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Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation

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I. INTRODUCTION

> "When *I* use a word . . . it means just what I choose it to mean—neither more nor less."[1]

This statement by Humpty Dumpty sets forth the argument of this Note: words used to describe mens rea in federal criminal statutes have plain, ordinary meanings. When the United States Supreme Court interprets these statutes, it should do so according to the words' plain meanings. Because the Court has not used this approach in past cases, the law of mens rea on the federal level is confusing and inconsistent.

The Court has tried to repair poorly drafted statutes by interpreting them in various ways to achieve what it thought was the correct result. By applying different interpretation techniques, however, the Court has developed an ad hoc mens rea jurisprudence that confuses people about what mental state is necessary for conviction under federal criminal laws. People thus cannot order their affairs to avoid violating the law. To clarify the law, the United States Congress and the Supreme Court should engage in a law-making dialogue that results in Congress drafting clearer statutes and the Court interpreting those statutes according to the words' plain meanings.

The Supreme Court's mens rea analysis in federal criminal cases is least settled in cases involving the "knowingly" standard. The Court apparently interprets other mens rea standards, such as "willfully," "purposely," and "recklessly," consistently. The Court has more difficulty interpreting "knowingly," because it falls in the middle of the mens rea standard hierarchy.[2] "Willfully," the most stringent

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1. LEWIS CARROLL, ALICE IN WONDERLAND AND THROUGH THE LOOKING-GLASS 159 (J.M. Dent & Sons Ltd. 1978) (1865) (emphasis in original).

2. *See, e.g.*, MODEL PENAL CODE § 2.02 (1980) (setting forth the mens rea hierarchy: "purposely;" "willfully;" "knowingly;" "recklessly;" and "negligently"). In contrast to the Court's ad hoc approach to defining "knowingly," the Model Penal Code attempts to define the torm precisely:

> A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Id. § 2.02(b). For a discussion of the confusion creatod by the Court's haphazard interpretations, see 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 123 (1970) (decrying the federal courts' "confused and inconsistent ad hoc approach" to the mens rea issue).

standard, implies either a full understanding of both the law and the facts[3] or an understanding of egregious facts that indicate the defendant knew she was doing something wrong.[4] "Recklessly," one of the lowest standards, implies very little thought.[5] "Knowingly," however, indicates a standard somewhere above recklessness and below fully-informed thwarting of the law. Determining exactly what it means to act knowingly appears to be difficult for the Court.[6]

Although the Court has consistently defined "knowingly" to require that the defendant actually knew he committed the acts that made his conduct criminal,[7] the Court applies this definition only if doing so will allow the Court to reach its desired result.[8] For instance, when the Court hears a case involving a statute that criminalizes morally suspect behavior,[9] it defines "knowingly" to require only that

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3. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 117 S. Ct. 2199, 2214 (1997) (stating that "a defendant may not be imprisoned for violating Rule 10b-5 [willfully violating the Securities and Exchange Act] if he proves that he had no knowledge of the rule"); Cheek v. United States, 498 U.S. 192, 201 (1991) (defining "willfully" as " 'the voluntary, intentional violation of a known legal duty' ") (quoting United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam)).

4. *See, e.g.*, Browder v. United States, 312 U.S. 335, 341 (1941) (stating that "willfully" can be demonstrated through a defendant's understanding of his actions, and does not necessarily require understanding that those actions are unlawful); Potter v. United States, 155 U.S. 438, 446 (1894) (same).

5. *Cf.* Osborne v. Ohio, 495 U.S. 103, 114 n.9 (1989) (affirming the defendant's conviction for possessing child pornography based on a recklessness standard).

6. *Compare* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952) (defining "knowingly" as knowledge of the existence of a safer route, not of the law), *with* Liparota v. United States, 471 U.S. 419, 422 n.3 (1985) (requiring knowledge of the law in addition to knowledge of the facts making the action unlawful).

7. *See, e.g.*, Staples v. United Statos, 511 U.S. 600, 622 n.3 (1994) ("The *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American legal system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.' ") (citing *Cheek*, 498 U.S. at 199) (Ginsburg, J., concurring); United States v. Bailey, 444 U.S. 394, 404 (1980) (stating that "he 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' " (quoting United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978))); United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971) (stating that the Court will not "attribute to Congress the inaccurate view that that Act [18 U.S.C. § 834] requires proof of knowledge of the law, as well as the facts, and that it intended to endorse that interpretation by retaining the word 'knowingly' ").

8. *See, e.g.*, *Liparota*, 471 U.S. at 422 n.3 (finding that to prove a defendant knowingly used, transferred, acquired, altered, or possessed food stamps illegally, the government must show that the defendant knowingly acted contrary to the law and knew the law forbid his action). *Compare* United States v. Yermian, 468 U.S. 63, 68 (1984) (concluding that "knowingly" applied only to the clause preceding it and not also to the jurisdictional element), *with* United States v. X-Citement Video, Inc., 513 U.S. 64, 77 (1994) (holding that even though a natural reading of the statute would not extend "knowingly" to the age of the performer, the Court would extend the modifier).

9. *See, e.g.*, 18 U.S.C. § 1001 (1994), which criminalizes certain types of lying:

the defendant knew he acted, regardless of whether the defendant knew those actions were illegal.[10] In cases that involve statutes that may be read as criminalizing otherwise innocent conduct,[11] the Court defines "knowingly" to mean that the defendant knew the facts about his or her actions *and* that those actions were illegal.[12]

In this latter set of cases, the Court allows ignorance of the law to be a defense to criminal liability even though one of the basic premises of criminal law is that people are presumed to know the law. Valid reasons why the Court requires knowledge of the law in certain cases include: not requiring it would criminalize too much behavior[13] or would result in the statute being unconstitutional.[14] The Court thus preserves statutes by interpreting their mens rea requirements in an ad hoc rather than a consistent manner. At the same time, the Court leaves a patchwork of precedent that results in no fixed law on which the Court, lower courts, or lay people can rely for guidance about how the "knowingly" mens rea standard will be interpreted in federal criminal cases.

A survey of the mens rea issues that have come before the Court in federal criminal cases in the last ten years shows the unsettled state of the law. This case law demonstrates that the Court ap-

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[W]hoever . . . knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any [materially] false, fictitious or fraudulent statements or representations, or . . . makes or uses any false writing or document knowing the same to contain any [materially] false, fictitious or fraudulent statement or entry, shall he fined [not more than $10,000] or imprisoned not more than five years, or both.

10. *See, e.g., Yermian*, 468 U.S. at 74 (holding that the mental element of the statute required only proof of "intentional and deliberate lies"); Morissette v. United States, 342 U.S. 246, 276 (1952) (holding that "knowingly convert[s]" requires criminal intent to take the casings, but does not require knowledge of the statute).

11. *See, e.g.*, 26 U.S.C. §§ 5801-5872 (1994) (imposing strict registration requirements on all firearms). Presumably, owning a firearm is generally an innocent act because the Constitution preserves the right to bear arms for all Americans. *See* U.S. CONST. amend. II.

12. *See, e.g., Staples*, 511 U.S. at 622 n.3 (reading "knowingly" into the statute and then defining the word to require knowledge of the registration requirements as well as of the fact that the gun was not registered).

13. For instance, the Court in *Staples*, 511 U.S. at 622-23, stated that the defendant could only violate the registration law if he knew he had te register his particular firearm because most guns do not require such stringent registration procedures. Thus, the average person might not know that he had an obligation to register a particular weapon. Further, in *Liparota v. United States*, 471 U.S. 419, 422-23 (1985), the Court required "knowingly" to encompass knowledge of the laws regulating food stamp usage because it felt that, otherwise, people who made innocent mistakes when using their food stamps would be prosecuted.

14. In *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 (1994), the Court extended the word "knowingly" to apply to all elements of the offense even though that was not the natural way to read the statute. Otherwise, the statute would criminalize the transportation of all pornography and therefore unconstitutionally infringe on the First Amendment guarantee of free speech.

plies a variety of definitions to the word "knowingly" and that it approaches mens rea issues inconsistently.[15] In some circumstances, the Court looks at legislative history to try and determine the congressional intent behind a statute.[16] In others, the Court relies on the text to determine the statute's meaning.[17] This lack of consistent interpretation is disturbing because it prevents people from knowing what the law is and adjusting their behavior accordingly.[18]

This Note will address the confusion the Court has created with regard to mens rea issues in federal criminal cases, and propose a methodology that would clarify the law in this area. The Court should adopt a version of the plain meaning approach that (1) looks at the natural meaning of the words in the statute and (2) applies a broad rule of lenity.

Part II will discuss the unsettled state of Supreme Court mens rea law in federal criminal cases by focusing on the mental state "knowingly." Part III will then describe the quasi-plain meaning analytical framework proposed by this Note. Finally, Part IV will return to the cases discussed in Part II and demonstrate how the proposed method would clarify the law in federal criminal cases. Clarification of federal law will enable the public to know what conduct the law prohibits so that individuals may order their affairs accordingly.

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15. *Compare Liparota*, 471 U.S. at 422 (stating that in order to be convicted defendant must know he is violating the law), *and Staples*, 511 U.S. at 622 (holding that the defendant must know the statute required registration of the firearm), *with* Moskal v. United States, 498 U.S. 103, 108 (1990) (requiring only that the defendant knows he altered a car title to be convicted), *and* Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 524 (1994) (holding that a defendant must know that the items sold are likely to be used with illegal drugs, but not that the items are "drug paraphernalia" within the meaning of the statute).

16. *See, e.g.*, Babbitt v. Sweet Home Chapter of Communities For a Greater Oregon, 515 U.S. 687, 696 n.9 (1995) (discussing the significance of Congress's changing the mens rea requirement from "willfully" to "knowingly" in 1978 in order to make violation of the Endangered Species Act a "general rather than specific intent crime" (quoting H.R. CONF. REP. NO. 95-1804, at 26 (1978))).

17. *See, e.g.*, United States v. Wells, 519 U.S. 482, 489-99 (1997) (holding that there is no materiality requirement to convict under 18 U.S.C. § 1014 for making false statements to an FDIC-insured institution because the text of the statute requires only making a false statement, not making a material false statement).

18. One of the law's main functions is prediction. To determine if the law accomplishes this function, one must "look at [the law] as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). In looking at federal criminal law as a "bad man," one cannot tell what conduct is legal and what is illegal; hence this law fails its predictive function.

II. THE CONFUSED STATE OF MENS REA LAW IN FEDERAL CRIMINAL CASES

A. A Review of the Court's Presumption in Favor of Mens Rea

In order to understand the current state of mens rea law in federal criminal cases, a survey of the law before 1985 is required. The first principle the Supreme Court established regarding mens rea in federal criminal statutes was a presumption in favor of mens rea standards generally. In *Morissette v. United States*, the Court stated that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."[19] Rather, the Court noted, it is basic to our system of law. According to the Court, individuals should only be prosecuted for the bad acts they intend to commit.[20] The Court found the need for mens rea instinctive, and thus initially established a presumption in favor of requiring mens rea elements in federal criminal statutes. Subsequently, the Court altered this presumption in order to allow Congress to explicitly eliminate the mens rea requirement from a statute in particular circumstances.[21] The Court, however, generally favors the inclusion of mens rea requirements.[22]

Another fundamental principle of federal statutory criminal law is the concept of notice. Because ignorance of the law is generally not a defense to a federal indictment, the Court requires that defendants have notice of the laws under which they are being

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19. Morissette v. United States, 342 U.S. 246, 250 (1952).

20. *See id.*

21. *See, e.g.*, Montana v. Egelhoff, 518 U.S. 37, 47-48 (1996) (finding that states may prevent juries from considering voluntary intoxication evidence when determining whether defendant had the requisite mens rea to commit murder knowingly); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859 (1988) (finding the plain meaning of the text explicit and determining that Congress did not intend to require scienter for a violation of the statute requiring judges to recuse themselves from a proceeding in which their impartiality might be impaired).

22. In *United States v. Freed*, 401 U.S. 601, 607 (1971), the Court again discussed the need for a "vicious will" or mens rea in order to convict someone of a statutory crime. *See also* JAMES MARSHALL, INTENTION - IN LAW AND SOCIETY 138 (1968):

> In other words, for the happening to be criminal, the wish had to be to accomplish something criminal. So in discussing intent we may have wishes of two different characters: one giving a basis for civil liability (the wish to take property not one's own), and another which would support criminal liability as well as civil (taking property with criminal intent).

prosecuted.[23] This requirement is based on the idea that it is fundamentally unfair to prosecute people before they know they might be subject to prosecution. In addition to a general presumption in favor of having mens rea elements in criminal statutes, this concept has continued to underlie the Court's analysis of mens rea issues even when its interpretations of specific mens rea standards (like "knowingly") have been inconsistent.

Upon these two premises, the Court has interpreted federal criminal statutes involving the "knowingly" standard to mean knowledge of one's actions or the probable results of those actions.[24] Historically, the Court addressed mens rea issues related to the "knowingly" standard consistently.[25] Since *Liparota v. United States*, however, the law has become schizophremic.

B. "Knowingly" as an Explicit Mens Rea Standard

1. Pre-*Liparota*

Beginning with *Boyce Motor Lines*, the Court determined that a knowing violation required factual knowledge of a defendant's actions rather than knowledge of the underlying law or regulation.[26] The defendant in *Boyce Motor Lines* was charged with transporting carbon bisulphide through the Holland Tunnel.[27] Because the transportation of explosives and inflammables had been regulated historically, the Court concluded that the defendant should have known to choose a safer route.[28] The defendant knowingly violated the regulation because, despite his lack of knowledge of the regulation, the defendant drove a truck laden with carbon bisulphide through a con-

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23. *See, e.g.*, Boyce Moter Lines, Inc. v. United States, 342 U.S. 337, 340 (1952) (asserting that any criminal statute must be sufficiently definite to (1) give the public notice of what type of conduct is prohibited, (2) guide the judge in her application, and (3) allow the lawyer to defend an individual charged with its violation).

24. *See* United States v. United States Gypsum Co., 438 U.S. 422, 444 (1978) (stating that "knowledge of [the] probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability").

25. *See id.* at 446 (defining "knowingly" to require knowledge of one's conduct and its probable effects); United States v. International Minerals & Chem. Corp., 402 U.S. 558, 560-62 (1971) (defining "knowingly" to require only that the defendant chose the more dangerous route and not that there was a regulation that prohibited taking that route); *Boyce Motor Lines*, 342 U.S. at 342 (same).

26. *See Boyce Motor Lines*, 342 U.S. at 342.

27. *See id.* at 339.

28. *See id.* at 342.

gested traffic tunnel.[29] Thus, the Court held that in order to knowingly violate a regulation prohibiting the transport of explosives or inflammables over congested traffic routes,[30] the defendant needed to know only that he chose the more dangerous route,[31] not the specifics of the regulation violated.

After its decision in *Boyce Motor Lines*, the Court addressed the issue of what qualified as a knowing violation of a toxic chemicals labeling regulation in *United States v. International Minerals & Chemical Corp.*[32] As in *Boyce Motor Lines*, the defendant in *International Minerals* was convicted of a crime related to shipping dangerous chemicals in interstate commerce.[33] The Court reviewed the language of the statute, its legislative history, and precedent in holding that the phrase "knowingly violate" required only knowledge of the facts that made the conduct illegal.[34] The Court then determined that because ignorance of the law is generally not a defense to criminal prosecution, no justification existed for finding that Congress intended to require knowledge of the law for conviction.[35] Therefore, the government was not required to prove that the defendant had knowledge of the law he violated.

In *United States v. Yermian*, the Court addressed the issue of whether "knowingly" applied to all clauses in a statutory provision.[36] Yermian was convicted for making a false statement to the Department of Defense because he failed to disclose that he had been charged with mail fraud on a security questionnaire asking whether he had ever been charged with a violation of the law.[37] He also stated that he was previously employed by two companies that had never

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29. *See id.*

30. *See id.* at 339 n.3 (discussing 18 U.S.C. § 835, which provided that "[w]hoever knowingly violates any such regulation [49 C.F.R. § 197.1(b)] shall be fined not more than $1,000 or imprisoned not more than one year, or both").

31. *See Boyce Motor Lines*, 342 U.S. at 342.

32. United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971).

33. *See id.* at 559.

34. *See id.* at 560-62.

35. *See id.* at 563. The Court "decline[d] to attribute to Congress the inaccurate view that that Act require[d] proof of knowledge of the law, as well as the facts, and that it intended to endorse that interpretation by retaining the word 'knowingly.'" *Id.*

36. *See* United States v. Yermian, 468 U.S. 63, 68 (1984).

37. *See id.* at 65-66. Yermian was convicted under 18 U.S.C. § 1001 (1994), which statos:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined [not more than $10,000] or imprisoned not more than five years, or both.

employed him.[38] Because the statute prohibited making a false statement to the federal government, the issue was whether the government had te prove Yermian knew he made a false statement *within the jurisdiction of a federal agency*, or only that he knew he made a false statement. To resolve this issue, the Court applied basic grammar concepts to the statute's text and determined that "[a]ny natural reading of section 1001 . . . establish[ed] that the terms 'knowingly and willfully' modify only the making of 'false, fictitious or fraudulent statements . . . .' "[39] The Court determined that the best interpretation of the statute was to apply the most obvious reading to its words and structure.[40] Thus, the government had to prove only that Yermian knew he made a false statement, not that he knew the law prohibited making such statements to a federal agency.

After *Boyce Motor Lines*, *International Minerals*, and *Yermian*, the Court seemed to establish that in order to find a defendant knowingly violated a statute or knowingly committed a crime, the government had to prove only that the individual had knowledge of the underlying facts and their likely consequences. What happened after *Yermian* to the Court's analysis of statutes involving the "knowingly" standard illustrates the confusion resulting from the Court's failure to develop a consistent method for interpreting mens rea provisions.

2. *Liparota v. United States*

At issue in *Liparota v. United States* was how to interpret a statute prohibiting an individual from knowingly using, transferring, acquiring, altering, or possessing food stamps in an unauthorized manner.[41] After reviewing legislative history and finding little guidance from Congress, the Court decided that "knowingly" applied not only to the use and transfer of food stamps, but also to the way in which the stamps were used or transferred.[42] Thus, violators could only be convicted under this statute if they knew they used or transferred food stamps *and* if they knew that the way in which they used

38. *See Yermian*, 468 U.S. at 65-66.

39. *Id.* at 69.

40. *See id.* at 74. The Court even comments that if this is not the reading Congress intended, "it is for Congress and not this Court to amend the criminal statute." *Id.* at 75.

41. Liparota v. United States, 471 U.S. 419, 421 (1985). The statute in question provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this chapter or the regulations issued pursuant to this chaptor shall . . . be guilty of a felony . . . ." 7 U.S.C. § 2024(b)(1) (1994).

42. *See Liparota*, 471 U.S. at 425.

or transferred them was against the law.[43] By adopting this definition of "knowingly," the Court created an ignorance of the law defense for people charged with food stamp fraud.[44]

The Court's holding in *Liparota* marked a departure from its previous decisions, which held that knowingly violating a regulation did not require actual knowledge of the law.[45] Nonetheless, the Court cited precedent to support its determination that knowledge of the regulation was required.[46] Although the Court, as it had in previous cases, considered legislative history, the structure of the statute, and the rule of lenity,[47] it arrived at the opposite result. The inconsistency must stem either from how the Court conducted these inquiries or from a shift in emphasis from one inquiry to another.[48]

3. Post-*Liparota*

In cases following *Liparota* that involved the term "knowingly violates," the Court did not apply the *Liparota* definition of "knowingly," which required knowledge of the statute. Rather, in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, the Court returned to using the definition of "knowingly" that required only knowledge of the underlying action.[49] The petitioners in *Sweet Home* brought a declaratory relief action against the Secretary of the Interior to challenge the statutory validity of the Secretary's

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43. *See id.* at 425-26.

44. Interestingly, the Court asserted in a footnote that this decision did not create a mistake of law defense. *See id.* at 425 n.9. However, the only way to read a holding that people cannot be convicted unless the government makes a showing "that the defendant knew his conduct to be unauthorized by statnte or regulations," *id.*, is that not knowing the law or that particular actions are against the law is a valid defense.

45. *See supra* notes 19-40 and accompanying text.

46. *See Liparota*, 471 U.S. at 425 (citing United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978), for the proposition that knowledge of the regulation is necessary).

47. *See id.* at 425-30.

48. The reasons and analysis of this change will be discussed in Parts III and IV.

Justice White in his dissent in *Liparota* highlighted the Court's inconsistency when he noted that the Court in *Yermian* found that:

> [U]nder the "most natural reading" of the statute, "knowingly and willfully" applied only to the making of false or fraudulent statements and not te the fact of jurisdiction. By the same token, the "most natural reading" of § 2024(b)(1) [wa]s that "knowingly" modifie[d] only the verbs to which it [wa]s attached.

Id. at 435 (citations omitted). Justice White argued that there was no reason to read this statute differently than the Court read the statute in *Yermian* because this language was almost identical te that statnte's language. *See id.* at 435 n.1. Because the Court found the language in *Yermian* to be unambiguous, it also should have considered the language in this statute unambiguous. *See id.*

49. Babbitt v. Sweet Home Chapter of Communities for a Greator Or., 515 U.S. 687, 696-97 (1995) (statmg that a knowing action is sufficient to violate the Endangered Species Act).

regulation defining "harm" in the Endangered Species Act ("ESA").[50] Although the focus of the Court's opinion was not whether knowingly violating the ESA required knowledge of the regulation, the statute did require a knowing violation.[51] Both Justice Stevens' majority opinion and Justice Scalia's dissent discussed how one can knowingly violate the prohibition against harming endangered species, even though it was not the issue presented in the case.[52] These discussions focused on the actions of the accused vis-à-vis the endangered species and ignored any need for knowledge of the ESA or its implementing regulations.[53] Justice Scalia, in his dissent, even noted that a "requirement that a violation be 'knowing' means that the defendant must 'know the facts that make his conduct illegal . . . .' "[54] Thus, even after the Court diverged from its previous definition of "knowingly" in *Liparota*, it did not continue to apply this new interpretation. Instead, it fluctuated between definitions, using the definition that best suited its purpose in a specific case.

The Court's next significant case involving an explicit mens rea issue in a federal criminal statute was *United States v. X-Citement Video, Inc.*[55] In this case, the defendant was convicted of violating the Protection of Children Against Sexual Exploitation Act of 1977[56] by transporting child pornography in interstate commerce.[57] According to the defendant, the Act was unconstitutionally vagne and violated

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50. *See id.* at 692.

51. *See* 16 U.S.C. § 1540(a)(1), (b)(1) (1994) (one must "knowingly violate the Act or its implementing regulations"); *see also Sweet Home Chapter*, 515 U.S. at 696 n.9.

52. *See Sweet Home*, 515 U.S. at 696-97, 721-22.

53. *See id.*

54. *Id.* at 722 (quoting Staples v. United States, 511 U.S. 600, 605 (1993)).

55. United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).

56. 18 U.S.C. § 2252 (1994). The Act punishes:

> (a) Any person who—
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> (1) knowingly transports or ships in interstate or foreign commerce by any meaus including by computer or mails, any visual depiction, if—
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> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
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> (B) such visual depiction is of such conduct;
>
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct.

57. *See X-Citement Video*, 513 U.S. at 66-67.

the First Amendment because it did not require knowledge of the actor's age for conviction.[58] The transportation of pornography involving adult actors is protected by the First Amendment as long as it is not obscene.[59] In contrast, the transportation of child pornography is criminal. Thus, the Court held that a statute criminalizing transportation of pornography had to require knowledge of the actor's age to be constitutional.[60]

In interpreting this statute, the Court recognized that the most natural reading would apply "knowingly" only to the verbs immediately following the term.[61] The Court, however, rejected this interpretation of the statute and adopted a reading that extended "knowingly" to modify the subsections discussing the actor's age.[62] At this point the Court's reading departed from *Yermian*, in which the Court stated that it should adopt the most natural reading of a statute. Even if the most natural reading resulted in a flawed statute, the Court should have adopted this type of reading in order to remain consistent with its past rulings.[63] In *X-Citement Video*, however, the Court held that it was its job, not Congress's, to repair constitutionally-flawed statutes.[64] Thus, in *X-Citement Video* the Court followed the *Liparota*-led divergent line of cases that held "knowingly" should be interpreted to require more than the natural

58. *See id.* at 67. For further discussion of why knowledge of the actor's age or obscene material was required by the First Amendment for conviction, see New York v. Ferber, 458 U.S. 747, 765 (1982) (stating that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant"); Hamling v. United States, 418 U.S. 87, 119-24 (1974) (same); Smith v. California, 361 U.S. 147, 153 (1959) (same); Doth v. Unitod States, 354 U.S. 476, 484-85 (1957) (holding that obscenity falls outside the First Amendment's protection because it is "utterly without redeeming social importance").

59. *See* 18 U.S.C. § 1461 (1994); *Hamling*, 418 U.S. at 99 (upholding constitutionality of statute prohibiting transportation of obscene material through the mail).

60. *See X-Citement Video*, 513 U.S. at 78.

61. *See id.* at 68.

62. *See id.* at 68-69.

63. *See supra* notos 26-40 and accompanying text.

64. Although the Court does not say this outright, in rejecting the natural reading of tbe statute and holding that it was reading the statute as it did to avoid "substantial constitutional questions," the Court attributed to itself the task of repairing Congress's constitutionally-flawed statutes. *See X-Citement Video*, 513 U.S. at 69. There is, of course, at least one countervailing canon of statutery construction that requires a judge to interpret all statutes so as to avoid constitutional issues. However, as Karl Llewellyn pointod out in his "dueling canons" article, for almost every canon of statutory construction, there is an opposing canon. *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). To determine which canon to use, judges must balance the equities involved. In a criminal case, tbat means balancing the value of salvaging poorly drafted laws against keeping a person prosecuted under an ambiguous statute from being convicted. It seems clear that the balance tilts in favor of not convicting people under laws too ambiguous to provide fair warning of their prohibited acts.

reading of the statute suggested.[65] Through *Liparota* and its progeny, the Court has left lower courts, defendants, and legislators with sufficient precedent to justify any interpretation of the word "knowingly" in a federal criminal statute. Further, the Court developed sufficient precedent to justify inferring a "knowingly" requirement into a statute and interpreting the implied requirement in any manner.

C. "Knowingly" as an Implied Mens Rea Standard

1. Pre-*Staples v. United States*

In *United States v. United States Gypsum Co.*, the Court had to interpret and determine the requisite level of mens rea for the Sherman Act because the statute lacked a mens rea element.[66] United States Gypsum and five other manufacturers of gypsum board were convicted of engaging in a combination and conspiracy in restraint of trade.[67] Because the Sherman Act did not specify whether mens rea was required, the Court considered the penalties associated with the Sherman Act, the history of mens rea elements in criminal law generally, and recommendations of the Attorney General to determine whether the Court should imply a mens rea element into the statute.[68] The Court concluded that in order to convict under this statute, the government must prove that a defendant knowingly violated the Act.[69] Once the Court stated that a defendant had to act knowingly, it determined that acting with knowledge meant knowledge of the "likely effects" of one's actions.[70] The Court did not require that the government prove the defendants had knowledge of the Sherman Act to convict.[71] *United States Gypsum* is significant because it shows that the Court used the same analysis for explicit

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65. *See supra* notes 41-48 and accompanying text.

66. United States v. United States Gypsum Co., 438 U.S. 422, 426 (1978). The Sherman Act is codified at 15 U.S.C. §§ 1-7 (1994).

67. *See United States Gypsum*, 438 U.S. at 427-33.

68. *See id.* at 440-43.

69. *See id.* at 444 (concluding that "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws").

70. *See id.* at 446. The Court determined that requiring knowledge of anything more than the likely effects would be unduly burdensome and unnecessary because section 1 of the Sherman Act punished planned and calculated conduct. Further, knowledge of the anticipated consequences could be determined simply by looking at the nature of the conduct itself. *See id.*

71. *See id.*

and implied "knowingly" terms[72] whether the case involved a public welfare offense or violent crime.[73] Further, the case reflects previous consistency in the Court's definition of "knowingly."

United States v. Bailey[74] illustrates how the Court adhered to this definition of "knowingly" even in a case involving a violent crime. Although the cases that preceded *Bailey—Boyce Motor Lines*, *International Minerals*, and *United States Gypsum*—all involved white-collar crimes, *Bailey* involved a jail break.[75] Bailey and three other prisoners were convicted of escaping from a District of Columbia jail.[76] The escapees claimed they fled because of inhumane conditions at the jail, and they remained at large because they feared for their lives if they surrendered to the FBI.[77] Because of the violent nature of the crime in *Bailey*, the Court could have decided that the definition of "knowingly" it adopted in previous cases was inapplicable to the statute at issue in this case. The Court, however, adopted the same definition in *Bailey* as it had used in the previous white-collar criminal cases.

The Court, recognizing that the statute did not contain a mens rea element, determined that "knowingly" was the required level of mens rea because the Court usually considered "knowingly" a

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72. *Compare id.* at 444 (requiring knowledge of anti-competitive actions and their likely effects only), *with* Boyce Motor Lines, Inc. v. United Statos, 342 U.S. 337, 342 (1952) (requiring actual knowledge of safer routes, but not of the transportation regulations), *and* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971) (requiring actual knowledge of the substance being shipped, but not of the labeling regulations).

73. United States Gypsum committed antitrust violations, while the defendants in *Boyce Motor Lines* and *International Minerals* committed public welfare-type offenses. It was easier for the Court to adopt a definition of "knowingly" that required only knowledge of the facts in *Boyce Motor Lines* and *International Minerals* because both cases involved inherently dangerous activities, which if engaged in would endanger the public's health and safety. To protect the public, the Court was willing to place the burden of knowing the law on the defendants. *United States Gypsum*, however, involved conspiracy in restraint of trade, which is not an inherently dangerous activity likely to harm the public's health or safety. Therefore, the public policy reasons present in *Boyce Motor Lines* and *International Minerals* for adopting a definition of knowledge that required only knowledge of the facts were not present in *United States Gypsum*. That the Court adopted the same definition of "knowingly" in *United States Gypsum* as it adopted in the previous two cases suggests that the Court intended this definition to apply in all cases, not just in the context of public welfare offenses.

74. United States v. Bailey, 444 U.S. 394 (1980).

75. *See id.* at 396. The relevant statuto is codified at 18 U.S.C. § 751(a) (1994):

> Whoever escapes or attempts to escape from the custody of the Attorney General . . . or from any institution or facility in which he is confined by direction of the Atterney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court . . . shall . . . be fined [not more than $5,000] or imprisoned for not more than five years, or both . . . .

76. *See Bailey*, 444 U.S. at 396.

77. *See id.* at 399-400. Bailey remained at large for three months until he was apprehended. *See id.*

sufficient level of culpability for criminal offenses.[78] Then, in defining this standard, the Court decided that it would adopt the definition set forth in *United States Gypsum*: that a person acted "knowingly" "if he [wa]s aware 'that the result [wa]s practically certain to follow from his conduct, whatever his desire may [have been] as to that result.' "[79] The Court held that, in order to be convicted for violating the escape statute, a defendant must have known the facts associated with his actions and the likely effects that made those actions criminal.[80] *Bailey* shows that by 1980 the Court had consistently held in both white-collar and common law-derived crimes that "knowingly" required only knowledge of the actions and the likely effects that made the conduct criminal. Until this point, the Court had not required knowledge of the statute or regulation under which the defendant was convicted.

2. *Staples v. United States*: The Implied Mens Rea Counterpart to *Liparota*

After *Liparota*, the Court defined "knowingly" in an ad hoc fashion in implied mens rea cases, just as it had defined "knowingly" in an inconsistent manner when interpreting explicit mens rea requirements. In *Staples v. United States*,[81] for instance, the Court read a knowledge requirement into the National Firearms Act ("NFA").[82] The defendant had been convicted of owning an unregistered "firearm," as defined by the NFA.[83] In deciding to imply a "knowingly" mens rea requirement into the NFA, the Court considered whether a violation of this Act constituted a public welfare offense.[84] Because gun ownership is permitted by the Constitution[85]

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78. *See id.* at 408 (stating that "[a]ccordingly, we hold that the prosecution fulfills its burden under 18 U.S.C. § 751(a) if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission").

79. *Id.* at 404 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978)).

80. *See id.* at 408.

81. Staples v. United States, 511 U.S. 600 (1994).

82. The NFA imposes strict registration requirements on specific types of firearms and sets punishment for failure te comply at a maximum of ten years in prison. *See* 26 U.S.C. §§ 5801-5872 (1994). Machine guns and any fully automatic weapons are included in the definition of a firearm. *See id.* § 5845(a)(6). Further, machine guns are defined as "any weapon which shoots . . . or can be readily restored te shoot automatically more than one shot . . . by a single function of the trigger." *Id.* § 5845(b).

83. *See Staples*, 511 U.S. at 602.

84. *See id.* at 606-07. For a definition of public welfare offenses, see *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) ("[A public welfare offense] dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest

and is common, the Court did not think the NFA fell into the category of statutes prohibiting public welfare offenses.[86] Therefore, the Court determined that strict liability was inappropriate and implied a mens rea requirement into the statute.[87] The Court then had to define the applicable mens rea standard. The Court could have defined "knowingly" to require either that the defendant knew he owned an unregistered gun, or knew that a registration statute existed and that his firearm was unregistered.[88] The Court chose the latter definition, believing that knowledge of the statute and of the underlying facts about registration were so closely tied that to prove one required proving the other.[89]

Previous cases presented to the Court, such as *International Minerals*, also involved violations of statutes that were closely tied to whether the defendant knew the statute existed.[90] In those cases, however, the Court did not require that the defendant know the law.[91] For instance, a defendant who did not know he was required to label barrels of sulfuric acid before transporting them in interstate commerce would not label the barrels. When convicted for violating the federal labeling statute, however, the defendant would be prohibited from raising an ignorance of the law defense—that he did not know he was required to label the barrels. Thus, the same close tie that the court in *Staples* found—between knowing one needed to register a firearm and registering it—existed in *International Minerals*—between knowing one needed to label a barrel and labeling it. Because the court in *Staples* acknowledged this "close tie" between knowledge of the law and knowledge of one's actions, rather than dismissing it as it had in prior cases, *Staples*, like *Liparota*, repre-

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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."), *United States v. Freed*, 401 U.S. 601, 609-10 (1971) (defining public welfare offense), and *United States v. Balint*, 258 U.S. 250, 253-54 (1922) (same). *See generally* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933) (coining the phrase and providing a history and explanation of public welfare offenses).

85. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

86. *See Staples*, 511 U.S. at 612 n.6.

87. *See id.* at 619.

88. The Court could also have avoided implying a mens rea into the NFA and used the default mens rea, "recklessly." *See* MODEL PENAL CODE § 2.02(3) (1980). However, the Court chose to imply "knowingly," and these are the two definitions of "knowingly" the Court generally applied. *See supra* notes 26-65 and accompanying text.

89. *See Staples*, 511 U.S. at 622 n.3.

90. *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 559 (1971) (upholding conviction of a defendant for failing to label toxic chemicals transported in interstate commerce).

91. *See id.* at 563-64.

sented a departure from the Court's established interpretation of the phrase "knowingly violates." In these two cases, the Court expanded the definition to require knowledge of the law as well as of the defendant's underlying criminal actions.[92]

3. Post-*Staples*

In contrast to *Staples*, in which the Court implied the term "knowingly" and then defined "knowingly" to include knowledge of the statute violatod, the Court in *Posters 'N' Things, Ltd. v. United States* implied the term "knowingly," but did not require knowledge of the statute.[93] The defendant company in *Posters 'N' Things* was convicted of violating the Mail Order Drug Parapherualia Control Act[94] and defended itself by claiming it lacked knowledge that the products sold were primarily intended for use as drug paraphernalia.[95] The act under which defendant was convicted did not contain an explicit mens rea requirement.[96] As in *Staples*, the Court decided to imply the term "knowingly" into the statute based on the premise that mens rea requirements were generally favored in statutes.[97] Therefore, the Court read the statute to require proof that the defendant knowingly sold drug paraphernalia.[98] But unlike *Staples*, here the Court determined that "knowingly" required only that "the defendant be aware that customers in general are likely to use the merchandise with drugs."[99] The Court returned to the definition of "knowingly" that it enunciated in the *Boyce Motor Lines* line of cases: knowledge of the defendant's underlying actions and their likely consequences.[100]

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92. *See, e.g., Staples*, 511 U.S. at 622 n.3 (stating that "[k]nowledge of whether the gun was registered is so closely related to knowledge of the registration requirement that requiring the Government te prove the former would in effect require it to prove knowledge of the law") (Ginsburg, J., concurring).

93. Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 524 (1994) (holding that while "the Government must establish that the defendant knew tbat the items at issue are likely to be used with illegal drugs, it need not prove specific knowledge that the items are 'drug paraphernalia' within the meaning of the statute").

94. 21 U.S.C. § 863 (1994). Section 863(a) makes it unlawful for any person "(1) to sell or offer for sale drug paraphernalia; (2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or (3) to impert or export drug paraphernalia." *Id.* § 863(a).

95. *See Posters 'N' Things*, 511 U.S. at 525-26.

96. *See* 21 U.S.C. § 863 (1994).

97. *See Posters 'N' Things*, 511 U.S. at 522-23.

98. *See id.* at 523.

99. *Id.* at 524.

100. *See id.*

Thus, rather than clarifying what the mens rea standard "knowingly" meant, the Court continued to muddy the waters. The Court interpreted an explicit "knowingly" standard in some cases to require that the defendant have only knowledge of his or her actions. For other cases with similar facts, the Court additionally required knowledge of the law. This same inconsistent interpretation coincided with the Court's analysis of implied "knowingly" standards.

D. The "Willfully" Mens Rea Standard

When the Court reads "knowingly" to include knowledge of the law, it is not simply interpreting the statute. Rather, it is adopting an entirely different mens rea standard. "Willfully," not "knowingly," requires knowledge of the law. A quick look at two cases in which the Court interpreted the mens rea standard "willfully" suggests that when the Court determines "knowingly" to include knowledge of the law, it is really changing Congress's statutory language—not interpreting the statute's terms. In *Cheek v. United States*, the Court considered the meaning of willfully violating the tax statutes.[101] Cheek failed to file seven years worth of personal income tax returns because he believed the tax laws were unconstitutional.[102] In determining whether Cheek willfully violated the law, the Court asserted that the standard the government had to prove was a "voluntary and intentional violation of a known legal duty."[103] In the Court's view, an honest mistake did not constitute a "willful" act. Failure to comply with the law because one disagreed with it, however, did constitute a "willful" act.[104] Because Cheek knew the law and merely disagreed with it, the Court held that he could not argue he lacked the requisite mens rea to violate the statute.[105]

In *Ratzlaf v. United States*, the Court also interpreted "willfully" to require knowledge of the law.[106] Ratzlaf was convicted of violating an anti-structuring law because he purchased a series of cashier's checks from different banks, each for less than the $10,000

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101. Cheek v. United States, 498 U.S. 192, 194 (1991). The statute at issue in *Cheek* stated that "[a]ny person required under this title . . . or by regulations made under authority thereof to make a return . . . who willfully fails to . . . make such return" shall be guilty of a misdemeanor. 26 U.S.C. § 7203 (1994).

102. *See Cheek*, 498 U.S. at 194-96.

103. *Id.* at 196.

104. *See id.* at 206.

105. *See id.*

106. *See* Ratzlaf v. United States, 510 U.S. 135, 138 (1994).

amount that would trigger reporting.[107] Because the Court defined "willfully" to require knowledge of the law, and the jury was instructed on a different definition of "willfully," the Court remanded the case for findings regarding whether Ratzlaf knew of the statute.[108]

Cheek and *Ratzlaf* demonstrate that the definition of "willfully" requires a defendant to know both the law and the facts.[109] When the Court interprets "knowingly" to require an understanding of the statute being violated, it is interpreting the standard as the equivalent of "willfully." The Court is interpreting the statute's mens rea standard as "willfully" in contradiction to Congress's nse of the term "knowingly" in the statute. Thus, the problem with the Court's mens rea analysis may be less its inability to clearly define meus rea standards such as "knowingly," and more its desire to rewrite statutes that it believes Congress drafted poorly. Apparently, the Court wants to redraft these statutes rather than interpret the mens rea standards Congress chose. Therefore, efforts by both the Court and Congress are necessary to clarify the specific role mens rea provisions play in federal criminal cases.

III. A QUASI-PLAIN MEANING APPROACH

A. The Case Against Linguists and Mathematicians

Many articles have been written on how to interpret mens rea provisions in federal criminal statutes. These articles, however, do not remedy the inconsistent interpretation of mens rea provisions in

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107. *See id.* at 137. The statutory provisions at issue in *Ratzlaf* were 31 U.S.C. §§ 5313, 5322, and 5324 (1994), which (1) require that financial institutions file reports with the Secretary of the Treasury every time they conduct a cash transaction that exceeds $10,000; (2) define structuring as breaking up a single transaction above $10,000 for the purpose of avoiding triggering the reporting requirement; and (3) establish criminal penalties for people who "willfully violate" the anti-structuring provision.

108. *See id.* at 149. Congress subsequently amended the language of 31 U.S.C. § 5324, removing the willfulness standard. Under the current statute, Ratzlaf's actions would probably subject him to criminal liability. *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2253 (1994).

109. *See, e.g., Ratzlaf*, 510 U.S. at 141 (defining "willfully" in the financial structuring statute as requiring " 'knowledge of the reporting requirement and [a] specific intent te commit the crime' " (quoting Unitod States v. Granda, 565 F.2d 922, 926 (5th Cir. 1978))); Cheek v. United States, 498 U.S. 192, 201 (1991) (stating that to meet the "willfully" standard, "the Government [had] to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty").

federal criminal statutes.[110] Instead, they tend to focus on the judiciary and how the courts can make sense of what Congress has written. Their suggestions generally involve developing interpretation aides, such as linguistics, to help interpret mens rea provisions[111] or breaking the crime down into its component elements, classifying the elements, and then assigning each class an appropriate mens rea, whether the statute provides one or not.[112] Rather than solving interpretation problems, these suggestions create new debates over how to classify elements[113] and what linguistic techniques judges should use.[114]

Even if judges use these proposed techniques, their analyses of mens rea provisions would not necessarily become more consistent. The techniques suggested require that judges make subjective choices about which linguistical rules to follow or how to divide a statute into conduct, attendant circumstances, and result. These preliminary judgments will differ for the very reason the use of interpretive aides

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110. For example, Daniel A. Farber discusses the problems with "brilliant" methods of interpretation and the benefits of simplicity in *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) and *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987).

111. *See* Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994) (reviewing LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993)) (four linguists review Solan's book and describe how linguists can assist judges in interpreting statutes); Michael S. Moore, *Plain Meaning and Linguistics—A Case Study*, 73 WASH. U. L.Q. 1253, 1258 (1995) (suggesting judges deconstruct statutory provisions containing mens rea requirements into if-then syllogisms to interpret them).

112. *See, e.g.*, Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 703-04 (1983) (advocating the use of the Model Penal Code's element-by-element analysis for determining the mens rea required for criminal offenses).

113. Element-by-element analysis suggests interpreting statutes by dividing their provisions inte conduct, attendant circumstances, and result and assigning a mental state (either "purposely," "knowingly," "recklessly," or "negligently") te each division. For instance, a person acts "purposely" with respect to his *circumstances* if "he is aware of the existence of such circumstances or he believes or hopes that they exist." *Id.* at 696-98 (quoting MODEL PENAL CODE § 2.02(a)(ii) (1980)). The problems associated with this method stem from the same reason scholars advocate for its use in the first place: the statute is unclear. For instance, theft by deception is defined by the Model Penal Code te require that the offender purposely obtain property through deceit. *See* MODEL PENAL CODE § 223.3 (1980). To deceive, the offender must purposely "create[ ] or reinforce[ ] a false impression . . . as to law, value, intention or other state of mind . . . ." *Id.* § 223.3(1). The conduct for this crime could simply be to create, *or* te create or reinforce a false impression. *See* Robinson & Grall, *supra* note 112, at 696-98. Because the statute is unclear, breaking the statute into elements is difficult. Individual judges will likely divide the statutory elements differently, thus negating the point of using this method. Rather than providing a consistent analysis of mens rea provisions in federal criminal statutes, the element-by-element method proves te be just as subjective and inconsistent as the Court's current ad hoc approach.

114. *Compare* Cunningham et al., *supra* note 111, at 1561 (suggesting that judges use linguists generally to discover the meanings of statutes), *with* Moore, *supra* noto 111, at 1253 (suggesting the use of a mathematics-type approach for deconstructing sentences and discovering their meanings).

was suggested: the statutes being considered are ambiguous or vague. Therefore, inconsistent analyses will continue.

Further, even if these suggestions did offer some guidance to judges, they offer little or no assistance the general public trying to understand the statutes. Few, if any, lay people have access to linguists who can interpret statutes for them. Nor should the average citizen require the assistance of a linguist, mathematician, or legal scholar to understand criminal statutes. Lay people who live under these statutes daily and who are subject to their penalties need to be able to understand them. If a judge needs a linguist to understand one of Congress's statutes, the problem is not with the judge's interpretive abilities, but with the statute itself. Thus, theories that focus on judges' interpretations are incomplete because they attempt to clarify statutes for only a portion of the audience that must be able to read and understand them. Further, these theories confuse the judges they are intended to aid and do nothing to help other individuals who need to understand the statutes.

The theory proposed in this Note focuses as much on Congress's drafting abilities as on judges' interpretative abilities in an attempt to develop consistent readings of mens rea provisions in federal criminal statutes. By focusing on Congress and its drafting of statutes, this Note seeks to clarify the language used in statutes, so that both judges and lay people can be aware of what activity a statute prohibits and what mens rea a statute requires.

B. Two Fundamentals of Criminal Law: Lenity and Notice

Many criminal laws and procedures (for instance, requiring the government to prove guilt beyond a reasonable doubt, granting a defendant the right against self-incrimination, and requiring federal juries to return unanimous verdicts to convict) stem from an institutional belief that in order to adequately protect individual liberties against a potentially tyrannical government, the law should provide criminal defendants some safeguards.[115] The rules of lenity and notice are two such protections.

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115. The idea that laws should give individuals certain rights that place them on more equal footing with the government derives from one of the basic ideas behind the republican form of government: that to protect individual liberty, the federal government's power must be checked. The way to protect individual liberty and prevent too much power from aggregating in one place was to allow "the private interest of every individual [to] be a sentinel over the public rights." THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). By

The rule of lenity, one of the basic canons of statutory construction, establishes that if a statute is ambiguous, it should be interpreted so as to favor the defendant.[116] Underlying this canon is the notion that a person should not be held responsible for violating a law that could be interpreted in a number of ways, one of which makes the defendant's conduct innocent.[117] This theory is important because with criminal law the defendant could serve jail time for her mistaken interpretation of an ambiguous statute. Although judges do interpret ambiguous statutes in favor of criminal defendants, they seem to be equally willing to go to great lengths to find that a statute is unambiguous.[118] Judges have frequently held that the rule of lenity does not apply if a statute can be interpretod *in any way* that makes it unambiguous.[119] Such an approach is at odds with the founding

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placing individuals in a position equal to the government and thus enabling them to challenge or check the government, society ensures that the rights of all individuals are protected. *See id.*

In the criminal law contoxt, checking government power by protecting individual rights is reflected in the law's underlying premises of due process, notice, and lenity. One of the most forceful explanations of this premise came from Justice Black in *Chambers v. Florida*:

> From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve "the blessings of liberty," wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can ouly follow if procedural safeguards of due process have been obeyed.

Chambers v. Florida, 309 U.S. 227, 236-37 (1940); *see also* Draper v. United States, 358 U.S. 307, 321 (1959) (Douglas, J., dissenting) (affirming this statement with regard to the necessity of probable cause); Harris v. United States, 331 U.S. 145, 194 (1947) (Murphy, J., dissenting) (explaining that unlawful search and seizure should immunize a defendant from prosecution based on reasons derived from Justice Black).

116. *See, e.g.*, United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978); United States v. Bass, 404 U.S. 336, 347-48 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971); Bell v. United States, 349 U.S. 81, 83 (1955); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952).

117. *See Bass*, 404 U.S. at 348 (stating that application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability); *see also* United States v. Aguilar, 515 U.S. 593, 600 (1995) (noting that before convicting a person of a crime, " 'a fair warning should be given to the world in language that the common world will understand, of what the law intonds to do if a certain line is passed' " (quoting McBoyle v. United States, 238 U.S. 25, 27 (1931))).

118. *See, e.g.*, Moskal v. United States, 498 U.S. 103, 107-08 (1990) (noting that statutery ambiguity is the "touchstone" of the rule of lenity) (citations omitted); United States v. Yermian, 468 U.S. 63, 70 n.7 (1984) ("Because the statutery language unambiguously dispenses with an actual knowledge requirement, we have no occasion to apply the principle of lenity urged by the dissent.").

119. *See, e.g.*, *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting) ("If the rule of lenity means anything, it means that the Court ought not do what it does today: use an ill-defined general purpose to override an unquestionably clear term of art . . . .").

principles of criminal law: that only those who acted with evil intent should be convicted.[120]

In addition to the rule of lenity, the requirement of notice or fair warning is foundational to criminal law.[121] The notion is that people should be convicted only for violating laws that clearly set forth what conduct is prohibited. Fundamental fairness underlies our criminal law in the guise of due process, and due process requires that people not be convicted under vague or ambiguous laws.[122] Therefore, Congress should draft laws to provide people with fair warning of what conduct is prohibited.[123] The Court should interpret those statutes in favor of the people trying to understand them, not in favor of the legislature that drafted them.

The Court should interpret a statute in favor of defendants if its plain meaning could be one of several meanings and Congress is not explicit about which interpretation is correct.[124] If the plain

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120. *See generally* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1936) (discussing historical mental requirements for criminality and the transition from these requirements to a general mens rea framework).

121. *See Bass*, 404 U.S. at 348 (considering fair notice and the rule of lenity "two policies that have long been part of our [statutory interpretation] tradition").

122. Support for this notion comes directly from the Sixth Amendment, which states, "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." U.S. CONST. amend. VI. Further, Justices Roberts, Frankfurter, and Jackson explained the importance of notice to due process when they stated in dissent that:

> If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment, so that men may presamably have an opportunity to avoid the happening, then . . . bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable.

Screws v. United States, 325 U.S. 91, 154 (1945) (internal citations omitted); *see also* Lambert v. California, 355 U.S. 225, 228 (1957). Explanation of the various roles notice plays throughout the legal system may be found in Oliver Wendell Holmes' *The Common Law*. For instance, in addition to its fundamental fairness role, notice plays a role in legitimizing laws. As Holmes explained, law must, at base, reflect the morality of the community. A "law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." OLIVER WENDELL HOLMES, THE COMMON LAW 50 (1923). Thus, a community must have notice of laws in order to determine whether they are laws the community can bear, i.e., legitimate laws the community will follow.

123. *See Lambert*, 355 U.S. at 229-30.

124. If Congress explicitly describes how a statute should be read, the statute should be read according to Congress's instructions, even if there are other possible interpretations of the statute. Such a statute is not ambiguons since Congress has clarified any ambiguity by explaining how the statute is to be intorpreted. *Cf.* Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 124 (discussing the relationship between mens rea doctrine and the vagueness doctrine and concluding that if Congress expressed the scope of its statutes with sufficient clarity, there would be "no mens rea analogue to the vagueness doctrine"). Congress should describe how it intends a statute to be read in the statute's preamble or purpose section. Although legislative history may provide another vehicle for expressing congressional intont, the legislative history is not part of the statute. The purpose behind developing a plain meaning approach to federal criminal statutes is te enable people to know what conduct is prohibited

meaning is clear, a judge should apply the statute accordingly. If the plain meaning of the statute is ambiguous, a judge should apply the meaning most favorable to defendants. The rule of lenity should be applied in this way even if the natural way to read the statute makes the statute unconstitutional. In this situation, the fact that a statute straddles the constitutional line provides additional support for reading the statute in the most natural way and finding the statute unconstitutional. If the Court strains to interpret an ambiguous statute in a way that makes it constitutional, the person convicted under the statute may have her constitutional rights infringed. To avoid such infringements, the rules of lenity and notice require that judges adhere to the principles underlying criminal law[125] and choose the reading of a statute that is most favorable to the defendant, even if that means invalidating a statute.[126]

A presumption that people know the law complements the roles of the rules of lenity and notice in this proposal for a more consistent method of interpreting mens rea in federal criminal statutes. If Congress has drafted a criminal law clearly, then the principle that ignorance of the law is not a defense and the rule of lenity have no role to play. Although this result may seem contradictory, further inquiry reveals that the same reasoning underlies using the rule of lenity when the plain meaning of a statute is ambiguous and prohibiting people from claiming iguorance of an explicit law. One reason for employing the rule of lenity is that the legal system assumes people conform their behavior to statutes.[127] If a statute can be read in several ways, an individual is likely to follow the reading most favorable to herself. Since her reading is valid, and Congress failed in its job of making the statute clear and unambiguous, the Court should uphold the individual's reading of the statute. The basis of this reasoning is that the defendant knew the law, conformed her behavior to the law, and should not be punished because Congress drafted an ambiguous statute.

The same reasoning underscores the theory that ignorance of the law is not a defense: people rely on the law and act in accordance with statutes. No legal system, especially not a criminal justice system, could function legitimately if judges presumed people did not

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from the plain meaning of the statute's words. Therefore, Congress should express its intent in the statute itself, not the legislative history.

125. *See supra* notes 115-23 and accompanying text.

126. *See supra* note 64 and accompanying text.

127. *See* HOLMES, *supra* note 122, at 50.

know the law.[128] Chaos would result because people would have no incentive to learn the law. Therefore, requiring lenity when a statute is ambiguous and requiring that defendants know the law is consistent. Because our law presumes the latter, it must allow the former when a statute can be understood in more than one way.[129]

C. A Quasi-Plain Meaning Approach?

1. How the Approach Operates

The next question then is why rely only on the plain meaning of a statute? If the criminal law is so concerned with protecting the criminal defendants' rights against a powerful government, why not read all statutes to favor the defendant rather than only doing so if the plain meaning of the statute is ambiguous? The answer is that under the Constitution, Congress has the power to make laws[130] and the judiciary applies the laws.[131] Thus, judges should apply the law that Congress makes, not make laws of their own.[132] Some may argue that when a judge applies the law to a particular set of facts, the judge is essentially making law because she is setting precedent. In the future, judges will generally interpret that statute in the same manner as the first judge. Judges setting precedent by following the plain meaning of a statute, however, are not making law by creating a new statute. Rather, they are interpreting the law by providing examples for people to follow. When judges go beyond just providing examples to accompany Congress's words and meaning, they exceed the limits of their constitutional powers.[133]

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128. *Cf.* ROLLIN M. PERKINS, CRIMINAL LAW 807 (1957) (explaining that the maxim "ignorance of the law is no excuse" is deeply imbedded in our criminal justice system).

129. *But see* Packer, *supra* note 124, at 145 (stating that the concept of *ignorantia legis* is inconsistent with mens rea). As explained above, the two concepts of lenity and ignorance of the law is not a defense are not necessarily inconsistent.

130. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

131. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time te time ordain and establish.").

132. For a general explanation of why the roles of Congress and the Court dictate using a plain meaning approach, see William Eskridge's article critiquing Justice Scalia's "new textualism." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 653-56 (1990).

133. Support for this approach te statutory interpretation can be found in the scholarship of legal positivism. Positivists place a premium on the value of clearly distinguishing lawmaking from law-applying. *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 612 (1958). They do this in part, because, in a pluralist society, "ordinary

For example, consider a variation of Hart and Sacks's hypothetical statute prohibiting vehicles in the park.[134] Congress passes a law that provides criminal penalties for walking a dog without a leash on federal property.[135] This statute does not include a mens rea element. If a judge convicts a man who was walking his German shepherd in a federal park without a leash, the judge has not determined that only men walking German shepherds will be convicted under the statute. Rather, the judge has provided an example of the kinds of actions prohibited. If the judge had decided that the man could not be convicted because this statute required the mens rea standard "knowingly" and the man did not know he was walking his dog in a federal park, the judge would be creating a new statute, rather than interpreting Congress's statute.

This is not to say the judge was incorrect in determining that the statute needed a mens rea element. As noted earlier, one of the basic premises of criminal law is that only those who act with an "evil intent" should be convicted.[136] Therefore, it may have been proper for the judge to determine that she could not convict the defendant because the statute did not include a mens rea element and one was necessary. The judge should not have read a mens rea requirement into the statute, however, because in doing so the judge created a law different from the one drafted by Congress. Instead, if the judge determined that a mens rea element was necessary for this statute to meet the constitutional requirements of due process, the judge should have held that the statute was unconstitutional.[137] If Congress wanted to have a law that criminalized walking dogs without leashes

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citizens should be in a position to identify what the law is and to act on that law" without reference to controversial moral propositions. Jules L. Coleman & Brian Leiter, *Legal Positivism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 241 (Dennis M. Patterson ed., 1996). The legal positivist's emphasis on the importance of a recognizable set of laws to which people can conform their behavior provides a strong argument for interpreting federal criminal statutes according to their plain meaning. Any other method for intorpreting these statutes reduces the likelihood that the average citizen will be able to understand the law and conform her actions to it because other methods require the judiciary to apply more controversial techniques of statutory interpretation. *See generally* Frederick F. Schauer, *Rules and the Rule-Following Argument*, *in* LAW AND LANGUAGE 313 (Frederick F. Schauer ed., 1993).

134. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1111 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing the role of courts in interpreting statutes throughout the chapter).

135. We are assuming for argument's sake that Congress could pass such a statute.

136. *See generally* Sayre, *supra* note 120, at 982-94 (explaining the historical development of mens rea law including the importance of evil intent as an element of every crime).

137. Again, we are assuming that such a crime could be unconstitutional for lacking mens rea.

in federal parks, then it would have to redraft the law to add the requisite mens rea element.

The above example demonstrates that if judges follow the Constitution and interpret Congress's criminal statutes according to their plain meaning, judges can assist Congress in its law-making efforts. Judges should not ouly apply the law, but rather should participate in a law-making conversation.[138] This conversation can only work if everyone understands the words being used. Congress must draft statutes that can be understood according to the plain meaning of their words, and the judiciary must interpret the statutes according to the plain meaning of the words used.

To illustrate, consider Alice's conversation with Humpty Dumpty quoted to at the outset of this Note.[139] In *Alice in*

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138. "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liqnidated and ascertained by a series of particular discussions and adjudications." THE FEDERALIST No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961). But, for these adjudications to occur, the adjudicators must have some idea of what the law they are interpreting means. In other words, Congress must draft criminal statutes that clearly prohibit specific conduct.

139. In her wanderings, Alice comes upon Humpty Dumpty sitting on his wall and they engaged in a conversation about whether it is better to get birthday presents or presents when it is not your birthday ("un-birthday presents"). The conversation flowed as follows:

> "[T]here are three hundred and sixty-four days when you might get un-birthday presents—"
>
> "Certainly," said Alice.
>
> "And only *one* for birthday presents, you know. There's glory for you!"
>
> "I don't know what you mean by 'glory,' " Alice said.
>
> Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant '[sic] there's a nice knock-down argument for you!"
>
> "But, 'glory' doesn't mean 'a nice knock-down argument,' " Alice objected.
>
> "When *I* use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."
>
> Alice was too much puzzled te say anything, so after a minute Humpty Dumpty began again.
>
> "They've a temper, some of them—particularly verbs, they're the proudest—adjectives you can do anything with, but not verbs—however, *I* can manage the whole lot! Impenetrability! That's what *I* say!"
>
> "Would you tell me, please," said Alice, "what that means?"
>
> "Now you talk like a reasonable child," said Humpty Dumpty, looking very much pleased. "I meant by 'impenetrability' that we've had enough of that subject, and it would be just as well if you'd mention what you mean te do next, as I suppose you don't intend to stop here all the rest of your life."
>
> "That's a great deal to make one word mean," Alice said in a thoughtful tone.
>
> "When I make a word do a lot of work like that," said Humpty Dumpty, "I always pay it extra."
>
> "Oh!" said Alice. She was too much puzzled to make any other remark.

CARROLL, *supra* note 1, at 159.

Wonderland, Alice could not engage in a conversation with Humpty Dumpty because she understood the ordinary definition of the words Humpty Dumpty used, not Humpty Dumpty's definitions. Humpty Dumpty, however, believed he could give words any meaning he wanted, use them in sentences, and people would understand him. This behavior confused Alice because she expected Humpty Dumpty to use the words as they were ordinarily used. Because Humpty Dumpty never sufficiently explained how he was defining words, Alice was never able to engage in a meaningful conversation with him. Instead, she was left "too much puzzled to make any other remark."[140]

Like Humpty Dumpty and Alice, Congress and the Court also have difficulty communicating when Congress does not use plain meanings in ordinary language. The Court can understand the plain meaning of the words Congress uses te draft statutes. But if Congress intends a statute to mean something other than what the plain meaning of the words suggest, it has to explain that to the Court. The judiciary's role then is to interpret the plain meaning of this statute; tell Congress whether the statute is constitutional; and if unconstitutional, suggest repairs that would make the statute constitutional. The Court should not, however, rewrite a statute for Congress. Congress can then either change the statute's wording or if Congress believes the wording conveys its intent, it can add language explaining how the statute should be interpreted. Congress might choose the latter if Congress and the Court disagreed about the plain meaning of the statute's words.

At some point this new statute will be challenged and the judiciary will again interpret what Congress wrote. If Congress adequately redrafted the statute, then the judiciary should have no problem applying the statute in the way Congress wanted. If, however, Congress still does not agree with the judiciary's application, it can rewrite the statute again. This dialogue will ensure that Congress drafts statutes that are clear enough to give people fair warning of what they prohibit, and that neither the legislative nor the judicial branch exceeds its constitutional powers.

2. Why a Quasi-Plain Meaning Approach is Necessary

When the Court makes new laws by interpreting the language of a statute to go beyond the words' plain meanings, the Court violates the separation of powers doctrine. The reason the judiciary is

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140. *Id.*

supposed to interpret the law and not make it is that in order to protect individuals' rights, the three branches of the federal government have to each retain limited powers.[141] If the judiciary is permitted to intorpret Congress's criminal statutes based on factors other than the words of the statute and any explicit explanations Congress provided regarding the statute's purpose, then the judiciary is enlarging its powers. When the Court goes beyond a statute's plain meaning, it implies that its interpretation is the statute that Congress should have passed, instead of interpreting what Congress enacted. Additionally, the judiciary is infringing on the powers of Congress. This aggrandizement and infringement threatens the security of individual liberties by (1) allowing too much power to be held in too few hands[142] and (2) allowing Congress to pass laws that do not provide sufficient notice, but under which people are nevertheless prosecuted.[143]

The argument exists that Congress is a group, not an individual, and thus cannot have one intent for enacting a statute.[144] Nor is Congress capable of drafting a statute that will cover every possible scenario likely to arise under the statute.[145] Further, there are a multitude of other reasons why scholars might object to the approach set forth in this Note.[146]

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141. Liberty will be lost, the Federalists said, if all legislative, executive, and judicial powers were allowed to accumulate in the same hands. "[W]hether of one, a few, or many, and whether hereditary, self-appointed, or elective [such an accumulation] may justly he pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossitor ed., 1961).

142. *See id.*

143. *See* Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302, 1321 (1991) (reviewing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)) (explaining that a plain meaning interpretation provides fairer notice).

144. *See, e.g.*, ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 388, 401 (3d ed. 1988) (discussing that intent is difficult to discern because the political record does not always make clear why particular legislators vote for bills); Melissa P. Collie, *Voting Behavior in Legislatures*, *in* HANDBOOK OF LEGISLATIVE RESEARCH 471-518 (Gerhard Loewenberg et al. eds., 1985) (explaining that legislators vote for statutes for a variety of reasons and do not all operate with the same intent); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 350-52 (1985) (questioning whether a collective intont may be found in Congress).

145. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340-45 (1990) (discussing that context, indeterminacy, and various other factors change the plain meaning of a statute and thus the situations to which it applies).

146. *See, e.g.*, Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 534-35 (1992) (asserting that reliance on practical reason is necessary when engaging in statutory interpretation because of the importance of context and purpose in determining what statutes mean).

The bottom line, however, is that the constitutional ideals of due process and fundamental fairness require this plain meaning approach to interpreting federal criminal statutes. The inconvenience and impracticability that scholars associate with this approach derive from the nature of the system of government—one with three separate and equal branches, each with limited powers—that the Framers created. Further, under this system it is fundamentally unfair to take away people's freedom based on ambiguous and vague laws. In order for people to have the necessary notice of what actions are criminal, Congress must draft statutes that the ordinary person can understand, and the judiciary must interpret Congress's statutes according to the plain meaning of words.

Drafting clear statutes, of course, is not an easy task. Words are complex, and expressing one's exact thought or intent can be difficult.[147] The Constitution, however, delegates this task to Congress. The more the judiciary interprets Congress's statutes contrary to their plain meaning, the less notice will be provided te the public about what behavior is prohibited. That people could go to jail without notice violates due process and fundamental fairness.

IV. IS A CONSISTENT ANALYSIS OF MENS REA ISSUES IN FEDERAL CRIMINAL CASES POSSIBLE?

The key question for this proposed quasi-plain meaning approach is whether it will result in consistent mens rea analysis in federal criminal cases. On a theoretical level, it should because the Court will be interpreting mens rea requirements, or the lack thereof,

147. Writers deal with this dilemma daily, but still find a way to convey their meaning through words. If they could not, we would not have books, or theories of math, science, philosophy, or law. If words were as indeterminate as anti-plain meaning theorists insist, we would never be able to communicate with each other because we would never be able to understand what another person was saying. But we do communicate. Therefore, words must have ordinary meanings that we can all recognize and that Congress can use as the basis for drafting statutes that people can understand. As James Madison stated when discussing the drafting of statutos, "The use of words is te express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate te them." THE FEDERALIST No. 37, at 229 (James Madison) (Clinten Rossiter ed., 1961). The assertion that we do communicate has been the subject of ongoing debate among linguistical philosophers. Although the details of this debate fall outside the scope of this Note, it is important to recognize that this Note's premise—that words can and do have plain meanings—is not necessarily a foregone conclusion. *See generally* EDMUND HUSSERL, CARTESIAN MEDITATIONS: AN INTRODUCTION TO PHENOMENOLOGY (Dorion Cairns trans., 1973); LAW AND LANGUAGE (Frederick Schauer ed., 1993); FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Charles Bally & Albert Sechehaye eds., Roy Harris trans., Duckworth 1983).

based on the ordinary words of the statute. For example, statutes with one mens rea requirement, like "knowingly," will be interpreted the same way because the Court will give one meaning to the word "knowingly." Thus, if the Court determines that to commit a crime "knowingly" requires the defendant know what she did and not that she know the law, the Court will use this definition to interpret every federal criminal statute with the mens rea requirement "knowingly."

A review of the sample of cases set forth in Part II using the proposed method will show that mens rea case law can be clarified by using a plain meaning approach combined with a general rule requiring leniency when there is more than one plain meaning of a statute. Any other approach allows the Court to alter its definition of a mens rea requirement in every case, as the particular facts of that case dictate.[148]

In *Liparota v. United States*, the Court interpreted the provision, "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall . . . be guilty of a felony . . . ."[149] The Court determined that innocent conduct would be overly criminalized unless it read "knowingly" to apply to "authorized by this chapter."[150] Thus, the Court implied a "knowingly violates" requirement into this statute and then defined that element to require knowledge not just of what

148. For instance, consider a version of the previous "dog on a leash" statute, again ignoring any constitutional problems with the statute. Assume the statute provides (1) it is unlawful to walk a dog without a leash on federal property and (2) anyone who knowingly violates this statute shall be imprisoned for no more than 13 months or fined up to $1,000, or both. Two different cases come before the Court based on this statute. In one, the facts show that the defendant frequently walked his dog on federal property without a leash, was asked to put his dog on a leash by a park policeman at least one time prior to his arrest, but was never told there was a statute that prohibited walking a dog not on a leash on federal property. In the second case, the facts show that the defendant frequently walked his dog on federal property without a leash, was never asked to put the dog on a leash, and did not know the statute existed. In the first case, the Court might find, considering all the facts, that "knowingly violates" means simply knowing that your actions are wrongful. The defendant was asked at least once to put his dog on a leash; thus he was on notice that his actions were wrongful even if he did not know of the exact statute that prohibited his conduct. While in the second case the Court might find that "knowingly violates" requires knowing about the law also. Because the defendant's actions were so close to innocent conduct, the Court might find that the only way to interpret this statute is that "knowingly violates" requires that the defendant know what he did and know about the statute.

We might approve of the results the Court reached in both cases because they seem to be the just results. The Court, however, has put every potential defendant (everyone who walks their dogs on federal property) in a position of not knowing what it means to "knowingly violate" the law regarding leashes.

149. Liparota v. United States, 471 U.S. 419, 420 n.1 (1985) (quoting 7 U.S.C. § 2024(b)(1)).

150. *Id.* at 427-28.

the defendant did, but also of the statute. If the Court had applied a plain meaning approach, it would not have implied a "knowingly violates" provision into the statute because that would be contrary to the plain words of the statute.

These words, given their plain meaning, set forth that an individual violates the statute if he or she "knowingly uses, transfers, acquires, alters or possesses coupons, authorization cards, or access devices."[151] The statute does not base a person's guilt on her knowingly using, transferring, acquiring, altering, or possessing coupons or authorization cards *knowing this action to be* in a manner not authorized by this chapter. By reading that language into the statute, the Court iguored the statute Congress created and developed its own statute regarding the illegal use of food stamps. As noted earlier, this is not the Court's role.[152]

Further, the Court altered its own definition of what it meant to "knowingly violate" a statute. Until *Liparota*, that phrase meant only knowing the underlying actions that made one's conduct criminal. The Court's decision in *Liparota* shows how failure to interpret statutes according to their plain meaning leaves people uncertain about the definition of "knowingly violates" and whether the behavior that Congress intended to prohibit is the same behavior the Court will deem prohibited. Had the Court interpreted this statute according to the plain meaning of its words, its definition of "knowingly violates" would have remained consistent with prior interpretations.

Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon[153] confirms the theory that if the Court adopted a plain meaning approach to mens rea in *Liparota*, the law regarding mens rea would be consistent. In *Sweet Home*, the Court did what this Note suggests it should do: it interpreted "knowingly violates" to mean the defendant had to know he harmed an endangered species, whether or not he knew that the animal was classified as endangered under the Endangered Species Act.[154] Taking *Sweet Home* with the above hypothetical interpretation of *Liparota* shows that the proposed method would clarify that "knowingly," when used in a criminal statute, means knowing that one performed specific wrongful actions, *not* knowing the specifics of the statute.

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151. *Id.* at 420 n.1 (quoting 7 U.S.C. § 2024(b)).

152. *See supra* notes 133-47 and accompanying text.

153. Babbitt v. Sweet Home Chapter of Communities for a Greater Or., 515 U.S. 687 (1995).

154. *Id.* at 696-97 n.9.

The same clarifying effect occurs when the proposed method is applied to cases such as *Staples v. United States*[155] and *Posters 'N' Things, Ltd. v. United States*,[156] in which the Court implied the "knowingly" mens rea requirement into the statutes. In both cases, the Court ignored the plain meaning of the statute because it implied words, specifically the word "knowingly," into the statutes.[157] These cases are examples of instances when the two parts of the proposed method seem to be inconsistent. Although, arguably, the rule of lenity would require a judge to interpret a "knowingly" requirement into the statute, the plain meaning interpretation requires interpreting the statute according to the words Congress used. As discussed previously,[158] this is not inconsistent when considering the founding principles of criminal law. The rule of lenity is only applicable when the plain meaning of the words is ambiguous, and in neither of these statutes does the plain meaning of the words involve the term "knowingly."

The Court may decide that without a mens rea requirement of "knowingly," the statutes violate the Constitution.[159] Instead of repairing Congress's statutes so that they satisfy coustitutional requirements, the Court should find the statutes unconstitutional and return them to Congress to add the word "knowingly." In so doing, the Court would be engaging in a law-making dialogue with Congress that would force Congress to improve its drafting of statutes and simultaneously allow lay people to know what the law prohibits. If the Court does not follow this method and repairs Congress's statutes, Congress has no incentive to improve its drafting. Further, people reading statutes will not know if the conduct the statute appears to prohibit is the same behavior that the Court will determine the statute bans. People, thus, will not have the notice necessary to make enforcing criminal laws fundamentally fair.

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155. Staples v. United States, 511 U.S. 600 (1994).

156. Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994).

157. The statute in *Staples* provided strict registration requirements on statutorily-defined "firearms." Section 5845(a)(6) of the National Firearms Act, 26 U.S.C. §§ 5801-5872 (1994), defined "firearm" to include a machine gun, and section 5845(b) defined "machine gun" as "any weapon which shoots . . . or can be readily restored to shoot automatically more than one sbot . . . by a single function of the trigger." The statute involved in *Posters 'N' Things* provided that "it is unlawful for any person (1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia; (2) te offer for sale and transportation in intorstato or foreign commerce drug paraphernalia; or (3) to import or export drug paraphernalia." 21 U.S.C. § 857, *amended by* 21 U.S.C. § 863 (1994).

158. *See supra* notes 115-29 and accompanying text (discussing the importance of assuming that people know the law with respect to the functioning of the criminal justice system).

159. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994).

X-Citement Video presented such a situation in that the Court interpreted a statute contrary to the statute's plain meaning.[160] In *X-Citement Video*, the Court recognized that the Court of Appeals for the Ninth Circuit had adopted "the most natural grammatical reading"[161] of the statute. "Knowingly" did not apply to the age of the performers in the pornographic videos. The Court, however, relied on the canon of constrnction that statutes should be read to avoid constitutional problems, and applied the "knowingly" requirement to the age of the performers.[162] By interpreting the statute this way, the Court repeated its actions in *Posters 'N' Things* and *Staples*: It ignored the statute Congress wrote and drafted its own statute regarding child pornography. Although the Court's statute is constitutional and Congress's was not, the Court overstepped its constitutional authority by drafting a statute.[163]

Further, the Court has upset individuals' abilities to rely on the words of statutes to convey the law.[164] Although in *X-Citement Video* the Court's alteration of the statute resulted in the same outcome that would have occurred if the Court had found the statute unconstitutional, in other cases people could be convicted under the Court's interpretation while they may not have been convicted under the plain meaning interpretation. Therefore, the only way to ensure that the public has sufficient notice, and that Congress and the Court adhere to the separation of powers doctrine is for the Court to apply a plain meaning interpretation, combined with a general rule of lemity, to federal criminal statutes.

A look at the most recent federal criminal mens rea case, *Bates v. United States*,[165] suggests that the Court recognizes how confusing

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160. *See id.*

161. *Id.* at 68. A comment Justice Scalia made in his dissenting opinion illuminates just how natural the Ninth Circuit's interpretation of the statute was: "To say . . . that [the Ninth Circuit's] interpretation is 'the most grammatical reading' is understatement to the point of distortion—rather like saying that the ordinarily preferred total for two plus two is four." *Id.* at 81 (internal citations omitted).

162. *See id.* at 78.

163. *See supra* notes 141-47 and accompanying text.

164. *See supra* notes 115-29 and accompanying text.

165. Bates v. United Statos, 522 U.S. 23, 118 S. Ct. 285 (1997). Since *Bates*, the Court granted certiorari and then dismissed it in *Rogers v. United States*, 522 U.S. 252, 118 S. Ct. 673, 677 (1998). In the dismissal discussion, the Court addressed what a knowing violation of the National Firearms Act, 26 U.S.C. § 5861(d)(i) (1994), entailed. According to the *Rogers* Court, *Staples* required "the Government to prove that the defendant knew that the item he possessed had the characteristics that brought it within the statutory definition of a firearm." *Id.* at 675. The Court, however, asserted that the defendant need not know his possession is unlawful. *See id.* But, in order te know that the item had the statutery characteristics of a firearm, the defendant may have to know how the NFA defines "firearm." *Id.* Although the Court seems to move toward a definition of "knowingly" that requires only knowledge of the facts, the value of

it has made the law of mens rea. Many commentators hoped the Court would use *Bates* to finally explain whether it would imply mens rea requirements into statutes.[166] The Court held that it would not imply a specific intent requirement into the statute because the plain meaning of the statute showed that one did not exist.[167] In other words, because Congress did not include a specific mens rea standard in the statute, the Court was not willing to add it. The Court, however, refused to address the issue of what "knowingly" meant in this statute because the government did not challenge the Seventh Circuit's interpretation of the term.[168] Thus, *Bates* does not indicate how the Court will analyze mens rea standards in future federal criminal cases.

Bates suggests that the Court is leery of discussing mens rea issues unless required, presumably because the Court recognizes the confusing state of the law. So, until the next case reaches the Court presenting a federal criminal mens rea issue directly, no one can know if the Court will comply with the plain meaning analysis it seemed to gravitate toward in *Bates*. This is the only method of analysis, however, that will allow the Court to protect both the interests of criminal defendants and the constitutional structure underlying federal criminal law.

V. CONCLUSION

The problems with the Court's mens rea analysis in federal criminal cases highlighted here reflect the problems associated with

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the *Rogers* opinion is questionable. The Court's discussion comes in the guise of a dismissal of certiorari, the question presented is not what a defendant must know to violate tbe Act, and the opinion is merely a plurality. Thus, the Court has yet to adopt one definition of "knowingly" that squares with precedent.

166. *See, e.g.*, Timothy W. Floyd, *Proving a Guilty Mind: In a Prosecution for Misapplying Federally Guaranteed Student-Loan Funds, Must the Prosecution Prove Specific Intent to Defraud the United States?*, PREVIEW U.S. SUP. CT. CAS., Sept. 18, 1997, at 12, 15 (speculating as to whether the Court would imply a specific intent requirement inte 20 U.S.C. § 1097(a) (1994)).

167. *See Bates*, 118 S. Ct. at 290 (stating that " 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' " (quoting Russello v. United States, 464 U.S. 16, 23 (1983))) (other citations omitted).

168. The Seventh Circuit held tbat knowingly and willfully misapplying funds "require[d] the government to allege and prove that the defendant consciously, voluntarily, and intentionally exercised unauthorized control . . . over federally provided or guaranteed Title IV funds . . . while knowing that such an exercise of control . . . was a violation of the law." United States v. Bates, 96 F.3d 964, 970 (7th Cir. 1996).

mens rea law generally. There is no set method used by the Court to interpret mens rea requirements, such as "knowingly." Further, there is no established method for interpreting the mens rea provisions of any criminal statutes. Rather, the Court takes an ad hoc approach to mens rea issues, reading mens rea requirements into some statutes but not other similar statutes, and defining the same mens rea term differently in various statutes. The reasons that the Court follows this kind of ad hoc method are laudable and necessary. They are laudable because the Court is considering general fairness issues in reaching a particular decision. This ad hoc approach is necessary because Congress has not drafted its statutes carefully enough. To apply a statute to a particular set of facts and arrive at a result, the Court must decipher what Congress wrote. However, in altering the statutes Congress writes, the Court raises separation of powers and notice concerns that are as fundamental to our criminal law system as due process.

Therefore, the Court should refrain from interpreting criminal statutes contrary to their plain meanings. Instead, it should interpret criminal statutes according to their plain meaning. If the plain meaning of a statute is ambiguous and two meanings seem equally plausible, then the Court should apply its interpretation of what the Constitution requires for fundamental fairness and notice, and interpret the statute in favor of the defendant. Such a method may not be perfect, but as long as people are writing and interpreting statutes, no method will be perfect. This quasi-plain meaning approach has the added advantage of ensuring that potential defendants can know what the criminal statutes prohibit before facing convictions under those statutes.

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