Two Sides of the Same Interpretive Coin: The Presumption of Mens Rea and the Historical Rule of Lenity

Shon Hopwood*

INTRODUCTION

In the last forty years, Congress has passed more than a thousand federal criminal laws,[1] many of which are unclear on their face.[2] Sometimes Congress omits important information and fails to define key terms.[3] Other times it drafts criminal statutes so imprecisely that courts have found them unconstitutionally vague.[4] And because its members often imagine the worst offenders when drafting criminal laws, Congress frequently writes laws so broadly as to include innocent conduct unrelated to the harms it intends to criminalize.[5] As Professor Dan Kahan has noted, "[C]riminal statutes typically emerge from the legislature only half-formed."[6]

When it comes to drafting mens rea elements for federal crimes, Congress has not performed much better.[7] Although the concept of a guilty mind and

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* Associate Professor of Law at Georgetown University Law Center. Special thanks to my research assistants Nicholas Mecsas-Faxon and Alexis Hart for their work on this piece.

1. There are now more than 4,500 federal crimes contained in fifty-one titles of the U.S. Code. *See* HARVEY A. SILVERGATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT, at xxxvii (2009); JOHN BAKER, HERITAGE FOUND., REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 1 (2008), https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes [https://perma.cc/S2KN-HMG8]; *see also* MIKE CHASE, HOW TO BECOME A FEDERAL CRIMINAL 2 (2019) ("The tricky part for the average person is that there's no comprehensive list of all the things that are crimes today. In fact, no one even knows how many federal crimes there are.").

2. *See* Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 696 (2017).

3. *See* Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 360 (2019).

4. *See, e.g.*, Johnson v. United States, 576 U.S. 591, 597–98 (2015); United States v. Davis, 139 S. Ct. 2319, 2323–24 (2019).

5. *See* Hessick & Kennedy, *supra* note 3, at 360.

6. Dan M. Kahan, *Ignorance of Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127, 153 (1997).

7. *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 477 (1996) ("Congress is notoriously careless about defining the mental state element of criminal offenses.").

moral culpability has been foundational in criminal law for centuries,[8] Congress often fails to clarify if and when a mens rea element applies to all the elements of a particular offense.[9] The consequences of this drafting dysfunction are quite severe. Without a mens rea requirement or where Congress has been unclear, criminal defendants can be exposed to decades of imprisonment in a federal prison even when their actions were not committed with a morally blameworthy intent .[10]

As a result of this sloppy drafting, courts have inconsistently interpreted laws that fail to clearly state whether an enumerated mens rea element applies to all or just some of the offense elements.[11] This Essay addresses how two doctrines, applied in tandem, could allow federal courts to more easily and consistently answer these important statutory interpretation questions. The first, the presumption of mens rea, applies a "scienter requirement" to "each of the statutory elements that criminalize[s] otherwise innocent conduct."[12] The second, the historical rule of lenity, applies an interpretive presumption in favor of the defendant when a statute is ambiguous, and reasonable doubts remain as to what Congress intended.[13] These doctrines both flow from the Due Process Clause and have similar aims of removing criminal liability for individuals who have not committed a morally blameworthy act or whose conduct does not clearly fall within the scope of the criminal law. Applying these doctrines in tandem would move courts to find that a mens rea element applies to most elements of a crime unless Congress has expressly stated otherwise.[14]

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8. *See* Morissette v. United States, 342 U.S. 246, 251 (1952); Staples v. United States, 511 U.S. 600, 605 (1994); *see also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 50 (1881).

9. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 77–78 (1994); Dean v. United States, 556 U.S. 568, 572–74 (2009); Rehaif v. United States, 139 S. Ct. 2191, 2195–96 (2019).

10. *See, e.g.*, *Dean*, 556 U.S. at 577 (upholding a ten-year mandatory minimum by declining to apply the mens rea requirement to one element of the statute); *see also infra* notes 66–72 and accompanying text (discussing *Dean*).

11. *See* Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 795 (2012) ("Legislatures routinely fail to specify the mental states associated with objective elements, and so courts frequently face the question whether a particular element requires a mental state.").

12. *X-Citement Video, Inc.*, 513 U.S. at 72.

13. *See* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 921 (2020) (explaining how the historical rule of lenity differs from the watered-down version of lenity the Supreme Court currently employs and arguing that the historical rule "better advances democratic accountability, protects individual liberty, furthers the due process principle of fair warning, and aligns with the modified version of textualism practiced by much of the federal judiciary today").

14. There is one key exception to this general rule: even after applying the mens rea presumption and the rule of lenity, a mens rea element would not apply to most jurisdictional elements contained in federal criminal statutes. *See infra* Part II.

Part I describes the presumption of mens rea and the historical rule of lenity and explains how these doctrines address similar concerns and protect defendants when Congress has drafted unclear laws. Part II of this Essay illustrates how the Supreme Court has inconsistently determined when an enumerated mens rea element in a federal criminal statute should apply to all or just some of the offense elements. And Part III argues that applying both doctrines together will both better protect criminal defendants in cases in which Congress has been unclear and a defendant has committed an essential element without the requisite intent, and also promote consistency in interpretation of criminal statutes.

I. THE PRESUMPTION OF MENS REA AND THE HISTORICAL RULE OF LENITY PROTECT DEFENDANTS WHEN CONGRESS IS UNCLEAR.

Both the presumption of mens rea and the historical rule of lenity protect defendants when Congress has sloppily drafted a criminal statute and its intent is unclear.

A. The Presumption of Mens Rea

The mens rea doctrine may have originated with St. Augustine and his works on evil motive.[15] St. Augustine explained the necessity of a "guilty mind" by stating, "The only thing that makes a guilty tongue is a guilty mind."[16]

The mens rea doctrine was ultimately adopted by English common law.[17] Blackstone explained that people with mental illness are unable to tell right from wrong,[18] and this lack of free will prevents a finding of criminal liability. As Blackstone noted, it is free will and the ability to choose that renders a person's conduct either "praiseworthy or culpable."[19]

The idea that a person must have a guilty mind took hold in America and was recognized by Oliver Wendell Holmes, Jr. in his influential book on the

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15. *See* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 654–55.

16. Stephen P. Garvey, *Authority, Ignorance, and the Guilty Mind*, 67 SMU L. REV. 545, 545 n.1 (2014) (quoting Saint Augustine, Sermon 180, *in* 5 THE WORKS OF SAINT AUGUSTINE: A TRANSLATION FOR THE 21ST CENTURY, PT. III—SERMONS 314, 315 (John E. Rotelle ed., Edmund Hill trans., 1992)). The quote itself is typically attributed to St. Augustine's sermon on perjury; hence, his focus was on the tongue. *See id.*

17. Morissette v. United States, 342 U.S. 246, 250–51 (1952).

18. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *1, *24.

19. *Id.* at *20–21.

common law.[20] Under American criminal law, a prosecutor must generally prove that the defendant both committed a prohibited act (the "actus reus") and did so with a guilty mind (the "mens rea").[21] One of the important aims of criminal law is to convict and punish those with morally blameworthy intent,[22] and under the common law, a finding of criminal intent was required to separate the morally blameworthy from those who commit a crime unintentionally or through an innocent mistake.[23]

As the Supreme Court has noted, a mens rea element has been "persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[24] Indeed, proving a criminal intent is "firmly embedded" in criminal law; it has been "the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[25]

The Supreme Court has long interpreted federal criminal statutes to require a mens rea element in light of this background rule from the common law.[26] Because Congress sometimes fails to specify whether an enumerated mens rea element applies to each element of an offense, the Supreme Court has created a presumption that an enumerated mens rea element in a federal criminal statute generally applies to "each of the statutory elements that criminalize[s] otherwise innocent conduct."[27] That is so even if reading the mens rea element as applying to all elements is not the best grammatical reading of a statute.[28]

The presumption of mens rea is thought to flow from the Due Process Clause.[29] Traditionally, the doctrine was meant to protect defendants from

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20. *See* HOLMES, *supra* note 8, at 4–5.

21. *See, e.g.*, United States v. Apfelbaum, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur."); 21 AM. JUR. 2D *Criminal Law* § 112 (1981) ("A crime generally consists of two elements, a physical, wrongful deed (the 'actus reus'), and a guilty mind that produces the act (the 'mens rea').").

22. *Morissette*, 342 U.S. at 250–52.

23. *See* Rehaif v. United States, 139 S. Ct. 2191, 2197 (2019) ("[E]ven a dog distinguishes between being stumbled over and being kicked." (quoting HOLMES, *supra* note 8, at 3)).

24. *Morissette*, 342 U.S. at 250.

25. Staples v. United States, 511 U.S. 600, 605 (1994) (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 436–37 (1978)).

26. *See Morissette*, 342 U.S. at 250.

27. United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994); *see also Staples*, 511 U.S. at 605.

28. *Rehaif*, 139 S. Ct. at 2196–97; *X-Citement Video, Inc.*, 513 U.S. at 70.

29. The Supreme Court has described principles of mens rea as being "essential" to the criminal law. *Morissette*, 342 U.S. at 273–74. And yet it has never held that substantive due process requires a mens rea element. *See* Louis D. Bilionis, *Process, the Constitution, and*

blameless conduct done accidentally, unintentionally, or unknowingly.[30] But the presumption also serves to prevent disproportional punishment.[31] As a result, the Court has considered the severity of a statute's punishment in deciding the level of textual proof needed to rebut the presumption in cases in which the statute enumerates a mens rea element but is unclear as to which offense elements the enumerated mens rea element applies.[32]

B. The Historical Rule of Lenity

Since the founding, the Supreme Court has employed the rule of lenity, which provides that when a criminal statute is ambiguous, a court must narrowly interpret the statute in favor of the criminal defendant.[33] The rule was initially called the rule of strict construction of penal statutes, and, beginning with Chief Justice Marshall, it had a prominent place in the Supreme Court's interpretive canons.[34] When now-Justice Amy Coney Barrett reviewed early federal case law, she found it "yielded far more cases applying the rule of lenity than any other canon," leaving "one with the distinct impression that lenity was the most commonly applied substantive canon of construction."[35]

Substantive Criminal Law, 96 MICH. L. REV. 1269, 1278–79 (1998) (calling the notion that "individualized moral blameworthiness" is central to the criminal law a myth); Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and* Kahler v. Kansas, 43 HARV. J.L. & PUB. POL'Y 85, 102–03 (2020) ("To be sure, English and American courts have created, shaped, and reshaped defenses to crimes as part of their perceived judicial authority to carry forward the common law and to fashion that law as reason dictates. There is, however, substantial reason to doubt that federal courts may use the Due Process Clause to accomplish that result. The history of the clause offers no warrant for doing so, and . . . the Supreme Court to date has repeatedly refused to use that clause as a basis for creating a constitutionally based doctrine defining criminal responsibility.").

30. *See* Stephen F. Smith, *"Innocence" and the Guilty Mind*, 69 HASTINGS L.J. 1609, 1611–12, 1612 n.7 (2018) ("As conventionally understood, 'innocence' and 'blamelessness' encompass conduct that is both consistent with community standards of morality and societal expectations about the kinds of activities that are likely to be illegal.").

31. *See* Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 128 (2009) ("Mens rea has traditionally served to prevent disproportional punishment as well as punishment of blameless conduct . . . .").

32. *See Staples*, 511 U.S. at 616 (taking into consideration the "harsh" mandatory minimum sentence attached to 26 U.S.C. § 5861(d) when ruling the presumption of mens rea was not rebutted).

33. *See, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820).

34. *See* Hopwood, *supra* note 13, at 925–28.

35. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 129 n.90 (2010).

The Supreme Court's current rule of lenity, however, is significantly weaker than the rule applied in the nineteenth and early twentieth centuries.[36] The current rule of lenity only applies after a court has used statutory text and structure, dictionaries, linguistic canons, statutory purpose, legislative history, and any other evidence of congressional intent and yet a "grievous ambiguity" remains. The more interpretive tools a judge possesses to construe away ambiguity, the more infrequently lenity will apply.

What I call the "historical rule of lenity" functions differently. It requires a judge to consult statutory text and structure, and apply any linguistic canons, and if "reasonable doubts" remain, the judge must then interpret the statute narrowly in the defendant's favor.[37] The historical rule also does not allow judges to use statutory purpose and legislative history when interpreting statutes.[38] If a judge can use statutory purpose and legislative history, it can interpret away even considerable ambiguity. Like the presumption of mens rea, the historical rule also favors interpreting statutory ambiguities narrowly in relation to the severity of the statutory punishment.[39] The more severe the penalty, the more clarity the Court requires from Congress.[40] And like the presumption of mens rea, the rule of lenity flows from the protections of the Due Process Clause.[41]

As compared to the modern version of the rule of lenity, the historical rule of strict construction is normatively superior. The historical rule advances democratic accountability by placing the onus on elected officials to clearly define the conduct they wish to criminalize, rather than allowing unelected judges to "create" crimes through broad interpretations of ambiguous criminal statutes. As Justice Antonin Scalia and Bryan Garner wrote, when

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36. *See* Hopwood, *supra* note 2, at 720 (explaining that the current rule of lenity is "a 'significant erosion' of past practices" (quoting Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the* Nulla Poena *Principle*, 29 ARIZ. L. REV. 385, 397–98 (1987))).

37. *Id.* at 921.

38. *Id.*

39. *Id.*

40. *Id.* at 928.

41. Lenity is often said to be rooted in constitutional norms of procedural due process. *See*, *e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 907 (4th ed. 2007) (arguing that the rule of lenity has constitutional underpinnings in the Due Process Clause); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992) (same); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406 & n.26 (2010) (arguing that lenity is constitutionally inspired). For another view, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1122 (2017) ("Legal canons don't need to be recast as a form of quasi-constitutional doctrine, because they don't need to outrank the statutes to which they apply. Instead, the canons stand on their own authority as a form of common law.").

Congress passes an unclear law, "the consequences should be visited on the party more able to avoid and correct the effects of shoddy legislative drafting—namely, the federal Department of Justice (DOJ) or its state equivalent," organizations that typically have massive lobbying power.[42] The historical rule also preserves the separation of powers by forcing Congress to pass clear laws rather than delegate lawmaking power to the federal judiciary.[43] It further advances the due process principle that compels Congress to give "fair warning," in "language that the common world will understand, of what the law intends to do if a certain line is passed."[44] Because historical lenity is applied at a lower level of ambiguity than the modern rule when the punishment is severe, it can protect defendants from unfairly harsh sentences.[45] And the historical rule is consistent with the modified form of textualism practiced by much of the federal judiciary. A court, under the historical rule, would seek the best reading of the statute and then depart "from that baseline if required to do so by any relevant substantive canons," such as the rule of lenity.[46] If reasonable doubts remained about the scope of the statute after looking at the text, linguistic canons, and the structure, the judge applies lenity to interpret the statute narrowly in favor of the defendant.[47]

The presumption of mens rea and historical rule of lenity protect similar concerns animating from the Due Process Clause and require Congress to draft criminal laws more clearly.

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42. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 299 (2012).

43. United States v. Bass, 404 U.S. 336, 348 (1971) ("[B]ecause criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.").

44. McBoyle v. United States, 283 U.S. 25, 27 (1931); *see also* Liparota v. United States, 471 U.S. 419, 427 (1985) ("[T]he rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal . . . .").

45. *See In re* Winship, 397 U.S. 358, 363–64 (1970) (stressing the immensely important interests at stake in criminal prosecutions for the accused—such as liberty and potential social stigma—and extolling the requirement of proof beyond a reasonable doubt).

46. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121, 2145 n.136 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

47. *See* Hopwood, *supra* note 13, at 937.

II. THE SUPREME COURT HAS INCONSISTENTLY APPLIED THE PRESUMPTION OF MENS REA.

Mens rea has a long history in criminal law, and under common law, a mens rea element was required for criminal convictions.[48] Recognizing that an evil will or guilty mind is a fundamental aspect of criminal law, the Supreme Court has created two mens rea presumptions. The first presumption applies when a federal criminal statute lacks a mens rea element altogether, and the Court will create one absent clear indication from Congress that it intended for the crime to be one of strict liability.[49] The second presumption applies when a federal criminal statute has an enumerated mens rea element, but it is unclear whether the mens rea element applies to every offense element.[50] In these latter cases, the Court employs a presumption that a scienter element applies to every element of the offense, minus any jurisdictional elements.[51] Phrased differently, the Court applies this presumption in favor of mens rea and requires "the degree of knowledge sufficient to mak[e] a person legally responsible for the consequences of his or her act or omission."[52] But the Court has not consistently applied this second presumption.[53]

The Court first clearly articulated the presumption in *Liparota v. United States*, which posed a challenge to a federal statute prohibiting certain actions involving food stamps.[54] The statute governing food stamp fraud provided "that 'whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations is subject to a fine and imprisonment.'"[55] The Court explained that the statute's use of the word "knowingly" could be read as only modifying "uses, transfers, acquires, alters, or possesses," or it could be read also to modify "in any manner not authorized by [the statute]."[56] But neither the statutory language nor the legislative history was conclusive on congressional intent, so the Court defaulted to the presumption of mens rea

48. *See* HOLMES, *supra* note 8, at 3–4 (discussing the deep roots of mens rea within Anglo-American law).

49. *See id.* at 58–70.

50. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 73 n.3 (1994).

51. *Id.* at 70.

52. Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (quoting BLACK'S LAW DICTIONARY 1547 (10th ed. 2014)).

53. *See, e.g.*, *X-Citement Video, Inc.*, 513 U.S. at 54; Dean v. United States, 446 U.S. 568, 573 (2009).

54. Liparota v. United States, 471 U.S. 419, 425–26 (1985).

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

56. *Id.* at 426–28.

set forth in *Morissette v. United States*,[57] requiring a mens rea element.[58] The Court was also concerned with the practical import that a broader reading of the statute would create. It noted that without a mens rea element applied to the element "in any manner not authorized," it would "criminalize a broad range of apparently innocent conduct" and impose criminal liability on an unwitting food stamp recipient who purchased groceries at a store that inflated its prices.[59]

A decade later, in *X-Citement Video*, the Court interpreted the Protection of Children Against Sexual Exploitation Act, prohibiting, inter alia, interstate transportation of minors engaged in sexually explicit conduct.[60] The Court there held that the mens rea element "knowingly" applied not just to the verbs in that subsection but also to the element of "the use of a minor" in a subsequent subsection.[61] The Court noted that the "most natural grammatical reading" of the statute applied the mens rea element of "knowingly" only to the surrounding verbs in that subsection and not to a following subsection prohibiting "the use of a minor engaging in sexually explicit conduct."[62] Yet it noted several "anomalies" that would result from that construction, including that a "retail druggist who returns an uninspected roll of developed film to a customer [who] 'knowingly distributes' [it]" would be criminally

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57. 342 U.S. 246, 273–76 (1952).
58. *Liparota*, 471 U.S. at 425–26.
59. *Id.* at 426.
60. United States v. X-Citement Video, Inc., 513 U.S. 64, 68–69 (1994).
61. *Id.* at 68 (citing 18 U.S.C. § 2252). Section 2252 provides, in relevant part:

> (a) Any person who—
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> (1) knowingly transports or ships . . . [in] interstate or foreign commerce . . . by any means 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;
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> (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; . . .
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> shall be punished as provided in subsection (b) of this section.)

62. *Id.*

liable.[63] The Court also noted that harsh penalties (up to ten years in prison) would attach to someone like the retail druggist, even without any criminal intent.[64] The Court thus applied a "presumption in favor of a scienter requirement" to "each of the statutory elements that criminalize[d] otherwise innocent conduct," and applied the "knowingly" requirement to the element of "the use of a minor."[65]

The Court next addressed the mens rea presumption in *Dean v. United States*.[66] The statute at issue there was 18 U.S.C. § 924(c)(1)(A), which prohibits any person from using or possessing a firearm "during and in relation to" any violent or drug trafficking crime.[67] The defendant was charged and convicted of "discharging" a firearm, and he argued that the "during and in relation to" element also applied to the "discharge" enhancement that increased his mandatory minimum sentence from five to seven years.[68] The Court, however, refused to apply the mens rea presumption because it found that the presumption was rebutted by the "most natural reading of the statute," which applied the "in relation to" language to only the nearby verbs of "uses" and "carries."[69] The Court thus concluded that the "in relation to" element did not extend down into a separate subsection to the "is discharged" element.[70] Justice Breyer dissented and conceded that the Court interpreted the statute in the most grammatical way.[71] But Justice Breyer concluded that the most grammatical reading was not the only reading of the statute and that the rule of lenity "tips the balance against the majority's [interpretation]."[72]

A month after *Dean* was decided, the Court again addressed the presumption in *Flores-Figueroa v. United States*.[73] The Court there interpreted the "[a]ggravated identity theft" statute that "imposes a mandatory consecutive [two]-year prison term [for] individuals convicted of certain other crimes *if*, during (or in relation to) the commission of those other crimes," an individual "*knowingly* transfers, possesses or uses, without lawful authority, *a means of identification of another person*."[74] The question before

63. *Id.* at 69.
64. *Id.* at 72.
65. *Id.* at 72–73.
66. Dean v. United States, 556 U.S. 568 (2009).
67. *Id.* at 573.
68. *Id.* at 571–73.
69. *Id.* at 573.
70. *Id.*
71. *Id.* at 584 (Breyer, J., dissenting).
72. *Id.*
73. Flores-Figueroa v. United States, 556 U.S. 646 (2009).
74. *Id.* at 647 (emphasis added) (citing 18 U.S.C. § 1028A(a)(1)).

the Court was whether the statute requires the prosecution to prove that the defendant knew that the "means of identification" they unlawfully possessed or used belonged to "another person."[75] The Court held that it did.[76] It found there were "strong textual reasons"[77] supporting the presumption of mens rea, including that "where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the [transitive] verb tells the listener how the subject performed the entire action" as "set forth in the sentence."[78] The Court also noted that it had previously applied the presumption of mens rea in other cases in which the statutory language "was more ambiguous" than the statute at issue because the mens rea element "appeared in a different subsection."[79]

Recently, in *Rehaif*, the Court confronted another statute with a mens rea element separated from other offense elements by a different subsection.[80] The statute at issue, 18 U.S.C. § 922(g), states that "[i]t shall be unlawful" for certain individuals to possess a firearm.[81] The statute prohibits nine categories of individuals from possessing a firearm, including those who are "illegally or unlawfully in the United States."[82] A separate subsection adds that any individual who "knowingly violates" the first provision shall be imprisoned for up to ten years.[83] Justice Breyer, writing for the seven-Justice majority, started the analysis with the "longstanding presumption that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct,'"[84] and he noted that the presumption "applies with equal or greater force when Congress includes a general scienter provision in the statute itself."[85] He concluded that there was no convincing reason to depart from the presumption, even though the mens rea element that "[w]hoever knowingly violates" certain subsections of § 922(g) appeared in a separate and subsequent subsection in § 924(a)(2).[86] Justice Breyer thus concluded that Congress intended the "knowingly" requirement to apply to every element of the offense, absent the jurisdictional element, and to the defendant's status of

75. *Id.* at 647.
76. *Id.*
77. *Id.* at 650.
78. *Id.*
79. *Id.* at 653.
80. Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019).
81. 18 U.S.C. § 922(g).
82. *Id.*
83. *Id.* § 924(a)(2).
84. *Rehaif*, 139 S. Ct. at 2195.
85. *Id.* (citing MODEL PENAL CODE § 2.02(4) (AM. L. INST. 1985)).
86. *Id.* at 2195, 2199.

being "illegally or unlawfully in the United States."[87] Justice Breyer noted that the mens rea presumption applies even where "'the most grammatical reading of the statute' does not support one."[88] He further noted that the presumption applies to non-public welfare offenses, such as § 922(g), especially when "they carry a potential penalty of 10 years in prison that we have previously described as 'harsh.'"[89]

Justice Alito, joined by Justice Thomas, dissented and argued that the majority's interpretation was contrary to the statutory text and the best grammatical reading of the statute.[90] He contended that the majority had extracted the term "knowingly" from § 924(a)(2) and "performed a jump of Olympian proportions" by moving the mens rea element "backward over more than 9,000 words in the U.S. Code, and then landing—conveniently—at the beginning of the enumeration of the elements of the § 922(g) offense."[91] Despite acknowledging that the statutory text "alone" did not provide "any degree of certainty" as to which particular elements of § 922(g) the mens rea element "knowingly" applied,[92] Justice Alito concluded that the statute was not ambiguous, and thus, the presumption of mens rea and the rule of lenity did not apply.[93]

As this summary of the cases illustrates, the Court has not consistently applied the presumption to statutes that enumerate a mens rea element but are unclear on what elements the mens rea requirement applies to.[94] That is especially so with statutes that state a mens rea element in a separate subsection from other offense elements. In *X-Citement Video* and *Rehaif*, the Court found the presumption unrebutted despite acknowledging the fact that its interpretation of those statutes was not the best grammatical reading of them.[95] But in *Dean*, the Court found the presumption rebutted because the best grammatical reading of the statute meant the mens rea element did not apply to every offense element.[96] Part of the Court's inconsistent application of the mens rea presumption stems from confusion over what level of statutory ambiguity is necessary before the presumption is rebutted. The

87. *Id.* at 2198.
88. *Id.* at 2196 (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994)).
89. *Id.* at 2197 (quoting *X-Citement Video, Inc.*, 513 U.S. at 72).
90. *Id.* at 2203–04 (Alito, J., dissenting).
91. *Id.* at 2203.
92. *Id.* at 2206.
93. *Id.* at 2212.
94. *See* Johnson, *supra* note 11, at 771 ("Unfortunately, nobody seems to know *which* material elements are subject to the mens rea presumption.").
95. *Rehaif*, 139 S. Ct. at 2196–97; United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994).
96. *See* Dean v. United States, 556 U.S. 568, 573–74 (2009).

following Part explains how applying the mens rea presumption in tandem with the historical rule of lenity would lead to both more consistent application of the presumption and better protection of defendants when Congress has been unclear as to whether some offense elements require a blameworthy intent.

III. THE PRESUMPTION OF MENS REA AND THE HISTORICAL RULE OF LENITY APPLIED IN COMBINATION WOULD REQUIRE CONGRESS TO BE CLEAR BEFORE A COURT CONCLUDES THAT AN ENUMERATED MENS REA ELEMENT DOES NOT APPLY TO EACH OF THE STATUTORY ELEMENTS THAT CRIMINALIZES OTHERWISE INNOCENT CONDUCT.

As noted previously, the Court has not consistently applied the presumption of mens rea to statutes that specify a mens rea requirement but are unclear which elements it applies to. That is especially so with statutes that state a mens rea element in a separate subsection from other offense elements. Applying the presumption of mens rea and the historical rule of lenity together would provide more consistency and better protect defendants from being convicted for conduct that is not morally blameworthy unless Congress has been exceedingly clear.

Just as the Court did in *Rehaif*, it should start with the presumption of mens rea that applies any enumerated scienter element to "each of the statutory elements that criminalize[s] otherwise innocent conduct."[97] The problem with the Court's analysis in *Dean* was that it started interpreting the statute without the presumption, which led the Court to apply the most grammatically sound reading of the statute.[98] Starting with the presumption and looking for indicia of congressional intent rebutting the presumption is the correct analysis, rather than looking for the best reading of a statute and then deciding whether the presumption has been rebutted. In sum, courts should start with the presumption that the mens rea requirement extends to all non-jurisdictional elements and only then look for clear indicia of congressional intent that shows Congress did not intend the mens rea requirement to extend to a given element.

The Court's inconsistent application of the mens rea presumption has primarily resulted from confusion over what level of statutory ambiguity can be tolerated before the presumption is rebutted—the more ambiguity, the less likely the presumption is rebutted. The most grammatically sound reading of

97. *X-Citement Video, Inc.*, 513 U.S. at 72; *see also* Staples v. United States, 511 U.S. 600, 605 (1994).

98. *E.g.*, *X-Citement Video, Inc.*, 513 U.S. at 72; *Staples*, 511 U.S. at 605.

a statute is not always sufficient to rebut the presumption.[99] That is especially so if the most grammatically sound reading would "criminalize a broad range of apparently innocent conduct."[100] In such cases, it is usually unclear if Congress placed an enumerated mens rea requirement in a different subsection from other offense elements purposefully or unintentionally. And given Congress's dysfunctional drafting, just because an enumerated mens rea element was placed in a different subsection does not mean Congress expressly intended for the mens rea element not to apply to other offense elements. When not applying the mens rea element would criminalize otherwise innocent conduct, the presumption of mens rea has not been adequately rebutted. Applying these doctrines in tandem would result in a strong presumption that requires Congress to be very clear that an enumerated mens rea element does not apply to other offense elements.

Applying historical lenity would help the Court be more consistent in deciding whether the mens rea presumption has been rebutted. In each case, the Court would look to the text, structure, and linguistic canons to interpret the statute, and even when the best grammatical reading of the statute is found, there might still be reasonable doubts as to whether Congress intended to criminalize innocent conduct without a mens rea. One example would be the statute in *Rehaif* in which Justice Alito, in dissent, concluded could be read in four different ways.[101] Yet he argued that the rule of lenity should not apply to hold that the mens rea presumption was unrebutted.[102] If a statute can be construed in one of four ways, lenity applies, and the presumption is unrebutted.[103] Because the doctrine of mens rea is fundamental, the rule of lenity should require more clarity from Congress before a court dispenses with it.

The Court's inconsistent application of the mens rea presumption also stems, in part, from a failure to take into consideration the harsh sentencing consequences of a statute. As noted, both the presumption of mens rea and the historical rule of lenity take into consideration the punishment imposed by a statute when determining what level of clarity it requires from Congress.[104] And for good reason: when someone is convicted of a felony and

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99. *See Dean*, 556 U.S. at 574 (relying on the grammatical structure of the statute and dismissing plaintiff's attempt to "contort[ ] and stretch[ ] the statutory language to imply an intent requirement").

100. Liparota v. United States, 471 U.S. 419, 426 (1985).

101. Rehaif v. United States, 139 S. Ct. 2191, 2204 (2019).

102. *Id.* at 2212.

103. Barber v. Thomas, 560 U.S. 474, 488 (2010).

104. *See, e.g.*, Ladner v. United States, 358 U.S. 169, 177–78 (1958) (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952)) ("When [a] choice has to be made

sentenced to prison, their life and liberty are forever altered. Serving time in an American prison can be incredibly violent, and even when convicted individuals finish serving their sentences, the collateral consequences of a felony are severe and often include legal discrimination in employment, housing, public benefits, and voting.[105] With such great stakes, a court determining whether a person's actions are covered by a criminal statute without a mens rea element separating guilty from innocent conduct must take particular care not to guess at Congress's intent. The mens rea presumption and historical lenity ensure that courts take into consideration these potential punishments when interpreting criminal statutes. The end result is that Congress must draft statutes more clearly if it desires for an enumerated mens rea element not to apply to other offense elements.

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between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.").

105. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) (citations omitted) ("A person convicted of a crime, whether misdemeanor or felony, may be subject to disenfranchisement (or deportation if a noncitizen), criminal registration and community notification requirements, and the ineligibility to live, work, or be present in a particular location."); Shon Hopwood*, Improving Federal Sentencing*, 87 UMKC L. REV. 79, 81–83 (2018) (explaining the harshness of a federal prison sentence and the collateral consequences of a felony conviction).