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# Constitutional Law--Times Mirror Co. v. United States and a Qualified First Amendment Right of Public Access to Search Warrant Proceedings and Supporting Affidavits

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## CONSTITUTIONAL LAW—*Times Mirror Co. v. United States* and a Qualified First Amendment Right of Public Access to Search Warrant Proceedings and Supporting Affidavits

Police break into a citizen's home and seize papers. The police claim the search was authorized by a search warrant based upon probable cause. Charges have not yet been filed against the citizen and she wants to know whether probable cause supported the warrant. The citizen cannot find out. The news media hears of the case and wants to know whether probable cause supported the warrant. It cannot find out. The reason? The search took place in a district where the public has no first amendment right of access to search warrant proceedings or materials.

In *Times Mirror Co. v. United States*,<sup>1</sup> the Ninth Circuit ruled that the first amendment did not establish a right of public access to search warrant proceedings and supporting affidavits while a preindictment investigation was still underway.<sup>2</sup> The *Times Mirror* decision expressly rejected the reasoning and holding of the Eighth Circuit in *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn, McDonnell Douglas Corp.*<sup>3</sup> The *McDonnell Douglas Corp.* court held that the first amendment did establish a qualified right of public access to documents filed in support of search warrants.<sup>4</sup> In reaching their respective conclusions, both the Ninth Circuit and the Eighth Circuit applied a "two-prong" test that the Supreme Court developed in a series of cases establishing a first amendment right of public access to preliminary hearings, voir dire, and criminal trials.<sup>5</sup> Under the two-prong test, courts consider whether the proceeding has a historical tradition of openness, and whether public access would play a "significant positive role in the functioning of the particular process in question."<sup>6</sup>

1 873 F.2d 1210 (9th Cir. 1989).

2 *Id.*

3 855 F.2d 569 (8th Cir. 1988) [hereinafter *McDonnell Douglas Corp.*].

4 *Id.* The court first ruled that the public did have a first amendment right of access to search warrant materials while a preindictment investigation was underway. The court then held, however, that this right was a qualified one that could be restricted if the party seeking the sealing order could show that it was necessitated by a compelling governmental interest.

5 See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*]; *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*]; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In the above cases the Supreme Court ruled that the media had a first amendment right of access to judicial proceedings. In *Times Mirror Co.* and *McDonnell Douglas Corp.* the media was not seeking access to search warrant proceedings but to the materials generated by the proceedings. This Comment focuses on whether there is a qualified right of public access to the materials generated by a search warrant proceeding. It does not argue that there should be a right of access to the actual proceeding where the search warrant is issued. See *infra* note 50.

6 *Press-Enterprise II*, 478 U.S. at 8.

This Comment argues that the Ninth Circuit was correct in ruling that search warrant materials do not satisfy the two-prong test developed by the Supreme Court. This Comment concludes, however, that courts should apply a different test to search warrant materials. Under that test, the public should have a qualified right of access to search warrant materials unless an interested party affirmatively shows that a substantial governmental or private interest necessitates the sealing of the materials.

Part I of this Comment examines the Supreme Court's two-prong test and the public's first amendment right of access to preliminary hearings, voir dire, and criminal trials. Part II discusses the facts and rulings in *McDonnell Douglas Corp.* and *Times Mirror*. Part III analyzes the Ninth Circuit's application of the two-prong test in *Times Mirror* and explains the court's reasoning. Part IV argues that courts should apply a different test, that considers the framer's intent and a presumption of openness, to search warrant materials. Part V concludes that this new test provides a qualified first amendment right of public access to search warrant materials.

### I. The First Amendment Right of Public Access to Preliminary Hearings, Voir Dire, and Criminal Trials

The Supreme Court first held that the public had a first amendment right of access to criminal trials in *Richmond Newspapers, Inc. v. Virginia*.<sup>7</sup> In a series of subsequent cases, the Court has extended the first amendment right of public access to the voir dire examination of prospective jurors<sup>8</sup> and to preliminary hearings.<sup>9</sup> In these cases, the Court developed a two-prong test for determining whether a particular proceeding should be open to the public. Under this two-prong test a right of public access exists if "the place and process have historically been open to the press and general public"<sup>10</sup> and "public access plays a significant positive role in the functioning of the particular process in question."<sup>11</sup>

In *Richmond Newspapers*, a suspect was indicted for the murder of a hotel manager.<sup>12</sup> At the commencement of the suspect's trial, the court granted his motion to close the trial to the public.<sup>13</sup> That same day the court denied a motion made by members of the press to vacate the closure order.<sup>14</sup> The Virginia Supreme Court denied the press' petition for appeal<sup>15</sup> and the United States Supreme Court granted the press' petition for a writ of certiorari.<sup>16</sup> The Court held that the public had a first amendment right of access to criminal trials.<sup>17</sup> Six of the seven Justices

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7 448 U.S. 555 (1980).

8 Press-Enterprise I, 464 U.S. 501.

9 Press-Enterprise II, 478 U.S. 1.

10 *Id.* at 8.

11 *Id.*

12 *Richmond Newspapers*, 448 U.S. at 559.

13 *Id.* at 560.

14 *Id.*

15 *Id.* at 562.

16 *Id.* at 563.

17 *Id.* at 555.

in the plurality, however, filed separate opinions making the basis for the decision unclear.<sup>18</sup>

The Court ruled on a similar case in *Globe Newspaper Co. v. Superior Court*.<sup>19</sup> In *Globe*, the Court invalidated a Massachusetts law requiring judges to exclude the public from trials involving sex crimes when the victim was a minor under eighteen years of age.<sup>20</sup> The Court held that the first amendment guarantees the right of public access to criminal trials. Justice Brennan, writing for the majority, stated the right of access to criminal trials exists because the "criminal trial historically has been open to the press and general public" and because "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole."<sup>21</sup> Justice Brennan went on to say, however, the right of public access was not absolute.<sup>22</sup> It could be denied if the State could show that "the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."<sup>23</sup>

In 1984, the Supreme Court ruled, in *Press Enterprise Co. v. Superior Court (Press-Enterprise I)*, that the public also has a first amendment right of access to voir dire proceedings.<sup>24</sup> The Court based its decision on historical evidence revealing that the process of juror selection has been presumptively open since the development of jury trials.<sup>25</sup> It further concluded that openness plays an important role in the administration of justice by enhancing "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."<sup>26</sup> In *Press-Enterprise I*, the Court emphasized the trial court's failure to consider alternatives to closure,<sup>27</sup> and stated that in the absence of such consideration, the trial court could not close voir dire proceedings.<sup>28</sup>

Decided in 1986, *Press Enterprise Co. v. Superior Court (Press-Enterprise II)* was the Supreme Court's last major "right of public access" case. In *Press-Enterprise II*, a magistrate granted a murder suspect's motion to exclude the public from a preliminary hearing under a California statute requiring such proceedings to be open unless "exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial."<sup>29</sup> In holding that the first amendment right of public access to criminal proceedings applies to preliminary hearings, the Court applied the two-prong test developed in *Globe Newspapers* and *Press-Enterprises I*. The Court stated the first prong was "whether the place and process

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18 See *id.* at 558-81 (Burger, C.J., plurality opinion); *id.* at 581-82 (White, J., concurring); *id.* at 582-584 (Stevens, J., concurring); *id.* at 584-98 (Brennan, J., concurring); *id.* at 598-601 (Stewart, J., concurring); *id.* at 601-04 (Blackmun, J., concurring).

19 457 U.S. 596 (1982).

20 *Id.*

21 *Id.* at 605-06.

22 *Id.* at 606.

23 *Id.* at 607.

24 *Press-Enterprise I*, 464 U.S. 501 (1982).

25 *Id.* at 505.

26 *Id.* at 508.

27 *Id.* at 511.

28 *Id.*

29 *Press-Enterprise II*, 478 U.S. 1, 4 (1986).

have historically been open to the press and general public.”<sup>30</sup> The second prong was “whether public access plays a significant positive role in the functioning of the particular process in question.”<sup>31</sup> The Court then concluded that there was a historical tradition of public access to preliminary hearings conducted before neutral and detached magistrates.<sup>32</sup> The Court also found that preliminary hearings of the type conducted in California were sufficiently like a trial to justify the conclusion that public access was essential to their proper functioning.<sup>33</sup> Since preliminary hearings met the two-prong test, the Court held that the public had a first amendment right of access to the proceedings.<sup>34</sup> Therefore, the proceedings could not be closed unless the trial court made specific findings on the record showing closure was necessary to preserve higher values and reasonable alternatives to closure could not achieve the same purpose.<sup>35</sup>

Within the context of the above cases the Eighth and Ninth Circuits reached different conclusions as to whether the public has a first amendment right of access to search warrant materials.

## II. *McDonnell Douglas Corp.* and *Times Mirror*

Both *McDonnell Douglas Corp.* and *Times Mirror* resulted from Operation Ill Wind, an investigation of fraud and bribery in the defense contracting industry, after federal agents served and executed more than forty search warrants throughout the nation on one day.<sup>36</sup>

*McDonnell Douglas Corp.* arose after the District Court for the Eastern District of Missouri issued two of these search warrants.<sup>37</sup> After agents executed the search warrants, the district court granted the government’s *ex parte* motion to seal one of these search warrants, the attached affidavits, and other materials.<sup>38</sup> After members of the news media made an unsuccessful informal request for access to the sealed documents, they made a formal motion for access in the district court.<sup>39</sup> When the district court denied this motion, the members of the news media appealed to the Eighth Circuit Court of Appeals.<sup>40</sup>

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30 *Id.* at 8.

31 *Id.*

32 *Id.* at 10.

33 *Id.* at 12. The Court explained the similarities between preliminary hearings and trials. Before a felony trial in California the prosecutor must either secure a grand jury indictment or a finding of probable cause in a preliminary hearing. *Id.* Even if there has been a grand jury indictment, the accused has the right to a preliminary hearing. *Id.* The preliminary hearing must be conducted before a neutral magistrate, and “the accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.” *Id.* The Court concluded that, in light of the above procedures, a finding of probable cause usually leads to a guilty plea. *Id.*

34 *Id.* at 13.

35 *Id.*

36 *McDonnell Douglas Corp.*, 855 F.2d 569, 570 (8th Cir. 1988); *Times Mirror*, 873 F.2d 1210, 1211 (9th Cir. 1989).

37 *McDonnell Douglas Corp.*, 855 F.2d at 570.

38 *Id.* at 571.

39 *Id.*

40 *Id.*

In holding that there was a first amendment right of public access to search warrant materials, the Eighth Circuit applied the two-prong test established in *Richmond Newspapers* and its progeny.<sup>41</sup> The Eighth Circuit found that search warrant materials satisfied the first prong of the test, the "historical openness" prong, because search warrant applications and receipts are routinely filed with the clerk of the court without seal.<sup>42</sup> The court said, "[u]nder the common law judicial records and documents have been historically considered to be open to inspection by the public."<sup>43</sup>

The Eighth Circuit also concluded that search warrant materials satisfied the second prong of the test, the "significant positive role" prong, because "public access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct."<sup>44</sup>

Based on these conclusions, the Eighth Circuit held that search warrant materials satisfied the two-prong test, thus, there was a first amendment right of public access to the materials.<sup>45</sup> But the Eighth Circuit went on to hold that the right was a qualified one. The court stated "the district court properly concluded that these documents should be kept under seal" because the district court specifically found that sealing was necessary to protect a compelling governmental interest and that less restrictive alternatives were impracticable.<sup>46</sup>

The facts in *Times-Mirror* were almost identical to those in *McDonnell Douglas Corp.* Media members, in two separate district courts, made motions to unseal search warrant materials generated by Operation Ill Wind.<sup>47</sup> Both district courts denied the motions and on appeal the Ninth Circuit consolidated the two cases.<sup>48</sup> The Ninth Circuit also applied the Supreme Court's two-prong test. However, in this case, it held that the public had no first amendment right of access to search warrant materials during an ongoing preindictment investigation.<sup>49</sup> The Ninth Circuit con-

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41 *Id.* at 572-73.

42 *Id.* at 573.

43 *Id.*

44 *Id.*

45 *Id.* at 575.

46 *Id.* at 574-75. After the Eighth Circuit's ruling the district court granted the government several 30-day extensions of the sealing order. *Certain Interested Individuals v. Pulitzer Publishing Corp.*, 895 F.2d 460, 462 (1990). The government then informed the district court that it no longer opposed disclosure of the search warrant materials. *Id.* The next day the Pulitzer Publishing Company made a motion for disclosure of the sealed search warrant materials. *Id.* Shortly thereafter, McDonnell Douglas Corp., and several of its employees, filed motions opposing disclosure. *Id.* The district court recognized that McDonnell Douglas Corp. and its employees had qualified fourth amendment privacy rights. *Id.* The court held, however, that these privacy rights were outweighed by the public's qualified first amendment right of access, and it ordered the materials released. *Id.* McDonnell Douglas Corp. appealed. *Id.* The Eighth Circuit held that it was improper to disclose the search warrant materials at this time because the materials contained information obtained by wiretaps. *Id.* at 467. This fact, the court stated, tipped the balance in favor of the privacy interests and against disclosure. *Id.*

47 *Times Mirror*, 873 F.2d 1210, 1212 (9th Cir. 1989).

48 *Id.*

49 *Id.* at 1216. See also *In re The Baltimore Sun Co.*, 886 F.2d 60 (4th Cir. 1989)(The Fourth Circuit agrees with the Ninth Circuit's analysis and decision in *Times Mirror*.)

cluded that search warrant materials did not satisfy the "historical openness" prong of the test because "the issuance of warrants had traditionally been carried out in secret."<sup>50</sup> The Ninth Circuit acknowledged that search warrant *materials* were generally available to the public. But the court concluded that this did not amount to a historical tradition of openness because the government "has always been able to restrict access to warrant materials by requesting a sealing order, which courts have granted freely upon a showing that a given criminal investigation requires secrecy."<sup>51</sup>

The Ninth Circuit also concluded that search warrant materials did not satisfy the second prong of the test. While noting that public access to search warrant materials advanced clearly legitimate interests, the Ninth Circuit determined that it would "hinder, rather than facilitate, the warrant process and the government's ability to conduct criminal investigations."<sup>52</sup> The court stated that, in this regard, search warrant proceedings were indistinguishable from grand jury proceedings, which are conducted in secret.<sup>53</sup> The court then reasoned that because search war-

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<sup>50</sup> *Times Mirror*, 873 F.2d at 1214. In *Times Mirror*, however, the media was not seeking access to the proceeding in which the search warrants were issued. Rather, the media was seeking access to the search warrant materials filed with the clerk of the court after agents executed the search warrants. The Ninth Circuit said the two-prong test applied to documents generated as part of the judicial proceeding as well as to the proceeding itself. *Id.* at 1213, n.4.

"The Supreme Court has not yet addressed the question whether the first amendment right of access also applies to written documents submitted in connection with judicial proceedings which themselves implicate the right of access." *In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986). However, several courts have extended the first amendment right of public access to documents generated in connection with these proceedings. See *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513, 1517 (9th Cir. 1988) (documents filed in connection with pretrial detention proceeding); *United States v. Haller*, 837 F.2d 84, 86-87 (3d Cir. 1988) (plea agreement); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (documents filed in connection with suppression motions); *In re Washington Post Co.*, 807 F.2d at 390; *United States v. Smith*, 776 F.2d 1104, 1111-12 (3d Cir. 1985) (bill of particulars); *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (pretrial documents in general).

Regarding the application of the two-prong test to documents in general, *Times Mirror* stated that "[a]lthough *Press-Enterprise II* concerned access to judicial proceedings themselves, we have previously indicated that the two-part analysis applies as well to documents generated as part of a judicial proceeding." [court's emphasis] *Times Mirror*, 873 F.2d at 1213 n.4. See also *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513, 1515-16 (9th Cir. 1988); cf. *United States v. Brooklier*, 685 F.2d 1152, 1172 (9th Cir. 1982).

Partly in response to McDonnell Douglas Corp.'s attempt to distinguish between search warrant proceedings and search warrant documents, *Times Mirror* stated, "[t]he warrant process—which . . . would be jeopardized if warrant proceedings were conducted openly—would be equally threatened if the information disclosed during the proceeding were open [in the form of documents] to public scrutiny, since in either case disclosure would frustrate the government's efforts to investigate criminal activity." *Times Mirror*, 873 F.2d at 1217 (emphasis in original). Therefore, *Times Mirror* applied the two-prong test simultaneously to warrant proceedings and materials.

<sup>51</sup> *Times Mirror*, 873 F.2d at 1214. The court limited its analysis of search warrant history to a brief examination of Rule 41(g) of the Federal Rules of Criminal Procedure. *Id.* Rule 41(g) provides:

(g) Return of Papers to Clerk. The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

FED. R. CRIM. P. 41(g).

<sup>52</sup> *Times Mirror*, 873 F.2d at 1215.

<sup>53</sup> *Id.* at 1215. See also *Press-Enterprise II*, 478 U.S. 1, 9 (1986) (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)).

rant proceedings were one step back in the judicial process from grand jury hearings, matters leading up to the hearings could be conducted in secret.<sup>54</sup> Therefore, the Ninth Circuit held that "the first amendment does not establish a qualified right of access to search warrant proceedings and materials while a pre-indictment investigation is still ongoing."<sup>55</sup>

### III. Analysis of the Ninth Circuit's Application of the Two-Prong Test

#### A. *Historical Tradition of Openness*

Neither the Eighth Circuit in *McDonnell Douglas Corp.*, nor the Ninth Circuit in *Times Mirror*, applied the historical openness prong of the two-prong test with the same thoroughness as the Supreme Court did in *Richmond Newspapers* and its progeny.<sup>56</sup> In *Times Mirror*, the Ninth Circuit's historical analysis extended only to Rule 41(g) of the Federal Rules of Criminal Procedure. Rule 41(g) requires magistrates to file returned search warrant materials with the clerk of the district court.<sup>57</sup> In *McDonnell Douglas Corp.*, the Eighth Circuit merely concluded that "under the common law judicial records and documents have been historically considered to be open to inspection by the public."<sup>58</sup> This limited historical analysis is probably due to the scarcity of information regarding the early history of search and seizure.<sup>59</sup>

In reviewing the history of search warrants for purposes of determining historical openness, it is not necessary to examine the origins and early practices of search and seizure. Such an examination is unnecessary because the history of search and seizure, unlike the history of criminal trials and voir dire, was fundamentally altered by the Revolutionary War.<sup>60</sup> It is necessary, however, to examine search and seizure in colonial America and the context in which the fourth amendment of the United States Constitution evolved.<sup>61</sup>

54 *Times Mirror*, 873 F.2d at 1215-16. Grand jury proceedings are not conducted in secret solely because public access to such proceedings would not play a "significant positive role in the functioning of the process." Grand jury proceedings do not have a historical tradition of openness. Therefore, under the two-prong test the public does not have a first amendment right of access to those proceedings. In reasoning that proceedings one step back in the judicial process should likewise be closed to the public, the Ninth Circuit was incorrect.

55 *Id.* at 1216.

56 In *Richmond Newspapers*, Chief Justice Burger reviewed the history of trials from the days before the Norman conquest through colonial America up to the time "our organic laws were adopted." *Richmond Newspapers*, 448 U.S. at 565-69. In *Press-Enterprise I* the Court made a similar examination and concluded "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." *Press-Enterprise I*, 464 U.S. at 505.

57 *See supra* note 51.

58 *McDonnell Douglas Corp.*, 855 F.2d at 573.

59 "Very little information is available about early practices in the area of what we now know as search and seizure. . . ." P. POLYVIUO, *SEARCH & SEIZURE 1* (1982). *But see* N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1987). Despite the thoroughness of Lasson's research, it provides little insight into the historical openness of search and seizure.

60 *See infra* note 68 and accompanying text.

61 As the Supreme Court stated in *Boyd v. United States*, 116 U.S. 616, 624-25 (1886): "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the con-



## 1. The Writs of Assistance and General Warrants

The fourth amendment of the United States Constitution<sup>62</sup> arose from the controversy surrounding the writs of assistance in colonial America and general warrants in England.<sup>63</sup> British customs officers used the writs of assistance in the colonies to search places suspected of containing smuggled goods.<sup>64</sup> Colonial courts issued the writs, and once issued, the writs operated as "continuing licenses in the hands of their holders, expiring only at the end of six months after the death of the monarch in whose reign they were issued."<sup>65</sup> The death of King George II in October, 1760, and the subsequent expiration of outstanding writs set the stage for the "famous debate" between James Otis and Jeremiah Gridley concerning whether the colonial courts should grant new writs.<sup>66</sup> The debate took place in the colonial courts and concluded in *Paxton's Case* where the court granted the new writs.<sup>67</sup> It is generally agreed that the debate regarding the continued use of the writs of assistance was "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppression of the mother country."<sup>68</sup> This resistance led to the Revolutionary War where the colonists gained their independence from England.

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temporary or then recent history of the controversies on the subject, both in this country and in England."

62 The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

63 The writs of assistance were themselves a general warrant. Both the colonists and the citizens of England objected to these warrants because they did not identify persons or places to be searched and they did not specify papers and effects to be seized. "[E]verything was left to the discretion of the bearer of the warrant." N. LASSON, *supra* note 59, at 26.

64 See *Boyd*, 116 U.S. at 625; N. LASSON, *supra* note 59, at 51; P. POLYVIUO, *supra* note 59, at 9. The American colonists smuggled goods to bypass various trade regulations and requirements that the British Government had enacted to protect England's own industries and commerce. The writs were so named because they commanded all officers and subjects of the crown to assist their holders in executing them. N. LASSON, *supra* note 59, at 51, 54-55.

65 Reynard, *Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right*, 25 IND. L. J. 259, 271 (1950). The writs were general as to the places and persons to be searched and the things to be seized. This allowed their holders to abuse the power the writs bestowed upon them. This abuse outraged the colonists and ultimately led to the Revolutionary War. *Id.*

66 See *Boyd*, 116 U.S. at 625; N. LASSON, *supra* note 59, at 58. This debate took place in the superior court of Massachusetts after 63 Boston merchants petitioned the court for a hearing on the question of granting new writs. *Id.* at 57-58. Interestingly, the debate over whether the colonial courts should grant general warrants took place in open court. The debate focused on the legality of general warrants as opposed to particular warrants. *Id.* The present controversy concerns whether today's courts should grant the public access to materials generated by a search warrant proceeding. It is almost a forgone conclusion that the public does not have a right of access to such a proceeding. Did the public give up its right of access to search warrant proceedings when it demanded particularized warrants?

67 Reynard, *supra* note 65, at 271-72.

68 See, e.g., *Boyd*, 116 U.S. at 625. John Adams witnessed this famous debate as a young man. Adams later remarked: "Otis was a flame of fire. . . . American independence was then and there born. . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free." 10 WORKS OF JOHN ADAMS 247-48 (Boston 1856).

While the colonists fought against the writs of assistance, the citizens of England objected to the use of general warrants.<sup>69</sup> But the controversy in England was resolved by the courts rather than by revolution. In *Entick v. Carrington*,<sup>70</sup> Lord Camden ruled that a general warrant to seize and carry away a party's papers was illegal and void.<sup>71</sup> After noting that the use of general warrants resembled the search and seizure for stolen goods,<sup>72</sup> Lord Camden discussed the checks that must govern search and seizure: "There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description."<sup>73</sup> He then stated that if these procedural safeguards existed for search and seizure, similar safeguards should also protect the subjects of general warrants.<sup>74</sup> General warrants "would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy."<sup>75</sup> Because these checks did not exist in *Entick*, Lord Camden ruled general warrants illegal. Parliament eventually abolished the general warrant in England.<sup>76</sup>

In the context of these events, Virginia established the first state constitutional predecessor to the federal constitution's fourth amendment in the Virginia Bill of Rights of 1776.<sup>77</sup> Between 1776 and the Constitutional Convention in 1787 every state except New Jersey adopted a similar provision in its state declaration or bill of rights.<sup>78</sup> With these provisions as a guide, the First Congress created the fourth amendment. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>79</sup>

The framers' memory of the writs of assistance and their knowledge of *Entick* influenced the creation and adoption of the fourth amendment. The fourth amendment does not state that the public has a right of access to search warrant materials. Given the framers' experiences with general

69 The writs of assistance were, of course, a general warrant. See *supra* note 63.

70 19 HOWELL'S STATE TRIALS 1029 (1769). The United States Supreme Court has called *Entick* "one of the landmarks of English liberty." *Boyd*, 116 U.S. at 626.

71 19 HOWELL'S STATE TRIALS 1029 (1769).

72 *Boyd*, 116 U.S. at 628. Even though general warrants resembled search and seizure for stolen goods, Lord Camden stated that the difference between the two processes was apparent.

In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

*Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 See N. LASSON, *supra* note 59, at 48-50; Reynard, *supra* note 65, at 269.

77 N. LASSON, *supra* note 59, at 79.

78 *Id.* at 80. For a detailed history of the development of these provisions, see *id.* at 79-83.

79 U.S. CONST. amend. IV.

warrants, however, the framers arguably intended that the public have the right to know whether probable cause supports a warrant. The framers objected to Britain's use of the writs of assistance because they were general as to the places to be searched and the things to be seized.<sup>80</sup> This allowed agents of the British government to abuse the writs.<sup>81</sup> Consequently, the framers intended that the fourth amendment prevent the United States government from similarly abusing its search warrant powers. One way the fourth amendment prevents the government from abusing its search warrant power is the requirement that search warrants must be supported by probable cause.

The question then becomes whether the public should be able to review a court's or magistrate's determination that probable cause exists. Courts and magistrates constitute a branch of the government. If the public cannot review a court or magistrate's determination of probable cause, the potential for government abuse still exists. Therefore, the public should be able to review a court's or magistrate's determination of probable cause. The only way the people themselves can review whether probable cause exists in a particular situation is by having access to search warrant materials.<sup>82</sup>

## 2. Whether Search Warrant Materials Have a Historical Tradition of Openness

The first prong of the two-prong test requires a proceeding to have a historical tradition of openness before the public has a first amendment right of access to it.<sup>83</sup> When the framers drafted the first amendment, criminal trials and voir dire were open to the public. Therefore, criminal trials and voir dire have "historical traditions of openness."<sup>84</sup>

The search warrant process, as it exists today, did not exist when the framers drafted the first amendment.<sup>85</sup> Consequently, the courts must examine the post-framing history of search warrant materials to determine whether the materials have a "historical tradition of openness."

An examination of the post-framing history shows that almost a century passed before the Supreme Court, in *Boyd v. United States*,<sup>86</sup> made its

<sup>80</sup> See *supra* note 65 and accompanying text.

<sup>81</sup> N. LASSON, *supra* note 59, at 54; P. POLYVIU, *supra* note 59, at 10; Reynard, *supra* note 65, at 262.

<sup>82</sup> The public should not have access to search warrant materials prior to the warrants execution, however. Such access would allow the subject of a search warrant to learn of the pending search before agents can execute the warrant. This would totally frustrate the search warrant process.

<sup>83</sup> Press-Enterprise II, 478 U.S. 1, 8 (1986).

<sup>84</sup> Press-Enterprise I, 464 U.S. 501 (1982); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 595 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>85</sup> See *supra* notes 61-81 and accompanying text.

<sup>86</sup> 116 U.S. 616 (1886). *Boyd* involved a forfeiture proceeding under the customs revenue laws. Pursuant to a federal statute, a district court issued an order directing the claimants to produce an invoice of 29 cases of imported plate glass. *Id.* at 618. The claimants complied with the order, and subsequently, a jury found that the claimants had violated the customs revenue laws. *Id.* The claimants then appealed to the Supreme Court. *Id.* The Supreme Court unanimously agreed that the statute requiring the production of the invoice violated the Fifth Amendment privilege against self-incrimination. *Boyd*, 116 U.S. 616. But seven members of the Court went further and argued that the statute authorized unreasonable searches and seizures in violation of the Fourth Amendment. *Id.*

first important decision interpreting the fourth amendment. Another ninety years passed before the courts began ruling on whether there was a public right of access to search warrant proceedings. During this period, the modern search warrant evolved and general patterns developed surrounding its use. Both the Eighth Circuit and Ninth Circuit agreed that "although the process of issuing search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal."<sup>87</sup> But the Ninth Circuit went on to say that the government "has always been able to restrict access to warrant materials by requesting a sealing order, which courts have granted freely upon a showing that a given criminal investigation requires secrecy."<sup>88</sup> This evidence does not demonstrate conclusively that the warrant process has a historical tradition of openness, nor does it demonstrate a historical tradition of secrecy.

Other courts have also ruled on whether the public has a right of access to search warrant materials. In 1980, the United States District Court for the District of Rhode Island, in *In re Search Warrant for Second Floor Bedroom*,<sup>89</sup> rendered the first ruling on whether the public has a right of access to search warrant materials. The district court noted that Rule 41(g) of the Federal Rules of Criminal Procedure requires a magistrate to file search warrant materials with the clerk of the district court.<sup>90</sup> Because all papers filed with the clerk are public records available for inspection, the court ruled that the public had a right of access to them.<sup>91</sup> The court did state, however, that it had the power to seal the materials in proper circumstances.<sup>92</sup> Until *McDonnell Douglas Corp.*, this was the only federal case ruling on the question.

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<sup>87</sup> *McDonnell Douglas Corp.*, 855 F.2d 569, 573 (8th Cir. 1988); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1214 (9th Cir. 1989). Federal magistrates are required to follow the Federal Rules of Criminal Procedure. Rule 41(g) of the Federal Rules of Criminal Procedure requires magistrates to file warrant materials with the district court clerk. FED. R. CRIM. P. 41(g). Unless the government requests a sealing order, the warrant materials become public records like any other document filed with the court. *Times Mirror*, 873 F.2d at 1214.

In the absence of a state counterpart to Rule 41(g), the states do not follow any uniform procedure in filing search warrant materials. The Supreme Court of Washington has conducted an informal survey of that State's counties to determine what procedures were followed in the filing of search warrant materials. This survey revealed that no uniform procedure existed within the State. Some counties allowed free access to the documents unless they were sealed by a court order. Other counties allowed judges to keep them in their chambers where the public had no right of access at all. *Cowles Publishing Co. v. Murphy*, 96 Wash. 2d 584, 637 P.2d 966, 969 (1981).

<sup>88</sup> *Times Mirror*, 873 F.2d at 1214.

<sup>89</sup> 489 F. Supp. 207 (D.R.I. 1980). In an earlier case, *In re Sealed Affidavit(s) to Search Warrants Executed on February 14, 1979*, 600 F.2d 1256, 1257 (9th Cir. 1979), the Ninth Circuit held that district courts have the inherent power to seal search warrant materials "within certain constitutional and other limitations." But the Ninth Circuit did not explain these "constitutional and other limitations." *Id.* 'On remand the district court held that sealing was a discretionary matter. *In re Sealed Affidavit(s) to Search Warrants Executed on February 14, 1979*, No. 79 Misc.Civ. 722, slip op. at 3 (D. Nev. 1979).

<sup>90</sup> See *supra* note 51.

<sup>91</sup> *In re Search Warrant for Second Floor Bedroom*, 489 F. Supp. 207, 212 (D.R.I. 1980).

<sup>92</sup> *Id.* at 209. The "proper circumstances" limitation required the government to show that a real possibility of harm would arise if the search warrant materials were disclosed. The governments "mere speculation" that disclosure might frustrate an on-going grand jury investigation did not meet this requirement. *Id.* at 212.

A number of state courts have considered the issue, and the vast majority of these courts have ruled that the public has no right of access to search warrant materials.<sup>93</sup> In *People v. Christopher*,<sup>94</sup> for example a New York court held that the public did not have a right of access to search warrant materials. But, unlike the federal government, New York did not have a statute requiring magistrates to file such documents with the clerk of the court.<sup>95</sup>

In 1981, the Supreme Court of Washington ruled that search warrant materials were not public records.<sup>96</sup> But the court stated that these materials should be filed, and thus be open to the public, unless an interested party could demonstrate that such disclosure would present a substantial threat to that party's interests.<sup>97</sup> In 1986, the Supreme Court of Washington again ruled that the public did not have a right of access to search warrant materials.<sup>98</sup> In this case, however, the court expressly ruled that neither the common law nor the first amendment required such access.<sup>99</sup>

Most recently, a Massachusetts's court held that even though a search warrant affidavit was a public record, the public did not have a right of access to it before indictment.<sup>100</sup>

These cases illustrate the lack of consensus as to whether there is a public right of access to search warrant materials. Since the evidence does not conclusively show that search warrant materials have historically been open to the public, courts should rule that the "historical openness" prong has not been met.

### B. *Significant Positive Role in the Functioning of the Process*

The second prong of the current first amendment right of access inquiry is "whether public access plays a significant positive role in the functioning of the particular process in question."<sup>101</sup> The "particular process in question"<sup>102</sup> is not the warrant proceeding isolated from the rest of the judicial process. To the contrary, the courts have analyzed the right of access to the particular proceeding in light of its role in the functioning of the overall judicial process.<sup>103</sup> Applying this analysis to search warrant proceedings and materials, *Times Mirror* balanced the interests the open warrant process would further against the damage it would cause to the judicial process.<sup>104</sup> The court concluded that the second

93 See *Newspapers of New England, Inc. v. Clerk-Mag.*, 403 Mass. 628, 531 N.E.2d 1261 (1988); *People v. Christopher*, 109 Misc. 2d 767, 443 N.Y.S.2d 544 (1981); *Seattle Times Co. v. Eberharter*, 105 Wash. 2d 144, 713 P.2d 710 (1986); *Cowles Publishing Co. v. Murphy*, 96 Wash. 2d 584, 637 P.2d 966 (1981).

94 109 Misc. 2d 767, 443 N.Y.S.2d 544 (1981).

95 *Id.* at 769, 443 N.Y.S.2d at 546.

96 *Cowles Publishing Co. v. Murphy*, 96 Wash. 2d 584, 637 P.2d 966 (1981).

97 *Id.*

98 *Seattle Times Co. v. Eberharter*, 105 Wash. 2d 144, 713 P.2d 710 (1986).

99 *Id.*

100 *Newspapers of New England, Inc. v. Clerk-Mag.*, 403 Mass. 628, 531 N.E.2d 1261 (1988).

101 *Press-Enterprise II*, 478 U.S. 1, 8 (1986).

102 *Id.*

103 See *id.* at 12; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

104 *Times Mirror Co. v. United States*, 873 F.2d 1210, 1214-16 (9th Cir. 1989).

prong was not satisfied because Times Mirror Company's contentions were "more than outweighed by the damage to the criminal investigatory process that would result from open search warrant proceedings."<sup>105</sup>

Applying this same analysis to similar facts,<sup>106</sup> *McDonnell Douglas Corp.* implicitly held that public access to search warrant materials would play a significant positive role in the functioning of the judicial process.<sup>107</sup> The Eighth Circuit conceded that the public probably could not claim a first amendment right of access to warrant *proceedings* because "the very objective of the search warrant process, the seizure of evidence of crime, would be frustrated if conducted openly."<sup>108</sup> The court, however, then held that "the qualified first amendment right of public access extends to the *documents* filed in support of search warrants. . . ."<sup>109</sup> In so holding, the court failed to carefully consider the potentially frustrating effects access to search warrant materials could have on the judicial process.<sup>110</sup> These potentially frustrating effects are incorporated in the following analysis of *Times Mirror's* application of the second prong.

Although *Times Mirror* correctly concluded that the warrant process does not satisfy the significant positive role prong as it previously has been applied, it applied this prong incorrectly in some respects and inadequately in others.

## 1. Interests Supporting Access to the Search Warrant Process

Times Mirror Company stated three general interests in support of its claim that public access to search warrant materials would serve a significant positive role in warrant proceedings.<sup>111</sup> It claimed:

[T]hat open warrant proceedings are essential to self-government because observation of all aspects of the judicial process promotes open discussion of the process and permits the public to serve as a check on possible governmental abuses. Second, appellants argue that public scrutiny of warrant proceedings enhances the 'quality and safeguards the integrity of the fact-finding process,' as is true with public scrutiny of the criminal trial. Finally, appellants argue that open warrant proceedings and access to warrant materials would have the same 'community therapeutic value' as open criminal trials, by serving as an

<sup>105</sup> *Id.* at 1215.

<sup>106</sup> See *supra* notes 36-39 and accompanying text.

<sup>107</sup> The court indicates that they applied the two-prong test. *McDonnell Douglas Corp.*, 855 F.2d 569, 572-73 (8th Cir. 1988). They then stated findings that supported the second prong: "[P]ublic access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct." *Id.* at 573. Although the court did not expressly state that public access plays a significant positive role in the functioning of the judicial process, they did hold that the "qualified first amendment right of public access extends to the documents filed in support of search warrants. . . ." *Id.* at 575. The application of the two-prong test together with the holding necessarily implies that the court found that public access plays a significant positive role in the functioning of the judicial process.

<sup>108</sup> *McDonnell Douglas Corp.*, 855 F.2d at 573 (citing *Press-Enterprise II*, 478 U.S. 1, 9 (1986) (citing *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979))).

<sup>109</sup> *McDonnell Douglas Corp.*, 855 F.2d at 575 (emphasis added). See *supra* notes 5, 50.

<sup>110</sup> See *infra* text accompanying note 115.

<sup>111</sup> *Times Mirror*, 873 F.2d at 1215.

outlet for the sense of outrage, insecurity and need for retribution that a community feels when a crime occurs.<sup>112</sup>

The Ninth Circuit acknowledged that these were clearly legitimate interests. It held, however, that the damage to the criminal investigatory process that could result from open warrant proceedings outweighed these clearly legitimate interests.<sup>113</sup>

## 2. Potential Damage to the Criminal Investigatory Process

The Ninth Circuit's analysis of the potential damage to the criminal investigatory process is more detailed than are the general interests Times Mirror Company argued would be furthered by access to search warrant materials. The court implied that the justification for granting public access to criminal trials did not apply with equal force to search warrant proceedings because of the types of potential damages involved.<sup>114</sup>

In explaining these potential damages, the *Times Mirror* court discussed the burden open warrant proceedings could place on the investigatory process, the privacy interests of those identified in warrants and supporting affidavits, and the current safeguards against governmental abuse of the search warrant process.<sup>115</sup>

112 *Times Mirror*, 873 F.2d at 1215 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)).

113 *Id.* *Times Mirror* did not explain why appellant's arguments are clearly legitimate, but they are fairly self-explanatory. Many other courts have also expressed these same general interests concerning access to judicial proceedings and documents:

(1) Public access serves as a check on governmental abuse, in that it gives "assurance that the proceedings [are] conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). *See also* *Press-Enterprise I*, 464 U.S. 501, 508 (1984); *Gannet Co. v. Despasquale*, 443 U.S. 375, 394 (1982) (Burger, C.J., concurring); *Id.* at 428 (Blackmun, J., concurring in part and dissenting in part); *Globe Newspaper*, 457 U.S. at 606 ("And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (Brennan, J., concurring).

(2) "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process. . . . Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper*, 457 U.S. at 606. *Times Mirror Co.* claimed these concerns apply equally to warrant proceedings. *Times Mirror*, 873 F.2d at 1213. *See also* *Press-Enterprise Co. I*, 464 U.S. at 508; *Richmond Newspapers*, 448 U.S. at 569-71; *Levine v. United States*, 362 U.S. 610, 616 (1960); *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1069-70 (3d Cir. 1984). *But cf.* *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988) (concedes that public access concerns are important, but contends that they are not served after the case is closed with prejudice).

(3) *Press-Enterprise I* explained the "therapeutic value" access to proceedings has for the public. "When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest. . . ." *Press-Enterprise I*, 464 U.S. at 509. *See also* *United States v. Hastings*, 461 U.S. 499, 507 (1983); *Morris v. Slappy*, 461 U.S. 1, 14-15 (1983); *Richmond Newspapers*, 448 U.S. at 569-71.

114 *See supra* notes 102-105 and accompanying text.

115 *Times Mirror*, 873 F.2d at 1212-18.

a. *The Burden an Open Search Warrant Process Could Place on the Investigatory Process*

Use of a balancing approach<sup>116</sup> in applying the significant positive role prong implicitly recognizes that some processes would be ineffective if, at least initially,<sup>117</sup> conducted openly. This point was expressly recognized in *Press-Enterprise II*. In that case, the court stated that “[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly.”<sup>118</sup>

*Times Mirror* analogized warrant proceedings to grand jury proceedings<sup>119</sup>— the “classic example” of the kind of “government operation[] that would be totally frustrated if conducted openly . . . [since] ‘the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.’ ”<sup>120</sup> The court used this analogy to discuss the hindering effects public access to the search warrant process would have on the government’s ability to conduct criminal investigations.<sup>121</sup>

*Times Mirror* cites several reasons, previously articulated by the Supreme Court, why secrecy is imperative in grand jury proceedings:

First, if pre-indictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment.<sup>122</sup>

The court interpreted these reasons to mean that “the secrecy of grand jury proceedings is maintained in large part to avoid jeopardizing the criminal investigation of which the grand jury is an integral part.”<sup>123</sup>

The court stated that these reasons for keeping grand jury proceedings secret are equally applicable to warrant proceedings: “[S]ecrecy is no less important to the process of investigating crime [including warrant proceedings] for the purpose of obtaining evidence to present to a grand jury.”<sup>124</sup> If the warrant proceedings or supporting affidavits were open to the public, the subject of the warrant could learn of the warrant and

116 See *supra* note 104 and accompanying text.

117 *Times Mirror* decision is limited only to access to warrant proceedings while a preindictment investigation is still ongoing. The court did not decide the “question whether the public has a First Amendment right of access after an investigation is concluded or after indictments have been returned.” *Times Mirror*, 873 F.2d at 1211, 1221 (emphasis added).

118 *Press-Enterprise Co. II*, 478 U.S. 1, 8-9 (1986).

119 *Times Mirror*, 873 F.2d at 1215.

120 *Id.* (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)).

121 *Times Mirror*, 873 F.2d at 1215. In fact, the court said that “[i]n this regard warrant proceedings are indistinguishable from grand jury proceedings . . . .” *Id.*

122 *Id.* (quoting *Douglas Oil*, 441 U.S. at 219). See also *United States v. Procter & Gamble Co.*, 356 U.S. 577, 681-82 n.6 (1958) (approving similar reasons for grand jury secrecy given in *United States v. Rose*, 215 F.2d 517, 628-29 (3d Cir. 1954)).

123 *Times Mirror*, 873 F.2d at 1215.

124 *Id.*



destroy criminal evidence or flee before the government executed the search warrant. Even after execution of the warrant, but while the investigation was ongoing, there would be the risk that other persons identified in the affidavits as being under suspicion of criminal activity might destroy evidence, coordinate their stories or flee the jurisdiction.<sup>125</sup> There is also the risk that public access to search warrant materials would discourage witnesses and informants from providing free and full information.<sup>126</sup>

The opinion in *Times Mirror* initially focused on the common need for secrecy in grand jury and warrant proceedings stemming from their role in the investigatory process. However, the court also set forth an additional line of reasoning to support its view that search warrant proceedings, like grand jury proceedings, require secrecy. The court cited reasoning expressed by Judge Harvey of the United States District Court for Maryland:

If proceedings before and related to evidence presented to a grand jury (including subpoenas, documents and even hearings before the court for the immunization of witnesses) can be kept secret, *a fortiori*, matters relating to a criminal investigation leading to the development of evidence to be presented to a grand jury may also be kept secret. Indeed search warrant proceedings are one step back from the convening of a grand jury.<sup>127</sup>

Apparently to clarify Judge Harvey's reasoning, the court cited *In re Search Warrant for Second Floor Bedroom* as stating the contrary of his proposition.<sup>128</sup> *In re Search Warrant for Second Floor Bedroom* held that "the rule of grand jury secrecy extends only to the grand jury proceeding themselves, not to the subject matter of the investigation or to *any material prepared prior to a grand jury proceeding*, including search warrant affidavits."<sup>129</sup>

The combination of these references to Judge Harvey and *In re Search Warrant for Second Floor Bedroom* suggests that the court's additional support for secrecy in the warrant process is merely an extension of grand jury secrecy.<sup>130</sup> Attempts to expand the scope of the grand jury's secrecy to include prior warrant proceedings are unnecessary. The need for secrecy in the warrant process is independently justified by the danger public access would pose to the ongoing investigatory process.<sup>131</sup> There is no need to force the warrant process under the grand jury's own

<sup>125</sup> *Id.*

<sup>126</sup> *See supra* note 122 and accompanying text. This is a further analogy to a grand jury's need for secrecy.

<sup>127</sup> *In re Sealed Search Warrants and Affidavits*, Criminal No. h-88-0427, at 12-13 (D.Md. August 30, 1988) (oral opinion).

<sup>128</sup> *Times Mirror*, 873 F.2d at 1216.

<sup>129</sup> *Id.* (summarizing the holding in *In re Search Warrant for Second Floor Bedroom*, 489 F. Supp. 207, 211 (D.R.I.1980) (emphasis added)). While not expressly rejecting this holding, the court uses Judge Harvey's contrary reasoning to support its "view that search warrant proceedings, like grand jury proceedings, require secrecy." *Times Mirror*, 873 F.2d at 1215-16.

<sup>130</sup> For a brief history of grand jury secrecy and its codification by the Federal Rules of Criminal Procedure, see *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 217 n.9 (1979); *FED. R. CRIM. P.* 6(e).

<sup>131</sup> *See supra* notes 123-26 and accompanying text.

well established veil of secrecy.<sup>132</sup> The court's argument would have been stronger if it had limited the "grand jury-warrant proceeding" analogy to the their common, although independent, need for secrecy to protect the criminal investigatory process.

b. *Privacy Interests of Those Identified in Search Warrants and Supporting Affidavits*

The Supreme Court has stated that another reason for maintaining the secrecy of grand jury proceedings is to "assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule."<sup>133</sup> *Times Mirror* stated that this concern applied with equal force to search warrant proceedings and reinforced its holding that the first amendment did not establish a qualified right of access to search warrant proceedings and materials during an ongoing preindictment investigation.<sup>134</sup>

The court analogized the individual privacy rights that would be at risk if the public had access to search warrant materials to those concerning public access to a bill of particulars which names unindicted members of a criminal conspiracy.<sup>135</sup> In *United States v. Smith*,<sup>136</sup> the Ninth Circuit upheld the district court's decision to seal a bill of particulars which named unindicted coconspirators. *Smith* held that the risks to individual privacy rights resulting from allowing public access to the bill of particulars seriously undermined the social utility of releasing the names.<sup>137</sup>

*Times Mirror* concluded that the risks identified in *Smith*<sup>138</sup> were also present when the public is allowed access to search warrant materials:

Persons who prove to be innocent are frequently the subjects of government investigations. Like a bill of particulars, a search warrant affidavit may supply only the barest details of the government's reasons for believing that an individual may be engaging in criminal activity. Nonetheless, the issuance of a warrant—even on this minimal information—may indicate to the public that government officials have reason to believe that persons named in the search warrant have engaged in criminal activity.<sup>139</sup>

Therefore, in addition to interests in the ongoing criminal investigatory process, the concern for the privacy rights of those unindicted persons named in search warrants weighs against public access to the warrant process.

132 See *supra* note 130.

133 *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 220 (1979); see also *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958); *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954).

134 *Times Mirror Co v. United States*, 873 F.2d 1210, 1216 (9th Cir. 1989).

135 *Id.*

136 *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985).

137 *Id.* at 1113-14. See also *United States v. Schlette*, 842 F.2d 1574, 1581 (9th Cir. 1988).

138 *Smith*, 776 F.2d at 1113-14.

139 *Times Mirror*, 873 F.2d at 1216.

c. *Current Safeguards Against Governmental Abuse of the Search Warrant Process*

Another factor weighing in favor of not allowing public access to the warrant process, is the existence of safeguards already in place to deter governmental abuse of the warrant process.<sup>140</sup> One of Times Mirror Company's principally asserted reasons for allowing public access to search warrant materials was that public access would "serve as a check on possible governmental abuses."<sup>141</sup> In *McDonnell Douglas Corp.*, the Eighth Circuit also relied heavily on this same assertion that public access "may operate as a curb on prosecutorial or judicial misconduct [in the search warrant process]."<sup>142</sup> In response, *Times Mirror* acknowledged the validity of this assertion,<sup>143</sup> but briefly concluded that the safeguards currently in place reinforced its holding that the government's interest in secrecy outweighed the value of public access to the search warrant process at this stage of an ongoing criminal investigation.<sup>144</sup>

For example, judicial determination of probable cause by a neutral and detached magistrate serves as a check on an investigating "officer engaged in the often competitive enterprise of ferreting out crime."<sup>145</sup> The subject of the warrant can also file a civil suit for a violation of constitutional rights.<sup>146</sup> Furthermore, a suppression motion provides a means to seek suppression of any unconstitutionally gathered evidence.<sup>147</sup> In addition, when an investigation results in a filed criminal charge, public scrutiny will occur during later pretrial and trial proceedings.<sup>148</sup>

By disallowing public access to the warrant process, public scrutiny is not denied, it is simply delayed "until a time when the affidavit is integrally related to a proceeding in which the public [already] enjoys a first amendment right of access."<sup>149</sup> While *Times Mirror* does not deny that "the public has a vital role to play in policing the government's use of the warrant process, [it] fail[s] to see how the public can play such a role at this *stage* without risk of damage to the [ongoing] investigation."<sup>150</sup> As recognized in *Seattle Times Co. v. Eberharter*,<sup>151</sup> the delay protects the privacy of the subjects of warrants and the informants, and fosters effective

140 *Id.* at 1218.

141 *Id.* at 1215.

142 *McDonnell Douglas Corp.*, 855 F.2d 569, 573 (8th Cir. 1988).

143 *Times Mirror*, 873 F.2d at 1217.

144 *Times Mirror*, 873 F.2d at 1218. *See also* *Seattle Times Co. v. Eberharter*, 105 Wash. 2d 144, 151-57, 713 P.2d 710, 714 (1986).

145 *Johnson v. United States*, 333 U.S. 10, 14 (1947). The Ninth Circuit is not insinuating that this safeguard alone is sufficient. "We recognize that the Supreme Court has noted that there must be some process by which society can monitor law enforcement officials' decisions . . . beyond relying on the judgement of the neutral detached magistrate." *Times Mirror*, 873 F.2d at 1218 n.11.

146 *Times Mirror*, 873 F.2d at 1218.

147 *Id.* *See also* *Waller v. Georgia*, 467 U.S. 39 (1984).

148 *Seattle Times Co.*, 105 Wash.2d at 152, 713 P.2d at 714. *See generally* *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980).

149 *Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Ct. Dep't*, 403 Mass. 628, 637 n.11, 531 N.E.2d 1261, 1266 n.11 (1988)(commenting on *Seattle Times*, 105 Wash.2d 144, 713 P.2d 710).

150 *Times Mirror*, 873 F.2d at 1218 n.11 (emphasis added).

151 105 Wash.2d 144, 152-53, 713 P.2d 710, 714 (1986).

law enforcement.<sup>152</sup> Here again, *Times Mirror* balanced the interests advanced by public access to the warrant process against the potential risk to the investigatory process. Nonetheless, the Ninth Circuit seems to ignore the possibility that the case will not go any farther in the criminal process, such that public access would not be available in a later proceeding.<sup>153</sup>

In conclusion, *Times Mirror* correctly held that, the search warrant process failed to satisfy the significant positive role prong of the two-prong test as it is presently applied. The Ninth Circuit supported its conclusion that during the preindictment stages of an ongoing investigation, the legitimate interests<sup>154</sup> supporting public access to the search warrant process are outweighed by the risk to the investigatory process,<sup>155</sup> the privacy interests of those individuals named in the warrant,<sup>156</sup> and the preexisting checks on possible governmental abuse.<sup>157</sup> However, as exemplified by the holding in *McDonnell Douglas Corp.*,<sup>158</sup> not all courts agree and the issue is not as clear cut as the Ninth Circuit has reasoned it to be.

#### IV. A Proposal For a Revised Two-Prong Test

The two-prong test is useful in determining whether the public has a right of access to preliminary hearings, voir dire, and criminal trials. As the Supreme Court has stated, these processes have "historical tradition[s] of openness."<sup>159</sup> In light of these "historical tradition[s] of openness", it is arguable that the framers of the Constitution intended that these processes remain open, and that therefore, there should be a first amendment right of public access to them. But the two-prong test proves inadequate when applied to processes which did not exist when the Constitution was framed. Courts should not uphold the assertion that processes not existing at this time are not entitled to Constitutional protection.<sup>160</sup> If the current version of the two-prong test is rigidly ap-

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152 *Id.* See *Cowles Publishing Co. v. Murphy*, 96 Wash. 2d 584, 589, 637 P.2d 966, 969-70 (1981).

153 If the government fails to bring criminal charges against the subject of the search warrant, the search warrant materials could remain sealed. Thus, the public's right of access to these materials would not merely be delayed, it would be lost. In fact, it is more likely that this would happen in a situation where the warrant was not supported by probable cause. Presumably, if the police found what they were looking for, the government would bring charges.

154 See *supra* notes 112-13 and accompanying text for a discussion of interests supporting public access to the search warrant process.

155 See *supra* notes 118-32 and accompanying text for a discussion of the potential risks public access to the search warrant process would pose to the investigatory process.

156 See *supra* notes 133-39 and accompanying text for a discussion of the privacy interests of those named in search warrants.

157 See *supra* notes 140-53 and accompanying text for a discussion of the preexisting checks on possible governmental abuse of the search warrant process.

158 *McDonnell Douglas Corp.*, 855 F.2d 569, 573 (8th Cir. 1988).

159 See *Press-Enterprise II*, 478 U.S. 1 (1986); *Press-Enterprise I*, 464 U.S. 501 (1984); *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers*, 448 U.S. 555.

160 There is strong support for the position that the Constitution is a living, breathing document which is constantly evolving to adapt and better serve changing interests and needs. See generally Note, *First Amendment Right of Access*, 34 *RUTGERS L. REV.* 292, 322-325 (1982); J. ELY, *DEMOCRACY AND DISTRUST* 60-63 (1980).

plied, processes of recent origin will never be open to the public under the first amendment.

The process of applying for search warrants and filing materials generated by the proceeding with the clerk of the court is of recent origin. Thus, the search warrant process fails the two-prong test by default. Rather than indulging in the legal fiction of determining whether a process of recent origin has a "historical tradition of openness", courts should try to determine whether the framers would have intended the public to have a first amendment right of access to the process in question. In determining the intent of the framers regarding search warrant materials, several facts must be considered. First, the abuse of the writs of assistance was a primary cause of the Revolutionary War.<sup>161</sup> Second, at the time the Constitution was framed, there existed a basic distrust of government.<sup>162</sup> Third, the entire Constitutional scheme favors an informed citizenry over a secretive government.<sup>163</sup>

Even though the framers may have intended the public to have a first amendment right of access to search warrant materials, there will be those who argue, as the Ninth Circuit did in *Times Mirror*, that such access would not play a "significant positive role" in the functioning of the process.

Beginning with *Richmond Newspapers* and continuing through *Press-Enterprise II*, the Supreme Court recognized the importance of access to judicial proceedings and developed the two-prong test as the standard for determining when the public possessed a qualified right of access to certain judicial proceedings.<sup>164</sup> *Press-Enterprise II* described the standard for the second prong as "whether public access plays a significant positive role in the functioning of the particular process in question."<sup>165</sup> This standard was based on *Globe Newspaper's* description of the right of public access to criminal trials as playing "a particularly significant role in the functioning of the judicial process . . ."<sup>166</sup> *Press-Enterprise II's* use of the "significant positive role" standard was arbitrary in the sense that although *Globe Newspaper* used similar language,<sup>167</sup> it used it in describing the important role public access played in the functioning of the judicial process in general. It did not expressly use it as a measuring stick for allowing public access. Perhaps under *Globe Newspaper*, a court should allow public access when that access would play a less than significant positive, but still a positive, role in the functioning of the judicial process.

Considering the Supreme Court's emphasis on first amendment rights and the important role of public access, it is ironic that the resulting two-prong test requires the public to make an affirmative showing

161 See *supra* note 68 and accompanying text.

162 See, e.g., F. STIMSON, *THE AMERICAN CONSTITUTION* 7 (1922); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1-2 (1978); C. WARREN, *CONGRESS THE CONSTITUTION AND THE SUPREME COURT* 79-82 (1935).

163 See, e.g., Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) (discussing the benefits of an informed citizenry as opposed to a powerful government).

164 See *supra* notes 7-35 and accompanying text.

165 *Press-Enterprise II*, 478 U.S. 1, 8-9 (1986).

166 *Globe Newspaper*, 457 U.S. at 606.

167 *Id.*

that public access would play a “significant positive role” to overcome a presumption of nonaccess. It seems more appropriate to presume that public access to the proceeding benefits the judicial process, unless it is shown that public access to that proceeding would play a negative role in the functioning of the judicial process. This minimizes the risk of unnecessary total denial of public access to the particular proceeding.<sup>168</sup>

First amendment protections are strong and the court should hesitate to deny them. Unless, after balancing the competing interests, the court determines that public access would serve a negative role in the process in question, the public should have a first amendment qualified right of access to the process—assuming it is consistent with the framers’ intent.

If a court determines that there is a qualified first amendment right of public access to a particular proceeding, such as search warrant proceedings, then courts should make a case by case determination as to whether the qualified right should be denied. For example, in appropriate circumstances it may be reasonable for the government to request a temporary sealing order for search warrant materials. One such circumstance may arise during an ongoing criminal investigation. But the mere fact that the government is still conducting an investigation is not, in and of itself, sufficient to deny the public a first amendment right of access to search warrant materials.<sup>169</sup> The government must show not only that an investigation is still underway, but also that public access to the search warrant materials would pose a substantial threat to that particular investigation. If the government makes such a showing, it would be proper for a court to grant a temporary sealing order. This order would expire upon completion of the investigation, indictment, or after a specified time period. At the expiration of this time period the government could request an extension of the sealing order. This extension would be subject to the same requirements as the original sealing order.

An individual named in a search warrant may also petition the court for a sealing order. In this case the court should grant a sealing order if the individual demonstrates that a legitimate interest<sup>170</sup> would be substantially threatened by public access to the search warrant materials. In making this determination, the court should first consider whether the individual’s claim is valid. If it is valid, the court should consider whether portions of the search warrant could be redacted to protect these legitimate interests. If redaction would not be practicable, the court could

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168 This suggestion reverses the current presumption and creates a presumption of openness which may be dispelled by the party seeking closure showing that access to the particular process in question would serve a *negative* role in the functioning of the judicial process. For example, the burden would be on the prosecutor, seeking closure of the search warrant proceeding, to show that public access to the proceeding would play a negative role in the functioning of the judicial process. This determination would be based on the current method of balancing the interests supporting public access and the interests against public access. See *supra* note 102-4 and accompanying text.

169 See *supra* notes 80-83 and accompanying text.

170 Public access to search warrant materials may pose a substantial threat to an individual’s privacy interest if the individual is named in the search warrant. This interest would vanish, however, if the individual is indicted. Courts should redact the names of informants as a matter of routine practice.

grant the sealing order conditioned upon the continued existence of the legitimate interests.

In the absence of either of the above situations, the public should have a first amendment right of access to search warrant materials. In no case should public access to search warrant materials be restricted without a showing, either by the government or an interested individual, that access would substantially threaten a legitimate interest.

## V. Conclusion

Thus far, the Supreme Court has required judicial proceedings to satisfy the two-prong test in order for the public to have a qualified first amendment right of access to them. Applying the current two-prong test to warrant proceedings, the Ninth Circuit correctly held that the public does not have a qualified first amendment right of access to search warrant proceedings and materials while a preindictment investigation is underway. The evidence does not reveal a "historical tradition of openness," and therefore, search warrant materials do not satisfy the "historical openness" prong of the two-prong test. Furthermore, the interests in favor of access do not significantly outweigh the burdens of access. Therefore, search warrant materials do not satisfy the "significant positive role" prong of the two-prong test.

However, a revised two-prong test should be applied to search warrant materials and other proceedings that have relatively short histories. In applying the historical openness prong, the court should focus on determining whether the framers of the Constitution would have intended for the public to have a first amendment right of access to the particular proceeding. In analyzing such proceedings the court should take into consideration the severe consequences of ruling that no first amendment right, qualified or unqualified, exists. In addition, the court should consider other means that are available to protect the qualified right against interests weighing in favor of closed proceedings. Furthermore, the significant positive role prong of the two-prong test should be altered so that it would be satisfied unless public access to a proceeding would play a *negative* role in the functioning of the process. Under this revised test, it is likely that the public would have a qualified first amendment right of access to search warrant materials during the preindictment stages of an ongoing criminal investigation.

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## *United States v. Nofziger* and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the *Mens Rea* Requirements of Federal Criminal Law

In 1980, the United States Congress gazed into the future of federal criminal law, beheld the opportunity for reform of *mens rea*<sup>1</sup>—and turned away.<sup>2</sup>

In the same year, the United States Supreme Court gazed into the future, beheld a similar opportunity—and paused, at least long enough to sketch a bare outline of what it saw.<sup>3</sup> The succeeding years, however, appear to have clouded the Court's vision.<sup>4</sup>

As a result, federal criminal law still lacks a unified, workable model for determining the state of mind requirements of a criminal statute. The recent decision in *United States v. Nofziger*<sup>5</sup> manifests this shortcoming. *Nofziger* involved one defendant and one statute. It produced two opinions—both mistaken. The amended version of the statute *Nofziger* interpreted also manifests the shortcoming. Congress attempted to eliminate the statute's confusion. It enacted a new subsection—still ambiguous.

The statute in question was a product of Congress' desire to slow the swirl of the "revolving door" involving personnel rotating between government and private industry.<sup>6</sup> In 1978, it strengthened the Ethics in

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1 For the purposes of this Comment, "*mens rea* . . . mean[s] a state of mind that is criminal if there is the requisite act, and *actus reus* . . . mean[s] an act that is criminal if there is the requisite mind." G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 642 (2d ed. 1961).

2 The reform was embodied in the Criminal Code Reform Act of 1979, S. 1722, 96th Cong., 1st Sess. (1979) [hereinafter S. 1722]. The bill was referred to the Committee on the Judiciary, which reported the bill favorably, recommending passage. S. REP. NO. 553, 96th Cong., 2d Sess. 1 (1980). The bill as a whole "can be regarded as a . . . truly momentous advance toward fulfillment of one of the most basic demands of our society, viz, justice in the administration of criminal law." *Id.* at 2. Sections 301-03 of the bill would have reformed the determination of state of mind in federal criminal law. See *infra* notes 92-120 and accompanying text.

Despite the Judiciary Committee's enthusiasm for reform, Congress never passed a comprehensive reform bill. S. 1722 fell victim to the constraints of the political process: "In the 96th Congress, both the Senate and the House Committees on the Judiciary reported criminal code bills; however, insufficient time remained in the press of the election year to complete the process." S. REP. NO. 307, 97th Cong., 1st Sess. 2 (1981). The reform movement slowed after this failure. "In the 1980's the steam went out of the effort to adopt a comprehensive criminal code revision, and Congress began again to consider crime bills that treat substantive criminal law piecemeal." N. ABRAMS, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 67 (1986).

3 In *United States v. Bailey*, 444 U.S. 394 (1980), the Court discussed and endorsed criminal law reform proposals aimed at producing "workable principles for determining criminal culpability . . . a byproduct [of which] has been a general rethinking of traditional *mens rea* analysis." *Id.* at 403. For a brief discussion of the facts and holding of *Bailey*, see *infra* note 93; for an explanation of its significance to contemporary state of mind jurisprudence, see *infra* notes 94-120 and accompanying text.

4 The Court's decisions in *United States v. Yermian*, 468 U.S. 63 (1984), and *Liparota v. United States*, 471 U.S. 419 (1985), indicate that the Court has not completely grasped the assumptions aimed at reforming the determination of *mens rea*. See *infra* notes 86 and 108.

5 878 F.2d 442 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989).

6 For a discussion of the "revolving door" problem, see Johnson, *Agency "Capture": The "Revolving Door" between Regulated Industries and Their Regulating Agencies*, 18 U. RICH. L. REV. 95, 95-96 (1983).



Government Act,<sup>7</sup> further limiting the involvement former government employees may have in matters related to their past responsibilities. Because Congress was concerned with officials actually or apparently using public office for private gain,<sup>8</sup> it imposed criminal penalties on former employees who violated additional post-employment restrictions.<sup>9</sup> One restriction prohibits a former government employee from making certain business contacts with the employee's prior agency for one year after leaving government service. Title 18 of the United States Code currently provides, in relevant part:

Whoever, [being a covered government employee], within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

- (1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and
- (2) in connection with any . . . particular matter, and
- (3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.<sup>10</sup>

In February of 1988, Franklyn C. Nofziger was tried and convicted under subsection 207(c). The District of Columbia Circuit, by a divided panel, overturned his conviction in June, 1989.<sup>11</sup> The majority interpreted the statute's *mens rea* element to require knowledge of each element in the offense. Because the government did not prove that Mr. Nofziger *knew* his former agency had a "direct and substantial interest"<sup>12</sup> in certain matters, the majority ruled that his guilt was not established.<sup>13</sup> Responding to this decision, in November of 1989 Congress amended

7 Pub. L. No. 95-521, Title V, 92 Stat. 1864 (1978), amended by Pub. L. No. 96-28, §§ 1, 2, 93 Stat. 76 (1979), current version codified at 18 U.S.C. § 207 (1988).

8 According to the Senate Report:

[The revision] is an attempt to prevent corruption and other official misconduct before it occurs, as well as penalizing it once it is uncovered. . . .

. . . .

18 U.S.C. 207, like other conflict of interest statutes, seeks to avoid *even the appearance* of public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. Thus government in its dealings must make every reasonable effort to avoid even the appearance of conflict of interest and favoritism.

S. REP. No. 170, 95th Cong., 2d Sess. 30, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4247-4248 (emphasis in original).

9 Subsections (a), (b), and (c) of section 207 describe the three post-employment restrictions. See Mundheim, *Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON L. REV., 707, 711-14 (1981) (briefly describing the historical development and practical effect of the Ethics in Government Act of 1978).

10 18 U.S.C. § 207(c) (1988).

11 *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989).

12 18 U.S.C. § 207(c)(3) (1988).

13 *Nofziger*, 878 F.2d at 454.

subsection 207(c).<sup>14</sup> Part of the revision eliminated the requirement that the communication or appearance relate to matters of direct and substantial interest to the former agency.

Obviously, *Nofziger* was important to Nofziger; it kept him out of prison. Nevertheless, its legal significance lies in the reasoning the majority and the dissent used in interpreting the statute. In fact, *Nofziger* graphically illustrates a problem of interpreting the federal criminal code that is altogether too common. Title 18 gives no explicit direction to judges, jurors, lawyers, or citizens on how to determine the *mens rea* requirements, if any, for each element of offenses defined in it.<sup>15</sup> Thus, different courts may require different states of mind for the same elements of the same offenses.<sup>16</sup> Where order should reign, chaos prevails.

14 Ethics Reform Act of 1989, Pub. L. No. 101-194, § 101(a), 103 Stat. 1716, 1724 (1989) (codified as amended at 18 U.S.C.A. § 207(c) (West Supp. 1990)) (effective Jan. 1, 1991). For the text and an analysis of the new section, see *infra* Part V, notes 202-27 and accompanying text.

Unless otherwise noted, all references in this Comment to § 207(c) refer to the section under which Mr. Nofziger was prosecuted. The present § 207(c) will remain effective until Dec. 31, 1990.

15 The Senate Judiciary Committee reported that:

No Federal statute attempts a comprehensive and precise definition of the terms used to describe the requisite state of mind. Nor are the terms defined in the statutes in which they are used. Instead the task of giving substance to the "mental element" used in a particular statute, or to be inferred from a particular statute, has been left to the courts.

S. REP. No. 553, 96th Cong., 2d Sess. 59 (1980).

16 The varying interpretations of the *mens rea* requirement in the National Firearms Act, 26 U.S.C. §§ 5841-72 (1988), illustrate the confusion in the courts regarding construction of federal criminal statutes. The Act provides:

It shall be unlawful for any person—

. . . .

- (b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter [relating to taxation and registration]; or
- (c) to receive or possess a firearm made in violation of the provisions of this chapter; or
- (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . . .

26 U.S.C. § 5861 (1988). "Firearm" is defined in § 5845 to include shotguns and rifles with short-ended barrels, automatic weapons, silencers, and other "destructive devices."

Initially, several courts held that the government need *not* prove that a defendant knew that his weapon was a "firearm" subject to registration under the Act. Thus, no state of mind was necessary regarding the characteristics of the weapon. An early case that interpreted the Act stated:

The statute makes the mere possession of an unregistered firearm transferred in violation of law an offense. If an accused possess such firearm, the offense is complete. . . . Scierter is not involved.

*United States v. Decker*, 292 F.2d 89, 90 (6th Cir. 1961) (citation omitted). This interpretation was followed by the Fifth Circuit in *United States v. Vasquez*, 476 F.2d 730 (5th Cir.), *cert. denied*, 414 U.S. 836 (1973). The court held that the

Government was not required to prove that the defendant had knowledge that the physical characteristics of the weapon rendered it subject to registration.

*Id.* at 732.

Nevertheless, some courts were troubled by the possible ramifications of this interpretation. In *United States v. Herbert*, 698 F.2d 981 (9th Cir.), *cert. denied*, 464 U.S. 821 (1983), the Ninth Circuit created a limited exception to the general rule that knowledge of the weapon's characteristics need not be proven. The court required the government to prove the defendant's state of mind as to weapons which could have been lawfully possessed but had been internally modified to become "firearms" under the Act. The court stated that, if the law were otherwise,

then any person who possessed an internally modified weapon with absolutely no knowledge or method of verification of the modification would be in violation of the law. We are sure Congress did not intend that this statute be so draconian.

*Id.* at 986-87.

Recently, two federal circuit courts have expanded the reasoning of *Herbert* to require proof of state of mind regarding the weapon's characteristics. In *United States v. Williams*, 872 F.2d 773, 777

This Comment examines the *Nofziger* decision and subsection 207(c) as prototypes of the problems in interpreting federal criminal statutes. Part I outlines the facts and ruling in *Nofziger*. Part II discusses the language difficulties found in interpreting all statutes and explains the jurisprudential assumptions<sup>17</sup> that federal courts are supposed to use to interpret the *mens rea* requirement of the federal criminal code. The assumptions provide a framework for analyzing federal criminal statutes. Part III analyzes the ruling in *Nofziger*. It argues that the *Nofziger* majority incorrectly interpreted subsection 207(c) when it required the prosecution to prove that the defendant acted *knowingly* with respect to *each element* of the crime. Part IV analyzes the present subsection 207(c) according to the framework outlined in Part II(B)(2). It argues that the statute should be interpreted to require knowledge for the "appearance offense," purpose for the "communication offense," and recklessness for the statute's remaining elements.<sup>18</sup> This interpretation reflects the grammatical structure of subsection 207(c) and uses the analytical framework outlined in Part II(B)(2). Part V briefly discusses the amended statute and applies the analytical framework to interpret it. This Comment concludes that federal courts should apply the suggested analytical framework when interpreting all federal criminal statutes.

### I. Summary of the Facts and Holding of *United States v. Nofziger*

Franklyn C. Nofziger served as Assistant to the President for Political Affairs under President Ronald W. Reagan from January 21, 1981, to January 22, 1982. After his resignation, Mr. Nofziger formed the political consulting firm of Nofziger-Bragg Communications.<sup>19</sup> In February of

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(6th Cir. 1989), the Sixth Circuit cited to *Herbert* in requiring proof of the defendant's knowledge that the weapon was automatic and thus fell under the Act.

The Fifth Circuit faced this issue in *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989). In an *en banc* decision, the judges split as closely as possible—eight to seven—on the issue of whether *mens rea* was required for conviction. The eight judge majority required proof that the defendant knew the guns were automatic weapons. The majority required that the defendant have "knowledge of the relevant physical characteristics of the items possessed." 885 F.2d at 1253 n.8. According to the majority, the "rule [allowing conviction without proof of this knowledge] is aberrational in our jurisprudence—a jurisprudence largely based on the Anglo-Saxon common law—[so] we discard it." *Id.* at 1249. The majority thus overruled *Vasquez*. The seven dissenting judges strongly disagreed with requiring proof of *mens rea* for conviction. According to the dissent, "the pertinent question is whether Congress intended to place on the owner a reasonable duty of inquiry; by far the better view is that it did." *Id.* at 1261. These cases demonstrate the need for a uniform method of interpreting federal criminal statutes.

17 This Comment utilizes a framework incorporating these assumptions. We refer to them as "assumptions" because they are not codified as law in Title 18. Nevertheless, modern criminal law developed these assumptions: in the Model Penal Code, adopted at the state level; in the products of criminal law reform bills, proposed at the federal level; and in Supreme Court holdings. See *infra* notes 91-93 and accompanying text.

18 The "appearance offense" means the portion of § 207(c) that prohibits "act[ing] as agent or attorney for, or otherwise represent[ing], anyone other than the United States in any formal or informal appearance before [the official's former department or agency]."

The "communication offense" means the portion of § 207(c) that prohibits a former official from "mak[ing] any oral or written communication on behalf of anyone other than the United States, to [the official's former department or agency]."

The remaining elements are described in parts (1) - (3) of § 207(c). 18 U.S.C. § 207(c) (1988).

19 Brief for the United States at 3, *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir.) (No. 88-3058), *cert. denied*, 110 S. Ct. 564 (1989).

1988, a jury convicted Mr. Nofziger of three violations of subsection 207(c) of the Ethics in Government Act.<sup>20</sup>

Three separate communications formed the basis of Mr. Nofziger's conviction. The first offense was an April 8, 1982, letter to Edwin Meese III, Counselor to the President, urging the White House to support the Welbilt Electronic Die Corporation's efforts to obtain an Army contract. The second offense was a letter to James Jenkins, Deputy Counselor to the President, urging support of a labor union. Finally, the third offense was Mr. Nofziger's lobbying of White House officials to support additional export sales of the Fairchild Republic Corporation's A-10 antitank aircraft.<sup>21</sup>

The jury found (1) that Mr. Nofziger intended to influence his former agency,<sup>22</sup> and (2) that the communications were made within one year after Mr. Nofziger left the government, and that the White House had "a direct and substantial interest" in the matters.<sup>23</sup>

<sup>20</sup> *Nofziger*, 878 F.2d at 444. For the text of the statute, see text preceding *supra* note 10.

<sup>21</sup> Brief for the United States at 6-14, *Nofziger* (No. 88-3058). The following is a summary of the context in which Mr. Nofziger made the communications that were the basis of his conviction.

First Offense: Mr. Nofziger lobbied on behalf of the Welbilt Electronic Die Corporation, a minority-owned manufacturer located in the South Bronx of New York City. The White House was interested in economic development of this area, and Welbilt was identified under a minority set-aside program of the Small Business Administration as a possible manufacturer of small gasoline engines for the Army. In March 1982, with an apparently irreconcilable \$15 million difference between the Army offer and Welbilt's proposal, the company retained Nofziger-Bragg Communications as its lobbyist. Pursuant to this arrangement, Mr. Nofziger sent the April 8 letter to Edwin Meese III, Counselor to the President. The trial court found that because the White House had a direct and substantial interest in this matter, Mr. Nofziger violated § 207(c) by contacting his former agency about the matter within a year after he resigned.

Second Offense: The Marine Engineers Beneficial Association (MEBA), a private labor union, retained Mr. Nofziger in April 1982 to convince the Reagan Administration to expand the use of civilian manning—as opposed to the use of Navy personnel—on United States ships. Previously, President Reagan made a campaign promise to implement civilian manning, and the matter was discussed at a Cabinet meeting. The trial court found that because the White House had a substantial interest in civilian manning, Mr. Nofziger's letter on behalf of MEBA to James Jenkins, Deputy Counselor to the President, violated § 207(c).

Third Offense: In 1982, Fairchild Republic Corporation retained Mr. Nofziger to lobby for retention of U.S. budget funds for additional purchases of its A-10 antitank aircraft. On August 20, 1982, President Reagan urged the Secretary of Defense Caspar W. Weinberger to encourage export sales of the A-10 or otherwise keep the aircraft in production at current levels. The trial court found that because President Reagan had a substantial interest in this matter, Mr. Nofziger violated § 207(c) by urging the National Security Council staff to implement President Reagan's directive.

<sup>22</sup> The jury instruction on intent to influence read as follows:

An intent to influence is an intent to affect either opinion or action. For you to find that Defendant Nofziger made a communication with the intent to influence that is required for a 207(c) offense, you must find that he intended on behalf of someone, other than the United States, to have that communication influence the opinion or action of the person who is alleged to have received the communication in connection with the alleged particular matter.

Record at 4129-30, *United States v. Nofziger*, No. 87-0309 (D.D.C. 1987), cited in Brief for United States at 30-31, *Nofziger* (No. 88-3058). The instruction only required the jury to find that the defendant possessed the intent to influence the person receiving the communication. It did not require the jury to find that the defendant intended or hoped that parts (1) - (3) of § 207(c) existed.

<sup>23</sup> The jury instruction on "direct and substantial interest" read as follows:

Another element is that the alleged particular matter must have been a matter in which the White House had a direct and substantial interest at the time of the alleged communication.

The term "direct" refers to the nature of the interest or involvement of the White House in the matter. You may find that the interest of the White House in the matter was a

The District of Columbia Circuit overturned Mr. Nofziger's conviction. The majority, Judges Stephen F. Williams and James L. Buckley, initially decided that subsection 207(c) was ambiguous as to the *mens rea* requirements.<sup>24</sup> The majority then used two canons of statutory construction to resolve the ambiguity. First, the majority invoked the rule of lenity, which requires a court to interpret an ambiguous criminal statute in favor of the defendant.<sup>25</sup> Second, the majority employed the rule that a statute's *mens rea* requirement should be presumed to apply to every element of the offense unless a clear legislative intent to the contrary exists.<sup>26</sup> Therefore, the majority decided that the *mens rea* of "knowingly" should apply to all elements of subsection 207(c). Because the government failed to prove that Mr. Nofziger possessed *knowledge* of each element—especially the requirement that the matter be of direct and substantial interest to the White House—the majority overturned the conviction.<sup>27</sup> The majority ruled that, in order to obtain a conviction, the government must prove Mr. Nofziger knew of the elements that made his communications a violation of subsection 207(c).

Judge Harry T. Edwards filed a dissenting opinion. He argued that subsection 207(c) is not ambiguous, so the rule of lenity was inapplicable.<sup>28</sup> Judge Edwards interpreted "knowingly" to apply to the clause it directly precedes—the appearance offense. For the communication of offense, he argued that the applicable *mens rea* should be "intent to influ-

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direct interest if you find that an officer, employee, or other representative of the White House was actively involved with the matter. Such active interest may be shown, for example, by giving advice, by making recommendations, or by giving approval or disapproval. The White House may have a direct interest in the matter even if the final action or decision making concerning the matter may have been the responsibility of an agency other than the White House.

The term "substantial" refers to the extent and the significance of the interest or involvement of the White House in a particular matter. It is not necessary for you to find that a particular matter was of major importance to the White House as compared to other matters. In deciding whether the White House had a substantial interest in the matter, you may consider the effort devoted by officers, employees, or other representatives of the White House on the matter and importance of the matter to the White House.

To find the defendants guilty, you must find beyond a reasonable doubt that the particular matters alleged in the indictment were of both direct and substantial interest to the White House on the dates alleged in the indictment.

*Id.* at 4128-29, cited in Brief for United States at 36-37. The instruction does not require the jury to find that the defendant had any state of mind as to whether the matter was of direct and substantial interest to the White House. Rather, all the jury had to decide was whether the matter was in fact of direct and substantial interest to the White House.

24 *United States v. Nofziger*, 878 F.2d 442, 446-52 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989). "Having concluded that subsection 207(c) is ambiguous, we must next decide how to resolve the ambiguity." *Id.* at 452.

25 "The first of these [two canons] is the rule of lenity: "Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."'" *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation omitted)).

26 "The second applicable rule states that absent evidence of a contrary legislative intent, courts should presume *mens rea* is required." *Nofziger*, 878 F.2d at 452 (citing *United States v. Liparota*, 471 U.S. 419, 426 (1985)).

27 "[W]e must be guided by the rule of lenity and the presumption of *mens rea*. These clearly require that the conviction of Nofziger be set aside because it is not based on a finding that he had knowledge of each element of the offenses charged." *Nofziger*, 878 F.2d at 454.

28 "To my mind, the language and structure of section 207(c) reveal no ambiguity or uncertainty, making the rule of lenity completely irrelevant in this case." *Nofziger*, 878 F.2d at 457 (Edwards, J., dissenting).

ence.”<sup>29</sup> Because the jury found that Mr. Nofziger communicated with his former agency with an intent to influence its decisions, and that the subjects of his communications were of direct and substantial interest to Mr. Nofziger’s former agency, Judge Edwards would have upheld the jury’s verdict.

The government petitioned the D.C. Circuit for a rehearing of the *Nofziger* decision *en banc*. The rehearing was denied, although four of the nine members of the circuit felt that the decision was “clearly wrong.”<sup>30</sup> The government then filed a petition for certiorari in the United States Supreme Court, which was also denied.<sup>31</sup>

## II. Background on the Framework for Analyzing Criminal Statutes

In order to make a useful analysis of the *Nofziger* decision and its interpretation of subsection 207(c), this Comment first must discuss two fundamentals for interpreting federal criminal statutes: (1) the possible bases of uncertainty arising from statutory language; and (2) the prevailing jurisprudential assumptions that courts should use when determining the state of mind requirements in federal criminal statutes.

### A. Uncertainty of Meaning Arising from Language

A court should begin its interpretation of a statute by analyzing the language of the relevant section.<sup>32</sup> Unfortunately, many statutes contain defects that hinder a reader’s ability to interpret the statute. Difficulties with the language of a statute usually fall into one of three areas: generality, vagueness, or ambiguity.

The first problem is generality. It is present when a term “is not limited to a unique referent and thus can denote more than one.”<sup>33</sup> The term “permits simultaneous reference,”<sup>34</sup> therefore, the reader may be

29 “The language of the statute clearly indicates that ‘knowingly’ is the *mens rea* requirement only for the ‘appearance offense,’ while ‘with the intent to influence’ is the *mens rea* requirement for the ‘communication offense.’” *Id.* at 455 (Edwards, J., dissenting).

30 *Id.* at 460. Circuit Judge Edwards wrote a concurrence in which Judges Wald, Mikva, and Ginsburg, Ruth B. joined. The concurrence, in its entirety, stated:

I think that the majority opinion in this case is clearly wrong; however, this is not a basis for *en banc* consideration by the court. Therefore, I concur in the denial of the suggestion for rehearing *en banc*. Any further consideration of this case must be pursuant to review by the Supreme Court.

*Id.*

31 *United States v. Nofziger*, 110 S. Ct. 564 (1989).

32 The Supreme Court endorsed this approach. It held that the “starting point in every case involving construction of a statute is the language itself.” *United States v. Hohri*, 482 U.S. 64, 69 (1987) (citations omitted). *See also United States v. Turkette*, 452 U.S. 576, 580 (1981) (“[i]n determining the scope of a statute, we look first to its language”).

This approach of focusing on the text of the statute seems obvious; however, Professor Dickerson noted that “[t]he tendency to neglect the specifics of statutes in favor of judicial commentary corrupts students, lawyers, and even judges.” R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 17 (1975). The better view is that “[t]he starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure.” 2A C. SANDS, *SUTHERLAND ON STATUTORY CONSTRUCTION* § 47.01 (N. Singer 4th ed. 1984) (footnote omitted).

33 R. DICKERSON, *supra* note 32, at 51.

34 *Id.* An example of a general term is “American citizen,” which can refer to all members of a class with over 200 million members. *See id.* at 284.

unable to choose the correct referent from a finite number of possible referents.

The second problem is vagueness. Vagueness "refers to the degree to which, independent of equivocation, language is uncertain in its respective application to a number of particulars."<sup>35</sup> Vagueness differs from generality because a term's generality leaves the reader uncertain as to what members of a given group the term refers, while a term's vagueness leaves the reader uncertain as to the boundaries of the term's meaning. A term's vagueness is "indicated by the finite area and lack of specification of its boundary."<sup>36</sup>

The third problem is ambiguity. In its most basic sense, ambiguous language is equivocal; it is "capable of double interpretation."<sup>37</sup> An ambiguous term differs from a general term in that an ambiguous term permits alternative, "either-or" reference, while the general term permits simultaneous reference.<sup>38</sup> Ambiguity differs from vagueness because the uncertainty that stems from ambiguity leaves the reader with alternative interpretations, while the uncertainty that stems from vagueness leaves the reader with questions of degree.<sup>39</sup> Ambiguity differs from both generality and vagueness because generality and vagueness are not always diseases of language but can instead serve as useful drafting tools,<sup>40</sup> whereas ambiguity *always* hinders the interpretation of language.<sup>41</sup> An

35 R. DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 39 (1986).

36 M. BLACK, *LANGUAGE AND PHILOSOPHY* 31 (1949). Professor Dickerson used the following example:

The generality of ["automobile"] . . . is exemplified by its capacity for simultaneously covering both Fords and Chevrolets without a tinge of uncertainty. Its vagueness is exemplified by the uncertainty whether it covers three-wheeled vehicles that bear a strong resemblance also to motorcycles.

R. DICKERSON, *supra* note 32, at 52. Nevertheless, there is a limit on how broadly a term similar to automobile may be interpreted. In interpreting the word "vehicle" to exclude airplanes, Justice Holmes noted: "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air . . . . But in everyday speech 'vehicle' calls up the picture of a thing moving on land." *McBoyle v. United States*, 283 U.S. 25, 26 (1931).

37 R. DICKERSON, *supra* note 35, at 33 (citing 3 OXFORD ENGLISH DICTIONARY 263 (1933)). "[A]n ambiguity presupposes at least two particular alternatives each of which, taken alone, is free of ambiguity and not so vague as to be meaningless." R. DICKERSON, *supra* note 32, at 55 (footnote omitted).

38 "In the sentence 'A grandmother sometimes has heavy responsibilities,' the word 'grandmother' is general. In the sentence 'My grandmother sometimes has heavy responsibilities,' it may well be ambiguous, if both grandmothers are living." R. DICKERSON, *supra* note 35, at 42.

39 *Id.* at 40. Professor Dickerson provided the following contrasting examples:

Language can be ambiguous without being vague. If in a mortgage, for example, it is not clear whether the word "he" in a particular provision refers to the mortgagor or the mortgagee, the reference is ambiguous without being . . . vague or imprecise. Conversely, language can be vague without being ambiguous. An example is the written word "red."

*Id.*

40 *See id.* at 42. Vagueness and generality can be utilized by the drafter of the statute to give leeway to those charged with administering the statute. *Id.* at 43.

41 [T]he ambiguous word carries the threat, in specific use, of competitive thrusts of meaning that are almost never desirable or justifiable. Because of its potential for deception or confusion, an ambiguous word should not be used by the draftsman in a context that does not clearly resolve the ambiguity.

*Id.* at 34.

ambiguous text prevents a court from utilizing only the words of the text to interpret the statute and compels a court to search for meaning.<sup>42</sup>

Three kinds of ambiguity may be distinguished.<sup>43</sup> The first is semantic ambiguity, which occurs when a word has multiple possible meanings.<sup>44</sup> The second is syntactic ambiguity, which is "uncertain[t]y of modification or reference within the particular instrument."<sup>45</sup> The third

42 When a court declares a statute ambiguous, it asserts that some of the words used may refer to several objects and the manner of their use does not disclose the particular objects to which the words refer. . . . It is then the function of the court to make the referent clear or as clear as possible from the information and evidence which is presented to it.

2A C. SANDS, *supra* note 32, § 45.02.

43 See generally R. DICKERSON, *supra* note 32, at 46-48. Professor Dickerson provided a brief synopsis of the different types of ambiguity:

Semantic ambiguity is uncertainty of multiple meaning that tends to follow particular words (e.g., "residence," "child") into the contexts of actual use. Syntactical ambiguity is uncertainty of modification or reference (e.g., a squinting modifier). Contextual ambiguity is uncertainty as to how a statement affects or is affected by another statement with which it is inconsistent.

R. DICKERSON, *supra* note 32, at 283.

44 R. DICKERSON, *supra* note 35, at 36. Professor Dickerson illustrated semantic ambiguity by attempting to determine the referent of the word "residence" in the following example: "[i]n the statement, 'His rights depend on his residence,' it is not clear whether they depend on place of abode or on legal home." R. DICKERSON, *supra* note 32, at 44.

The use of the word "willfully" in criminal statutes is an example of semantic ambiguity. Federal courts have given the term two different meanings. The first meaning requires the prosecution to prove that the accused acted with the purpose to break the law. In *Screws v. United States*, 325 U.S. 91 (1945), the Supreme Court interpreted a section of the federal civil rights statute, which provides: "[w]hoever, under color of any law . . . willfully subjects . . . any inhabitant of any State . . . to the deprivation of any rights [shall be fined or imprisoned]." 18 U.S.C. § 52 (1940) (current version at 18 U.S.C. § 242 (1988)). It held that punishment is imposed "only for an act knowingly done *with the purpose* of doing that which the statute prohibits." *Screws*, 325 U.S. at 102 (emphasis added).

The second meaning requires the prosecution to prove only that the accused acted with the knowledge that his conduct would have a certain result. Recently, the Tenth Circuit interpreted the federal arson statute, which provides: "[w]hoever, within the . . . jurisdiction of the United States, willfully and maliciously sets fire to or burns . . . any building [shall be fined or imprisoned]." 18 U.S.C. § 81 (1988). In upholding the conviction, the court noted that "[o]ne of the most common state-of-mind terms in statutory crimes is 'willfully.' The Model Penal Code follows many judicial decisions in declaring that knowing conduct is sufficient to establish willfulness." *United States v. M.W.*, 890 F.2d 239, 240 (10th Cir. 1989) (citation omitted). The court concluded that

in this context, "willfully and maliciously" includes acts done *with the knowledge* that burning of a building is the practically certain result: "A person acts knowingly with respect to a material element of an offense when . . . 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.* at 241 (quoting the MODEL PENAL CODE § 2.02(2)(b)(ii) (Official Draft and Revised Comments 1985)) (emphasis added). Judge Learned Hand expressed the most sensible view regarding the word "willfully": "It's an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, 'wilful' would lead all the rest in spite of its being at the end of the alphabet." ALI PROCEEDINGS 160 (1955), quoted in MODEL PENAL CODE § 2.02, comment 10, n.47 (Official Draft and Revised Comments 1985).

45 R. DICKERSON, *supra* note 35, at 36. Professor Dickerson used the following example to illustrate syntactic ambiguity: "'The trustee shall require him promptly to repay the loan.' . . . Does 'promptly' modify 'require' or 'repay'?" *Id.* at 36 and n.8.

The statute at issue in *Liparota v. United States*, 471 U.S. 419 (1985), exhibits syntactic ambiguity in a definition of a criminal offense. The statute, punishing food stamp fraud, provides in relevant part: "whoever knowingly uses, transfers, acquires, alters, or possesses coupons . . . in any manner not authorized by this chapter . . . shall . . . be guilty of a felony." 7 U.S.C. § 2024(b)(1) (1988). The syntactic ambiguity arises because there is a question of "how far down the sentence the term 'knowingly' travels." *Liparota*, 471 U.S. at 434 (White, J., dissenting).



is contextual ambiguity, which is "uncertainty as to how a statement affects or is affected by another statement with which it is inconsistent."<sup>46</sup>

Differentiating the kinds of uncertainty facilitates the resolution of the uncertainty. Misidentifying an uncertainty allows a court to stray from the meaning of the statute's language and accept less valid interpretations.<sup>47</sup>

A court should read a statute to identify any sources of uncertainty. This will allow it to determine if the language is clear enough to ascertain meaning. If the language is clear and plain enough, then the court need not use any extrinsic aids.<sup>48</sup> If the language is not clear enough for the court to ascertain the meaning of the statute, the court should to look elsewhere to establish the meaning.<sup>49</sup>

## B. *Jurisprudential Assumptions in Federal Criminal Law Regarding the Determination of Mens Rea*

The jurisprudential assumptions that contemporary federal courts should use grew out of the determined efforts of criminal law reformers to solve the problems that developed as common law crimes gave way to statutory crimes. This Subpart will begin by briefly outlining the historical evolution of several state of mind issues. This Subpart will then explain the assumptions that courts should use to determine the proper state of mind for each element of a criminal offense.

### 1. Historical Background

An American criminal law maxim is that a every crime needs the "concurrence of an evil-meaning mind with an evil-doing hand."<sup>50</sup> Thus,

<sup>46</sup> R. DICKERSON, *supra* note 32, at 283. Professor Dickerson used the example of a will to illustrate contextual ambiguity: "in a gift to the testator's daughter for life and then to the testator's heirs, it is sometimes uncertain whether the daughter is to be included as an 'heir.'" R. DICKERSON, *supra* note 35, at 37.

<sup>47</sup> The *Nofziger* majority followed this errant path. The majority held that, "[h]aving concluded that subsection 207(c) is ambiguous, we must next decide how to resolve the ambiguity." *United States v. Nofziger*, 878 F.2d 442, 452 (D.C. Cir.), *cert. denied*, 110 S. Ct. 564 (1989). The court then incorrectly resolved the ambiguity. *See infra* notes 183-86 and accompanying text.

<sup>48</sup> "The task of resolving the dispute over the meaning of [a statute] begins . . . with the language of the statute itself. . . . [I]t is also where the inquiry should end . . . where . . . the statute's language is plain, [for] 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 109 S. Ct. 1026, 1030 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) and quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

<sup>49</sup> Professor Dickerson explained the process more fully:

Whether the statute is clear or obscure, whether or not it adequately resolves the current issue, and whether it can be applied as it came from the legislative oven or must be remolded, the court should first examine it in its proper context to discover, if possible, what it most probably means. Then, after measuring the legislative contribution, the court, where necessary, may add its own contribution.

R. DICKERSON, *supra* note 32, at 15. The Supreme Court recently held that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 110 S. Ct. 997, 1001 (1990) (citations omitted).

<sup>50</sup> *Morissette v. United States*, 342 U.S. 246, 252 (1952).

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as

the general rule is that every crime must include *mens rea*—the mental element—as well as an *actus reus*—the act.<sup>51</sup>

The major exceptions to this general requirement of *mens rea* fall into two groups. The first group is composed of those crimes, developed in the English common law, that did not require a guilty state of mind. Leading examples of this group are the doctrine that ignorance of the law is no defense, the felony-murder/misdemeanor-manslaughter rule, and the law of statutory rape.<sup>52</sup> The doctrine of *ignorantia juris non excusat* (ignorance of the law is no excuse) was first expounded by Chief Justice Sir John Popham in the *Trial of Sir Christopher Blunt*.<sup>53</sup> This rule, as developed by English courts, held that state of mind need not be proven as to the legal element of the offense. Ignorance of the law is thus no defense to a criminal prosecution. In the area of homicide, the courts developed the felony-murder and misdemeanor-manslaughter rules.<sup>54</sup> Under these rules, an accidental killing, otherwise not punishable, became murder if it occurred during the commission of a felony and manslaughter if during a misdemeanor. The offender was held strictly liable for any deaths occurring during the crime.

The statutory crime of sexual intercourse with a minor developed in England as a strict liability offense. Statutory rape required no *mens rea* as

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belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

*Id.* at 250.

51 "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). The Latin maxim *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty) encapsulates this principle. See generally W. LAFAVE & A. SCOTT, *CRIMINAL LAW*, § 3.4, at 212 (2d ed. 1986).

The origins of the *mens rea* requirement date back to the 1500s. Professor Williams noted that "the requirement of a guilty state of mind (at least for the more serious crimes) had been developed by the time of Coke, which is as far back as the modern lawyer needs to go." G. WILLIAMS, *supra* note 1, at 30.

Although *mens rea* has long been a part of Anglo-American criminal law, in ancient legal systems scienter was not a requirement. For example, consider the plight of King Oedipus, punished even though he lacked an "evil-meaning mind." Judge Richard A. Posner explained:

[E]arly legal systems, in which the roots of law in revenge still show, rely on strict liability more heavily than modern legal systems do. The protagonist of *Oedipus Tyrannus* is guilty of parricide and incest, and must be punished terribly even though he neither knew nor had reason to know that the man he had killed was his father and the woman he had married was his mother.

R. POSNER, *LAW AND LITERATURE* 35 (1988) (footnote omitted).

52 See S. KADISH & S. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 300-01 (5th ed. 1989).

53 1 St. Tr. 1415, 1450 (1600). The Chief Justice stated that "I am sorry to think, that Englishmen should seem to excuse themselves by ignorance of the law, which all subjects are bound to know, and are born to have the benefit of." *Id.*

54 For two thorough and thoughtful discussions of the common law evolution of the felony-murder rule and its development in America, and two different conceptions of the jurisprudential consequences of the rule, see *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980). All seven justices joined in the holding abolishing the felony-murder rule in Michigan. Nevertheless, the two chief opinions disagreed on whether felony-murder created a special type of malice. Justice Fitzgerald, writing for the majority, held that "the felony-murder doctrine . . . provid[es] a separate definition of malice, thereby establishing a fourth category of murder. The effect of this doctrine is to recognize the intent to commit the underlying felony, in itself, as a sufficient *mens rea* for murder." 409 Mich. at 707, 299 N.W.2d at 321. Justice Ryan, in a separate opinion, argued that "[m]alice has nothing to do with common-law felony-murder; it is not an element of the crime, and is not properly considered by the jury. Except for its name, felony-murder bears little if any resemblance to the offense of murder." 409 Mich. at 742, 299 N.W.2d at 333 (Ryan, J., concurring) (footnote omitted).

to the age of the victim, although the victim's age was an element of the offense bearing on liability.<sup>55</sup> This crime seems to provide a historical analog for a strict liability offense. Nevertheless, this view of statutory rape ignores the actual role that the victim's age played in the definition of the offense. Because a statutory rape defendant could have been convicted of fornication in an ecclesiastical court regardless of the victim's age, the age was not the deciding factor in imposing criminal liability; rather, it determined the level of punishment and proper court.<sup>56</sup>

<sup>55</sup> The traditional view of statutory rape is that an accused can be convicted of the offense even if he possessed no state of mind as to the age of the victim. See O. HOLMES, *THE COMMON LAW* 58-59 (1881). The prosecution need not prove that the accused possessed any state of mind as to an element of the offense that goes to liability: the age of the victim. See *infra* notes 107-08 and accompanying text for the definition of an element that goes to liability.

An early formulation of statutory rape appears in the 1828 English statute "consolidating and amending the Statutes in *England* relative to Offences against the Person." Offences Against the Person Act, 1828, 9 Geo. 4, ch. 31, preamble (emphasis in original). The relevant sections read as follows:

XVII. And be it enacted, That if any Person shall unlawfully and carnally know and abuse any Girl under the age of Ten Years, every such Offender shall be guilty of Felony . . . ; and if any Person shall unlawfully and carnally know and abuse any Girl, being above the age of Ten years and under the Age of Twelve years, every such Offender shall be guilty of a Misdemeanor. . . .

XX. And be it enacted, That if any Person shall unlawfully take, or cause to taken, an unmarried Girl, being under the Age of Sixteen Years, out of the Possession and against the Will of her Father or Mother . . . every such Offender shall be guilty of a Misdemeanor. . . .

*Id.*

The English statutes were later codified in 24 & 25 Vict. ch. 100. Section 50 made carnal knowledge of a girl under ten years old a felony; § 51 made carnal knowledge of a girl between ten and twelve a misdemeanor; and § 55 made it a misdemeanor to take a girl under sixteen out of the possession of her parents. Because twelve was the age of consent, carnal knowledge of a girl over twelve could only be punished by § 55. According to one commentator, "there must have been many cases in which the real culpability of those accused under section 55 lay in the seduction [and sexual intercourse] rather than in the abduction of a girl between the ages of 12 and 16." Cross, *Centenary Reflections on Prince's Case*, 91 *LAW Q. REV.* 540, 541 (1975).

Section 55 was at issue in the celebrated case of *Regina v. Prince*, L.R.-2 Cr. Cas. 154, 13 Cox Cr. Cas. 138 (1875). The defendant was convicted of taking the underage victim out of the possession of her parents. The court upheld the conviction, despite its acceptance of the jury's finding that the defendant had a reasonable belief that the victim was over sixteen. Baron Bramwell wrote the majority opinion, concluding that the defendant should be punished because

[t]he act forbidden is wrong in itself . . . I do not say illegal, but wrong. . . . I say that done without lawful cause is wrong, and that the Legislature meant it should be at the risk of the taker whether or no she was under sixteen. . . . It seems to me impossible to say that, where a person takes a girl out of her father's possession, *not knowing* whether she is or is not under sixteen, that he is not guilty.

*Prince*, 13 Cox Cr. Cas. at 141-43 (emphasis added). Thus, the court stressed the immoral nature of the defendant's actions. Because of the relatively high sentence imposed upon *Prince* by the trial court, the suggestion has been made that the judges suspected him of sexual intercourse with the girl. See Cross, *supra*, at 550. The victim was over the age of consent, however, so the only crime *Prince* could be convicted of was taking her from her parents.

Later English cases interpreted *Prince* to also dispense with the state of mind requirement for the carnal knowledge offenses (§§ 50-51). *Prince* was taken as precedent for all three offenses.

<sup>56</sup> The interpretation of statutory rape as a strict liability crime rests on the assumption that, at the time the English statute was originally enacted, the age of the girl was a material element of the offense that went to the *liability* of the defendant for his conduct. This is not a correct view of this element of the crime. Instead, the age of the victim should more properly be viewed as an element that goes to the either the jurisdiction over or the grading of the offense. Assume that the girl in a statutory rape case is *over* sixteen. In this case, the defendant could still be convicted of a crime: the crime of fornication. He could not, however, be convicted in a temporal court; rather, such a trial would be held in an ecclesiastical court. In 1828, at the time the original statute was enacted, ecclesiastical courts possessed the jurisdiction to convict defendants of fornication. The leading commen-

Several American states adopted the English statutory rape and carnal knowledge laws.<sup>57</sup> Courts in these states followed English precedent by making statutory rape a strict liability offense,<sup>58</sup> despite the existence of applicable state statutes expressly requiring a criminal state of mind for conviction.<sup>59</sup> Because the underlying act of fornication was often not

tators on English law noted this situation. William Blackstone, although critical of the practice, traced the development of the ecclesiastical court jurisdiction:

In 1650, when the ruling powers found it for their interests to put on the semblance of a very extraordinary strictness and purity of motive, not only incest and wilful adultery were made capital crimes; but also the repeated act of keeping a brothel, or *committing fornication*, were (upon a second conviction) made felony without the benefit of clergy. But at the restoration, when men from an abhorrence of the hypocrisy of the late times fell into a contrary extreme, of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual court, according the rules of canon law.

4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 64 (T. Green facsimile ed. 1979) (1st ed. 1769) (emphasis added). William Holdsworth, also critical of the practice, noted that "[t]his jurisdiction [over the private affairs of life] was restored to the ecclesiastical courts in 1661; and there is no legal reason why at the present day they should not try cases of adultery and fornication." 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 621 (3d ed. 1922). Parliament itself implicitly recognized this right of ecclesiastical courts in 1787, when it passed a statute establishing that "no suit shall be commenced in any ecclesiastical court for fornication or incontinence . . . after the expiration of eight calendar months from the time when such offence shall have been committed." The Ecclesiastical Suits Act, 1787, 27 Geo. 3, ch. 44, quoted in 6 HALSBURY'S STATUTES OF ENGLAND 177 (1929).

Since the defendant in a statutory rape case could have been tried and convicted in an ecclesiastical court regardless of the age of the victim, the age of the victim is an element of the offense going to jurisdiction or grading and not to liability. Elements that relate to jurisdiction and grading have been traditionally viewed as requiring *no mens rea*. Contemporary criminal law also does not require that a state of mind be proven for these elements. See *infra* note 108; cf. *Feola v. United States* 420 U.S. 671 (1975) (holding that the defendant need not be aware of the circumstances that caused his offense to be a federal crime); *United States v. Holland* 810 F.2d 1215 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987) (holding that the defendant need not be aware of the circumstances that caused his offense to be a more serious crime).

Thus, the traditional view that statutory rape is historically a strict liability offense is not correct. The earliest case law interpreting this crime can be harmonized with modern assumptions for the determination of *mens rea*, assumptions that exempt matters of jurisdiction or grading from the state of mind requirement. For an explanation of these assumptions, see *infra* notes 101-08 and accompanying text. The statutory rape provisions should be interpreted utilizing the modern assumptions with the element of the victim's age going not to liability, but rather to jurisdiction or grading.

57 The drafters of the New York Field (Penal) Code explicitly credit the English statute as the predecessor of their law against taking an underage girl out of her parent's possession. See PENAL CODE OF THE STATE OF NEW YORK § 329, comment (1865) (proposed 'Field Code') (citing to the Offences Against the Person Act, 9 Geo. 4, ch. 31, § 20).

Although never adopted in New York, the New York Field Code was used as a basis for the California Penal Code of 1872; see McMurray, *California Jurisprudence*, 13 CAL. L. REV. 445, 461 (1925). The Field Code influenced the penal codes of many other states.

58 In *People v. Ratz*, 115 Cal. 132, 46 P. 915 (1896), the California Supreme Court explicitly cited *Regina v. Prince* as support for strict liability statutory rape. In this case, the defendant urged that he lacked criminal state of mind because he believed that the prosecutrix was over the age of consent. The court rejected his contention, stating:

The whole question is learnedly and elaborately discussed in *Reg. v. Prince*, L.R. 2 Crown Cas. 154. . . [The English court] held that neither defendant's honest belief [of the victim's maturity], nor the reasonable ground afforded him for such belief, relieved him from the consequences of his act.

*Ratz*, 46 P. at 916. Thus, the California Supreme Court held that an honest misbelief regarding the victim's age was no defense to statutory rape.

Other state courts also cited *Prince* in holding a statutory rape defendant strictly liable for the element of the victim's age. See, e.g., *State v. Newton*, 44 Iowa 45 (1876); *Commonwealth v. Murphy*, 165 Mass. 66, 42 N.E. 504 (1895); *Edens v. State*, 43 S.W. 89 (Tex. Crim. 1897); *Miller v. State*, 16 Ala. App. 534, 79 So. 314 (1918).

59 The California Penal Code contains a prefatory section specifying that "to constitute a crime there must be unity of act and intent." CAL. PENAL CODE § 20 (West 1988) (originally enacted as

a crime, the interpretation of statutory rape by American courts transformed it into an offense in which the defendant was held strictly liable for a liability element. Regardless of a defendant's state of mind as to the age of the victim, if the victim was under the statutory age, the defendant was guilty of rape; if the victim was over the age, the defendant was not guilty of any crime. A misunderstanding of the role played by the victim's age in the offense caused American courts to erroneously create a strict liability crime.<sup>60</sup> Although courts in some states—notably California—have allowed the defendant's reasonable mistake regarding the victim's age as a defense, most American courts continue to hold a statutory rape defendant strictly liable as to the girl's age.<sup>61</sup>

THE PENAL CODE OF CALIFORNIA, Feb. 14, 1872). This section seems to negate strict liability criminal offenses. But in *People v. Ratz*, 115 Cal. 132, 46 P. 915 (1896), the California Supreme Court endorsed strict liability statutory rape by not allowing the defense of mistake as to the victim's age.

According to the court, the defendant had assumed the risk of his victim being underage, so his lack of state of mind was not a defense. By invoking the assumption of risk doctrine, the court effectively negated the criminal state of mind requirement. The California Supreme Court thus disregarded a state statute requiring *mens rea* for all criminal offenses. Instead, it followed English case law and made statutory rape a strict liability offense.

60 When the California Supreme Court decided *People v. Ratz*, 115 Cal. 132, 46 P. 915 (1896), the California Penal Code contained no crime of fornication. See THE PENAL CODE OF CALIFORNIA, Feb. 14, 1872. Thus, there was no lesser offense, and the age of the victim served as a basis for criminal liability. The English precedent cited by *Ratz* dispensed with state of mind for the victim's age because it served as a basis for grading and jurisdiction. Nevertheless, the *Ratz* court followed this precedent when the victim's age served as a basis for liability. Because the contexts of the statute were not analogous, the application of *Prince* by *Ratz* was erroneous.

As additional support for strict liability statutory rape, the California Supreme Court in *Ratz* cited to its earlier decision in *People v. Fowler*, 88 Cal. 136, 25 P. 1110 (1891). In this case, the defendant was convicted of taking an underage female out of the possession of her parents for purposes of prostitution. In upholding the conviction, the court noted that "[i]t is claimed that the information is defective because it is not alleged that the defendant knew the girl was under age. We think that under this statute the people are not bound to allege or prove that the defendant knew the girl was under 18 years of age." *Id.* at 1110. As proof of this contention, the *Fowler* court cited § 632 of J. BISHOP, STATUTORY CRIMES (1873). This section simply quotes the holding in *State v. Ruhl*, 8 Iowa 447 (1859). In *Ruhl*, the Supreme Court of Iowa upheld the conviction of a man accused of taking an unmarried female out of her parents' custody for the purposes of prostitution. The trial court had excluded testimony offered by the defendant "to show that [the] defendant believed, or had good reason to believe, that the prosecuting witness was, at the time of taking . . . over fifteen years of age." *Ruhl*, 8 Iowa at 450. To support its decision upholding the trial court, the Iowa Supreme Court used the doctrine of transferred intent. According to this doctrine, "[t]he wrong intended, but not done, and the wrong done, but not intended, coalesce, and together constitute the same offence . . . as if the prisoner had intended the thing unintentionally done." *Id.* at 451 (quoting J. BISHOP, CRIMINAL LAW § 254 (1st ed. 1856)). At the heart of this doctrine lies the assumption that had the facts been as the defendant believed them to be, his conduct would still have been blameworthy. According to Bishop, "this doctrine seems to be qualified by the proposition, that the thing intended must not be merely *malum prohibitum*; it must be *malum in se*." J. BISHOP, CRIMINAL LAW § 257 (1st ed. 1856). Fornication was not a crime in California at the time *Ratz* was decided. Thus, the California Supreme Court incorrectly applied the doctrine of transferred intent to support its holding.

The two cases on which *Ratz* relied, *Prince* and *Fowler*, do not support the holding that knowledge of the victim's age was not required of the defendant.

61 In *People v. Hernandez*, 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964), the California Supreme Court held that the defendant's reasonable belief that the prosecutrix had reached the age of consent could constitute a defense to a statutory rape charge. The court recognized that the state of mind requirement of § 20 of the California Penal Code could not be satisfied by references to the defendant's assumption of the risk. According to the court, while many cases have ruled that criminal state of mind is presumed in statutory rape,

[t]he courts have uniformly failed to satisfactorily explain the nature of the criminal intent present in the mind of one who in good faith believes he has obtained a lawful consent before engaging in the prohibited act. As in the *Ratz* case, the courts often justify convic-

The second group of exceptions to the *mens rea* requirement arose when both English and American courts developed a body of law to interpret the growing number of "public welfare" offenses.<sup>62</sup> These crimes "depend on no mental element but consist only of forbidden acts or omissions."<sup>63</sup> Unlike the traditional crimes codified in statutes, public welfare offenses have no common law antecedents but instead are "creatures of statute."<sup>64</sup> Public welfare offenses came into existence when the legislature decided to promote the public good by enacting regulations accompanied by criminal sanctions. The new regulations allowed the government to convict violators without proving that the defendant possessed a state of mind for each and every element of the offense.

The law of public welfare offenses began to develop in England in 1846 with *Regina v. Woodrow*.<sup>65</sup> The court upheld the conviction of a tobacco dealer for possessing adulterated tobacco, even though he had no knowledge of its character. In 1866, the famous case of *Regina v. Stephens*<sup>66</sup> began the general trend in England to dispense with the requirement of *mens rea* for public nuisance offenses. The defendant in *Stephens*,

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tions on policy reasons which, in effect, eliminate the element of intent. The Legislature, of course, by making intent an element of the crime [in § 20], has established the prevailing policy from which it alone can properly advise us to depart.

*Hernandez*, 393 P.2d at 676. The criminal state of mind necessary for conviction was not present unless the defendant acted with utter disregard of, or lacked grounds for his belief in, the victim's age. The court therefore overturned *Ratz*, and it required a *mens rea* of criminal negligence or recklessness for statutory rape convictions.

A few recent decisions have followed *Hernandez* by eliminating the inconsistency of strict liability rape. Courts in a few states have allowed the defendant's reasonable mistake regarding the victim's age as a defense to the crime of statutory rape. See, e.g., *State v. Guest*, 583 P.2d 836, 839-40 (Alaska 1978) (relying on a general disapproval of strict criminal liability); and *State v. Elton*, 680 P.2d 727, 729 (Utah 1984) (holding that "there must be proof of a culpable mental state which establishes that the defendant was at least criminally negligent as to the age of the partner" after noting that the prefatory section of the Utah Penal Code requires that a state of mind be proven with respect to each element of an offense). Nevertheless, most courts continue to hold that the defendant's knowledge of the female's minority is not an element of a statutory rape crime. These courts have usually cited considerations of public policy—problems with enforcement and the protective purposes of the statute—as justifications for this divergence from the general state of mind requirement. Despite these explanations, statutory rape, with its extensive common law antecedents, does not fit into the framework for strict liability public welfare offenses, see *infra* notes 62-64 and accompanying text. Thus, requiring no *mens rea* for this offense is an anomaly of modern criminal law.

62 Professor Sayre recognized that

there has grown up within comparatively recent times a group of public welfare offenses, consisting of violations of police regulations which are punishable without proof of any individual blameworthiness and which form an exception to the general established doctrines of the criminal law.

Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 70 (1933).

63 *Morissette v. United States*, 342 U.S. 246, 252-53 (1952).

64 *Liparota v. United States*, 471 U.S. 419, 424 (1985).

65 15 M. & W. 404 (Exch. 1846). Judge Pollock stated that regarding

the case of provisions, or of any matter that affected the public health, it would not be at all unreasonable to require persons dealing in them to be aware of their character and quality, and to be responsible for their goodness, whether they know it or not;—they are bound to take care.

*Id.* at 415.

66 1 L.R.-Q.B. 702 (1866). Judge Mellor stated:

Inasmuch as the object of this indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment.

*Id.* at 710.

a quarry owner, was charged with creating a public nuisance because his employees obstructed a river with rubbish from the quarry. The court upheld Stephen's conviction even though his workmen had acted "without his knowledge and against his general orders."<sup>67</sup> The elimination of a *mens rea* requirement for adulterated foods and public nuisances spread to other areas of the law.<sup>68</sup>

A parallel movement occurred in America when the states began to enact their own public welfare statutes. In *Barnes v. State*,<sup>69</sup> the Connecticut Supreme Court interpreted the crime of selling liquor to a common drunkard as requiring no state of mind as to the character of the buyer. Thus, the defendant was convicted even though he had no knowledge that the buyer was a drunkard. The doctrine became firmly established in the United States as a result of several Massachusetts cases interpreting public welfare statutes. Decisions involving liquor and adulterated foods began the trend. In *Commonwealth v. Boynton*,<sup>70</sup> the Massachusetts Supreme Judicial Court upheld the conviction of a defendant for selling intoxicating liquor although he did not know it to be intoxicating. *Commonwealth v. Farren*,<sup>71</sup> following *Boynton*, held that a defendant need not possess any state of mind as to adulterated character in a conviction for selling adulterated milk. Other states followed Massachusetts' lead in enacting public welfare crimes and requiring no state of mind for some elements of these offenses.<sup>72</sup>

The Supreme Court applied this public welfare exception to the *mens rea* requirements of a federal criminal law in *United States v. Balint*.<sup>73</sup> This case involved a prosecution under the Narcotic Act of 1914,<sup>74</sup> which restricted traffic in narcotics. The Court held that if a federal criminal statute is silent as to state of mind for an element, then no state of mind need be proven for that element.<sup>75</sup> The Supreme Court followed *Balint*

67 *Id.* at 708.

68 These areas included prosecutions for receiving lunatics into a house which was not a registered asylum (Reg. v. Bishop, 5 Q.B.D. 259 (1880)), for selling liquor to a drunken person (Cundy v. Le Cocq, 13 Q.B.D. 207 (1884)), and for killing a tame house pigeon (Horton v. Gwynne, 2 K.B. 661 (1921)).

69 19 Conn. 398 (1849).

70 83 Mass. 160 (2 Allen 1861).

71 91 Mass. 489 (9 Allen 1864).

72 See generally Sayre, *supra* note 62, at 65-67.

73 258 U.S. 250 (1922).

74 Narcotic Act of December 17, 1914, Pub. L. No. 63-223, §§ 1-2, 38 Stat. 785, 786 (1914) (superceded by Internal Revenue Code of 1939). The relevant sections provide:

It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section. [In addition] . . . it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

75 The Supreme Court recognized that

[w]hile the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement.

in *United States v. Dotterweich*,<sup>76</sup> in which the Court interpreted the Federal Food, Drug, and Cosmetic Act.<sup>77</sup> The Court held that state of mind need not be proven as to the mislabeled character of the drugs.<sup>78</sup>

The expansion of the doctrine that statutes containing no state of mind terms were construed so as not to require state of mind for some elements met with criticism. Commentators urged that this rule should be limited.<sup>79</sup> Further, the federal courts were becoming increasingly confused as to the proper state of mind requirements for federal crimes with common law antecedents.<sup>80</sup>

*Balint*, 258 U.S. at 251-252 (citation omitted). The Court decided that the purposes of the Narcotic Act, especially that of minimizing drug use, would be best served by not reading a *mens rea* requirement into the statute. The Court thus did not require proof that the defendant knew he was dealing with narcotics. According to the Court: "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." *Id.* at 254.

<sup>76</sup> 320 U.S. 277 (1943).

<sup>77</sup> 21 U.S.C. §§ 301-392 (1988). The defendant was prosecuted under § 331(a), which prohibits "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

<sup>78</sup> In this case, the defendant was guilty of shipping misbranded drugs, even "though consciousness of wrongdoing be totally wanting." *Dotterweich*, 320 U.S. at 284. The Court approved of legislation that

dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.

*Id.* at 281. In these "public welfare" statutes, the "penalties serve as effective means of regulation," so strict liability is justified. *Id.* at 280-81.

<sup>79</sup> Professor Sayre stated:

The group of offenses punishable without proof of any criminal intent must be sharply limited. The sense of justice of the community will not tolerate the infliction of punishment which is substantial upon those innocent of intentional or negligent wrongdoing; and law in the last analysis must reflect the general community sense of justice.

Sayre, *supra* note 62, at 70.

Professor Sayre delineated "two cardinal principles" for determining whether or not an offense fits into this "public welfare" exception to the *mens rea* requirement:

The first relates to the character of the offense. . . . Crimes created primarily for the purpose of singling out individual wrongdoers for punishment or correction are the ones commonly requiring *mens rea*; police offenses of a merely regulatory nature are frequently enforceable irrespective of any guilty intent.

. . . .

The second criterion depends upon the possible penalty. If this be serious, particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind.

*Id.* at 72.

Professor Sayre outlined the following eight areas into which public welfare offenses generally fall:

1. Illegal sales of intoxicating liquor;
2. Sales of impure or adulterated food or drugs;
3. Sales of misbranded articles;
4. Violations of anti-narcotic acts;
5. Criminal nuisances;
6. Violations of traffic regulations;
7. Violations of motor-vehicle laws;
8. Violations of general police regulations, passed for the safety, health or well-being of the community. *Id.* at 73.

<sup>80</sup> Justice Jackson noted: "[t]he unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element." *Morissette v. United States*, 342 U.S. 246, 252 (1952).



The Supreme Court attempted to remedy the confusion in *Morissette v. United States*.<sup>81</sup> The Court interpreted the federal conversion of property statute.<sup>82</sup> It held that *mens rea* is an essential element of the crime of knowing conversion of Government property, since conversion was originally a common law offense. The Court thus distinguished between common law crimes, which require *mens rea*, and regulatory or "public welfare" crimes, which can be subject to strict liability if no *mens rea* requirement exists in the statute.<sup>83</sup>

The Supreme Court's decision in *Morissette* has not succeeded in bringing order to the determination of the appropriate states of mind in federal criminal law.<sup>84</sup> *Morissette* failed because it established a vague rule for the application of an ambiguous concept. *Morissette*'s division of crimes into common law offenses or public welfare offenses is *vague* because there is no clear distinction between the two categories.<sup>85</sup> This vagueness caused subsequent decisions to make arbitrary and confusing distinctions.<sup>86</sup> *Morissette*'s requirement of *mens rea* for common law offenses is *ambiguous* because the decision did not specify which state of

81 342 U.S. 246 (1952).

82 The statute, in relevant part, reads: "[w]hoever embezzles, steals, purloins or knowingly converts to his use or the use of another, or without authority sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . . Shall be fined . . . or imprisoned." 18 U.S.C. § 641 (1988).

83 The Court stated that "we have not found, nor has our attention been directed to, any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law." *Morissette*, 342 U.S. at 265.

Conversely, in justifying the application of strict liability to regulatory offenses, the Court stated that

whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

*Id.* at 256.

84 The Supreme Court, assessing the state of federal criminal law nearly thirty years after *Morissette*, observed in *United States v. Bailey*, 444 U.S. 394, 403 (1980), that

[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime. In 1970, the National Commission on Reform of Federal Criminal Laws decried the "confused and inconsistent ad hoc approach" of the federal courts to this issue and called for "a new departure."

85 Even in *Morissette*, the Court seemed to realize this fact:

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and those that do not. We attempt no closed definition, for the law on the subject is neither settled nor static.

*Morissette*, 342 U.S. at 260.

86 When applying this distinction to crimes contained in the federal criminal code, courts have difficulty identifying those possessing common law antecedents. There often is nothing intuitive or logical about these distinctions. For example, a law regulating hand grenades has been held to be a regulatory offense, *United States v. Freed*, 401 U.S. 601 (1971), while food stamp regulations have not been so held, *Liparota v. United States*, 471 U.S. 419 (1985).

In *Freed*, the Supreme Court held that the regulations on hand grenades in the National Firearms Act, §§ 5841-72 (1988), fit into the category of public welfare offenses. The Court stated: "[t]his is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an inno-

mind a court should apply, in spite of both the panoply of state of mind terms<sup>87</sup> and the different possible meanings of a single term.<sup>88</sup>

The distinction between common law and welfare offenses is vague, and thus causes more confusion than it cures. Nevertheless, a certain amount of vagueness is not fatal to criminal law if the vagueness plays an appropriate role. For example, when a statute defines illegal conduct, it may do so using clear standards, as opposed to overly precise rules.<sup>89</sup> A person risks violating these standards when engaging in some given conduct.<sup>90</sup> The point at which conduct becomes unlawful should be a question for the jury. To guide the jury, however, each criminal statute should contain identifiable standards that describe what the prosecution must prove to convict the defendant. The appropriate *mens rea* for an

cent act." *Freed*, 401 U.S. at 609. For the defendants to be convicted, the Court thus required no specific knowledge that the grenades were unregistered.

In *Liparota*, the Supreme Court held that a violation of the Food Stamp Act of 1964, 7 U.S.C. § 2024 (1988), was not a public welfare offense. Thus, the Court held that the government must prove that the defendant knew his acquisition or possession of food stamps was unauthorized by law. Because this was not proven, the Court reversed the conviction. According to the Court,

the offense at issue here differs substantially from those "public welfare offenses" we have previously recognized. In most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety.

*Liparota*, 471 U.S. at 432-33. However, this distinction is dubious, since a reasonable person would expect food stamp use to be subject to "stringent public regulation."

The Court is correct: hand grenades and food stamps (perhaps the modern analog to "guns and butter") are not comparable *as items*. Nevertheless, the regulations are comparable *as laws*, and the laws both strictly regulate the items. Although the legal distinction seems illusory, the Court held that laws concerning food stamps are not "regulatory," while those concerning hand grenades are "regulatory."

87 *Morissette* noted:

[Congress] has seen fit to prescribe that an evil state of mind, described variously in one or more such terms as "intentional," "wilful," "knowing," "fraudulent" or "malicious," will make criminal an otherwise indifferent act, or increase the degree of the offense or its punishment.

*Morissette*, 342 U.S. at 264. For the modern hierarchy of state of mind terms, see *infra* notes 94-100 and accompanying text.

88 Consider the different meanings of the term "wilfully." See *supra* note 44.

89 Justice Black, writing for the majority in *United States v. Petrillo*, 332 U.S. 1 (1947), stated:

It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. . . . The Constitution has erected procedural safeguards to protect against conviction for crime except for violations of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards.

*Id.* at 7 (citations omitted).

90 In *Nash v. United States*, 229 U.S. 373, 377 (1913), Justice Holmes wrote for the majority that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

The standards must, however, be clear enough to satisfy the requirement that the public be given notice of what is criminal and what is not. This necessity of notice derives from the constitutional principle of due process. Justice Douglas, in *Lambert v. California*, 355 U.S. 225, 228 (1957), described the role of notice in due process:

Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.

offense is the most important standard of a criminal statute because it mandates the minimum level of culpability necessary for conviction.

## 2. Modern Assumptions for Interpreting Criminal Statutes

Modern criminal law is moving away from traditional notions of criminal states of mind and towards more sophisticated conceptions regarding states of mind and how they should be determined. Three different sources embody this reform. The first and earliest source is the Model Penal Code section "General Requirements of Culpability."<sup>91</sup> The second source is the "Culpable States of Mind" chapter in the Criminal Code Reform Act of 1979.<sup>92</sup> The third source is Part II(A) of the Supreme Court's opinion in *United States v. Bailey*.<sup>93</sup>

Three jurisprudential assumptions embody the thrust of contemporary criminal law reform on the proper determination of a state of mind required by a criminal offense. The analytical framework utilized by this Comment incorporates all three. The first assumption is that all state of

91 MODEL PENAL CODE § 2.02 (Official Draft and Revised Comments 1985). The American Law Institute approved this provision in May, 1962. See *id.* at 225-26.

"Section 2.02 may appropriately be considered the representative modern American culpability scheme." Robinson & Grall, *Element Analysis in Defining Criminal Liability*, 35 STAN. L. REV. 681, 692 (1983) (footnote omitted).

92 S. 1722, *supra* note 2, §§ 301-303. Although Congress never enacted S. 1722 or its successor bills, commentators praised its reforms. "S. 1722 replaces the confusing and inconsistent ad hoc approach to culpability that now characterizes federal criminal law with a new system that has its genesis in the Model Penal Code, the recommendations of the National Commission, and recent state codifications." Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 AM. CRIM. L. REV. 123, 129 (1980). Professor Feinberg continued:

S. 1722 attempts to reform, modernize, and streamline the way the federal criminal law currently treats the issue of culpability. . . .

. . . .

. . . [S. 1722 has the ability to] clarify the law and make it more readily understandable to lawyer and layman alike. Although the new rules of construction may, on first reading, appear to be complex, the rules are easily mastered and should promote fairness, consistency, and discipline in drafting.

*Id.* at 142, 143.

93 444 U.S. 394, 403-406 (1980). The Court, when it began its analysis, noted that "[t]his ambiguity [involving the determination of *mens rea*] has led to a movement away from the traditional dichotomy of intent and toward an alternative analysis of *mens rea*." *Bailey*, 444 U.S. at 404.

*Bailey* interpreted the federal escape statute, which provides: "[w]hoever escapes or attempts to escape from . . . any institution or facility in which he is confined by direction of the Attorney General . . . shall . . . be fined . . . or imprisoned." 18 U.S.C. § 751 (a) (1988). At trial, the defendants attempted to present a defense of duress based on jail conditions. The District Court refused their proposed jury instruction on duress.

The appellate court reversed, holding that

[s]ection 751(a) required the prosecution to prove that a particular defendant left federal custody voluntarily, without permission, and "with an intent to avoid confinement" . . . [which] encompass[es] only the "normal aspects" of punishment prescribed by our legal system. Thus, where a prisoner escapes to avoid "non-confinement" conditions such as beatings or homosexual attacks, he would not necessarily have the requisite intent to sustain a conviction under § 751(a).

*Bailey*, 444 U.S. at 401 (quoting *Bailey v. United States*, 585 F.2d 1087, 1093 (1978)). The Supreme Court decided that the statute did not contain "such a heightened standard of culpability or such a narrow definition of confinement." *Id.* at 408. It therefore held that "the prosecution fulfills its burden under § 751(a) if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission." *Id.* The Supreme Court thus reversed the Court of Appeals and reinstated the conviction.

mind terms may be reduced to a four-part hierarchy.<sup>94</sup> This assumption rejects the traditional division between specific and general intent.<sup>95</sup> The Model Penal Code and S. 1722 use a similar hierarchy of culpability: purpose/intent,<sup>96</sup> knowledge,<sup>97</sup> recklessness,<sup>98</sup> and negligence.<sup>99</sup> One of

94 The state of mind hierarchy can only be understood in relation to the three different types of elements that constitute an offense. The three types of elements are conduct, surrounding circumstance, and result. See *infra* notes 104-06 and accompanying text.

The variety of terms now used in federal criminal statutes to describe states of mind is tremendous. "Present Federal criminal law is composed of a bewildering array of terms used to describe the mental element of an offense. The National Commission's consultant on the subject identified 78 different terms used in present law." S. REP. No. 553, 96th Cong., 2d Sess. 59 (1980).

95 The Supreme Court criticized the traditional distinction: "[a] common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This venerable distinction, however, has been the source of a good deal of confusion." *Bailey*, 444 U.S. at 403. Professors LaFave and Scott noted:

The meaning of the word "intent" in the criminal law has always been rather obscure, largely as a result of its use in such phrases as "criminal intent," "general intent," "specific intent," "constructive intent," and "presumed intent." Intent has traditionally been defined to include knowledge, and thus it is usually said that one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts.

W. LAFAVE & A. SCOTT, *supra* note 51, § 3.5, at 216. The concept of "specific intent" has been particularly troublesome:

The term "specific intent" has been productive of untold confusion, partly because courts have not been consistent in their use of it and partly for the more fundamental reason that it is often quite difficult to determine whether a statute *should* be interpreted to require specific intent—that is, the Code concept of a true "purpose."

S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 277 (4th ed. 1983) (emphasis in original).

96 The Model Penal Code employs the term "purpose" to express the highest state of mind and defines it as follows:

A person acts purposely with respect to a material element of an offense when: (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) (Official Draft and Revised Comments 1985).

S. 1722 retains the term "intentional," and defines it as follows:

A person's state of mind is intentional with respect to—

- (1) his conduct if it is his conscious objective or desire to engage in the conduct; or
- (2) a result of his conduct if it is his conscious objective or desire to cause the result.

S. 1722, *supra* note 2, § 302(a).

In *Bailey*, the Supreme Court preferred the use of "purpose": "a person who causes a particular result is said to act purposefully if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.'" *Bailey*, 444 U.S. at 404 (quoting *United States v. United States Gypsum*, 438 U.S. 422, 445 (1978) (quoting W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 28, at 196 (1st ed. 1972))).

There are two noticeable differences between these two definitions. First, the Model Penal Code uses the term "purpose," while S. 1722 uses the term "intentional." This is a distinction without a difference, since the heart of both definitions is the concept of conscious objective. The Supreme Court noted that "the respondents acted with the purpose—that is, the conscious objective—of leaving the jail . . ." *Bailey*, 444 U.S. at 408.

Second, the Model Penal Code applies "purposely" to elements that are surrounding circumstances, while S. 1722 limits "intentional" to elements that are either conduct or result. This distinction does make a meaningful, albeit slight, difference. The analytical framework of this Comment utilizes the limited application of S. 1722. A court would not be able to meaningfully apply a state of mind of intent or purpose to an element that is a surrounding circumstance. "[A] person cannot intend an existing circumstance, but can only have knowledge of, or be reckless or negligent with respect to, its existence." Feinberg, *supra* note 92, at 133.

97 According to the Model Penal Code:

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.

MODEL PENAL CODE § 2.02(2)(b) (Official Draft and Revised Comments 1985).

According to S. 1722:

A person's state of mind is knowing with respect to—

- (1) his conduct if he is aware of the nature of his conduct;
- (2) an existing circumstance if he is aware or believes that the existing circumstance exists; or
- (3) a result of his conduct if he is aware or believes that his conduct is substantially certain to cause the result.

S. 1722, *supra* note 2, § 302(b).

In *Bailey*, the Supreme Court defined knowingly as follows: "a person who causes a particular result . . . is said to act knowingly if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'" *Bailey*, 444 U.S. at 404 (quoting *Cypsum*, 438 U.S. at 445 (quoting *W. LAFAVE & A. SCOTT, supra* note 96, at 194)).

98 The Model Penal Code defines "reckless" as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(c) (Official Draft and Revised Comments 1985).

S. 1722 defines "reckless" as follows:

A person's state of mind is reckless with respect to—

- (1) an existing circumstance if he is aware of a substantial risk that the circumstance exists but disregards the risk; or
- (2) a result of his conduct if he is aware of a substantial risk that the result will occur but disregards the risk;

except that awareness of the risk is not required if its absence is due to self-induced intoxication. A substantial risk means a risk that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

S. 1722, *supra* note 2, § 302(c).

The differences between the definitions are not significant. The first difference is that the Model Penal Code's application of "recklessness" to result and attendant circumstances is implicit, while S. 1722's application of "reckless" to result and existing circumstances is explicit. The second difference is the Model Penal Code's use of "unjustifiable" in defining the type of risk that an offender may disregard. The Senate Committee felt that "substantial" risk included the meaning of "unjustifiable": "As the proposed Code uses the term 'reckless,' the risk consciously disregarded must be substantial and unjustifiable. . . . The Committee believes that use of the term 'substantial' in conjunction with the last sentence in subsection (c) . . . encompasses this concept [of unjustifiable]." S. REP. NO. 553, 96th Cong., 2d Sess. 64 (1980).

99 The Model Penal Code defines negligence:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(d) (Official Draft and Revised Comments 1985).

S. 1722 defines negligence as follows:

A person's state of mind is negligent with respect to—

- (1) an existing circumstance if he ought to be aware of a substantial risk that the circumstance exists; or
- (2) a result of his conduct if he ought to be aware of a substantial risk that the result will occur.

A substantial risk means a risk that is of such a nature and degree that to fail to perceive it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

S. 1722, *supra* note 2, § 302(d).

the most important distinctions drawn by the hierarchy is between its definitions of purpose and knowledge.<sup>100</sup>

The second assumption underlying the interpretation of modern criminal statutes is that element-by-element analysis can advance the determination of a statute's state of mind requirements.<sup>101</sup> Element-by-element analysis recognizes that different states of mind may apply to different elements of the crime.<sup>102</sup> When courts utilize element-by-element analysis, they do so step by step. Initially, the court classifies the

100 The Court noted in *Bailey* that "[p]erhaps the most significant, and most esoteric, distinction drawn by this analysis is that between the mental states of 'purpose' and 'knowledge.'" 444 U.S. at 404. Professors LaFave and Scott noted that "the modern approach is to define separately the mental states of knowledge and intent (sometimes referred to as purpose, most likely to avoid confusion with the word 'intent' as traditionally defined). This is the approach taken in the Model Penal Code." W. LAFAVE & A. SCOTT, *supra* note 51, § 3.5(b), at 218 (footnote omitted).

In some cases, including prosecutions for complicity, this distinction is crucial. The Comment to the Model Penal Code notes:

It is true, of course, that this distinction is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient. But there are areas where the discrimination is required and is made under traditional law, which uses the awkward concept of "specific intent." This is true in treason, for example, insofar as a purpose to aid the enemy is an ingredient of the offense, and in attempts, complicity and conspiracy, where a true purpose to effect the criminal result is requisite for liability.

MODEL PENAL CODE § 2.02 comment 2, at 234 (Official Draft and Revised Comments 1985).

An analysis of the state of mind requirements for the offense of complicity reveals the importance of the difference between "purpose" and "knowledge." One view, propounded vigorously by Judge Learned Hand, is that the proper state of mind for complicity is a purpose to promote the criminal result. Judge Hand noted that the traditional terms describing complicity

have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, . . . that he seek by his action to make it succeed. All the words used—even the most colorless, "abet"—carry an implication of *purposive attitude* towards it.

United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (emphasis added). The other view, argued by Judge John J. Parker, holds that the state of mind of knowledge is sufficient for complicity:

Guilt as an accessory depends, not on "having a stake" in the outcome of crime . . . but on aiding and assisting the perpetrators. . . . One who sells a gun to another *knowing* that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he had received full price for the gun. . . .

Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940) (emphasis added). The former view was adopted by the Model Penal Code, establishing that "[a] person is an accomplice of another person in the commission of an offense if: (a) *with the purpose* of promoting or facilitating the commission of the offense . . ." that person either acts or fails to act. MODEL PENAL CODE § 2.06(3) (Official Draft and Revised Comments 1985) (emphasis added).

The distinction is similarly important to the law of conspiracy and attempt. The Court noted in *Bailey* that "[a]nother such example [where heightened culpability merits special attention] is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior." *Bailey*, 444 U.S. at 405.

101 The Court explicitly praised this technique for determining the proper states of mind of a statute. "[T]he suggested element-by-element analysis is a useful tool for making sense of an otherwise opaque concept." United States v. Bailey, 444 U.S. 394, 406 (1980). The "opaque concept" to which *Bailey* referred is the concept of *mens rea*.

102 The Supreme Court in *Bailey* reflected this:

Is the same state of mind required of the actor for each element of the crime, or may some elements require one state of mind and some another? In *United States v. Feola* . . . we were asked to decide whether the Government, to sustain a conviction for assaulting a federal officer under 18 U.S.C. § 111, had to prove that the defendant knew that his victim was a federal officer. After looking to the legislative history of § 111, we concluded that Congress intended to require only "an intent to assault, not an intent to assault a federal officer." . . . What *Feola* implied, the American Law Institute stated: "[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."

*Bailey*, 444 U.S. at 405-06 (citations omitted).

elements<sup>103</sup> of the offense as either conduct,<sup>104</sup> surrounding circumstances,<sup>105</sup> or prohibited result.<sup>106</sup> Next, the court, having identified the elements that are surrounding circumstances, must further classify them as either requiring a state of mind<sup>107</sup> or not requiring a state of mind. The elements that do not require a state of mind relate to grading, venue, jurisdiction, or a question of law.<sup>108</sup> The surrounding circum-

103 The Model Penal Code defines "element of an offense" as follows:

"[E]lement of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

(a) is included in the description of the forbidden conduct in the definition of the offense; or

(b) establishes the required kind of culpability; or

(c) negatives an excuse or justification for such conduct; or

(d) negatives a defense under the statute of limitations; or

(e) establishes jurisdiction or venue.

MODEL PENAL CODE § 1.13(9) (Official Draft and Revised Comments 1985).

To apply these definitions to 18 U.S.C. § 207(c), the requirement that the nature of the communication be "in connection with any . . . particular matter . . . in which such department or agency has a direct and substantial interest," 18 U.S.C. § 207(c)(2)-(3), is a surrounding circumstance included in the description of the forbidden conduct.

104 The Model Penal Code provides a useful definition of conduct. Conduct is "an action or omission and its accompanying state of mind, or, where relevant, a series of acts or omissions." MODEL PENAL CODE § 1.13(5) (Official Draft and Revised Comments 1985).

105 Surrounding circumstances are referred to as "attendant circumstances" by the Model Penal Code, MODEL PENAL CODE § 2.02 (Official Draft and Revised Comments 1985), and "existing circumstances" by S. 1722, *supra* note 2, § 301(a).

106 An element classified as a result is similar to an element classified as a surrounding circumstance in that all four states of mind can be applied to both types of elements under either Model Penal Code § 2.02 or S. 1722 § 302. An element classified as conduct is different: the only applicable states of mind are purposely (Model Penal Code) or intentionally (S. 1722), and knowingly. *See* MODEL PENAL CODE § 2.02(2) (Official Draft and Revised Comments 1985) and S. 1722, *supra* note 2, § 301(c).

107 The Model Penal Code provides that a person is not guilty unless he acted with some state of mind "with respect to each *material element* of the offense." MODEL PENAL CODE § 2.02(1) (Official Draft and Revised Comments 1985) (emphasis added). The Code had earlier defined "material element" by negative example:

"[M]aterial element of an offense" means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct . . . .

*Id.*, § 1.13(10). Thus, no state of mind is necessary for the non-material elements, such as the statute of limitations, jurisdiction, venue, and questions of law.

108 Elements not requiring a state of mind relate to one of five matters, as outlined in S. 1722: MATTERS OF LAW REQUIRING NO PROOF OF STATE OF MIND.—

(1) EXISTENCE OF OFFENSE.—Proof of knowledge or other state of mind is not required with respect to—

(A) the fact that particular conduct constitutes an offense, or that conduct or another element of an offense is pursuant to, or required by, or violates, a statute or regulation, rule, or order issued pursuant thereto;

(B) the fact that particular conduct is described in a section of this title; or

(C) the existence, meaning, or application of the law determining the elements of an offense.

(2) JURISDICTION, VENUE, AND GRADING MATTERS.—Proof of state of mind is not required with respect to any matter that is solely a basis for federal jurisdiction, for venue, or for grading.

(3) MATTERS DESIGNATED A QUESTION OF LAW.—Proof of state of mind is not required with respect to any matter that is designated as a question of law.

S. 1722, *supra* note 2, § 303(d). This section includes grading, one matter that is not included by the Model Penal Code in its section defining which elements are not material and thus do not require a state of mind; *see supra* note 107. For elements of grading, the Model Penal Code would require some state of mind. "[T]he culpability structure of section 2.02 is meant to apply to grading criteria

stance elements that require a state of mind are those elements that do not relate to grading, venue, jurisdiction, or a question of law, but rather relate to liability for the substantive offense. Finally, the court, having classified all the elements, examines the statute and attempts to assign a

as well as to the formal elements of the Model Penal Code offenses." Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 *RUTGERS L.J.* 539, 546 (1988).

The framework utilized in this Comment includes grading as an element for which no state of mind need be required. This position follows the common law, *id.* at 546-47, and present federal case law. *See, e.g.*, *United States v. Holland*, 810 F.2d 1215 (D.C. Cir.), *cert. denied*, 481 U.S. 1057 (1987) (upholding a conviction for selling a controlled substance within 1000 feet of a school, without proof that the defendant knowingly was in the school zone, where the element of being within 1000 feet of a school resulted in a different offense and a more serious penalty); *United States v. Falu*, 776 F.2d 46 (2d Cir. 1985) (same); *United States v. Collado-Gomez*, 834 F.2d 280 (2d Cir. 1987), *cert. denied*, 485 U.S. 969 (1988) (upholding a conviction under statute providing for enhanced penalties for selling "crack," without proof that the defendant knew the specific controlled substance he possessed).

The Model Penal Code and S. 1722 agree that a matter of jurisdiction requires no state of mind. This position follows the controlling Supreme Court decisions. In *United States v. Feola*, 420 U.S. 671, 684 (1975), the Court held that the federal assault statute "cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer." The Court further noted that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute. The question, then, is not whether the requirement is jurisdictional, but whether it is *jurisdictional only*." *Id.* at 676 n.9 (emphasis added).

The specific language of both the Model Penal Code and S. 1722, excluding elements that are jurisdictional from the state of mind requirement, flows from this requirement that an excluded element be "jurisdictional only." The Model Penal Code uses the phrase "an element that does not relate *exclusively* to . . . jurisdiction", § 1.13(10), *supra* note 107 (emphasis added). S. 1722 uses the phrase "to any matter that is *solely a basis for federal jurisdiction*," § 303(d), *supra* (emphasis added). If jurisdiction is necessarily part of the substantive offense, it will require a state of mind. *See, e.g.*, *United States v. Schankowski*, 782 F.2d 628 (6th Cir. 1986) (holding that knowledge was required for conviction under the mail fraud statute, since "there can be no separation of the crime from the predicate act. Unless mail is involved there is nothing to prohibit . . .").

Unfortunately, the Supreme Court's more recent holding in *United States v. Yermian*, 468 U.S. 63 (1984) clouds its clear holding in *Feola*. The statute at issue was 18 U.S.C. § 1001 (1982), which, in relevant part, provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations . . . shall be fined . . . or imprisoned . . .

The Court began by noting that "[t]he statutory language requiring that knowingly false statements be made 'in any matter within the jurisdiction of any department or agency of the United States' is a jurisdictional requirement." *Yermian*, 468 U.S. at 68. It concluded that "proof of actual knowledge of federal agency jurisdiction is not required under § 1001." *Id.* at 75 (emphasis added). Nevertheless, in a footnote, the Court seemed to back away from the clear holding of *Feola* that a jurisdictional element requires no state of mind at all:

It is worth noting that the jury was instructed . . . that the Government must prove that respondent "knew or should have known" that his false statements were made within the jurisdiction of a federal agency.

As the Government did not object to the reasonable-foreseeability instruction, it is unnecessary for us to decide whether that instruction erroneously read a culpability requirement into the jurisdictional phrase. . . . The jury's finding that federal agency jurisdiction was reasonably foreseeable by the defendant, combined with the requirement that the defendant had actual knowledge of the falsity of those statements, precludes the possibility that criminal penalties were imposed on the basis of innocent conduct.

*Id.* at n.14. This footnote cannot be explained. The Court could have held that the federal agency jurisdiction was part of the substantive offense by noting that the states do not prosecute people who lie on federal forms. If the Court had done this, then the surrounding circumstance element it views as jurisdictional would instead go to liability, thus requiring a state of mind. *See infra* notes 113-14 and accompanying text. Alternatively, the Court could have held that no state of mind at all is required for the jurisdictional matter, which would have followed its holding in *Feola*. The Court declined to do either, and the decision seems to cast doubt on the continued vitality of *Feola*.



state of mind term to each element. The Supreme Court has reiterated its support of this tool,<sup>109</sup> and it has been praised by several commentators.<sup>110</sup> Federal appellate courts have recognized and utilized this approach.<sup>111</sup> In the words of one court, using element analysis is simply

109 The Court held in *Liparota v. United States*, 471 U.S. 419, 424 n.4 (1985), that "[t]he required mental state may of course be different for different elements of a crime." This approach has been called either "element analysis" or "element-by-element analysis."

110 Professors Robinson and Grall argued:

Element analysis provides the comprehensiveness, clarity, and precision needed to give fair notice and to limit governmental discretion . . . .

. . . .

Element analysis, by providing a precise statement of all separate elements of an offense definition, has the conceptual advantage of increased simplicity. It eliminates the need for separate bodies of law such as mistake and accident by demonstrating that these apparently independent doctrines are actually concerned with culpability as to particular objective elements. In addition, the clarity and precision of element analysis has the practical effect of reducing litigation by reducing ambiguities in offense definitions.

Robinson & Grall, *supra* note 91, at 703-04 (footnotes omitted).

Professors LaFave and Scott recognized the heart of element-by-element analysis: "the mental ingredients of a particular crime may differ with regard to the different elements of the crime." W. LAFAVE & A. SCOTT, *supra* note 51, § 3.4(d), at 215.

111 The Fifth Circuit recognized the utility of element-by-element analysis in *United States v. Adamson*, 665 F.2d 649 (5th Cir. Unit B 1982), *aff'd in part and rev'd in part on rehearing*, 700 F.2d 953 (5th Cir. Unit B), *cert. denied*, 464 U.S. 833 (1983) [hereinafter *Adamson I*]. The court was attempting to determine the appropriate state of mind necessary for conviction under 18 U.S.C. § 656 (1982), which provides:

Whoever, being an officer, director, agent or employee of . . . any Federal Reserve bank . . . willfully misapplies any of the moneys, funds or credits of such bank . . . , shall be fined not more than \$5,000 or imprisoned not more than five years, or both . . . .

Prior decisions of the Fifth Circuit and other circuits had "uniformly construed the statute to include the 'intent to injure or defraud the bank' as a material element of the crime." *Adamson I*, 665 F.2d at 652 (citations omitted).

The presiding judge for the trial of *Adamson* had charged the jury that "[a] reckless disregard of the interest of the bank is the equivalent of the intent to injure or defraud the bank." *Id.* at 651. This instruction explicitly tracked the Fifth Circuit holding in *United States v. Welliver*, 601 F.2d 203, 210 (5th Cir. 1979), which *Adamson I* cited: "*Welliver* thus has interpreted the 'intent to injure or defraud' element of willful misapplication to import a *mens rea* of merely recklessness." *Adamson I*, 665 F.2d at 655. This state of mind requirement was thus satisfied if the prosecution could prove that the defendant had acted with reckless disregard for the interest of the bank.

The court was uneasy with this conception of *mens rea*, and noted that "[n]o other circuit has approved a jury instruction equating 'recklessness' with 'intent to injure or defraud.'" *Adamson I*, 665 F.2d at 654 (footnote omitted). In a footnote, the court explained how the Fifth Circuit rule could be harmonized with the positions of other circuits by applying element-by-element analysis:

This interpretation begins with the premise that an offense can have a different state of mind requirement for different elements of the crime. *United States v. Bailey*, 444 U.S. 394, 405-06 [1980], . . . The recklessness charge approved in *Welliver* might be said to refer only to the ultimate consequences—whether the acts in question will tend to injure or defraud the bank—and not to the constituent parts of the offense. Under this analysis, the defendant in *Welliver* would have violated the statute if he *knew* he was in effect arranging a loan without a written obligation for repayment but need only have been *reckless* with regard to whether such a loan would tend to injure or defraud the bank . . . .

*Id.* at 655 n.17 (emphasis in original). The court continued:

In the present case, under this analysis, to violate § 656 the defendant would have to *know* that the named borrower lacked the ability or intent to repay, but the defendant need only be *reckless* with regard to whether such a loan would tend to injure or defraud the bank.

*Id.* (emphasis in original). The court did not adopt this interpretation because "[t]he charge approved by *Welliver*, however, is not consistent with this analysis." *Id.* The panel thus upheld the conviction of *Adamson*, relying on *Welliver*.

One year later, in an *en banc* rehearing of the case, the Fifth Circuit reversed the panel and overruled *Welliver* by an 8-4 decision. *United States v. Adamson*, 700 F.2d 953 (5th Cir. Unit B), *cert. denied*, 464 U.S. 833 (1983) [hereinafter *Adamson II*]. The court held that

“heeding the advice of the Supreme Court.”<sup>112</sup>

The third assumption that courts should make builds on the traditional assumption that a state of mind is presumed when not expressed. Generally speaking, a court will read into a statute a state of mind if that statute does not expressly require a state of mind.<sup>113</sup> The analytical framework of this Comment, drawn from modern criminal law, improves the traditional presumption by specifying the *particular* state of mind that should be presumed for a *particular type of element*. For elements that are either *surrounding circumstance* or *result* elements, a court should require that at least the state of mind of *recklessness* be proved for that element. For elements that are *conduct* elements, a court should require that at least the higher state of mind of *knowledge* be proved for that element. This requirement of a minimum state of mind adopts S. 1722’s explicit

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the appropriate mens rea standard for § 656 is knowledge. In order to convict a defendant for willfully misapplying funds with intent to injure or defraud a bank, the government must prove that the defendant *knowingly* participated in a deceptive or fraudulent transaction. The trier of fact may infer the required intent, *i.e.*, knowledge, from the defendant’s reckless disregard of the interest of the bank . . . .

*Adamson II*, 700 F.2d at 965 (emphasis in original). Thus, the interpretation urged in *Adamson I*, which called for a state of mind of knowledge as to the ability of the borrower to pay and a state of mind of recklessness as to the effect on the bank, was implicitly adopted by the entire circuit in *Adamson II*.

112 *United States v. Sturm*, 870 F.2d 769, 777 (1st Cir. 1989). The court stated that “we have avoided specific intent terminology and instead have used the Model Penal Code’s element-by-element approach towards intent.” *Id.* See also *United States v. M.W.*, 890 F.2d 239 (10th Cir. 1989) (adopting element-by-element analysis and Model Penal Code view of “knowingly”).

113 Unless the statute expressly indicates that no state of mind is required, a court should infer that the legislature intended to require that some state of mind be proved for an offense.

The Court affirmed this doctrine in *Bailey*: “mere omission [from the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced.” *Bailey*, 444 U.S. at 406 n.6 (quoting *Morissette v. United States*, 342 U.S. 252, 263 (1952)) (insert in original). This general component of the assumption is not a contemporary development. Since *Morissette*, American law has contained a presumption against strict liability for common law crimes. Thus, express legislative intent is necessary to eliminate the requirement of a state of mind, making a criminal statute subject to strict liability. As the Court recently held in *Liparota*:

[I]n *United States v. United States Gypsum Co.* . . . we noted that “certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement” and that criminal offenses requiring no *mens rea* have a “generally disfavored status.” Similarly, in this case, the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law.

*Liparota v. United States*, 471 U.S. 419, 426 (1985) (citation omitted).

The Model Penal Code and S. 1722 adopt this assumption in the context of element-by-element analysis. The Model Penal Code formulates this presumption in two sections. Section 2.02(1) establishes that “[e]xcept as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.” Section 2.05 defines “When Culpability Requirements Are Inapplicable to Violations and to Offenses Defined by Other Statutes.” MODEL PENAL CODE §§ 2.02(1), 2.05 (Official Draft and Revised Comments 1985).

S. 1722 notes, in relevant part:

Except as otherwise expressly provided, the following provisions apply to an offense under any federal statute:

(a) REQUIRED PROOF OF STATE OF MIND.—A state of mind must be proved with respect to each element of an offense, except that—

(1) no state of mind must be proved with respect to a particular element of an offense if that element is specified in the description of the offense as existing or occurring “in fact”

. . . .

S. 1722, *supra* note 2, § 303.

position and the Model Penal Code's implicit position.<sup>114</sup> These inferences for a minimum state of mind operate when a statute does not specify the required state of mind for an element of the offense, whether that element relates to conduct, a surrounding circumstance, or a result.

The framework adopted by this Comment also follows S. 1722's guidance as to when a given section does or does not "specify" a state of mind for a given element. The Model Penal Code contains a section that applies *any* state of mind expressed in an offense to *all* the elements of that offense unless "a contrary purpose plainly appears."<sup>115</sup> This section undermines the utility of element-by-element analysis,<sup>116</sup> and the frame-

114 S. 1722 and the Model Penal Code differ in the way this presumption is presented. The relevant section of the Model Penal Code, its "default culpability provision," reads:

When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

MODEL PENAL CODE § 2.02(3) (Official Draft and Revised Comments 1985). Professors Robinson and Grall explained that "Model Penal Code section 2.02(3) requires recklessness for any element for which the offense definition does not specify culpability." Robinson & Grall, *supra* note 91, at 712.

Nevertheless, the Model Penal Code implicitly presumes a different minimum state of mind for elements of an offense that relate to *conduct*. In its definition of recklessness at § 2.02(2)(c), *supra* note 98, the Code does not define "recklessly" with respect to conduct. Professors Robinson and Grall explained the result of the interaction between §§ 2.02(2)(c) (recklessness definition) and 2.02(3) (default culpability provision):

[A] person must be at least "reckless" with respect to circumstance and result elements and at least "knowing" with respect to conduct elements. The difference between circumstance and result elements and conduct elements occurs because "recklessly" is not defined with respect to conduct.

Robinson & Grall, *supra* note 91, at 700 n.84.

S. 1722, on the other hand, explicitly reads in recklessness for elements that are surrounding circumstances or results, and knowledge for elements that are conduct. S. 1722 provides:

REQUIRED STATE OF MIND FOR AN ELEMENT OF AN OFFENSE IF NOT SPECIFIED.—Except as provided in subsection (a), if an element of an offense is described without specifying the required state of mind, the particular state of mind that must be proved with respect to—

- (1) conduct is "knowing";
- (2) an existing circumstance is "reckless"; and
- (3) a result is "reckless".

S. 1722, *supra* note 2, § 303(b).

Recklessness is the appropriate state of mind to presume because it requires a subjective component in the mind of the defendant. The distinction between recklessness and negligence "hinges upon the *awareness of the defendant*." Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 820 (1980) (emphasis in original). The requirement of awareness justifies the use of recklessness as a minimum level of culpability.

115 The entire section reads:

*Prescribed Culpability Requirement Applies to All Material Elements.* When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

MODEL PENAL CODE, § 2.02(4) (Original Draft and Revised Comments 1985) (emphasis in original).

116 Section 2.02(4), applying a prescribed culpability requirement to all material elements, is not consistent with § 2.02(3), requiring at least recklessness unless otherwise provided, because § 2.02(4) directs a court to apply a state of mind expressed in the *offense* to *all* the elements of the offense regardless of the role those elements play. Professors Robinson and Grall noted that "[s]ection 2.02(3) is, in fact, central to the implementation of element analysis" yet the drafters of the Model Penal Code included § 2.02(4), which "is characteristic of an offense analysis model of offense definition." Robinson & Grall, *supra* note 91, at 715-16. Professors Robinson and Grall used the following example:

Consider the definition of harassment:

A person commits a petty misdemeanor if, with purpose to harass another, he . . . insults . . . another in a manner likely to provoke violent or disorderly response.

work suggested by this Comment rejects it.<sup>117</sup> Instead, this Comment follows S. 1722's guidance for the proper application of an expressed state of mind term in a section. S. 1722 limits the reach of an expressed state of mind term "to the element that it immediately introduces."<sup>118</sup> If an element of the offense lacks a state of mind term immediately modifying it, then a court should apply S. 1722's provision requiring that a certain minimum state of mind must be proven for that element.<sup>119</sup>

In sum, when a court interprets a criminal statute, it should take several steps. The court should (1) analyze the section element by element, classifying each element as either conduct, surrounding circumstance, or result; (2) as to those elements that are surrounding circumstances, determine if they require a state of mind;<sup>120</sup> (3) determine if the statute specifies a state of mind for each element that requires a state of mind; if it does, then apply the expressed state of mind terms; (4) when a statute does not specify a state of mind term for each element that requires a state of mind, decide how to apply any state of mind terms that are included; and finally (5) as to those elements lacking a state of mind modifier, require the prosecution to prove the state of mind of recklessness for elements that are surrounding circumstances or results, and a state of mind of knowing for elements that are conduct.

These three assumptions—the state of mind hierarchy, element-by-element analysis, and the requirement of state of mind when one is not expressed—will give greater predictability and certainty to interpretation of the statute. Although these assumptions are not codified, ample precedent exists in Supreme Court opinions to justify viewing the framework as the preferred approach to interpreting the federal criminal law.

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If section 2.02(3) is applied, the defendant must be purposeful only as to harassing another, and need be only reckless with respect to all other elements. If section 2.02(4) is applied, the actor must act purposely with respect to all elements. . . . [T]he section 2.02(3) recklessness requirement should be preferred.

Robinson & Grall, *supra* note 91, at 715 (first two ellipses in original, third ellipsis added).

117 The value of element-by-element analysis and the Supreme Court's expressed preference for it, *see supra* notes 101-02, 109-12 and accompanying text, justify the rejection of § 2.02(4) (applying the prescribed culpability requirement to all material elements) in order to allow for more effective element-by-element analysis.

118 The Senate Report noted that § 303(b) of S. 1722:

[P]rescrib[es] the requisite degree of culpability that must be proved with respect to an element of the offense where none immediately modifies the element.

The rule of construction provided in this subsection [§ 303(b)] applies, except as otherwise provided by subsection (a), where a statute specifies a mental state but it is unclear whether the mental state applies to all the elements of the offense or *only to the element that it immediately introduces* . . . .

S. REP. NO. 553, 96th Cong., 1st Sess. 67 (1980) (emphasis added). For the text of S. 1722 § 303(b), *see supra* note 114.

119 The level of state of mind depends on the type of element that the offense definition does not modify. "Where a state of mind does not immediately introduce an *actus reus* element of an offense, the state of mind which must be proved with respect to conduct is knowing and to an existing circumstance or a result is reckless." S. REP. NO. 553, 96th Cong., 1st Sess. 67 (1980).

120 Elements that relate to jurisdiction, grading, venue, or question of law do not require a state of mind. *See supra* notes 107-08 and accompanying text.

### III. Analysis of the Opinions in *Nofziger*

The analysis of both *Nofziger* opinions centers on the proper interpretation of the state of mind required by subsection 207(c). Judge Thomas A. Flannery, the presiding judge in Mr. Nofziger's trial, recognized the shortcomings of this provision: "[T]he big problem with this case is that we are dealing with a statute that is hardly a model of clarity."<sup>121</sup> Likewise, the big problem with *Nofziger* is that trial courts are now dealing with a *decision* that is hardly a model of clarity.

The *Nofziger* majority analyzed the statute in two steps: it determined that the statute was ambiguous, and then used extrinsic aids to resolve the ambiguity. The majority's analysis of the ambiguity turned on the following question: "whether . . . Congress has manifested an unambiguous intent to impose strict liability for the communication offense by limiting the reach of 'knowingly' to the appearance offense."<sup>122</sup> The majority felt that the referent of "knowingly" was uncertain. Because the majority formulated the issue in this manner, it felt compelled to examine whether the statute was *syntactically* ambiguous.<sup>123</sup> The majority focused on whether "knowingly" refers to (1) the appearance offense plus the rest of the subsection, or (2) the appearance offense alone.

The majority thus perceived two plausible readings of subsection 207(c). One reading would not limit the reach of "knowingly" to the appearance clause, but would allow it to modify both the communication offense and parts (1) - (3). The other reading would limit the reach of "knowingly" to the appearance clause, which, in the majority's view, eliminated any state of mind requirement for both the communication offense and parts (1) - (3).<sup>124</sup> If both of the readings were in fact plausible, then the statute was ambiguous and the majority properly used extrinsic aids to resolve the ambiguity.

#### A. *The Majority's Conclusion that the Statute Is Ambiguous*

The *Nofziger* majority began its analysis of subsection 207(c) by assuming that one *plausible* reading of the statute was the one used by the district court, which limited the reference of "knowingly" to the appear-

121 Record at 3416, *United States v. Nofziger*, No. 87-0309 (D.D.C. 1988), cited in *United States v. Nofziger*, 878 F.2d 442, 445 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989).

122 *Nofziger*, 878 F.2d at 446. By "communication offense," the majority referred to the portion of § 207(c) that prohibits a former official from "mak[ing] any oral or written communication on behalf of anyone other than the United States, to [his former department or agency]."

By "appearance offense," the majority referred to the prohibition on "act[ing] as agent or attorney for, or otherwise represent[ing], anyone other than the United States in any formal or informal appearance before [the official's former department or agency]." 18 U.S.C. § 207(c) (1988).

123 The majority did not utilize the specific terminology "syntactic ambiguity." However, this is exactly the type of ambiguity the majority examined. Recall that the definition of syntactic ambiguity is an uncertainty of reference. See *supra* note 45 and accompanying text. When the majority tried to determine the "reach" of the ambiguous term "knowingly," it was, in effect, trying to determine to what "knowingly" refers.

124 The majority believed that the effect of the statute's syntax was "to strand the *mens rea* 'knowingly' in a grammatical no man's land in which it is uncertain whether it applies to both offenses . . . , or just the appearance offense . . . ." *Nofziger*, 878 F.2d at 450.

ance offense.<sup>125</sup> To prove that *another* plausible reading would extend the reach of “knowingly” to the entire subsection, the majority presented five arguments. The opinion: (1) analogized to present case law; (2) analyzed the legislative history of the statute; (3) analyzed the grammatical structure of the subsection; (4) analogized to the Model Penal Code; and (5) cited interpretations by executive agencies.

The majority cited two principal cases to support its contention that the statute is ambiguous. *Liparota v. United States*<sup>126</sup> addressed a statute penalizing anyone who “knowingly uses, transfers, acquires, alters, or possesses coupons [food stamps] or authorization cards in any manner not authorized . . . .”<sup>127</sup> The *Liparota* majority determined that the statute was syntactically ambiguous,<sup>128</sup> and then invoked the rule of lenity to apply “knowingly” to all the elements.<sup>129</sup> The *Nofziger* majority used

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125 The district court rejected the reading of the statute that applies “knowingly” to the communication offense and requires actual knowledge of parts (1) - (3). *Nofziger*, 878 F.2d at 446. The district court stated:

The court does not believe this pervasive, super-modifying role [assigned the word “knowingly”] can be reconciled with common usage. Nor can the court accept this reading without some clear indication that Congress intended such a less-than-obvious result.

*United States v. Nofziger*, No. 87-0309, memo. op. at 22 (D.D.C. 1988) quoted in *Nofziger*, 878 F.2d at 446.

The presiding judge at the trial, Thomas A. Flannery, faced the problem of deciding how to interpret “knowingly” in a different context as chairman of the Judicial Conference of the United States Subcommittee on Pattern Jury Instructions. He noted that

[w]e have made a particular effort to develop clear statements of the state of mind that is necessary for a finding of guilt. . . . [W]e have avoided the word “knowingly,” a term that is a persistent source of ambiguity in statutes as well as jury instructions. . . . LaFave and Scott observed some years ago that it is often unclear how far down the sentence the word “knowingly” is intended to travel.

Flannery, *Introduction to FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS at III-IV & n. 2* (1988) (citation omitted).

126 471 U.S. 419 (1985).

127 7 U.S.C. § 2024(b)(1) (1988).

128 The *Liparota* majority found that the statute was syntactically ambiguous when it noted that there were two different interpretations which turned on exactly what the word “knowingly” modifies. It noted:

Although Congress certainly intended by use of the word “knowingly” to require *some* mental state with respect to *some* element of the crime defined in § 2024(b)(1), the interpretations proffered by both parties accord with congressional intent to this extent. Beyond this, the words themselves provide little guidance. Either interpretation would accord with ordinary usage.

*Liparota*, 471 U.S. at 424 (emphasis in original).

129 “In the instant case, the rule [of lenity] directly supports petitioner’s contention that the Government must prove knowledge of illegality to convict him under § 2024(b)(1).” *Liparota*, 471 U.S. at 427-28.

Section 2024(b)(1) is sufficiently different from § 207(c) so as to render *Liparota*’s interpretation of § 2024(b)(1) unhelpful to the correct interpretation of § 207(c). See *infra* notes 131-33 and accompanying text.

Further, *Liparota* has been criticized for seeming to create an ignorance of the law defense. See, e.g., W. LAFAVE & A. SCOTT, *supra* note 51, § 3.8, at 242 n.1; Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1399-1400 (1986). In *Liparota*, the Supreme Court held that a defendant could not be convicted of violating the food stamp statute unless he *knew* that his acquisition or use of the stamps was not authorized by law. According to the majority, this result was supported by the “generally disfavored status” of strict liability offenses. *Liparota*, 471 U.S. at 426. The majority was mistaken. Limiting the reach of “knowingly” in the food stamp statute would not create a strict liability crime. The dissent revealed what the majority actually did: “In relying on the ‘background assumption of our criminal law’ that *mens rea* is required . . . the Court ignores the equally well founded assumption that ignorance of the law is no excuse.” *Id.* at 441 (White, J., dissenting). If “knowingly” is not read to apply to the “not authorized by” language, then the prosecution would

*Liparota* to prove that the Supreme Court has found provisions similar to subsection 207(c) ambiguous.<sup>130</sup>

This analogy is not persuasive. The food stamp statute in *Liparota* is structured differently from subsection 207(c). In the *Liparota* statute, it is unclear how far into the statute's language "knowingly" travels. The knowledge requirement could apply to the entire clause or solely to the "use" of the coupons. The punctuation of the statute gives no indication of which actions require knowledge. Conversely, in subsection 207(c) "knowingly" is readily connected to the appearance offense and separated by two commas and an "or" from the communication offense. Subsection 207(c) prohibits "knowingly act[ing] as agent or attorney for . . . anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, mak[ing] communications [to the prohibited department]."<sup>131</sup>

Further, unlike the statute in *Liparota*, subsection 207(c) includes within it a separate offense that is subject to its own express *mens rea* requirement. The majority opinion argued that "this is a distinction without a difference."<sup>132</sup> The majority stated that "[i]f one removes the communication offense and its 'intent to influence' modifier from subsection 207(c)" the resulting text would be similar to the ambiguous statute in *Liparota*, so the knowledge requirement should be interpreted similarly.<sup>133</sup> The majority, in effect, ignored certain parts of the statute to find the ambiguity it desired. Rewriting a Congressional statute and then interpreting the judicially rewritten version, however, is an unacceptable method of judicial interpretation.<sup>134</sup> Instead, a court should strive to interpret a statute so as to give every word and every phrase meaning.<sup>135</sup> A court should not omit material language from a statute to clarify it.

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still be required to prove that the defendant intended or knew what he was doing in a physical sense, as distinguished from the legal significance of the act. As the dissent explained, "[k]nowingly to do something that is unauthorized by law is not the same as doing something knowing that it is unauthorized by law." *Id.* at 436 (White, J., dissenting). The distinction is between knowledge of the physical act and knowledge of its legality.

Thus, limiting the reach of knowingly in the food stamp statute would not subject the defendant to strict liability. A defendant still could not be convicted if he "was unaware of the circumstances of the transaction that made it illegal." *Id.* at 437 (White, J., dissenting). If, unknown to the food stamp user, a store violated the regulations so that the use of the stamps was unlawful, the user would not be guilty because he had no knowledge of the circumstances making the use illegal.

130 *United States v. Nofziger*, 878 F.2d 442, 445-46 (D.C. Cir.), *cert. denied*, 110 S. Ct. 564 (1989).

131 18 U.S.C. § 207(c) (1988) (emphasis added).

132 *Nofziger*, 878 F.2d at 447.

133 *Id.*

134 Statutory construction should begin by reading the text, not by removing portions of it. See *supra* note 32. In a recent opinion, the Supreme Court criticized the approach of the *Nofziger* majority: "courts are not authorized to rewrite a statute because they might deem its effects susceptible to improvement." *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984).

135 The Supreme Court has repeatedly held that each word and each phrase of a statute should be given meaning. In *United States v. Menasche*, 348 U.S. 528 (1955), it noted that "'[t]he cardinal principle of statutory construction is to save and not to destroy' . . . . It is our duty 'to give effect, if possible, to every clause and word of a statute,' . . . rather than to emasculate an entire section . . . ." *Id.* at 538-39 (first quoting *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1936), second quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882)). See also *Connecticut Dept. of Income Maint. v. Heckler*, 471 U.S. 524, 530 n. 15 (1985) (holding that "[i]t is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute"). Generally speaking, "[a] statute should be construed so that effect is given to all

The majority also cited *United States v. Johnson & Towers*.<sup>136</sup> In *Johnson & Towers*, the Third Circuit interpreted a statute penalizing any person who “knowingly treats, stores, or disposes of any hazardous waste . . . either—(A) without having obtained a permit . . . or (B) in knowing violation of [the permit].”<sup>137</sup> The *Johnson* court determined that the statute was ambiguous and that “knowingly” applied to both subparts (A) and (B). The majority in *Nofziger* stated that, similarly, “knowingly” should apply to both offenses in subsection 207(c). But the text of the Solid Waste Disposal Act in *Johnson & Towers* is substantially different from the Ethics in Government Act in *Nofziger*. The Solid Waste Disposal Act consists of the state of mind “knowingly,” the prohibited acts, and then two subparts describing the surrounding circumstances, with the second subpart containing the state of mind “knowing.” The Ethics in Government Act consists of the state of mind “knowingly,” the prohibited act “appear,” then the state of mind “intent” and the prohibited act “communicate.” This grouping of state of mind and prohibited act is not found in the Solid Waste Disposal Act interpreted by *Johnson & Towers*. Because of the textual differences in the statutes, the Third Circuit’s decision is inapplicable. In addition, any comparison to the *Johnson & Towers* holding is suspect: a recent decision by the Ninth Circuit, interpreting the Solid Waste Disposal Act, reached a contrary result.<sup>138</sup>

After examining these decisions, the majority turned to the text of the section. But instead of looking first at the statute’s language, the majority stated that “[w]e begin our analysis of subsection 207(c) with its genesis, which was President Carter’s proposal . . . .”<sup>139</sup> The majority then recounted the legislative history of subsection 207(c) to support its ultimate contention that the subsection is syntactically ambiguous. This reversed the normal order of statutory analysis,<sup>140</sup> and it ignored the

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its provisions, so that *no* part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another.” 2A C. SANDS, *supra* note 32, § 46.06 (footnotes omitted) (emphasis added).

136 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

137 42 U.S.C. § 6928(d)(2) (1982).

138 In *United States v. Hoffin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990), the Ninth Circuit interpreted the Solid Waste Disposal Act directly contrary to the interpretation of the Third Circuit in *Johnson & Towers*. In *Johnson*, the Third Circuit held that employees could be subjected to criminal prosecution under § 6928(d)(2)(A) only if they knew or should have known that their employer had failed to obtain the required permit. In *Hoffin*, the Ninth Circuit stated:

We respectfully decline to follow the Third Circuit’s analysis in *Johnson & Towers*. Had Congress intended knowledge of the lack of a permit to be an element under subsection (A) it easily could have said so. It specifically inserted a knowledge element in subsection (B), and it did so notwithstanding the “knowingly” modifier which introduces subsection (2). In the face of such obvious congressional action we will not write something into the statute which Congress so plainly left out.

*Hoffin*, 880 F.2d at 1038. The Ninth Circuit refused to require knowledge under subsection (A) because the grammatical structure of the statute did not support such a requirement.

The grammar of § 207(c) lends itself to a similar analysis. If Congress intended to require knowledge of parts (1) - (3), Congress could have “specifically inserted” the word “knowingly” after the communication offense to modify parts (1) - (3). Because Congress did not do this, the court should not have required the prosecution to prove that *Nofziger* possessed knowledge of the circumstances described in parts (1) - (3).

139 *Nofziger*, 878 F.2d at 448.

140 See *supra* note 32 and accompanying text.



maxim that a court should use legislative history to *solve* ambiguity, not to *create* it.<sup>141</sup>

Assuming that the majority appropriately examined the legislative history, the statute's history still does not support the majority's interpretation of subsection 207(c) as requiring the offender to possess knowledge of each element of the offense. The Senate version of the statute modified the entire subsection with the adverb "knowingly."<sup>142</sup> The House version, on the other hand, contained two separate clauses with "knowingly" modifying the first clause—the appearance offense—and "intent to influence" modifying the second clause—the communication offense.<sup>143</sup> The Conference Committee adopted the House version. It stated that "the two elements of the House language, as set forth above [with 'knowingly' modifying only the appearance offense] are each independent of the other for the purposes of a violation of any subsection in which those terms appear."<sup>144</sup> The majority contended that the Conference Committee viewed the two versions as containing stylistic, rather than substantive, differences.<sup>145</sup> It ignored the fact that the House version was chosen over the Senate one. Nonetheless, the Conference Committee's paraphrasing of the House version into two independent clauses indicated that the grammatical structure was important in its choice. The majority opinion disregarded this implication.

The majority's next argument involved an analysis of the grammar of subsection 207(c). The majority contended that the grammatical structure of the statute does not point toward only one interpretation. It agreed that the communication clause is subject to the intent requirement. But the majority argued that the intent requirement for the communication offense "is not inherently incompatible" with an additional knowledge requirement for the entire statute.<sup>146</sup> The grammatical structure of the statute, however, contradicts the majority's view that "know-

141 This maxim is particularly true of the committee reports, the type of legislative history on which the majority relied. The Supreme Court has noted that

such reports [by congressional committees] are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. . . . Like other extrinsic aids to construction their use is "to *solve*, but not to *create* an ambiguity."

United States v. Shreveport Grain & Elev. Co., 287 U.S. 77, 83 (1932) (quoting Hamilton v. Rathbone, 175 U.S. 414, 421 (1899)) (citations omitted) (emphasis in original).

142 The Senate version penalized a former official who "knowingly—

(1) makes any appearance or attendance before, or

(2) makes any written or oral communication to, and with the intent to influence the action of . . . ." H.R. REP. NO. 1756, 95th Cong., 2d Sess. 74-75, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4381, 4390-4391 (ellipsis in original).

143 The House version penalized a former official who "(a) 'knowingly acts as agent or attorney . . . or otherwise represents . . . in any formal or informal appearance before,'; (b) 'or, with the intent to influence, make[s] any written or oral communication . . . to . . .'" H.R. REP. NO. 1756, 95th Cong., 2d Sess. 74, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4381, 4390 (ellipsis in original).

144 H.R. REP. NO. 1756, 95th Cong., 2d Sess. 74, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4381, 4390. The Conference Committee was referring here to the two elements of § 207(a) (lifetime ban on certain contacts). Nevertheless, the Committee expressly stated that the elements were independent of each other for every succeeding subsection, including § 207(c).

145 United States v. Nofziger, 878 F.2d 442, 449 (D.C. Cir.), *cert. denied*, 110 S. Ct. 564 (1989).

146 *Nofziger*, 878 F.2d at 451.

ingly” extends throughout the entire statute. The statute contains two separate offenses, the appearance offense and the communication offense. Each offense contains its own *mens rea* requirement—appear “knowingly” and communicate “with the intent to influence.”<sup>147</sup> If Congress meant to require “knowingly” to apply the elements of subsection 207(c) coming after the communication offense, it could have drafted the statute to make “knowingly” clearly modify all the elements of the offense.<sup>148</sup>

The majority cited the Model Penal Code in its fourth argument to prove that a plausible reading does not limit “knowingly” to the appearance clause. The majority sought to demonstrate that the “intent to influence” requirement of the communication offense does not preclude “knowingly” from applying to all of subsection 207(c)’s elements because both states of mind can apply to the communication offense.<sup>149</sup> This approach layers the “knowingly” state of mind on top of the “intent to influence” state of mind instead of applying the two state of mind requirements separately.<sup>150</sup>

The majority presented an example from the Model Penal Code to prove that a higher state of mind expressed in an offense’s definition—in subsection 207(c), the “intent to influence” term—does not necessarily apply to all elements of the offense.<sup>151</sup> As to the elements which the expressed term does not modify, the “[default culpability provision] ‘should control elements of this character, and therefore recklessness should suffice in the absence of special provision to the contrary.’”<sup>152</sup>

<sup>147</sup> See *infra* notes 187-91 and accompanying text; see also *Nofziger*, 878 F.2d at 455 (Edwards, J., dissenting).

<sup>148</sup> The requirement of knowledge for parts (1) - (3) could be achieved by drafting § 207(c) as the Senate did. See *supra* note 142. Alternatively, § 207(c) could have been drafted as follows:

Whoever, . . . within one year after such employment has ceased, knowingly . . . represents anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

- (1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and
- (2) in connection with . . . any particular matter, and
- (3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

*while possessing knowledge of the circumstances described in parts (1), (2), and (3), shall be fined . . . or imprisoned . . .*

The emphasized phrase is the hypothetical addition to § 207(c).

<sup>149</sup> “[A] requirement that the communication be made with the ‘intent to influence’ is not inherently incompatible with a parallel requirement that the other elements of the communication offense be subject to the ‘knowingly’ *mens rea*.” *Nofziger*, 878 F.2d at 450-51.

<sup>150</sup> The majority argued that “knowingly” applies to all elements and that the communication offense simply has an added requirement of intent to influence. “The Model Penal Code provides several analogies that would support the applicability of both *mens rea* requirements to the communication offense.” *Nofziger*, 878 F.2d at 450.

<sup>151</sup> The majority cited the example of burglary. *Nofziger*, 878 F.2d at 450. To be guilty of burglary, the defendant must have entered the dwelling place of another at night with the “purpose to commit a crime therein.” The state of mind of purpose does not apply to the elements of “night” and “dwelling house.” The majority sought to prove that offenses that contain a higher state of mind (i.e., “with intent to influence,” “with purpose to commit a crime”) allow for lower state of mind terms to apply to other elements of the offense.

<sup>152</sup> *Nofziger*, 878 F.2d at 450, quoting the commentary of the Model Penal Code describing the default culpability provision (MODEL PENAL CODE § 2.02 comment 6 (Official Draft and Revised

This section does not support the argument that a single *element* can have multiple states of mind; rather, it supports a basic premise of element-by-element analysis, that a single *offense* can have multiple states of mind while each *element* has its *own* state of mind.<sup>153</sup> The section requires a court to apply a single, alternative state of mind if the state of mind specified in the statute was not meant to apply to all elements. If this provision were applied to subsection 207(c), the result would be a requirement of recklessness as to parts (1) - (3), and not the state of mind of "knowingly."<sup>154</sup>

Finally, as the last argument to support its conclusion that knowledge is required for all elements of the statute, the majority cited administrative regulations promulgated by the Office of Government Ethics (OGE).<sup>155</sup> The majority looked to OGE regulations interpreting subsection 207(b)(i), a provision which has a structure similar to subsection 207(c). Both subsections establish an appearance offense and a communication offense.<sup>156</sup> But subsection 207(b)(i) contains one element—the fact that the matter was previously under the official's responsibility—that is not present in subsection 207(c). This prior responsibility element, unique to subsection 207(b)(i), is the specific element for which the OGE regulation requires knowledge.<sup>157</sup> Nevertheless, the majority used the OGE interpretation of subsection 207(b)(i) to support its view that knowledge is required for all elements of subsection 207(c).<sup>158</sup> The

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Comments 1985)) (insert in original). For the text of the provision, see *supra* note 114. This requirement, that recklessness be presumed where no other state of mind term applies, assumes that the provision's expressed state of mind term (immediately modifying at least one element of the offense) is not meant to apply to all other elements of the offense. This involves the application of Model Penal Code § 2.02(4) (applying an expressed culpability requirement to all material elements unless a contrary purpose plainly appears). See *supra* notes 115-16.

153 For a full discussion of element-by-element analysis, see *supra* notes 101-102 and accompanying text.

154 Because § 207(c) is not clear as to which state of mind ("knowingly" or "with intent to influence") should apply to parts (1) - (3), § 2.02(3) of the Model Penal Code—the default culpability provision—would apply and require recklessness as to those elements.

155 The Ethics in Government Act of 1978 established the OGE within the Office of Personnel Management (OPM) to help prevent conflict of interest problems arising from post-employment conduct by former executive agency employees. See 5 C.F.R. § 737.1(a) (1989). The OPM published the OGE's regulations relating to section 207 in their final form. See 45 Fed. Reg. 7402 (1980) (codified at 5 C.F.R. § 737).

156 18 U.S.C. § 207(b)(i) (1988) provides:

Whoever, (i) [being a covered government employee], within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) . . . —

- (1) any department, agency, court . . . or any officer or employee thereof, and
- (2) in connection with any . . . particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest, and
- (3) as to (i), which was actually pending under his official responsibility . . . within a period of one year prior to the termination of such responsibility or, as to (ii), in which he participated personally and substantially . . .

shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

157 5 C.F.R. § 737.7(b)(4) (1989) states that a "former employee is not subject to the restriction unless at the time of the proposed representation of another, he or she knows or learns that the matter had been under his or her responsibility."

158 *Nofziger*, 878 F.2d at 451. The majority stated that the OGE's interpretation should be followed because "the language being interpreted is identical in both subsections." *Id.* While the

majority's use of the OGE regulation was therefore not persuasive because 207(c) does not contain the prior responsibility element.

Further, at the time the OGE issued regulations interpreting subsection 207(b)(i), it also issued detailed regulations interpreting subsection 207(c).<sup>159</sup> In these regulations, the OGE *did not* require knowledge for any of the subsection 207(c) elements. Thus, the OGE interpretation of subsection 207(b)(i) does not indicate that a court should similarly interpret subsection 207(c). A court should follow the OGE's regulations for subsection 207(c), which require knowledge only for the appearance offense.

The majority concluded that subsection 207(c) is ambiguous because more than one plausible reading of the subsection exists.<sup>160</sup> This conclusion is erroneous. The foregoing analysis revealed that the reading propounded by the majority is not a plausible reading of subsection 207(c). The reach of "knowingly" should be limited to the appearance offense. This leaves only one plausible reading: "knowingly" applies to appearance element of the offense, and "intent to influence" applies to the communication element of the offense.<sup>161</sup> Thus, contrary to the majority's conclusion, the subsection is not ambiguous.

### B. *The Majority's Resolution of the Ambiguity*

The *Nofziger* majority invoked two "canons of statutory construction"<sup>162</sup> to support its interpretation requiring knowledge of all elements of subsection 207(c). First, it cited the rule of lenity, which requires courts to interpret ambiguous criminal statutes in the defendant's favor.<sup>163</sup> The application of the rule of lenity to subsection 207(c) is inappropriate. First, the Supreme Court established that "the 'touchstone' of

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language defining the conduct of the appearance and communication offenses is the same, the attendant circumstance of subsection 207(b)(i), for which the OGE required knowledge, is not an element of subsection 207(c).

159 The majority argued that the interpretation of § 207(b)(i) should apply by analogy to § 207(c) because "the OGE . . . has not issued any regulation interpreting subsection 207(c)." *Nofziger*, 878 F.2d at 451.

This assertion is mistaken. The OGE issued detailed interpretations of *both* subsections on Feb. 1, 1980. Examination of the Federal Register reveals that the regulations were implemented simultaneously. See 45 Fed. Reg. 7411-12, 7413-15 (1980). The OGE regulation interpreting subsection 207(b)(i) contains a specific requirement that the former official knew that a matter was pending under his or her responsibility. See 5 C.F.R. § 737.7(b)(4) (1989). While the regulations for subsection 207(c) set out requirements regarding the element of influence, prior involvement, and other issues, the regulations require no knowledge for any element of this subsection. See 5 C.F.R. § 737.11 (1989). This omission indicates that the OGE determined that the knowledge requirement should only apply to subsection 207(b)(i). In the presence of this statutory construction by the OGE, a court should not require knowledge in 207(c) because of an analogy to the OGE's interpretation of 207(b)(i).

160 "In sum, we find nothing in the text of subsection 207(c), or in its legislative history, or in official interpretations of the statute, that will support the government's contention that the subsection unambiguously limits the reach of 'knowingly' to the appearance clause." *United States v. Nofziger*, 878 F.2d 442, 452 (D.C. Cir.), *cert. denied*, 110 S. Ct. 564 (1989).

161 For an explanation of the proper state of mind that should be required for parts (1) - (3), see *infra* notes 196-201 and accompanying text.

162 *Nofziger*, 878 F.2d at 452.

163 *Id.*

the rule of lenity 'is statutory ambiguity.'"<sup>164</sup> Because subsection 207(c) is not ambiguous<sup>165</sup> the rule is inapplicable. Second, the ambiguity that the majority sought to resolve is not the actual ambiguity. The majority viewed subsection 207(c) as ambiguous as to whether or not the state of mind of knowledge is required for all elements of the offense, including parts (1) - (3). This view of the ambiguity is mistaken. Subsection 207(c) is actually ambiguous as to whether a state of mind of recklessness is required for parts (1) - (3), or whether no state of mind at all is required for parts (1) - (3).<sup>166</sup> Thus, even if the rule of lenity is applicable, it should not be applied to require *knowledge* for parts (1) - (3).

The majority also relied on the general presumption against strict liability criminal offenses. The majority stated that "absent evidence of a contrary legislative intent, courts should presume *mens rea* is required."<sup>167</sup> According to the majority, the *mens rea* presumption is particularly strong in this context because subsection 207(c) is a felony, and "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."<sup>168</sup> Finally, the offense in *Nofziger* did not fit the pattern of "public welfare" offenses that might warrant the imposition of strict liability.<sup>169</sup> The majority, however, failed to understand that limiting "knowingly" to the appearance offense would not subject the communication offense to strict liability. Instead, the conduct element of the offense would be subject to its own express "intent to influence" state of mind.

In sum, the majority erroneously applied the rule of lenity and the presumption against strict liability and inappropriately disregarded grammatical structure and legislative intent in interpreting subsection 207(c). By virtue of its misinterpretation of the statute, the majority skewed the result in favor of Mr. Nofziger.

### C. *The Dissent's Analysis*

The *Nofziger* dissent strongly disagreed with the majority's characterization of subsection 207(c) as ambiguous.<sup>170</sup> It argued that the plain meaning and the legislative intent clearly indicate that "knowingly" modifies the appearance offense and "intent to influence" is the *mens rea* re-

164 *Bifulco v. United States*, 447 U.S. 381, 387 (1980). See also *Crandon v. United States*, 110 S. Ct. 997 (1990), which held that

because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. . . . [The rule of lenity] serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.

*Id.* at 1001-02 (citations omitted).

165 See Part III(A) of this Comment, *supra* notes 125-61 and accompanying text.

166 See *infra* notes 192-94 and accompanying text.

167 *Nofziger*, 878 F.2d at 452.

168 *Id.* at 453 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)).

169 *Id.* at 454. Public welfare statutes are an exception to the requirement of *mens rea*. In these statutes, the lawmakers have used criminal sanctions as a means of enforcing regulations for the public good. For a discussion of strict liability criminal offenses, see *supra* notes 52-80 and accompanying text.

170 *Nofziger*, 878 F.2d at 455 (Edwards, J., dissenting).

quirement for the communication offense.<sup>171</sup> As for the other elements of the statute, including the requirement that the subject of the communication be a matter "of direct and substantial interest,"<sup>172</sup> the dissent did not explicitly decide what state of mind should be required. It suggested that strict liability is inappropriate,<sup>173</sup> but it did not say which elements require a state of mind.

In fact, the clear consequence of the dissent's analysis is that there is *no state of mind* required for parts (1) - (3) of the offense. The jury instruction did not require the jury to find that Mr. Nofziger possessed any state of mind as to whether the matter was of direct and substantial to the White House. The crucial part of the instruction read: "To find the defendants guilty, you must find . . . that the particular matters alleged . . . were of both direct and substantial interest to the White House . . ." <sup>174</sup> Because it would sustain the jury's verdict, the dissent would not require that the prosecution prove that the defendant possess any state of mind as to elements (1) - (3).

This Comment agrees with the dissent's conclusion that subsection 207(c) is not ambiguous; "knowingly" does not apply to the entire subsection, but only to the appearance offense. This Comment disagrees, however, with the consequence of the dissent's analysis—requiring no state of mind as to the elements specified in parts (1) - (3). This Comment argues that courts should require a state of mind where none is expressed, instead of holding defendants strictly liable for liability elements.<sup>175</sup>

#### IV. Correct Identification and Resolution of the Ambiguities in Subsection 207(c)

The foregoing analysis of the majority opinion in *Nofziger* shows that it incorrectly identified the ambiguities in the statute. This Part identifies the statute's true ambiguities and resolves them using the analytical framework suggested in Part II(B).<sup>176</sup>

Excess generality does not trouble subsection 207(c). None of the words in the statute are so general so as to make it impossible to limit the conceivable number of references. A possible problem with vagueness exists, involving the meaning of the phrase "direct and substantial."<sup>177</sup>

<sup>171</sup> *Id.*

<sup>172</sup> 18 U.S.C. § 207(c)(3) (1988).

<sup>173</sup> "By enacting the statute thus, Congress avoided imposing strict liability in a criminal context while simultaneously fashioning a more appropriate intent standard for the unique nature of the communication offense." *Nofziger*, 878 F.2d at 460 (Edwards, J., dissenting).

<sup>174</sup> Record at 4129, *supra* note 22. For the complete text of the jury instructions on "intent to influence" and "direct and substantial interest," see *supra* notes 22-23.

<sup>175</sup> See *supra* notes 113-119 and accompanying text.

<sup>176</sup> See *supra* notes 93-120 and accompanying text.

<sup>177</sup> The appellants in their brief argued that the words "direct" and "substantial" are too vague to allow a reasonable determination of the criminality of a person's acts. According to the appellants, *Nofziger's* conduct fell within the "misty borderland" between prohibited and permitted conduct because of the vagueness of the terms "direct and substantial." Opening Brief for Appellant at 61, *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir.), *cert. denied*, 110 S. Ct. 564 (1989) (No. 88-3058). The claim is partially based on the chilling effect on speech by such a vague definition. A brief from the ACLU, as an amicus, addressed this specific issue of First Amendment problems. It

In *Nofziger*, this argument was relegated to footnote in the dissent.<sup>178</sup> The majority did not consider this issue. As a practical matter, any vagueness defects in subsection 207(c) are cured by the creation and operation of the Office of Government Ethics (OGE). The purpose of the OGE is to advise former officials regarding possible violations of subsection 207(c).<sup>179</sup> If a covered employee is uncertain about whether some contact is prohibited, the OGE will issue an interpretive opinion. Thus, the statute is not facially unconstitutional due to any vagueness.

#### A. *Identifying and Resolving the Syntactic Ambiguity*

Rather than vagueness or generality, the real problem with subsection 207(c) lies in its ambiguities.<sup>180</sup> The statute is not semantically ambiguous, because no single word in the statute has a double meaning.<sup>181</sup>

The subsection's difficulties begin with its syntactic ambiguities.<sup>182</sup> The *Nofziger* majority viewed the ambiguity in terms of the following question: "whether . . . Congress has manifested an unambiguous intent to impose strict liability for the communication offense by limiting the reach of 'knowingly' to the appearance offense."<sup>183</sup> The majority answered its own question when it found "nothing . . . that will support the government's contention that the subsection unambiguously limits the reach of 'knowingly' to the appearance clause."<sup>184</sup>

The majority's erroneous framing of the issue drove its result. If the reach of "knowingly" stops after the appearance offense, then in the majority's view there is no applicable state of mind term for the rest of the offense. This would have the effect of making subsection 207(c) strict as to parts (1) - (3). The majority wanted to avoid this result because strict liability interpretations of criminal statutes have a "generally disfavored status."<sup>185</sup> Thus, the majority felt compelled to extend "knowingly" throughout the statute. This may be the correct answer to the question asked by the majority—but the majority asked the wrong question. As noted by Justice Frankfurter, "[i]n law . . . the right answer usually depends on putting the right question."<sup>186</sup> The proper initial question to ask is whether, in a grammatical sense, the word "knowingly" modifies the elements of the communication offense at all.

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argued that strict liability standards in the First Amendment context are unconstitutional. Brief for *Amicus Curiae* at 28-33, *Nofziger* (No. 88-3058).

178 In *Nofziger*, the dissent forcefully noted: "I find no merit in appellant's or amicus' seemingly half-hearted claims that there is insufficient evidence in the record to support a conviction, or that the Ethics in Government Act may be constitutionally infirm. In my view, these claims border on frivolous." *Nofziger*, 878 F.2d at 460 n.4 (Edwards, J., dissenting).

179 5 U.S.C. § 402 (1982). See also 5 C.F.R. Part 737.11 (1988).

180 For a discussion of the different types of ambiguity, see *supra* notes 43-46 and accompanying text.

181 See *supra* note 44 and accompanying text.

182 Recall that the definition of a syntactic ambiguity is an uncertainty of reference. See *supra* note 45 and accompanying text.

183 *Nofziger*, 878 F.2d at 446. See also *supra* notes 122-123 and accompanying text.

184 *Id.* at 452.

185 *Nofziger*, 878 F.2d at 452 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985) (citations omitted)).

186 *Estate of Rogers v. Commissioner*, 320 U.S. 410, 413 (1943).

An examination of the grammatical structure of the sentence provides the answer to the correct question. In terms of punctuation, the appearance offense is set off with commas. When a phrase is set aside with commas and a conjunction, the phrase should be read independently of other phrases.<sup>187</sup> When the phrase beginning with “knowingly” is read independently, “knowingly” cannot modify the subsequent phrase.

This does not mean, however, that there is no state of mind for the communication offense. Rather, the communication offense has its own state of mind—“with intent to influence.” This is a separate and distinct state of mind from “knowingly.”<sup>188</sup> Courts and statutes commonly interpret intent to mean that “the actor either has a purpose to do the thing or [to] cause the result specified or believes that his act, if successful, will cause that result.”<sup>189</sup> “Intent to influence” is effectively equivalent to the Model Penal Code’s “purpose” state of mind, which is a higher degree of culpability than the “knowingly” requirement. Thus, the phrase “with intent to influence” is a valid state of mind term which provides the communication offense with its own state of mind requirement. The answer to the proper question—whether “knowingly” modifies the communication offense at all—is no. The reach of “knowingly” is limited to the appearance offense.

An application of the suggested analytical framework also provides the answer to the correct question.<sup>190</sup> The initial step is to analyze sub-

187 In *United States v. Ron Pair Enters., Inc.*, 109 S. Ct. 1026 (1989), the Supreme Court interpreted § 506(b) of the Bankruptcy Code, which provides: “to the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges . . .” 11 U.S.C. § 506(b) (1988). In construing this statute, the Court noted:

This reading is also mandated by the grammatical structure of the statute. The phrase “interest on such claim” is set aside by commas, and separated from the reference to fees, costs, and charges by the conjunctive words “and any.” As a result, the phrase “interest on such claim” stands independent of the language that follows.

*Ron Pair Enters.*, 109 S. Ct. at 1030-31. To analogize to § 207(c), the phrase beginning with “knowingly” reads like this: “[Whoever], knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, . . .” Note that there is a comma immediately preceding “knowingly,” and that a comma is inserted immediately after the description of the appearance offense. This second comma is followed by the word “or.” Thus, the entire phrase describing the appearance clause is set off with commas, and it is separated from the clause describing the communication offense by the conjunction “or.” Therefore, the reach of “knowingly” should be limited to the phrase in which it appears.

188 See *supra* notes 96-97 and 100 and accompanying text discussing the difference between knowledge and purpose.

189 MINN. STAT. ANN. § 609.02(subd. 9)(3) (West 1987); see also WIS. STAT. ANN. § 939.23(3) (West 1982). State statutes are an appropriate place for federal courts to turn when attempting to define terms in *federal* statutes. The Supreme Court noted recently in *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1608 (1989) that the fact that

we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine “the ordinary meaning of the words used.” Well-settled state law can inform our understanding of what Congress had in mind when it employed a term it did not define.

This is particularly true in criminal law, since state and federal laws are directed to a common problem: the jurisprudence of crime. The resolution of this problem is a matter of shared responsibility between the states and the federal government. The common goal justifies the practice of federal courts borrowing state definitions for criminal law terms.

190 For a summary of the steps of analysis, see *supra* text following note 119.



section 207(c) element-by-element, and classify the elements as conduct, surrounding circumstances or results. The first element is a conduct element: "acts . . . or otherwise represents." The second element is also a conduct element: "makes." Both elements describe conduct that a covered employee may not be able to do. Since both elements are conduct elements, the required state of mind must be at least knowing. The next step is to see if a state of mind term immediately modifies or introduces the element. In this case, both elements are immediately preceded by a state of mind term. "Acts" is immediately introduced by "knowingly," and "makes" is immediately introduced by "with intent to influence." Since both elements are modified, then the construction ends here, and the expressed terms should be applied.

Both examination of grammar and application of the suggested framework produce the same logical result. The distinction between an appearance offense and a communication offense is logical because the impropriety of a communication is less than that of an appearance. Because the possibility of improper influence is greater when a former employee lobbies his former agency in person, Congress would require a lesser degree of culpability for a conviction. The defendant in such a case need not have possessed any intent to influence; simply appearing is enough. Conversely, for the communication offense, Congress may well have wanted a greater degree of culpability for a conviction.<sup>191</sup> Mere communication with an official's former agency is not enough—the communication must be made with the intent to influence the agency.

### B. *Identifying and Resolving the Contextual Ambiguity*

In addition to the syntactic ambiguity, subsection 207(c) also contains a contextual ambiguity.<sup>192</sup> The contextual ambiguity arises from a second question: How do the statements defining the appearance and communication offenses relate to parts (1), (2), and (3) of the subsection?<sup>193</sup> Neither state of mind expressed in the subsection ("knowingly" or "intent to influence") immediately modify these three elements of the offense. The dissent's reasoning eliminates the requirement of a state of mind for these elements. This conclusion is invalid because it conflicts

<sup>191</sup> Congress did not mean to prevent all communication between an employee and his former agency, but rather only communication that sought to influence that agency. Normal communications, such as Christmas cards, are acceptable under § 207(c). According to the Senate Report:

The contact must be on a matter of business. Casual, social communication, such as "cocktail party" conversation, is not included unless it relates to a pending matter of business.

. . . .  
Subsection (c) further excludes contacts concerning matters of a personal and individual nature, such as personal income taxes and pension benefits. That form of self-representation is reasonable and to be expected.

S. REP. NO. 170, 95th Cong., 2d Sess. 153, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4369. See also 5 C.F.R. § 737.11(h) (1989).

<sup>192</sup> Recall that contextual ambiguity arises when there is uncertainty as to how a statement is affected by another statement. See *supra* note 46 and accompanying text.

<sup>193</sup> The three additional conditions of § 207(c) are: (1) the communication must be to the employee's former agency; (2) it must relate to a proceeding or other "particular matter"; and (3) the matter must be one that is either "pending" before the agency or in which the agency has an interest that is both "direct" and "substantial." 18 U.S.C. § 207(c) (1988).

with the assumption that a state of mind will be read into the definition of an offense.<sup>194</sup>

Application of the suggested analytical framework<sup>195</sup> will resolve the contextual ambiguity and determine the proper state of mind. The first step is to analyze the rest of the subsection element-by-element. Two conduct elements have already been identified. Parts (1) - (3) are readily identified as elements that serve as surrounding circumstances.<sup>196</sup> These elements describe circumstances that must be present before criminal liability is incurred. The elements that are surrounding circumstances are then classified so as to determine if a state of mind is required for them. The surrounding circumstance elements that do not require a state of mind relate to jurisdiction, grading, venue, or a question of law.<sup>197</sup> None of the three relate to venue or to a question of law. Neither do any relate to grading, since there is no lesser offense which is dependent on the existence or non-existence of one of the elements. All three are, to some extent, jurisdictional, since their presence serves to bring the defendant into the federal system. The question, though, is whether they are "jurisdictional only."<sup>198</sup> The three are not, since in the absence of any one there is no crime. Thus, the three are all surrounding circumstance elements related, in part if not entirely, to liability. Because they are liability elements, a court should require that state of mind be proven for them.<sup>199</sup>

The next step is to apply any express state of mind term that immediately modifies the element. None of the three are so modified. Lacking an express state of mind modifier, the next step is to apply the assumption that some state of mind should be read in.<sup>200</sup> Because the elements are surrounding circumstances, the correct state of mind to require is recklessness.<sup>201</sup>

In sum, the proper state of mind requirements are "knowingly" for the conduct element of "acts . . . or represents," "intent to influence" for the conduct element "makes (communication)," and recklessness for the surrounding circumstance elements described in parts (1) - (3).

194 See *supra* note 113 and accompanying text.

195 See *supra* text following note 119.

196 Parts (1) - (3) read as follows:

- (1) the department or agency in which he served as an officer or employee thereof, and
- (2) in connection with any . . . particular matter, and

(3) which is pending before such department or agency or in which the department or agency has a direct and substantial interest . . .

18 U.S.C. § 207(c) (1988).

197 See *supra* notes 107-08 and accompanying text.

198 *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975).

199 See *supra* notes 113-19 and accompanying text.

200 See *supra* note 119 and accompanying text.

201 For an explanation of this assumption, see *supra* notes 113-119 and accompanying text.

## V. Application of the Analytical Framework to the Amended Subsection 207(c)

Congress amended subsection 207(c) when it passed the Ethics Reform Act of 1989,<sup>202</sup> part of which provided for "the first comprehensive reform of ethics laws in more than a decade."<sup>203</sup> After January 1, 1991, subsection 207(c) will read, in relevant part, as follows:

[A]ny person [who is a covered government employee] and who, within 1 year after the termination of his or her employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.<sup>204</sup>

Section 216, a completely new provision, contains the following criminal penalties:

The punishment for an offense under [section 207] . . . of this title is the following:

(1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.

(2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.<sup>205</sup>

The new subsection differs in focus from the existing subsection because it eliminates the requirement that the contact relate to a matter "in which such department or agency has a direct and substantial interest."<sup>206</sup> The new subsection instead requires that the contact relate to a matter "on which such person [the former employee] seeks official action." The new subsection focuses less on the role of the department lobbied but more on the goal of the person lobbying.

The new subsection also changes the state of mind requirements. Nevertheless, the legislative history explaining these changes is

202 Pub. L. No. 101-194, §§ 101(a), 102, 103 Stat. 1716, 1717-18, 1724 (1989) (codified as amended at 18 U.S.C.A. § 207(c) (West Supp. 1990)) (effective Jan. 1, 1991) [hereinafter 18 U.S.C.A. § 207 (West Supp. 1990)].

203 162 CONG. REC. S15,953 (daily ed. Nov. 17, 1989) (statement of Sen. Levin). Senator Levin continued, noting that the "ethics portion" of the bill

imposes some tough new standards on Members of Congress, and on our staffs, and it strengthens existing ethics laws that apply to all three branches. It addresses key ethics issues ranging from postemployment lobbying restrictions to financial disclosure, to gifts and travel restrictions.

. . . [F]or the first time, through this bill we would bring Members of Congress and top congressional staff under the postemployment lobbying restrictions of 18 United States Code section 207.

*Id.* at S15,953-54.

204 Pub. L. No. 101-194, §§ 101(a), 102, 103 Stat. 1716, 1717-18, 1724 (1989) (codified as amended at 18 U.S.C.A. § 207(c)(1) (West Supp. 1990)) (effective Jan. 1, 1991).

205 Pub. L. No. 101-194, § 407(a), 103 Stat. 1716, 1753 (1989) (codified at 18 U.S.C.A. § 216(a) (West Supp. 1990)).

206 18 U.S.C. § 207(c)(3) (1988).

sparse.<sup>207</sup> The only extended discussion of the changes made in subsection 207(c) is in the floor remarks of Senator Carl M. Levin, co-sponsor of the bill. Senator Levin specifically referred to the *Nofziger* decision, noting that the D.C. Circuit's

interpretation does not reflect congressional intent. . . . There is no requirement, here, that the former employee *know* that the particular matter on which he or she is lobbying was a matter of interest or was pending before the subject agency or department. Thus, we are able to set the record straight on this matter.<sup>208</sup>

In its attempt to "set the record straight," Congress instead succeeded in enacting a statute that is as ambiguous as the one it replaced.

### A. *Identifying the Ambiguities in the Revised Subsection*

The revised subsection contains two ambiguities. It is syntactically ambiguous<sup>209</sup> because the reader is uncertain how far down the sentence "knowingly" travels. A court interpreting the subsection is faced with the question of which elements "knowingly" modifies. The new subsection initially defines the prohibited conduct ("makes . . . any communication . . . or appearance") and then lists other elements. For example, another element of the offense is that the subject of the communication must be a matter "on which such person [the former employee] seeks official action."<sup>210</sup> An interpretive problem arises because the language of the statute does not specify if the prosecution must prove that the former employee *knew* that the subject of the communication involved official action.<sup>211</sup>

<sup>207</sup> "The Act was moved through Congress in a couple of weeks, and no committee or conference reports were prepared." Murdock, *Finally, Government Ethics as if People Mattered: Some Thoughts on the Ethics Reform Act of 1989*, 58 GEO. WASH. L. REV. 502, 503 (1990).

<sup>208</sup> 162 CONG. REC S15,954 (daily ed. Nov. 17, 1989) (statement of Sen. Levin) (emphasis added). The complete text of Senator Levin's comments on the changes to § 207(c) reads:

One matter we have addressed [in making the changes] in this section has to do with the knowing standard. In the recently decided case involving former Presidential aide Lyn Nofziger, the court of appeals held that under the current law, the word "knowing" modified all the elements of the offense including the provision that the particular matter was pending before the subject department or agency or that the agency had a direct and substantial interest in the particular matter. That judicial interpretation does not reflect congressional intent. We correct that misinterpretation in this bill by including a knowing standard *only for the act of making the communication* with the intent to influence and state that the offense is committed if the former employee seeks official action by an agency or department employee. There is no requirement, here, that the former employee *know* that the particular matter on which he or she is lobbying was a matter of interest or was pending before the subject agency or department. Thus, we are able to set the record straight on this matter.

*Id.* (emphasis added). The only other mention of the changes to § 207(c) appears in a section-by-section analysis that Senator Levin placed in the Congressional Record. It notes simply that "207(c) is similar to current law. It bars Executive Branch employees, including members of the Senior Executive Service, who are paid at or above the GS-17 level and comparable military officers from lobbying their former agency on behalf of another person, on any matter on which such person seeks official action. This is a 1 year ban." 162 CONG. REC S15,954-55 (daily ed. Nov. 17, 1989).

<sup>209</sup> See *supra* note 45 and accompanying text.

<sup>210</sup> 18 U.S.C.A. § 207(c)(1) (West Supp. 1990).

<sup>211</sup> Consider the factual scenario where an ex-employee contacts his former agency to gain information on the specifics of a contract on which that agency is taking bids. The ex-employee's firm has yet to make a bid, and the ex-employee does not know if his firm will decide to make a bid. Thus, the

The ambiguity in the new subsection is similar to the ambiguity in the statute at issue in *Liparota v. United States*<sup>212</sup> penalizing “whoever knowingly uses, transfers, acquires, alters, or possesses [food stamps] . . . in any manner not authorized by this chapter . . . .”<sup>213</sup> In that case, the Court decided that “knowingly” applied to all the elements that followed it. Applying this precedent to interpret the new subsection would, however, seem to contradict the little legislative history that discusses the change. The drafters of the new subsection revised the law to eliminate the requirement that the former employee know the nature of his communication.

The revised subsection is also semantically ambiguous. It specifies that the punishment for violating the subsection is found in 18 U.S.C. § 216, the new penalty section. The new section establishes misdemeanor penalties for “engag[ing] in the conduct constituting the offense,” and felony penalties for “*willfully* engag[ing] in the conduct constituting the offense.”<sup>214</sup> The state of mind term “willfully” is semantically ambiguous because courts have interpreted it as meaning either a purpose to break the law or simply knowledge of one’s conduct.<sup>215</sup>

An application of section 216 to subsection 207(c) produces two alternative interpretations of what the prosecution must prove to impose felony penalties. One alternative would require that an ex-employee “knowingly make[], with the intent to influence, any communication.” with the purpose to break the law. The other alternative would require that an ex-employee “knowingly make[], with the intent to influence, any communication.” with knowledge of his own conduct. Either alternative is possible. The application of this semantic ambiguity to a subsection that is already syntactically ambiguous creates a gordian knot for a court faced with the task of determining the states of mind required by the statute.

### B. *Resolving the Ambiguities in the Revised Subsection*

An application of the suggested analytical framework resolves the ambiguities and identifies the states of mind required by the new subsection. The initial step is to apply element-by-element analysis and classify the elements as conduct, surrounding circumstances, or results. The new subsection contains two conduct elements: (1) “makes . . . any communication to”; and (2) “makes . . . appearance before.” The subsection contains five surrounding circumstance elements. The contact must be: (1) “within 1 year after the [former employee’s] termination”; (2) “before any officer or employee of the department or agency in which such person served within 1 year before such termination”; (3) “on behalf of any other person (except the United States)”; (4) “in connection

defendant prosecuted under the new section could argue that when he communicated with his former agency, he did not *know* if his firm would seek official action on the subject of the communication.

212 471 U.S. 419 (1985).

213 7 U.S.C. § 2024(b)(1) (1988). See *supra* notes 45, 127-29 and accompanying text.

214 18 U.S.C.A. § 216(a)(1) - (2) (West Supp. 1990) (emphasis added).

215 See *supra* note 44.

with any matter on which such person [the former employee] seeks official action”; and the action sought must be (5) “by any officer or employee of such department or agency.”

The next step is to determine which elements require a state of mind. The determination for the two conduct elements is simple: all conduct elements require a state of mind of at least knowledge.<sup>216</sup> Whether the five surrounding circumstance elements require a state of mind depends on their role in the offense. Elements that are a basis for liability for the substantive offense require a state of mind; elements that determine jurisdiction, grading, venue, or a question of law do not require a state of mind.<sup>217</sup> None of the five elements serve as a basis for jurisdiction, grading,<sup>218</sup> or venue, and none relate to a question of law. Thus, all five are liability elements, and absent expressed legislative intent, a state of mind must be proven for each element.<sup>219</sup>

The next step is to determine if a particular state of mind term immediately modifies or introduces the element. The conduct elements are immediately modified by “knowingly . . . with the intent to influence.” Because there is no intervening conduct element between the term “knowingly” and the phrase “with the intent to influence,” as there was in the original subsection 207(c), the two state of mind terms can be read together, and treated as one unified state of mind.<sup>220</sup> Because the conduct elements are modified by express terms, the construction ends here, and a court should apply the expressed terms.

The determination of the appropriate state of mind for the five surrounding circumstance elements is not as straightforward as it was for the two conduct elements. The revised subsection does not contain a term that immediately modifies any of the five surrounding circumstance elements. Thus, it does not specify a state of mind for these elements.<sup>221</sup> The analytical framework of this Comment fills this void. A court should utilize the assumption that the state of mind of recklessness be proven for surrounding circumstance elements that serve as a basis for liability. In interpreting subsection 207(c), a court should require the prosecution to prove, for example, that the former employee is at least reckless with respect to whether the subject of his communication is one on which official action is sought.

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216 See *supra* note 114 and accompanying text.

217 See *supra* text accompanying notes 108-09.

218 The offense does have different grades of punishment, but the higher felony punishment is based on the presence of “willfulness,” not on the presence of an additional surrounding circumstance.

219 See *supra* notes 113-14 and accompanying text.

220 The terms create a unified state of mind because in this sentence, “knowingly” modifies not only “makes” but also “intent to influence.” Thus, the former employee must knowingly intend his action. The employee must know that he seeks to influence his former agency. This level of state of mind was envisioned by Judge Edwards in his dissenting opinion in *Nofziger* when he noted that “‘intending to influence’ and ‘knowingly intending to influence’ are different standards.” *United States v. Nofziger*, 878 F.2d 442, 460 n.3 (D.C. Cir.), *cert. denied*, 110 S. Ct. 564 (1989) (Edwards, J., dissenting) (emphasis in original).

221 See *supra* notes 118-19 and accompanying text for an explanation of the process for determining whether a section “specifies” a state of mind.

An application of the suggested analytical framework also resolves the semantic ambiguity caused by the word "willfully" in section 216. The ambiguity exists because "willfully" can be interpreted to mean either "knowingly" or "with a purpose to break the law."<sup>222</sup> A major source of the analytical framework is the Model Penal Code § 2.02, and it can assist in resolving the ambiguity because it addresses the meaning of "willfully" in an offense definition. The relevant paragraph notes that "a requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears."<sup>223</sup> If the term "willfully" in section 216 is read as meaning "knowingly," the resulting interpretation is not meaningful. When the two sections are read together, while assuming that "willfully" means "knowingly," felony penalties are imposed on a former employee who "[knowingly] engages in the conduct constituting the offense,"<sup>224</sup> and the conduct is itself "knowingly mak[ing], with the intent to influence, any communication."<sup>225</sup> One of the two "knowingly" modifiers is redundant, and if one was excised the section would have the same meaning. Read this way, section 216(a)(2) has the same meaning as section 216(a)(1), even though (a)(1) does not contain "willfully" as a modifier.

This interpretation of section 216(a)(2) violates the principle of statutory construction which holds that a given section should be interpreted to give each word and phrase meaning.<sup>226</sup> The interpretation also contradicts the legislative history of section 216. Section 216 is a new section of the criminal code, and it was added to "create alternative felony, misdemeanor, and civil penalties for Sections 203, 204, 205, 207, 208, and 209."<sup>227</sup> Formerly, subsection 207(c) only provided for felony penalties. If a statute imposes alternative penalties, it should also specify alternative levels of criminal culpability.

To give section 216(a)(2) meaning, the term "willfully" should be interpreted to justify the imposition of the more severe felony penalties. Interpreting "willfully" as meaning "with the purpose to break the law" provides the necessary justification. This interpretation follows section 2.02(8) of the Model Penal Code, which conditioned interpreting "willfully" as "knowingly" on the absence of an apparent purpose "to impose further requirements." The heightened penalties of section 216(a)(2) exhibit a purpose to impose a further requirement; in this case, section 216(a)(2) imposes the further requirement on the prosecution to prove that the former employee made a communication with the purpose of breaking the law.

In sum, the proper state of mind requirements for the revised subsection are "knowingly . . . with the intent to influence" for the conduct

<sup>222</sup> See *supra* text accompanying note 215 and note 44.

<sup>223</sup> MODEL PENAL CODE § 2.02(8) (Official Draft and Revised Comments 1985).

<sup>224</sup> 18 U.S.C.A. § 216(a)(2) (West Supp. 1990) (substituting "knowingly" for "willfully").

<sup>225</sup> 18 U.S.C.A. § 207(c)(1) (West Supp. 1990).

<sup>226</sup> See *supra* note 135.

<sup>227</sup> 162 CONG. REC S15,956 (daily ed. Nov. 17, 1989) (section-by-section analysis of the Ethics Reform Act of 1989 offered by Sen. Levin).

elements of "makes . . . any communication" and "makes . . . appearance," recklessness for the five surrounding circumstance elements, and a purpose to violate the subsection for the imposition of section 216(a)(2) felony penalties.

## VI. Conclusion

The opinions of the court in *Nofziger* are symbolic of the fundamental problems involved in *interpreting* the federal criminal code. The revisions of subsection 207(c) are symbolic of the fundamental problems involved in *drafting* the federal criminal code. Neither statutes nor case law provide a useful principle to guide courts when they interpret the thousands of disparate provisions contained in Title 18. Over ten years ago, in *United States v. Bailey*,<sup>228</sup> the Supreme Court took the first tentative steps toward filling the void. The states are leaders in this area, with a majority of states modernizing their criminal codes and regularizing their methods of statutory interpretation over the last thirty years.<sup>229</sup> A similar development has not occurred with the federal criminal code, in spite of the fact that the federal criminal justice system possesses the capacity for reform.<sup>230</sup>

228 444 U.S. 400 (1980).

229 MODEL PENAL CODE xi (Official Draft and Revised Comments 1985).

230 The recent enactment of the Federal Sentencing Guidelines demonstrates that federal criminal law can be reformed. The Comprehensive Crime Control Act of 1984 created the United States Sentencing Commission, and it gave the Commission "broad authority to review and rationalize the sentencing process." Federal Sentencing Guidelines § 1A2, U. S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 1 (1990 ed.) [hereinafter MANUAL].

Pursuant to this goal, the Commission structured the Guidelines so that after the Introduction, but before the chapters describing the details of the Guidelines, there is a Part entitled "General Application Principles." The longest and most detailed guideline in this part relates to "Relevant Conduct (Factors that Determine the Guideline Range)." Guidelines § 1B1.3. The guideline in force in 1988-89 required that the sentencing court evaluate the conduct in light of several factors:

(a) . . . Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, [and] (ii) specific offense characteristics . . . shall be determined on the basis of the following: . . .

(3) all harm or risk of harm that resulted from the acts or omissions specified . . . if the harm or risk was caused *intentionally, recklessly, or by criminal negligence* [; and] . . .

(4) the defendant's state of mind, intent, motive and purpose in committing the offense . . .

Guidelines § 1B1.3(a), *id.* at 360 (amendment effective January 15, 1988) (emphasis added). Note how the Guidelines clearly specify the state of mind levels that a court should consider, with the lowest state being negligence. Although this Comment argues that the lowest state of mind that should apply to any of the attendant circumstances is recklessness, this guideline provides a parallel in sentencing to what this Comment proposes in substantive offenses.

The recent D.C. Circuit decision in *United States v. Burke*, 888 F.2d 862 (D.C. Cir. 1989), correctly applied these guidelines to require the prosecution to show a minimum state of mind of negligence before the sentence could be increased. Guideline § 2D1.1(b) calls for a two level increment in sentencing if the defendant possessed a firearm. The trial court did not require the prosecution to prove that the defendant knew he possessed the gun, only that the defendant possessed it. *Burke*, 888 F.2d at 865. The court decided that

*[p]ossession without proof of knowledge will result in an enhancement only when the Government proves that the defendant was reckless or criminally negligent in order to show that he should have been aware that he was in possession of a weapon.*

*Id.* at 868 (emphasis in original). In reaching this conclusion, the court reasoned that "[a]lthough section 2D1.1(b) itself is silent as to scienter, section 1B1.3—which supplies 'general application principles'—is not." *Id.* at 866. Courts can utilize principles of general application if the courts recognize such principles. The analytical framework outlined by this Comment supplies the general



The need for reform is obvious, the opportunity is manifest; however, courts are apparently unwilling to introduce reform,<sup>231</sup> and Congress is seemingly unable to legislate reform.<sup>232</sup> The analytical framework utilized by this Comment provides a workable model for interpreting federal criminal statutes. The *Nofziger* decision represents a lost opportunity for a respected federal appellate court to initiate the necessary reform for the determination of *mens rea* in federal criminal law. The Congressional revision of subsection 207(c) demonstrates the continued need for a comprehensive model to guide the drafting and interpretation of federal criminal laws.

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principles federal courts should use to determine the proper states of mind that must be shown for the elements of a substantive offense.

Despite the ability of courts to utilize guidelines specifying that particular levels of states of mind should be considered, the Commission amended Guideline § 1B1.3 in November of 1989, deleting references to state of mind terms. See MANUAL, *supra*, at 396-97.

231 Appellate courts can be particularly resistant to reform.

[A]ppellate courts are not sufficiently aware of the need to use clear and consistent language or of the difficulty in administration that results if terms are ambiguous and used in inconsistent ways. Nor do appellate courts feel a responsibility to maintain a coherent criminal code, seemingly because they are unaware of its value. As a result, one ordinarily cannot rely upon appellate courts to clarify a confused statutory definition.

Remington, *The Future of the Substantive Criminal Law Codification Movement — Theoretical and Practical Concerns*, 19 RUTGERS L.J. 867, 874 (1988).

232 Congress amended § 207(c) with the ostensible purpose of clarifying the statute. “[S]ome of the changes we have made to the postemployment law simply reflect an effort to make the statute more readable.” 162 CONG. REC. S15,954 (daily ed. Nov. 17, 1989) (statement of Sen. Levin). Instead of making the statute clearer, the changes succeeded only in replacing two old ambiguities with two new ambiguities.

## ***In re Metmor Financial, Inc.*: The Better Approach to Post-Seizure Interest Under the Comprehensive Drug Abuse Prevention and Control Act**

Since 1970, following congressional approval of the Comprehensive Drug Abuse Prevention and Control Act (Drug Control Act),<sup>1</sup> the federal government has carried out scores of civil forfeitures under its provisions. *In re Metmor Financial, Inc.*<sup>2</sup> is an example of a case arising from government exercise of the powers granted by the Drug Control Act in the fight against the drug trade and drug usage in this country. In fact, *In re Metmor* is the first federal circuit court of appeals decision addressing the award of post-seizure interest to an innocent party under the Drug Control Act. Consistent with a small contingent of district courts addressing the issue at the time, but contrary to the majority, the Fourth Circuit declared its intent to protect the “innocent owner” from the government’s attempt to deny such protection.

Part I of this Comment discusses the facts of *In re Metmor* and its holding in favor of post-seizure interest. Part II examines the inconsistent treatment of post-seizure interest to innocent lienholders by various courts by discussing the primary district court case denying post-seizure interest, *United States v. One Piece Of Real Estate*.<sup>3</sup> Part III discusses the legislative history and analyzes the congressional intent behind the Drug Control Act and one of its most important amendments. Part IV examines the reliance by both sides in the issue upon *United States v. Stowell*,<sup>4</sup> a forfeiture case handed down a century ago. Finally, Part V addresses possible consequences of denying post-seizure interest to an innocent third party and concludes that the *In re Metmor* court’s protection of post-seizure interest is the best approach.

### **I. Facts and Ruling of *In re Metmor***

*In re Metmor* involved an appeal of an order of forfeiture in favor of the United States government.<sup>5</sup> The government seized a small horse ranch located near Dade County, Florida, after the property’s owner, Paul Ackley, was implicated as a drug smuggler and declared a fugitive.<sup>6</sup> The government accomplished the seizure by filing a complaint against the property with the United States Marshal’s Service, pursuant to section 511 of the Drug Control Act.<sup>7</sup>

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1 Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (current version codified at 21 U.S.C. §§ 801-971 (1988)).

2 819 F.2d 446 (4th Cir. 1987).

3 571 F. Supp. 723 (W.D. Tex. 1983).

4 133 U.S. 1 (1890).

5 *In re Metmor*, 819 F.2d at 447.

6 *Id.*

7 *Id.* Section 511 of the Drug Control Act is codified at 21 U.S.C. § 881 (1988), *see infra* note 32.

Metmor Financial was an assignee of a mortgage on the horse ranch prior to Ackley's purchase of it; the property was subsequently purchased by Ackley who assumed the mortgage held by Metmor Financial.<sup>8</sup> Metmor Financial claimed no knowledge of Ackley's alleged connections with illegal drug activity and filed a claim with the government for an interest in the property.<sup>9</sup>

The United States District Court for the District of South Carolina entered an order of forfeiture which condemned and forfeited to the government Ackley's ranch in Florida.<sup>10</sup> In addition, the court stated that the real property remained subject to Metmor Financial's lien, plus interest up to the time of seizure.<sup>11</sup> On appeal, the sole issue was the district court's denial of Metmor Financial's claim for post-seizure interest on the mortgage.<sup>12</sup> Such interest had been accruing from the time of seizure and eventually amounted to nearly two years worth of accumulated interest.<sup>13</sup>

At no time did the government deny that Metmor Financial had obtained an interest in the property, but rather, essentially acquiesced to Metmor Financial's claimed innocent lienholder status.<sup>14</sup> The government did not contest the district court's forfeiture of the property subject to Metmor Financial's lien, so long as post-seizure interest was denied.<sup>15</sup> The Fourth Circuit Court of Appeals subsequently reversed the district court's holding, and required that the government pay Metmor Financial post-seizure interest that had accrued from the time of seizure to the property's eventual sale.<sup>16</sup>

## II. *United States v. One Piece Of Real Estate* and the Controversy Over Post-Seizure Interest

*United States v. One Piece Of Real Estate (One Piece)* was the first federal district court case denying post-seizure interest to lending institutions claiming an innocent owner status.<sup>17</sup> This 1983 case from the United

8 *In re Metmor*, 819 F.2d at 447. In October, 1974, Newton and Nancy Baker purchased the property and executed a mortgage in favor of Allstate Enterprises Mortgage Corporation. This mortgage was later assigned to Metmor in 1981. In early 1985, using drug proceeds and a straw purchaser, Ackley took title to the property. Ackley purchased the property encumbered by Metmor Financial's lien which subsequently remained on the property. Opening Brief for Appellant at 3-4, Brief for Appellee at 4-5, *In re Metmor Fin., Inc.*, 819 F.2d 446 (4th Cir. 1987) (No. 86-3710).

9 *In re Metmor*, 819 F.2d at 447. According to the court, the government did not deny that Metmor's interest in the property arose before the property became implicated in any illegal activity. *Id.* at 448. Thus, there was no issue as to Metmor Financial's claimed "innocent owner" status as opposed to many forfeiture actions involving supposed innocent parties.

10 *Id.*

11 *Id.* The order of forfeiture stated: "The real property remains subject to a lien by Metmor Financial, Inc. in the principal amount of \$183,914.54, plus interest at the rate of 9.5% from March 1, 1985 [the date when the government's complaint for forfeiture was filed] through March 28, 1985 [the date when the property was seized]." Appellant's Opening Brief at 5, *In re Metmor Fin., Inc.*, 819 F.2d 446 (4th Cir. 1987) (No. 86-3710).

12 *In re Metmor*, 819 F.2d at 447.

13 *Id.* at 448.

14 *Id.*

15 *Id.*

16 *Id.* at 451. It is only when the government proceeds with the final sale of the property that an innocent lienholder obtains satisfaction on his mortgage.

17 *Id.* at 448 n.5.

States District Court for the Western District of Pennsylvania is the precedent setting case for other districts adopting a "no-interest" rule.<sup>18</sup>

In *One Piece*, the government sought forfeiture of various parcels of real-estate because they were purchased with the proceeds of unlawful drug transactions.<sup>19</sup> Like *In re Metmor*, several institutional lienholders filed claims under section 881 seeking to recover the unpaid principal as well as post-seizure interest.<sup>20</sup> The government did not deny the lienholder's right to their unpaid principal and any unpaid interest charges accrued up to the date of seizure.<sup>21</sup> Nonetheless, the government, in what was to become their usual posture in such cases, held firm in their denial of the lienholder's claim to any post-seizure interest.<sup>22</sup> The court subsequently awarded the lienholder-claimants their remaining principal and interest up to the time of seizure on the liens.<sup>23</sup> The court refused, however, to allow any recovery for post-seizure interest.<sup>24</sup>

In *In re Metmor*, the Fourth Circuit states at the beginning of its decision that, "[a]s far as we are aware, no court of appeals, and only a handful of district courts, have addressed this issue."<sup>25</sup> With the exception of *In re Metmor*, this situation remains unchanged. Among the limited number of courts addressing this issue, districts in South Carolina, Louisiana, and Florida have opted to deny post-seizure interest to innocent lienholders while districts in Tennessee, Georgia, Pennsylvania, and Hawaii have adopted the diametric position.<sup>26</sup> All of these decisions resolve the issue upon either one or both of the following grounds: the interpretation of the federal statute governing these seizures and subsequent forfeitures, or the relation-back doctrine as formulated in *United States v. Stowell*.<sup>27</sup>

The discussion of the governing statute centers upon the interpretation of a clause purporting to protect "innocent owners." Specifically, the dispute revolves around the *extent* of an innocent owner's interest under the statute. Under the relation-back concept, the dispute arises over the ability of the doctrine to deny or protect an innocent lienholder's post-seizure interest. Courts applying *Stowell* hold that the relation-back doctrine vests the government's interest in the forfeitable property at the time it becomes tainted from illegal activity.<sup>28</sup> Thus, once

18 *Id.* See *infra* note 26.

19 *United States v. One Piece Of Real Estate*, 571 F. Supp. 723, 724 (W.D. Tex. 1983).

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* at 726.

24 *Id.*

25 *In re Metmor Fin., Inc.*, 819 F.2d 446, 448 (4th Cir. 1987).

26 Cases denying post-seizure interest are: *United States v. A Fee Simple Parcel Of Real Property*, 650 F. Supp. 1534 (E.D. La. 1987); *United States v. 8.4 Acres Of Land*, 648 F. Supp. 79 (D.S.C. 1986); *United States v. One Condominium Apartment*, 636 F. Supp. 457 (S.D. Fla. 1986); *United States v. Escobar*, 600 F. Supp. 88 (S.D. Fla. 1984). Cases awarding post-seizure interest are: *United States v. Parcel Of Real Property*, 715 F. Supp. 1323 (W.D. Pa. 1989); *United States v. Real Property In Sevier County, Tenn.*, 703 F. Supp. 1306 (E.D. Tenn. 1988); *United States v. Real Property Titled In The Name Of Shashin, Ltd.*, 680 F. Supp. 332 (D. Haw. 1987); *United States v. All That Tract & Parcel Of Land*, 602 F. Supp. 307 (N.D. Ga. 1985).

27 *United States v. Stowell*, 133 U.S. 1, 16-17 (1890).

28 *United States v. One Piece Of Real Estate*, 571 F. Supp. 723, 725 (W.D. Tex. 1983).

title to the property vests in the government, others, including innocent lienholders, may not acquire a superior interest or increase their already present interest.<sup>29</sup> Here, the dispute arises over the ability of the relation-back doctrine to deny or protect an innocent lienholder's post-seizure interest. This Comment analyzes these two concepts and discusses how both the *In re Metmor* and *One Piece* courts apply them in justification of their opposing positions on this issue.

### III. The Drug Control Act

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act to curb what was found to be a growing problem of drug abuse and addiction in this country.<sup>30</sup> A House report states that one of the principal purposes of the bill, "was to deal in a comprehensive fashion with the growing menace of drug abuse in the United States . . . through providing more effective means for law enforcement aspects of drug abuse prevention and control."<sup>31</sup>

The seizures in *In re Metmor* and *One Piece*, as well as those in the other district court cases, were executed pursuant to the civil forfeiture provisions of the Drug Control Act, codified at 21 U.S.C. § 881.<sup>32</sup> Sec-

<sup>29</sup> *Id.*

<sup>30</sup> H.R. REP. NO. 91-1441, 91st Cong., 1st Sess. 2, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4566-68.

<sup>31</sup> *Id.*

<sup>32</sup> 21 U.S.C. § 881 (1988). Subsection (a) of § 881 reads as follows:

§ 881. Forfeitures

(a) Subject property.

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance

tion 881 permits the federal government to seize by forfeiture numerous items, including real property, which were purchased with the proceeds of illegal narcotics trafficking or were used to facilitate the manufacture or distribution of illegal narcotics.<sup>33</sup> Since these are *civil* forfeiture proceedings, a criminal conviction is not a prerequisite.<sup>34</sup> The proceedings are in rem actions that are based upon the legal fiction that the property itself is guilty of wrongdoing.<sup>35</sup> Congress designed section 881 primarily to take the profit out of the drug trade and, as is readily apparent, it provides the means to do just that.<sup>36</sup>

Until Congress amended section 881 in 1978, no basis existed for bringing a lawsuit under that section to recover post-seizure interest. After reviewing the success of the 1970 statute, Congress became concerned that the government could forfeit a person's property even though that person was in no way connected to the wrongdoing that had triggered the forfeiture. For instance, prior to the amendment, under certain circumstances a person could forfeit his automobile to the gov-

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in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

*Id.*

For a comprehensive examination of § 881, see Annotation, *Forfeiture of Personal Property Used in Illegal Manufacture, Processing, or Sale of Controlled Substances Under § 511 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USC § 881)*, 59 A.L.R. FED. 765 (1982).

33 21 U.S.C. § 881 (1988). See *United States v. Reynolds*, 856 F.2d 675, 676 (4th Cir. 1988) (holding that an entire tract of property is subject to forfeiture even though only a small part of it was used for illicit purposes). In referring to 21 U.S.C. § 881(a)(7), the *Reynolds*' court stated, "Congress expressly contemplated forfeiture of an entire tract based upon drug-related activities on a portion of a tract. The statute is so clear that resort to extrinsic aids to seek its meaning are unnecessary." *Id.*

34 *United States v. \$152,160.00 United States Currency*, 680 F. Supp. 354, 356 (D. Colo. 1988); *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, *reh'g denied*, 417 U.S. 977 (1974). Public policy supports the use of civil forfeiture proceedings involving narcotics violations in that it prevents illicit use of real or personal property by imposing an economic penalty rendering unlawful behavior less profitable. *Id.* at 686-87. See *United States v. Premises Known As 2639 Meetinghouse*, 633 F. Supp. 979 (E.D. Pa. 1986). The *Premises Known* court stated that the purpose of civil forfeitures under § 881 includes, "removing the incentive to engage in the drug trade by denying drug dealers the proceeds of illgotten gains, stripping the drug trade of its instrumentalities, including money, and financing Government programs designed to eliminate drug trafficking." *Id.* at 994.

35 *\$152,160.00 United States Currency*, 680 F. Supp. at 356.

36 See *supra* notes 30-35 and accompanying text.

ernment even though he never engaged in any illegal activity. If the vehicle happened to be stolen, was used to transport controlled substances, and then recovered, it could eventually be forfeited because it was used to facilitate the crime. As the *One Piece* court points out, prior to 1978, the statute itself offered no remedy, and the owners only remedy was to petition the Attorney General of the United States for remission or mitigation—a so-called act of executive clemency.<sup>37</sup> This process could be highly arbitrary, being governed not by a court of law but by the government itself, the original seizer of the property.<sup>38</sup>

The government presently rejects petitions for executive clemency because the congressional amendment of 1978 provides an alternative remedy.<sup>39</sup> The new provision, commonly deemed the “innocent owner” defense, states in part that, “no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.”<sup>40</sup>

This amendment is at the heart of the opposing decisions in *In re Metmor* and *One Piece*. It is not the *application* of the defense that creates the controversy, however, but the *scope* of the defense that proves troublesome. In both cases the government did not even challenge the

<sup>37</sup> *United States v. One Piece Of Real Estate*, 571 F. Supp. 723, 724 (W.D. Tex. 1983). The *One Piece* court stated:

Historically, the remedy of the innocent holder of a lien interest in property forfeited under [s]ection 881 and other statutes has been to petition the Attorney General of the United States for remission or mitigation, an act of executive clemency. Thus, although innocent lienholders could not prevent forfeiture of their interests, they could request an administrative determination that certain properties be returned or a portion of the proceeds of sale be paid to them.

*Id.*

<sup>38</sup> 19 U.S.C. § 1618 (1988) governs remission and mitigation proceedings. The relevant portions state:

[T]he Secretary of the Treasury . . . if he finds that such fine, penalty, or forfeiture was incurred without willful negligence . . . or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture *may* remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

*Id.* (emphasis added).

The courts have consistently held that it is solely within the Attorney General's discretion whether property should be returned. *United States v. One 1973 Buick Riviera Auto.*, 560 F.2d 897, 900 (8th Cir. 1977). Remission under § 881 is also considered a matter of grace, not right. *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8, 11-12 (1st Cir. 1977). As a result, a district court has no jurisdiction to consider the Attorney General's determination. *United States v. One Volvo Sedan*, 393 F. Supp. 843, 846-847 (C.D. Cal. 1975).

One article notes:

[W]hile a petition for remission or mitigation is an important avenue to ameliorate the harshness of the forfeiture statute, it is purely a matter of grace . . . [s]ince no guidelines have been published by the Attorney General's Office, there is no framework provided by which an individual's rights can be protected . . . [t]he petition to the Attorney General should be considered equivalent to a criminal pardon.

Darmstadter & Mackoff, *Some Constitutional and Practical Considerations of Civil Forfeitures Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27, 38 (1987).

<sup>39</sup> *One Piece*, 571 F. Supp. at 725. The court notes that the remedy of an innocent owner today, instead of filing a remission or mitigation petition (although this is still a viable avenue), is to file a claim in the forfeiture proceeding and establish the existence of his “ownership” interest and his innocence. *Id.* “When this showing is made, the claimant's interest survives forfeiture and may be returned to him in the manner provided by the Court.” *Id.*

<sup>40</sup> 21 U.S.C. § 881(a)(6) (1988). See *supra* note 32 for the text of the entire subsection.

lienholder's assertion that it was an innocent owner. In fact, the court in *One Piece* was one of the first to acknowledge that a lienholder qualified as an innocent owner.<sup>41</sup> Citing the Congressional Record, the *One Piece* court states that the term owner, "should be broadly interpreted to include any person with a recognizable interest in the property seized."<sup>42</sup> Another court subsequently held that a credit corporation, as lienholder with a security interest in real property subject to forfeiture proceedings, was an "owner" according to the statute and, therefore, had standing to contest the forfeiture action to the extent of its interest in the property.<sup>43</sup>

In addition to recognizing that lienholders could stake a claim using the innocent owner defense, the cases illustrate that the government will not challenge the lienholder's recovery of the principal owed to them or in the interest accrued *up to the time of seizure*.<sup>44</sup> The controversy concerning interpretation of the statute therefore comes down to one question: is the statute, and more specifically the 1978 amendment, broad enough to allow innocent lienholders *post-seizure* interest on their investment? This is of utmost importance, for if post-seizure interest is protected under section 881(a)(6) it becomes, as the *One Piece* court states, "*statutorily exempt* from forfeiture."<sup>45</sup> Examining the legislative history of the 1978 amendment is the only way to determine the scope of the innocent owner defense for two reasons. First, the plain language of the statute does not indicate whether the defense is broad enough to encompass post-seizure interest. Second, courts have not yet construed the statute in a manner that would assist in resolving this issue. Without such guidance, the only alternative is a thorough examination of the amendment's legislative history.

The *In re Metmor* court uses this method very persuasively throughout its decision. The court finds that the issue before it is the *extent* of Metmor Financial's interest in the property and the right the government has to invade such an interest.<sup>46</sup> In response to their own question, the court declares that the legislative history of the amendment shows strong congressional recognition that the government could not disrupt Metmor Financial's right to the mortgage and the continually accruing interest, and that a forfeiture cannot change the nature of Metmor Financial's rights as an innocent mortgagee.<sup>47</sup> Citing to the Congressional

41 *One Piece*, 571 F. Supp. at 725.

42 *Id.* (quoting 124 CONG. REC. 17,649, 12,792 (1978)).

43 *United States v. All That Tract & Parcel Of Land*, 602 F. Supp. 307, 312 (N.D. Ga. 1985). The court here placed strong reliance upon the legislative history of 21 U.S.C. § 881 in arriving at their decision. *Id.*

44 *One Piece*, 571 F. Supp. at 725.

45 *Id.* at 726 (emphasis added).

46 *In re Metmor Fin., Inc.*, 819 F.2d 446, 450 (4th Cir. 1987).

47 *Id.* at 450. See *United States v. Real Property Titled In the Name Of Shashin, Ltd.*, 680 F. Supp. 332 (D. Haw. 1987). In discussing a similar fact pattern to the *In re Metmor* case, the *Shashin, Ltd.* court stated:

Under the typical loan agreement which constitutes the basis for a lien, the claimant is entitled to receive interest until the loan is paid, together with any other charges or costs provided for in the loan agreement. To interpret section 881 to compel the claimant to take any less *flies in the face of the statute*. It may be true that the forfeiture actually occurs at the moment of the illegal use and that no third party could thereafter acquire a legally recognizable interest in the property, but [the innocent party] had already acquired a legally



Record, the court highlights language from the amendment's legislative history which states that, "no property would be forfeited . . . to the extent of the interest of any innocent owner . . . ."48 Two congressional leaders specifically noted the amendment's purpose. Representative Rogers stated, "[the Senate amendment] *expands* the rights of innocent parties who own or have an interest recognized by the law in the seized property, to assert their claim in court to the extent of their interest in that property . . . ."49 Even more revealing is the testimony of Senator Nunn, the sponsor of the amendment, concerning the amendment's purpose:

[We] did add a provision . . . to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact . . . and forfeiture would not occur. That is the purpose of the wording added to the modification, in addition to some other wording in the modification *making the amendment broader than it otherwise would have been.*<sup>50</sup>

This language explains the purpose of the amendment: to protect and enlarge a legally recognizable interest which, in the past, had been marginally protected by archaic administrative practices of remission and mitigation.

If no dispute exists as to the propriety of allowing an innocent lienholder to assert the innocent owner defense, that defense should protect the lienholder's *entire* interest as it would any other interest falling under the defense. If this interest includes a mortgage granting rights to a principal monetary amount and continuing interest payments, then that is the interest to be protected; not just the principal and *some* interest, but the principal and *all* the interest rightfully due. Just as owners are entitled to have their entire automobile returned, so too should mortgages be provided with the *full* value of their mortgages.<sup>51</sup>

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recognizable interest in the property, represented by the lien, which secured all the rights and obligations provided in the agreement.

*Id.* at 336 (emphasis added). See also *United States v. Real Property In Sevier County, Tenn.*, 703 F. Supp. 1306 (E.D. Tenn. 1988). The *Real Property* court stated, "I agree that denying the lienholder entitlement to post-seizure interest . . . would result in a diminution of the lienholders' interest, and that such a result would be contrary to the statute, 21 U.S.C. § 881(a)(6)." *Id.* at 1313.

48 *In re Metmor*, 819 F.2d at 449 (quoting 124 CONG. REC. 36,948 (1978)).

49 *Id.* (emphasis added) (quoting 124 CONG. REC. 36,946 (1978)) (Statement of Rep. Rogers, then Chairman of the Subcommittee on Health and the Environment of the House Committee on Interstate and Foreign Commerce). The *One Piece* court was not unaware of this quote, but they have misinterpreted it. The *One Piece* court claims that, "[no member of Congress] made any reference to any right to greater financial recovery under Subsection (a)(6) than was already available," and that the amendment's purpose was merely to allow an innocent party to assert their claim in court. *One Piece*, 571 F. Supp. at 726 n.3. This clearly ignores the amendment's other legislative history. See *supra* note 48 and accompanying text and *infra* note 50 and accompanying text.

50 *In re Metmor*, 819 F.2d at 449 (emphasis added) (quoting 124 CONG. REC. 23,057 (1978)) (Statement of Sen. Nunn, sponsor of the amendment). See also Note, *An Analysis of Federal Drug-Related Civil Forfeiture*, 34 ME. L. REV. 435 (1982). Subsection 881(a)(6) was designed to "avoid inequities present in prior legislation." *Id.* at 438. In referring to the class the new subsection protects, the author notes that now, "a broader class can claim relief from forfeiture. These protections indicate a congressional awareness of the punitive effects of the forfeiture laws." *Id.* at n.31.

51 A common definition of a mortgage is, "a pledge or security of particular property for the payment of a debt." BLACK'S LAW DICTIONARY 911 (5th ed. 1979). The debt in this context would have to be the full value of all the principal and interest outstanding that would be paid to the

The language of section 881 does not grant more protection to individuals in certain circumstances and limit it in others. If Congress had intended to distinguish interests, for example, by granting more protection for automobile owners and less for lienholders, they would have so specified. Alternatively, if Congress intended such a distinction, once it became aware the distinction was not self-evident, Congress should have amended the statute again to make such a distinction apparent.<sup>52</sup> Congress, however, has not responded in this manner. It is, therefore, more likely that Congress is content with the broad protection granted by the 1978 amendment.<sup>53</sup> Thus, absent a clear legislative prohibition against such a practice, a lienholder's entire interest should be protected as would any other interest of an innocent owner.

The *One Piece* court, while highlighting this legislative history, fails to recognize its importance in reaching its final conclusion. In *One Piece*, the court states that the legislative history "reveals only a concern about protecting the 'interest' of innocent owners, with no precise explanation as to what the interest represents . . . [and] [i]n the absence of any legislative . . . guidance . . . the [c]ourt looks to the nature of civil forfeiture actions . . . used prior to the enactment of [s]ubsection (a)(6)."<sup>54</sup> Obviously, the *One Piece* court decided that the statute's legislative history was valueless in determining the scope of the innocent owner defense. Yet, when legislative language is vague or ambiguous it is standard practice to look to the legislative history for guidance.<sup>55</sup> The legislative history of the amend-

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mortgagee out of the proceeds from a judicial sale of the mortgaged property. To claim otherwise, that the debt includes the principal and only a *portion* of the interest, is ridiculous.

52 Beginning in 1983 and continuing to the present, the disagreement in the courts over the amendment's protection of post-seizure interest is readily apparent. See *supra* note 26 and accompanying text.

The *In re Metmor* court noted that the government was attempting to find legislative history supporting its contention of the fact that, in its 1978 and 1984 legislative enactments relating to forfeitures, Congress chose not to disturb either the ruling in *Stowell* or the administrative practice of denying post-seizure interest. 819 F.2d at 449 n.6. The *In re Metmor* court, in response to the government, stated that, "there is no indication that Congress was aware of the administrative practice of denying post-seizure interest, such that a failure explicitly to eliminate the practice [from the legislative enactments] could be viewed as an endorsement [of the prior administrative practice]." *Id.* The *In re Metmor* court then stated that even if one assumes congressional awareness, the legislative history of the 1978 amendment is clear that it intended to "expand[] the rights of innocent parties." *Id.* The language of the statute itself, (no property shall be forfeited . . . to the extent of the interest of an [innocent] owner), "plainly covers all aspects of an innocent owner's stake in otherwise forfeitable property." *Id.* The United States v. Real Property Titled In the Name Of Shashin, Ltd. court also addressed this issue. 680 F. Supp. 332, 336 (D. Haw. 1987). The *Shashin, Ltd.* court, in response to the *One Piece* court's claim that the prior administrative practice should be followed, noted that:

[I]n my opinion, by adding subsection (a)(6), Congress specifically provided for a procedure differing from the administrative process previously followed by requiring the government, in the event it wishes to retain the property, to pay to the claimant just compensation for such possession as determined by the court based upon applicable damage standards. In this case such compensation should consist of principal in full, interest, including that acquired post-seizure . . . .

*Id.*

53 The legislative history of the amendment clearly shows that the statute should be broadly interpreted. See *supra* notes 48-50 and accompanying text.

54 United States v. One Piece Of Real Estate, 571 F. Supp. 723, 725 (W.D. Tex. 1983) (emphasis added). See *supra* note 52.

55 The notion that in the interpretation of statutes legislative history is the controlling factor has been well established. See generally 73 AM. JUR. 2D Statutes §§ 142-146 (1974).

ment clearly shows the congressional intent to protect all the rights that an innocent party may have in a piece of forfeitable property.<sup>56</sup> By refusing to recognize this, the *One Piece* court does an injustice to the proponents and drafters of the amendment and ignores the congressional intent in passing the amendment.

#### IV. *United States v. Stowell*

Both the *One Piece* and *In re Metmor* courts, however, do not end their examination with the scope of the innocent owner defense. Rather, both courts proceed to place great reliance upon a case the Supreme Court handed down a century ago. *United States v. Stowell* established the doctrine known today as the "relation-back" doctrine.<sup>57</sup>

*Stowell* stands for the proposition that when property is subject to forfeiture due to its involvement in an illegal act, forfeiture takes place immediately upon the commission of the act.<sup>58</sup> At the time the act occurs, title vests in the government, transferring ownership of that property to the government.<sup>59</sup> Actual judicial condemnation of the property—forfeiture—is only used to formalize the transfer.<sup>60</sup> The basis for such reasoning was, "to prevent any subsequent alienation [by the offender] before seizure and condemnation," thereby avoiding some of the consequences of his wrongdoing.<sup>61</sup> Thus, no third party could acquire a legally valid interest in the property after the activity that subjects it to forfeiture occurred. Considering the prior automobile hypothetical as an example, the relation-back doctrine applies to the situation in which an owner uses his vehicle to transport an illegal substance and then attempts to sell the vehicle to a third party. Under *Stowell*, the third party purchaser could not acquire a valid interest in the vehicle because the prior owner did not have the right to transfer title; the title to the vehicle vested with the government at the time of the illegal activity.

Both the *One Piece* and *In re Metmor* courts interpret and place different levels of significance upon the *Stowell* decision. The *One Piece* court notes that a lienholder's argument for post-seizure interest is untenable in light of *Stowell*.<sup>62</sup> It states, "to hold that an innocent lienholder's interest continues to grow, necessarily at the expense of the government, results in a diminution of the government's forfeited interest . . . [which] is contrary to the holding in *Stowell* that the interest of the government is fixed as of the date of the illegal act."<sup>63</sup> The court then further claims

<sup>56</sup> *Supra* notes 49-50 and accompanying text.

<sup>57</sup> See Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165 (1990), for a comprehensive discussion advocating a narrowing of the relation-back doctrine under 21 U.S.C. § 881.

<sup>58</sup> *United States v. Stowell*, 133 U.S. 1, 16 (1890).

<sup>59</sup> *Id.* at 17.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 17-18.

<sup>62</sup> *United States v. One Piece Of Real Estate*, 571 F. Supp. 723, 725 (W.D. Tex. 1983).

<sup>63</sup> *Id.* Obviously, if an innocent lienholder takes a portion of the seized property's worth there will be less left for the government, but if the whole mortgage were ignored the government receives even more. This, however, should not be the way to rationalize the government's interest, for their rights in a particular piece of seized property should be set. And here, that interest should be set at what the government acquired through drug enforcement: the property value *minus* the lien an inno-

that, under a strict reading of *Stowell*, an innocent third party's interest would be cut off at the date when property is purchased with drug money or used illegally, not at the time of seizure.<sup>64</sup>

The *One Piece* court then reasons, however, that the lienholder's interest will only be cut off at the time of seizure, and not when the illegality occurs. The court emphasizes the generosity of the government in detailing how the government has chosen to afford lienholders *greater protection* than what they are entitled to.<sup>65</sup> The court bases this statement on the government's practice of remission and mitigation used prior to the enactment of the section 881(a)(6) amendment. The *One Piece* court states, however, that although Congress enacted subsection (a)(6), nothing has changed because Congress made no effort to "provide some specific guideline supporting a different interpretation when enacting [the amendment] . . ." <sup>66</sup> This is where the *One Piece* court's disregard for the legislative history of the amendment fails them. For if the amendment serves no purpose except to legislatively codify the government's previous actions, why would there be such a clamoring by the members of Congress to protect the innocent owner's interest?<sup>67</sup> According to the *One Piece* court it is *already* protected.<sup>68</sup> This view fails to explain subsequent congressional action. While the court mentions that the amendment was enacted to remove the arbitrariness of the prior executive actions, surely the statements from the members of Congress show their intent to exempt from forfeiture not just a *part* of an innocent owner's interest, but his *entire* interest in the forfeitable property.

The *In re Metmor* court interprets *Stowell* differently and declares that the case actually supports and upholds Metmor Financial's claim to post-seizure interest. In fact, the court demonstrates how the positions of the innocent lienholders in both cases are similar. The *In re Metmor* court recognizes that, in *Stowell*, the plaintiff also obtained a mortgage interest in the property before the illegality occurred.<sup>69</sup> According to the *In re Metmor* court, it is, therefore, imperative to the decision that the innocent lienholder acquired his or her interest prior to any illegality.<sup>70</sup>

In *Stowell*, where the lienholder was able to recover his mortgage, the Supreme Court held that, "the mortgage is valid as against the United States, and . . . so far as concerns the real estate, the judgment of con-

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cent lienholder acquired pre-illegal activity. Since an innocent lienholder does not acquire his interest through drug related activities, it should not be reduced by such.

64 *Id.*

The *One Piece* court through its language seems to imply that the government's current practice of allowing the return of the mortgagee's principal and interest up to the time of seizure should be looked on as an act of generosity. *Id.* It is incredulous to think that an innocent lienholder has no *right* to collect its pre-illegal activity mortgage principal and interest, and must rely instead on the altruism of the government.

65 *Id.*

66 *Id.* at 726. See *supra* note 52.

67 See *supra* notes 49-50 and accompanying text.

68 *United States v. One Piece Of Real Estate*, 571 F. Supp. 723, 725 (W.D. Tex. 1983).

69 *In re Metmor Fin., Inc.*, 819 F.2d 446, 448 (4th Cir. 1987).

70 *Id.*

demnation must be against the equity of redemption *only*.”<sup>71</sup> The *In re Metmor* court interprets this as allowing the government to succeed *only* to the interest that belonged to the wrongdoer.<sup>72</sup> “[Since] Ackley purchased the property encumbered by Metmor’s secured note, *with interest accruing* . . . [h]is equity was subject to an obligation to repay the borrowed principal *and* to pay interest on the unpaid balance until all of the principal was repaid.”<sup>73</sup> Essentially, the court holds that legally, the government only had an ownership interest equivalent to that which belonged to Ackley: a stake in property carrying a pre-existing mortgage with continually accruing interest.<sup>74</sup>

As was the case in *Stowell*, Metmor Financial was entitled to complete satisfaction of its mortgage, which included the continually accruing interest, with the government’s “equity” interest being the remainder.<sup>75</sup> This is entirely consistent with *Stowell*’s emphasis upon not diminishing *any* rights of the innocent lienor. The innocent owner in *Stowell*, with whom the Court eventually sides, gave an amusing example that is analogous to a current innocent lienholder scenario:

Suppose that a person drives his horse upon premises secretly used as a distillery for some innocent and legitimate purpose and while there the distillery and the horse are seized, cannot he claim it? . . . [I]t

71 *Id.* (emphasis added) (quoting *United States v. Stowell*, 133 U.S. 1, 20 (1890)). There was no mortgage interest at stake in *Stowell*, and therefore the court did not address the issue.

72 *In re Metmor*, 819 F.2d at 448-49.

73 *Id.* at 449. Examined through another approach it is easy to see how the government in these cases never owned more than that which belonged to the wrongdoer. When the wrongdoer took title to the property he assumed certain obligations to the lending institution. The government upon taking title should not now be able to say that they will take free of these obligations. The government seeks to impose a fictional freeze period wherein the government owns the property but is exempt from the incidents of ownership. When the government succeeded to the property just as the wrongdoer did, the interest bearing lien should have remained unchanged. To hold otherwise is to say that the government succeeded to a *larger* interest than its predecessor, i.e., that the government is capable of transforming notes with interest accruing into interest free notes.

74 *Id.* See *United States v. All That Tract & Parcel Of Land*, 602 F. Supp. 307 (N.D. Ga. 1985). The court found the *One Piece* court’s reading of *Stowell* erroneous and declared:

As this court reads *Stowell*, that case does not prohibit allowing an innocent lienholder to recover interest on a loan up to the date the principal is paid off when the secured property is forfeited. The lienholder’s *property interest* at the time of the seizure amounts to the unpaid principal and interest on the principal until the principal is fully paid (the “loan interest”); the government’s forfeited interest is the equitable interest which remains. Contrary to what the [*One Piece*] court suggests, the lienholder’s *property interest* does not grow at the expense of the government’s forfeited interest by allowing the lienholder to recover the *loan interest* to which it was entitled all along. (Perhaps the [*One Piece*] court confused the distinction between the two types of “interest.”)

*Id.* at 313 n.11 (emphasis in original). If the government is really interested in acquiring proceeds through the forfeiture process, they could always speed up the forfeiture proceedings (which in *In re Metmor* took two years from the time of seizure) thus allowing the government to payoff the lienholders earlier.

The *In re Metmor*, court, in an alternative theory, examined the awarding of post-seizure interest through a fifth amendment takings perspective. 819 F.2d at 450. The court noted that under such an argument:

[A] plaintiff is entitled to ‘just compensation’—typically defined as ‘fair market value of the property on the date it is appropriated’—the government must pay Metmor the fair market value of the mortgage as of the date of the transfer of title, a value which would include the interest that accrues under the mortgage terms.

*Id.* See generally *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984).

75 *In re Metmor*, 819 F.2d at 451.

ought to be enough to simply state our position. If a man leaves his property and parts with control of it for a legal and proper purpose, no act of the tenant, unknown to him, and without his consent, can deprive him of his property.<sup>76</sup>

The purpose of forfeiture laws is to discourage an underlying illegal act by denying the wrongdoer the fruits of his illegal enterprise.<sup>77</sup> In these cases, the innocent owner's interest *predated* that of the wrongdoer, therefore, no purpose exists for depriving the innocent owner of a part of its property. The wrongdoer receives no benefit if the innocent owner continues to receive its rightful interest. As such, the innocent owner should not be denied its continuing interest on the mortgage because of the wrongdoer's presence. It would be inconsistent with *Stowell* to deny such interest. Even under *Stowell*, the innocent lienholder's mortgage interest remains unaffected by the forfeiture proceedings. In *Stowell*, the Court noted that the mortgaged estate, even after the illegal activity, remained exactly the same as it was prior to the illegal act.<sup>78</sup>

One final note, relating to *Stowell*, concerns the 1984 amendment to section 881, subsection (h). It states, "[a]ll right, title, and interest in [forfeitable] property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section."<sup>79</sup> This unmistakably incorporates the relation-back doctrine into the statute.<sup>80</sup> However, some would go further and state

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<sup>76</sup> *United States v. Stowell*, 133 U.S. 1, 9, 19-20 (1890).

<sup>77</sup> "When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly in a criminal enterprise." *United States v. United States Coin & Currency*, 401 U.S. 715, 721-722 (1971).

<sup>78</sup> *Stowell*, 133 U.S. at 19.

<sup>79</sup> 21 U.S.C. § 881(h) (1988).

<sup>80</sup> Prior to this amendment there was a considerable lack of consensus as to the application of the relation-back doctrine to 21 U.S.C. § 881. The dispute revolved around the permissiveness of the language in § 881. According to the court in *United States v. Thirteen Thousand Dollars In United States Currency*, 733 F.2d 581, 584 (8th Cir. 1984), the relation-back doctrine was inapplicable to cases involving 21 U.S.C. § 881. The court juxtaposed § 881 against the forfeiture statute in *Stowell* which mandatorily required that upon the commission of a specified act certain property *shall* be forfeited. *Id.* The *Thirteen Thousand Dollar* court then posed the notion that since § 881 uses the language "*shall be subject to forfeiture*," it was a permissive statute and hence the relation-back doctrine was inapplicable. *Id.* (emphasis in original). See *United States v. Currency Totalling \$48,318.08*, 609 F.2d 210, 213 (5th Cir. 1980) (Although a different statute other than 21 U.S.C. § 881 was at issue, the court used the same reasoning that with a permissive statute the relation-back doctrine as announced in *Stowell* does not apply where the statute provides only for *possibility* of subsequent forfeiture). Accord *United States v. A Fee Simple Parcel Of Real Property*, 650 F. Supp. 1534, 1542 (E.D. La. 1987); *United States v. \$319,820.00 In United States Currency*, 634 F. Supp. 700, 703 (N.D. Ga. 1986). *But see Eggleston v. Colorado*, 873 F.2d 242 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1112 (1990) (where the Tenth Circuit in a well written opinion seemed to clarify the dispute). In overturning the district court decision, the court denied the Colorado Department of Revenue's contention that § 881 is permissive and therefore the relation-back doctrine is inapplicable. *Id.* at 243. In arriving at their decision, the court set down four rationales for holding that the relation-back doctrine *applies* to § 881. First, the *Eggleston* court states that the language of 21 U.S.C. § 881(a), "the following . . . shall be subject to forfeiture to the United States and no property right shall exist in them," makes it clear that property rights are divested immediately at the moment such property is used in a manner or context prescribed by § 881. *Id.* at 246. "The language 'subject to forfeiture' is merely used in this statute to give notice of the scope of property that shall be forfeited." *Id.* Second, the court notes that since there is no *option* for the government to institute forfeiture proceedings the statute cannot be permissive. *Id.* (*referring to United States v. Grundy & Thornburgh*, 7 U.S. (3 Cranch) 336, 350-52 (1806)). "Although the government apparently could choose to forgo forfeiture altogether . . . governmental discretion that is not founded on explicit

that this amendment would deny Metmor Financial's post-seizure interest because the illegal act predated Metmor Financial's actual date for receiving any post-seizure interest. It does nothing of the sort. It does not destroy the innocent owner defense, but merely says what the *In re Metmor* court recognized—that a third party cannot acquire a valid interest in forfeitable property *after* an illegality occurs.<sup>81</sup> This does not impact upon an interest, whether it be a mortgage with continuing interest payments or otherwise, acquired and vested *prior* to the illegality.

Here again, the legislative history of the amendment is helpful. The Senate report explaining the amendment shows that Congress relied upon the common-law "taint" theory in enacting subsection (h); property is considered tainted from the time of its prohibited use or acquisition.<sup>82</sup> It states, "[a]s discussed above, [the 'relation-back' doctrine] is well established in the current law."<sup>83</sup> The discussion referred to merely relates what *Stowell* holds, and states that the purpose of the provision is to "close a potential loophole in current law whereby the . . . forfeiture sanction could be avoided by transfers that were not 'arms length' transactions."<sup>84</sup> Obviously, its concern was *post*-illegality transfers and not *pre*-illegality acquired interests.<sup>85</sup> Thus, the 1984 amendment does nothing to diminish or cast doubt on the *In re Metmor* decision.

## V. Ramifications of Denying Post-Seizure Interest

This final Part discusses some of the unique issues arising from the award of post-seizure interest. First, it focuses on the government's dubious contention that an innocent lienholder who is denied his post-seizure interest still has another means of recourse. Second, it briefly touches upon the problems a lending institution would face if the courts follow the *One Piece* rationale and deny post-seizure interest to innocent lienholders. Third, this Part examines what the government receives

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language of the statute does not make the statute permissive." *Id.* at 246. Third, the court rejects the department's argument that since § 881 has an exception for an innocent owner, regardless of everything else, the statute is still permissive. *Id.* at 246-47. The court notes that the Supreme Court's decision in *Stowell* made clear that an exception for innocent holders did not prevent a forfeiture from relating back. *Id.* at 247 (citing *Stowell*, 133 U.S. at 17-18). Finally, the court discusses the legislative history of § 881(h). *Id.* at 246-47. See *supra* notes 74-78 and accompanying text. While the other circuits have not conclusively lined up behind the Tenth Circuit's decision, the *Eggleston* case appears to offer the best reasoning and logic in holding that the relation-back doctrine applies to 21 U.S.C. § 881. In light of the 1984 amendment to § 881 adding subsection (h), it would be difficult to hold otherwise at this time.

See Note, *State and Federal Forfeiture of Property Involved in Drug Transactions*, 92 DICK. L. REV. 461 (1988). "The Drug Control Act codified the relation back doctrine as part of its 1984 amendments to the forfeiture provisions." *Id.* at 473. The note also provides a brief discussion of the status of the relation-back doctrine today. *Id.* See also Note, *supra* note 57, at 176. "In enacting section 881, Congress codified the relation-back doctrine in subsection 881(h)."

81 See Note, *supra* note 57, at 177. ("Whereas subsection 881(a)(6) provides a safe harbor against the application of in rem forfeitures, there is no corresponding protection for the *subsequent* purchaser . . . ." (emphasis added)).

82 See S. REP. NO. 225, 98th Cong. 2d Sess. 196, 215, reprinted in 1984 U.S. CONG. & ADMIN. NEWS 3182, 3379, 3398.

83 *Id.*, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3398.

84 *Id.*, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3383, 3384.

85 See *supra* note 81 and accompanying text. See also Note, *supra* note 57, at 176-78 (for a claim that subsection 881(h) needs to be amended to protect innocent, subsequent purchasers).

under both the *One Piece* and *In re Metmor* scenarios. Finally, it examines the future of the post-seizure interest issue.

The *In re Metmor* court refers to a government suggestion that Metmor Financial can always collect their post-seizure interest from other sources.<sup>86</sup> One of these sources would obviously be Ackley, the wrongdoer, who was a fugitive at the time Metmor Financial attempted to collect its money.<sup>87</sup> It is ironic that the government offers this as an alternative when the government admits that Ackley's assets, "would probably be unavailable to Metmor even if he could be found."<sup>88</sup> The *In re Metmor* court makes this assessment based on the fact that the government had seized or was in the process of seizing the remainder of Ackley's property. Since Metmor Financial would not have an interest superior to the government's interest in this other property, it is an unrealistic alternative.

The court also notes that even if Metmor Financial could pursue other sources that had not been tainted through illegal use, they are essentially transformed from a secured to an unsecured creditor.<sup>89</sup> To impair innocent lienholder's rights in their collateral was clearly not the intent of the drafters of section 881(a)(6), nor the purpose of the forfeiture laws.<sup>90</sup>

A second issue to consider is how the decision in *One Piece* effects the business of lending institutions. To what extent is the court going to burden the innocent lienholders in their efforts to prevent future losses? Apparently, in addition to the usual background checks required before money is lent, a bank would be forced to constantly monitor a person and his property for illegal activity. For instance, if a lending institution has a mortgage on a piece of property and no illegal activity has occurred, must they monitor it every day in fear that if it becomes tainted, the government will seize the property and deny the bank any interest on their mortgage? Under the *One Piece* decision, the bank will still receive their principal and interest up until the date of seizure, as long as the bank is "innocent."<sup>91</sup> However, the bank will face a significant loss if not allowed to collect post-seizure interest.<sup>92</sup> A bank's only option to avoid this loss is to anticipate illegal activity and foreclose on the mortgage. Of course, the difficulty lies in the bank attempting to foreclose on a mort-

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86 *In re Metmor Fin., Inc.*, 819 F.2d 446, 450 (4th Cir. 1987).

87 *Id.*

88 *Id.* The *In re Metmor* court notes that as an alternate theory to awarding post-seizure interest, Metmor Financial's enforceability rights had been impaired and therefore constituted a fifth amendment taking. *Id.* See generally *Armstrong v. United States*, 364 U.S. 40 (1960).

89 *In re Metmor*, 819 F.2d at 451. If such a transformation from secured to unsecured creditor did occur, Metmor Financial, or any innocent lienholder, would be in no better position than someone contesting the forfeiture who had no interest in the property. See *United States v. One 1965 Cessna 320C Twin Engine Airplane*, 715 F. Supp. 808 (E.D. Ky. 1989). "The federal courts have consistently held that an unsecured creditor has no standing to contest the forfeiture of seized property." *Id.* at 812. "Under the civil forfeiture statute, [21 U.S.C. § 881] which requires a greater degree of ownership interest in seized property, an unsecured creditor does not have a legally cognizable interest in the property sufficient to challenge the forfeiture." *Id.* at 813.

90 See *supra* notes 48-49 and accompanying text and note 77 and accompanying text.

91 See Note, *supra* note 57, at 189-93 (for a discussion concerning the reasonable precautions necessary to remain an "innocent owner").

92 See *infra* note 97.



gage upon the mere *speculation* of impending illegal activity. If, however, banks were to wait for the illegal act to occur and then attempt to foreclose, even if they were to foreclose within twenty-four hours, the application of the relation-back doctrine would nevertheless deny the bank its post-seizure interest on the mortgage.

Thirdly, what would the government receive under both the *One Piece* and *In re Metmor* decisions? As the *In re Metmor* court accurately points out, under a *One Piece* analysis, the government is essentially receiving the benefit of an interest-free loan.<sup>93</sup> As the court states, "[a]lthough no formal loan from Metmor has been obtained, the government has use of the mortgaged property, without paying the interest due on the mortgage, until such time as it chooses to sell."<sup>94</sup> It is widely held that governmental delay in instituting forfeiture proceedings after seizure of such property can violate the due process clause of the fifth amendment, if the delay is substantial or unreasonably long.<sup>95</sup> However, there has been no uniformity as to what constitutes an unreasonable length of time. At least one court has held that a forty-eight month delay did not violate the claimant's due process rights.<sup>96</sup> Thus, despite the fact a lending institution's ability to survive is based upon interest earned from money lent, under the *One Piece* decision, the institution would receive no income while the government took its time to institute forfeiture proceedings.<sup>97</sup>

On the other hand, under *In re Metmor*, the government receives only what it is entitled to—the wrongdoer's interest in the property. If the *In re Metmor* decision is followed to its logical result, an innocent owner's lien will be respected in its entirety. This respect is not the result of the government's generosity. Instead, it is a *statutory* right, existing since the 1978 amendment to the Drug Control Act, to receive what rightfully belongs to the innocent owner. The government usually sells the property, but is entitled to only that which belonged to the guilty party. The statute states, "no property shall be forfeited . . . to the extent of the interest

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93 *In re Metmor*, 819 F.2d at 451. The *In re Metmor* court noted that, "the only purpose served by retaining an innocent lienor's mortgage interest is to boost the federal treasury." *Id.* at 450 n.7.

94 *Id.* at 451.

95 *United States v. \$62,972 In United States Currency*, 539 F. Supp. 586, 588 (D. Nev. 1982). For an extensive discussion of this issue see Annotation, *Delay Between Seizure of Personal Property by Federal Government and Institution of Proceedings for Forfeiture Thereof as Violative of Fifth Amendment Due Process Requirements*, 69 A.L.R. FED. 373 (1984), and Annotation, *Supreme Court's Views as to Due Process Requirements of Forfeitures*, 76 L. ED. 2D 852 (1989).

96 *United States v. \$10,755.00 In United States Currency*, 523 F. Supp. 447, 449-50 (D. Md. 1981). While in this case the property at issue was currency, the case is illustrative of the fact that the government is granted considerable discretion in their decisions to institute forfeiture proceedings or continue to keep the property in a state of "limbo."

97 Lending institutions are in the *business* of lending money and charging for its use over time. The government in these forfeiture cases wants to use that money without paying interest, although lending institutions must continue to pay third parties for the use of the funds until the government eventually forfeits the property and pays them their principal. Meanwhile, the government's "equity" interest continues to grow through appreciation. Essentially, the procedure is a money maker for the government, not at the expense of a drug dealer but rather at the expense of an innocent third party.

of an owner."<sup>98</sup> The reasoning of the *In re Metmor* court will protect this interest.

Finally, three years have passed since the court handed down the *In re Metmor* decision and, surprisingly, there has been little activity in the courts concerning the post-seizure interest issue. However, two district courts rendered important decisions on the issue in 1989. One of these cases implies that the post-seizure interest issue no longer exists.

In *United States v. Parcel Of Real Property*,<sup>99</sup> the District Court for the Western District of Pennsylvania faced a situation much like the one in *In re Metmor* and in *One Piece*. In the government's forfeiture proceeding against a rental property, an innocent lienholder of the property moved for summary judgment and sought an order entitling them to post-seizure interest.<sup>100</sup> After examining all relevant authority, the *Parcel Of Real Property* court agreed with the *In re Metmor* court and allowed the lienholder to collect its post-seizure interest.<sup>101</sup> The court noted that, "to conclude otherwise would be to allow the United States the benefit of an interest-free loan at [the bank's] expense."<sup>102</sup> This case, decided in July, 1989, two years after *In re Metmor*, demonstrates that the government is still challenging innocent lienholder's claims to post-seizure interest. This challenge, however, should not be taken as the automatic response of the United States Justice Department and all United States Attorneys as to this issue.

Another district court case, handed down in April, 1989, indicates that the post-seizure interest issue has now been resolved. In *United States v. Certain Real Property*,<sup>103</sup> the district court held that a Justice Department regulation, 28 C.F.R. § 9, allowed for the awarding of post-seizure interest to innocent lienholders.<sup>104</sup> This regulation is titled "Remission or Mitigation of Civil and Criminal Forfeitures."<sup>105</sup> Nonetheless, the court held that the section was applicable for determining the "interest" of an innocent owner under section 881.<sup>106</sup> Whether this regulation

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98 21 U.S.C. § 881(a)(6) (1988).

99 715 F. Supp. 1323 (W.D. Pa. 1989).

100 *Id.* at 1325.

101 *Id.* at 1326.

102 *Id.* While the court went on to note that to deny post-seizure interest would be particularly disturbing in light of the fact that the government had been accumulating rent monies for managing and maintaining the property, the court emphasized that their decision to award post-seizure interest was not dependent on that fact. *Id.*

103 710 F. Supp. 792 (S.D. Fla. 1989).

104 *Id.* at 796. Note, that this same court previously held that an innocent lienholder was not entitled to post-seizure interest. *United States v. Escobar*, 600 F. Supp. 88 (S.D. Fla. 1984).

105 Remission or Mitigation of Civil and Criminal Forfeitures, 28 C.F.R. § 9 (1989). Subsection 9.2(h) states as a definition:

The term 'net equity' means the amount of a lien-holder's monetary interest in property subject to forfeiture. Net equity is to be computed by determining the amount of unpaid principal and unpaid interest at the time of seizure, and by adding to that sum unpaid interest calculated from the date of seizure through the last full month prior to the date of the notification granting the petition . . . .

*Id.*

106 *United States v. Certain Real Property*, 710 F. Supp. 792, 796 (S.D. Fla. 1989). In 1983, the *One Piece* court attempted a similar argument by claiming that in the absence of any case law addressing the issue, "the [c]ourt looks to the nature of civil forfeiture actions under Section 881 and to the practice that was used to protect an innocent lienholder's interest prior to the enactment of Subsec-

governs claims filed by innocent lienholders under section 881 remains debatable. Nonetheless, it is noteworthy that the government recognizes a right to post-seizure interest if a remission or mitigation petition is filed, but does not explicitly recognize such a right if an innocent owner files a claim at a forfeiture proceeding. This puzzling stance of the government is irrelevant considering the position that post-seizure interest is statutorily protected under section 881, as this Comment advocates. Nevertheless, the government's stance illustrates the government's failure to recognize the innocent lienholder's right to claim post-seizure interest and its insistence, despite *In re Metmor* and its progeny, to treat post-seizure interest as a grace conferred at the government's discretion. In addition, the government's confusing position permits dissimilar treatment of the post-seizure interest issue by the United States attorneys.<sup>107</sup> If some decide that post-seizure interest is protected either under section 881 or 28 C.F.R. § 9, then no problem exists. If however, a United States attorney takes the converse position and argues that such interest is not protected, then an innocent owner has only the courts to protect his interest—courts that are themselves in disagreement over the issue. This issue is, therefore, just as controversial today as when the *One Piece* court handed down their decision, and accordingly, should not yet be dismissed as resolved.

## VI. Conclusion

Until the Fourth Circuit handed down its *In re Metmor* decision in 1987, no other federal appellate court had confronted the issue of awarding or denying post-seizure interest to an innocent owner under the Drug Control Act. Some district courts follow a Texas district court's decision denying such interest.<sup>108</sup> A few others take the position announced in *In re Metmor*.<sup>109</sup> The issue is significant to many aspects of our legal system today because it confronts the issues of property rights and property interests, as well as our society's current war against drugs.

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tion (a)(6).” *United States v. One Piece Of Real Estate*, 571 F. Supp. 723, 725 (W.D. Tex. 1983). The *One Piece* court was referring to 28 C.F.R. § 9. *Id.* at 724. The *Certain Real Property* court, however, used the regulation to award post-seizure interest, unlike the *One Piece* court, because 28 C.F.R. § 9 was revised in August, 1987. Prior to this date, § 9.2(d) expressly disallowed awarding post-seizure interest. 28 C.F.R. § 9 (1987). The legislative history of the revision in 1987, however, specifically notes that, “[t]his revision also will permit payment of post-seizure interest to innocent petitioners holding liens on property forfeited.” Summary, 52 Fed. Reg. 32,785 (1987).

<sup>107</sup> It is clear that some United States attorneys will continue to challenge innocent owners claims to post-seizure interest. In talking to the government attorney in the *Parcel Of Real Property* case it was this author's impression that although the attorney lost the post-seizure interest issue in court, he would continue to challenge claims to post-seizure interest if they continued to arise. Telephone interview with James J. Ross, Assistant United States Attorney, Chief of Erie Division, Western District of Pennsylvania (Mar. 16, 1990). Conversely, in talking to the Office of Asset Forfeiture in Washington, at least one attorney there stated that he advised United States attorneys not to contest post-seizure interest for purely equitable reasons. Telephone interview with Roger Weiner, Trial Attorney, Asset Forfeiture Office, Criminal Division, Department of Justice (Mar. 16, 1990). Another United States attorney in Los Angeles stated that she merely cited to *In re Metmor* in concluding that the awarding of post-seizure interest would not be challenged. Telephone interview with Carolyn Reynolds, Assistant United States Attorney, Special Counsel for Real Property Forfeitures, Los Angeles, California (Mar. 15, 1990).

<sup>108</sup> See *supra* note 26.

<sup>109</sup> *Id.*

The *In re Metmor* court's decision invites a comprehensive examination of an innocent owner's right to post-seizure interest, which is sure to come soon. The *In re Metmor* court correctly determined that an innocent owner's interest should be protected to its fullest extent. The court's decision holds true to the legislative intent behind the Comprehensive Drug Abuse Prevention and Control Act, and attends to Congress' concern with the plight of the innocent owner in our society's war on drugs. Also, the *In re Metmor* decision clearly falls in line with the decision in *Stowell*, and does nothing to compromise the validity of the relation-back doctrine. Further, if the government recognizes and awards post-seizure interest to those parties granted a petition for remission or mitigation, such protection and recognition should also be extended to those filing claims at the forfeiture proceeding. In the future, courts should follow the lead of *In re Metmor* in upholding an innocent owner's *statutorily* protected interest and abandon the misguided approach of the *One Piece* court.

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