (1978) (Rehnquist, J., dissenting) (stating that Congress is free to correct the Court's mistakes in statutory construction through legislative action).

238. The public welfare offense doctrine applies to crimes that are so inherently wrong it is assumed that the defendant knew the act was regulated. See *supra* note 161 (discussing in greater detail the public welfare offense doctrine).

239. See *supra* note 161 (discussing the application of the public welfare offense doctrine to conduct involving hand grenades, drugs, and hazardous waste and noting the inapplicability of the doctrine to fraudulent conduct involving food stamps).

240. See *Liparota v. United States*, 471 U.S. 419, 433 (1985) (rejecting application of the public welfare offense doctrine to the statute regulating food stamps).

conduct is regulated.²⁴¹ Additionally, the primary conduct prohibited by the act relates to the draining of federal funding from the system.²⁴² Because this activity relates to conduct with an economic impact and not health, welfare, and safety, courts should not interpret the anti-kickback provision as imposing strict liability.

B. Public Policy Dictates a Conclusion Consistent With Hanlester

When the term knowingly and willfully is interpreted to require knowledge of the law, ignorance of the law is an excuse, or a defense, for an otherwise guilty defendant.²⁴³ This ignorance can operate as an excuse for violating the law as long as one had a good-faith belief that he was acting within the bounds of the law.²⁴⁴ Knowledge of the law may be difficult for the prosecution to prove.²⁴⁵ Additionally, by requiring a showing of knowledge of the law, health care professionals are granted a favorable standard of proof, because the statute, as applied to joint ventures, generally affects referring physicians.²⁴⁶ The idea of granting this defense to a professional, knowledgeable in the regulated field, should be

241. See Androphy, *supra* note 3, at 39 (noting that to date, there are few cases interpreting safe harbors); Morgan R. Baumgartner, Note, *Physician Self-Referral and Joint Ventures Prohibitions: Necessary Shield Against Abusive Practices or Over Regulation?*, 19 J. CORP. L. 313, 324 (1994) (noting that it is difficult to distinguish between fraudulent business practices and legitimate relationships); Puryear, *supra* note 8, at 308 (noting that whether a joint venture violates the anti-fraud statute is not entirely predictable, since there are some ventures that are not protected by regulatory "safe harbors," but do not necessarily violate the anti-fraud statute).

242. See *supra* note 31 (discussing the amendment to the Social Security Act in response to the problem of increased fraudulent activity).

243. See *Ratzlaf v. United States*, 114 S. Ct. 655, 664 (1994) (Blackmun, J., dissenting) (arguing that the majority's holding that "willfulness" requires knowledge of the law negates the general rule that ignorance and mistake of law is no excuse); *United States v. Zehrbach*, 47 F.3d 1252, 1261 (3d Cir. 1995) (noting that when knowledge of illegality is an element of a crime, mistake of law is a complete defense), *cert. denied sub nom. Mervis v. United States*, 115 S. Ct. 1699 (1995); *supra* note 72 (noting that negating the mental state because of mistake is similar in concept to the prosecution's inability to prove the mental state).

244. See *Cheek v. United States*, 498 U.S. 192, 203 (1991) (stating that a good faith belief, even an unreasonable one, is sufficient to negate the willfulness requirement).

245. See *Ratzlaf*, 114 S. Ct. at 669-70 (Blackmun, J., dissenting) (arguing that requiring proof of knowledge of the law will make the prosecution's task difficult or impossible in most cases). However, it is not impossible to persuade a jury that the defendant knew of his legal duty. See *id.* at 663 n.19 (noting that a jury may find the requisite knowledge on the part of the defendant by drawing inferences from circumstantial evidence).

246. Due to the nature of the statute, offenders are likely to be health care professionals, possibly physicians. See 42 U.S.C. § 1320a-7b(b) (1988 & Supp. V 1993) (regulating the referral of patients receiving benefits from Medicare or state health care programs). Physicians are not only well-educated, but they are specialists in the field regulated by the statute. Merely because someone is well-educated or professionally involved in the regulated area does not mean he should be assumed to know the law. The jury may consider these

contrasted with laws where ignorance of the law is no defense.²⁴⁷

For example, in New York City, it is a traffic violation to make a right turn at a red light.²⁴⁸ If a California resident is driving in New York City, he will be guilty of such a violation, regardless of whether he knew the law existed.²⁴⁹ In contrast, under the *Hanlester* interpretation of the anti-kickback provision, one would not be guilty of a violation if he did not know the law.²⁵⁰ While this may appear unjust, there is a fundamental and significant distinction between the two circumstances.

Applying the analysis used in tax law,²⁵¹ the difference between the right on red and the kickback is that if one were to read the New York ordinance, that person clearly would understand the law.²⁵² Conversely, if one were to read the anti-kickback provision, he rightfully would be confused as to what conduct was prohibited.²⁵³ Though it may seem unjust to hold an innocently ignorant lay person guilty of an offense of which he had no knowledge, while excusing an educated professional, the focus is not on the educational level of the violator. Rather, the responsibility of learning the law is placed on every citizen.²⁵⁴ If a person at-

factors, however, in determining whether the defendant actually did know the law. See *Ratzlaf*, 114 S. Ct. at 663 n.19.

247. Unless there is an exception, ignorance of the law is no excuse for a statutory violation. *Ratzlaf*, 114 S. Ct. at 663; *Cheek*, 498 U.S. at 199.

248. N.Y. VEH. & TRAF. LAW § 1111(d)(2)(a) (McKinney 1994).

(2) *Except in a city having a population of one million or more*, unless a sign is in place prohibiting such turn:

(a) Traffic facing a steady circular red signal may cautiously enter the intersection to make a right turn after stopping as required by paragraph one of this subdivision, except that right turning traffic is not required to stop when a steady right green arrow signal is shown at the same time.

Id. (emphasis added).

249. See *United States v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring) (noting that "ignorance of the law is no excuse" means that the defendant does not have to know the law to be blameworthy).

250. *Hanlester Network v. Shalala*, 51 F.3d 1390, 1400 (9th Cir. 1995).

251. See *supra* notes 93-102 and accompanying text (discussing the rule carved out in cases involving tax law).

252. See *supra* note 248 (providing the text of N.Y. VEH. & TRAF. LAW § 1111 (d)(2)(a) (McKinney 1994)); see also *United States v. Liddy*, 397 F. Supp. 947, 954 (D.D.C. 1975) (stating that "ignorance of the law is no excuse" and that one may be liable for a violation of the law whether or not he has seen the statute), *aff'd*, 530 F.2d 1094 (D.C. Cir.), *cert. denied*, 426 U.S. 937 (1976).

253. See Baumgartner, *supra* note 241, at 324 (noting that a liberal interpretation of the "anti-fraud statutes could cover many business arrangements such as physician incentive programs, physician and hospital joint ventures, physician recruitment programs, and other such arrangements that are natural responses to the constant changes in the health care industry").

254. *United States v. R.L.C.*, 503 U.S. 291, 311-12 (1992) (Thomas, J., concurring); *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925).

tempts to learn the law, but could not understand it, that person may be excused.²⁵⁵

Without the proposition that every person is presumed to know the law, it would be an affirmative defense to argue that the defendant is not guilty because he never researched the law.²⁵⁶ Understandably it is difficult to sympathize with a lawyer or police officer who claims he did not know that a right turn on red is prohibited in New York City because he is not from the area. Yet it remains a different issue whether society should excuse an illiterate person who does not have the educational tools to research the law. Because it is impossible to know where to draw the line, the courts have required society to learn the law.²⁵⁷ Only when one attempts to learn the law and still does not understand it do the courts make an exception.²⁵⁸

If limited to those crimes not “inherently evil,”²⁵⁹ the interpretation of “knowingly and willfully” as requiring knowledge of the law can be viewed as providing protection to those who did not know, and arguably should not have known, that their conduct was illegal.²⁶⁰ This analysis comports with the framework of the American judicial system, which favors the defendant in instances of ambiguity.²⁶¹

255. See *Cheek v. United States*, 498 U.S. 192, 200 (1991) (carving out an exception to the general notion that all citizens are presumed to know the law in the case of tax law because it is so confusing).

256. See *United States v. Baker*, 63 F.3d 1478, 1491 (9th Cir. 1995) (noting that there are two exceptions to the assumption that every person knows the law: an independent misunderstanding of a legal condition, such as the defendant mistakenly thinking he was buying a gun from a person who was selling it legally, and complex regulatory schemes), *cert. denied*, 133 L. Ed. 2d 767 (1996).

257. See *Cheek*, 498 U.S. at 199 (noting that generally everyone is presumed to know the law); *Ratzlaf v. United States*, 114 S. Ct. 655, 663 (1994) (noting that ignorance of the law is not a defense to a criminal charge unless Congress decrees otherwise).

258. See *Cheek*, 498 U.S. at 199-200 (recognizing an exception for tax law to the common law rule that everyone knows the law because tax law is difficult for the average person to understand); *Baker*, 63 F.3d at 1491 (noting an exception to the general rule that ignorance of the law is no excuse when the statute is complex).

259. It has been stated that “willfulness” requires some evil motive. See *Spies v. United States*, 317 U.S. 492, 498 (1943); *United States v. Murdock*, 290 U.S. 389, 395 (1933) (noting that an evil motive is an element of the crime of willfully failing to pay taxes). Further, a defendant should not be convicted of crimes that are not inherently evil if he did not know the law. *Ratzlaf*, 114 S. Ct. at 660-61.

260. Because it is unclear which business ventures are legal and which are not, a defendant may violate the anti-kickback provision inadvertently, with no evil motive. See *Rockelli*, *supra* note 54, at 553 (noting that “the anti-kickback statute covers conduct that is not inherently bad”) (quoting Sanford Teplitzky). With a statute so ambiguous, it would be unfair to hold a defendant criminally liable if he did not know the law. See generally *Baumgartner*, *supra* note 241 (discussing the difficulty in determining which conduct is prohibited and which is legal).

261. See *supra* note 83 and accompanying text (discussing the rule of lenity).

C. *The Effect of Hanlester on The Health Care Industry*

It is unclear how courts will interpret a particular financial relationship under the anti-kickback provision because the statute is not clear as to what activities are permitted.²⁶² This lack of clarity, along with the statute's various exceptions, creates uncertainty regarding which business relationships remain legal and which result in illegal "kickbacks."²⁶³ This uncertainty obstructs the development of integrated health care facilities.²⁶⁴ Some courts have held that a physician who receives financial gain for Medicare referrals has committed a violation, even if the physician has other reasons for referral.²⁶⁵ The Health Care Financing Administration interprets the provision more narrowly, finding that whether the transaction is a violation depends upon whether the return on investment is contingent upon the number of referrals provided.²⁶⁶ *Hanlester*, the first case where the anti-kickback provision was applied to limited partnerships,²⁶⁷ demonstrates that many existing physician-owned ventures, even limited partnerships, may violate the anti-fraud statutes.²⁶⁸ This not only creates uncertainty, but also inhibits physicians in need of capital from obtaining a partner or entering into a joint venture for fear of violating the law.²⁶⁹

262. See Baumgartner, *supra* note 241, at 324 (noting that a liberal interpretation of the statute could result in including as illegal business ventures incentive programs, joint ventures, recruitment programs, and other arrangements that have developed as a result of changes in the health care industry); see also *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989) (concluding that payments received for referrals to medical labs were illegal under the statute even if the referral was made for reasons other than financial gain); *United States v. Greber*, 760 F.2d 68, 72 (3d Cir.) (concluding that compensation for services can be illegal under the anti-kickback statute if the defendant intended the payments to induce referrals), *cert. denied*, 474 U.S. 988 (1985).

263. See Rockelli, *supra* note 54, at 553 (noting the uncertainty in the anti-kickback provision).

264. Woodhall, *supra* note 31, at 190.

265. *Kats*, 871 F.2d at 108; *Greber*, 760 F.2d at 72; see also Farley, *supra* note 9, at 172 (noting that courts have interpreted the anti-fraud statute broadly).

266. Baumgartner, *supra* note 241, at 325.

267. *Id.*; see *Hanlester Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995) (finding that actions of general partnerships, individuals, and joint ventures are subject to the restrictions of the anti-kickback provision); see also William S. Painter, *Recent Legislation, Cases, and Economic and Other Developments Affecting Health Care Providers and Integrated Delivery Systems*, in *QUALIFIED PLANS, PC'S, AND WELFARE BENEFITS 1, 7* (Ali-Aba Course of Study Materials No. C980, 1995) (stating that *Hanlester* substantially broadened the standard for violation of the anti-kickback statute "so that a mere finding that the [partnership] arrangement offers the physicians an opportunity to substantially profit from the referrals is sufficient to support a finding of improper inducement").

268. Baumgartner, *supra* note 241, at 326.

269. See Puryear, *supra* note 8, at 296-98 (discussing the formation of a joint venture as a means by which a physician can contribute or generate capital). A physician may be involved in various forms of joint ventures. *Id.* One example is a limited partnership,

The anti-kickback provision, intended to prevent abuse of the system, actually may impede health care reform.²⁷⁰ Physicians seek to own health care facilities to maintain their competitiveness, become more efficient, and provide better services.²⁷¹ Thus, many of these physician-owned ventures lower the cost of providing health care.²⁷² Because of the legal risk of violating the anti-kickback provision, however, there is a chilling effect on potentially legitimate and necessary business arrangements.²⁷³

Requiring one to know that he is violating the law makes it more difficult to convict a defendant under the anti-kickback provision. This would allow physicians to enter into a business relationship in good faith without fear of being charged with violating the anti-kickback provision.²⁷⁴ Without the requirement that the prosecution show that the defendant

where outside investors are general partners and the physicians are limited partners. *Id.* at 297. Under this type of agreement, the physicians contribute capital and are not involved with the management of the business. *Id.* It typically is understood, however, that the physicians will refer patients to the facility. *Id.* An example would be a limited partnership clinical laboratory. *Id.*

When the investment requires little capital from the physician, the business relationship may be suspect. *Id.* at 298. In these cases, the physician's financial contribution comes largely from referrals. *Id.* Even those investments involving large amounts of capital from the physicians can be problematic under the anti-kickback provision, however, because there still exists an incentive to over-utilize the facility by ordering unnecessary health care services for patients in order to reap more profits. *Id.* at 298-99; *see also* Farley, *supra* note 9, at 179 (stating that there is evidence that physicians over-utilize facilities in which they have a financial interest).

270. *See* Fabrikant, *supra* note 68, at 455 (noting that litigation related to the anti-kickback statutes "may retard the development of the very relationship between providers that are necessary to achieve health care reform").

271. Douglas A. Hastings, *Physician-Hospital Integration: Beyond Contracting Models*, in *HEALTH LAW HANDBOOK* 3, 3-4 (Alice G. Gosfield ed., 1995). *See generally* Farley, *supra* note 9, at 179 (discussing the benefits of physician investments, including competition in the marketplace, because the physician must compete with other similar facilities; efficiency, because a variety of services are made available to the patient; and quality of care, because the physician will have a strong working relationship with the facility in which he has a financial interest).

272. *See* Phillip A. Proger & Roxane C. Busey, *Update of Recent Developments*, in *DEVELOPMENTS IN ANTITRUST HEALTH CARE LAW* 5 (Phillip A. Proger et al. eds., 1990); *see also* Rockelli, *supra* note 54, at 553 (noting that the changing health care market is more and more based on managed care and capitalization); Baumgartner, *supra* note 241, at 324 (noting that business arrangements such as physician incentive programs, physician and hospital joint ventures, physician recruitment programs, and others are responses to the change in the health care industry).

273. *See* Hastings, *supra* note 271, at 6. It should be noted that a fully integrated facility, such as a medical group practice, does not have as great a risk of violating the anti-kickback provision because there is only a single economic unit. *Id.* at 4. Therefore, the risk of conspiracy or collective efforts to obtain "kickbacks" is reduced. *Id.*

274. *See* Rockelli, *supra* note 54, at 553 (commenting on the decision in *Hanlester* as a blessing for health care providers because of the high burden on the government).

knew the law, a court can interpret the statute liberally and convict a physician who cares for Medicare patients and happens to be involved in a venture from which he reaps a profit.²⁷⁵ Additionally, discouraging physicians from entering into relationships that may result in a violation of the anti-kickback provision also will dissuade physicians from accepting Medicare patients.²⁷⁶ Therefore, the requirement that one know he is violating the law provides a balance between the interest of protecting government funds and permitting the growth and development of health care facilities. This requirement continues to punish those who are using the system to their financial benefit and spares those who are attempting to work with the system but inadvertently violate its provisions.²⁷⁷

IV. CONCLUSION

The Medicare anti-kickback provision of the Social Security Act prohibits one from knowingly and willfully offering or accepting remunerations for referrals of Medicare patients. Whether the term knowingly and willfully should be interpreted as requiring knowledge of the act or knowledge of the law is unsettled. There is strong evidence that the correct interpretation is consistent with the Ninth Circuit decision in *Hanlester Network v. Shalala*,²⁷⁸ which held that the term knowingly and willfully required that the defendant know he was violating the law.

The language of the anti-kickback provision is ambiguous. In looking at the legislative history, there is evidence that the term knowingly and willfully is intended to require knowledge that one is violating the law. Even if it is determined that the legislative intent is not clear, however, the application of the rule of lenity would require the term to be interpreted in the same way. Therefore, the court in *Hanlester*, although it failed to properly articulate the appropriate analysis, arrived at the cor-

275. See Baumgartner, *supra* note 241, at 324 (discussing the broad range of business relationships that may be affected if the anti-kickback provision is interpreted liberally, such as physician incentive programs, physician and hospital joint ventures, physician recruitment programs).

276. Because the anti-kickback provision applies to only Medicare and state health care programs, physicians with questionable financial investments in health care facilities may be willing to accept only patients with other forms of insurance coverage. See 42 U.S.C. § 1320a-7b (1988 & Supp. v 1993) (criminalizing only acts involving Medicare or state health care programs).

277. See *supra* note 40 (discussing the failure of Stark II to balance the interest in permitting the market to provide health care services with a desire to prevent abuse of the system).

278. 51 F.3d 1390 (9th Cir. 1995).

rect conclusion—that ignorance of the law is a legitimate excuse under the anti-kickback statute.

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