Aliens Charged with Illegal Re-entry Are Denied Due Process and, Thereby, Equal Treatment Under the Law

*Larry Kupers**

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* The author, Larry Kupers, practiced federal criminal defense law as an assistant federal public defender in the Northern District of California from 1991 to 2003. From October 2003 to September 2004, he served as visiting counsel to the United States Sentencing Commission and to the Office of Defender Services in the Administrative Office of the United States Courts. In October 2004, he began working as a trial attorney at the Public Defender Service for the District of Columbia in Washington, D.C. The views expressed in this Article are entirely personal to the author and are neither intended nor authorized as statements of the organizations with which the author has worked or currently works.

This Article derives from defense briefings filed in several cases in which aliens were charged with entering the United States illegally after deportation in violation of 8 U.S.C. § 1326. Credit for whatever constitutional sophistication and polish that can be found in the arguments stated in this Article should go to Lara Vinnard, who is an assistant federal public defender in the Northern District of California. Ms. Vinnard took the trial court briefing in a case challenging the Ninth Circuit's *mens rea* requirement (or lack thereof) for section 1326 cases and transformed the trial court arguments into a formidable piece of appellate reasoning and advocacy. This Article borrows shamelessly from that briefing, but Ms. Vinnard is responsible only for the cogent and persuasive portions.

INTRODUCTION

Our Constitution guarantees due process of law and equal treatment under the law to all persons. There is no dispute that this guarantee applies to aliens present in our country, even aliens unlawfully present in our country.[1] In recent years, however, Congress has denied due process to aliens charged with illegally entering our country.[2] The courts, operating under the principle that Congress has plenary authority in all matters relating to immigration,[3] have generally been reluctant to interfere with or curb Congressional action in the immigration sphere.[4] As a result, alien defendants have received less

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[1] In the landmark case of *INS v. Lopez-Mendoza*, the Supreme Court held that the exclusionary rule does not apply to a deportation proceeding involving an illegal alien because such a proceeding is not criminal, and the costs of applying the rule outweigh its benefits. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984). Even so, a majority of the justices in *Lopez-Mendoza* assumed that "illegal aliens in the United States have Fourth Amendment rights . . . ." United States v. Verdugo-Urquidez, 494 U.S. 259, 263 (1990). The *Verdugo-Urquidez* Court held that aliens outside the United States do not have Fourth Amendment protection. *Id.* at 261. Despite the *Verdugo-Urquidez* Court's citation to the assumption of a majority of the justices in *Lopez-Mendoza* that aliens, even illegal, inside the United States do have Fourth Amendment rights, the *Verdugo-Urquidez* Court appeared to leave that question open by noting that the scope of the Fourth Amendment differs significantly from the trial rights guaranteed to criminal defendants in the Fifth Amendment. *Id.* at 264. Even if the Court in a future case were to deny illegal aliens within the United States the protection of the Fourth Amendment, the *Verdugo-Urquidez* Court instructs that illegal aliens charged with crimes in American courts will continue to enjoy the same due process and equal protection rights of defendants who are American citizens. *Id.* at 270-71 (collecting Supreme Court cases holding that Equal Protection and Due Process Clauses apply to illegal aliens).

[2] Glaring examples of action by Congress in this vein are found in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546. AEDPA and IIRIRA, designed to curtail judicial review by Article I judges of deportation and exclusion orders by Article III judges, repealed critical due process provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq. *See* United States v. Bakhtriger, 360 F.3d 414, 418 (3d Cir. 2004).

Before AEDPA and IIRIRA, aliens found deportable by an Article III immigration judge could appeal that order on direct review to a federal court of appeals. *See* 8 U.S.C. § 1105(a) (1994). An alien found excludable was not afforded direct review but could, along with aliens found deportable, seek collateral review of the order of exclusion through a writ of habeas corpus. 8 U.S.C. D 1105(a)(10) & 1105(a)b (1994). AEDPA repealed the immigration habeas provision in INA and IIRIRA repealed the remainder of U.S.C. § 1105a. Bakhtriger, 360 F.3d at 418. AEDPA and IIRIRA also made certain categories of INS decisionmaking entirely unreviewable such as removal of an alien based on the alien's criminal history. *Id.* (citing 8 U.S.C. § 1252(a)(2)(C)).

[3] *See* Harisades v. Shaughnessy, 342 U.S. 580 (1952); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889) (interpreting legislation excluding aliens as part of inherent sovereign power of federal government).

[4] Even though the Supreme Court held that nothing in AEDPA or IIRIRA precludes

than equal treatment under the law. This Article discusses one disturbing illustration of this unjust treatment: exposing an alien who re-enters this country after deportation to a lengthy term of imprisonment on a mistaken, but reasonable, belief that such entry is legal.

I. ILLEGAL RE-ENTRY AFTER DEPORTATION, 8 U.S.C. § 1326

8 U.S.C. § 1326 is a federal criminal statute prohibiting previously deported aliens from re-entering this country without express permission from the federal government. The statute provides in pertinent part:

(a) In general

Subject to subsection (b) of this section, any alien who —

> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his re-embarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

Subsection (b) provides enhanced penalties for aliens who have suffered certain kinds of convictions before deportation or removal.[5] An offender faces up to a twenty-year prison term if previously deported from the United States after suffering a felony conviction for an aggravated felony.[6] Also, an offender faces up to a ten-year prison term if previously deported by the United States after suffering any felony conviction or

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aliens facing removal on the basis of criminal convictions from seeking habeas review, the circuit courts have upheld AEDPA and IIRIRA's foreclosure of any sort of direct or non-habeas review. *See* INS v. St. Cyr, 533 U.S. 289, 308-10 (2001); Bakhtriger, 360 F.3d at 424-25 (joining First, Fourth and Fifth Circuits in holding that habeas review of criminal removal cases is limited to constitutional challenges or errors of law).

[5] 8 U.S.C. § 1326 (1988), *amended by* § 7345(a), 102 Stat. 4471 (1988) (current version at 8 U.S.C. § 1326 (2000)).

[6] *Id.* The term "aggravated felony" is defined in 8 U.S.C. § 1101(a)(43) (2000).

three or more misdemeanor convictions for drugs, crimes against a person, or some combination of both.[7]

The three-tiered sentencing scheme of section 1326 did not exist until 1988. Between 1952, when Congress enacted the illegal re-entry statute, and 1988, the maximum penalty for the crime was two years.[8] In 1988, Congress added subsection (b), thereby exposing illegal re-entry defendants to imprisonment for up to twenty years.[9] In 1995, the Supreme Court addressed the question of whether that three-tiered scheme creates three separate crimes or simply authorizes enhanced penalties once a defendant has been convicted of the conduct proscribed in section 1326(a).[10] The Court held that section 1326 contains one crime with two penalty enhancement provisions.[11] Thus, for a conviction under section 1326, the government must prove beyond a reasonable doubt to a jury that the defendant is an alien who entered the United States after a previous deportation and did so without the explicit permission of the United States Attorney General. Once such proof is made, the government need only show by a preponderance of the evidence at sentencing that the defendant has a certain criminal history in order to trigger an increased potential penalty of either ten years or twenty years.[12]

The absence of any culpability or *mens rea* requirement for a conviction under section 1326 reveals the unequal treatment of aliens under this section.[13] In 1968, when the maximum penalty for illegal re-entry was

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[7] *Id.* § 1326.

[8] Immigration and Nationality Act, ch. 477, 66 Stat. 229 (1952) (codified as amended at 8 U.S.C. § 1326 (2000)).

[9] 8 U.S.C. § 1326 (1988), *amended by* § 7345(a), 102 Stat. 4471 (1988) (current version at 8 U.S.C. § 1326 (2000)).

[10] Almendarez-Torres v. United States, 523 U.S. 224 (1995).

[11] *Id.* at 235.

[12] Though *Almendarez-Torres* remains good law, its precedential value is dubious. In a subsequent decision, *Apprendi v. New Jersey*, Justice Thomas famously declared he was in error to vote with the 5 to 4 majority in *Almendarez-Torres*. Apprendi v. New Jersey, 530 U.S. 466, 520 (2000) (Thomas, J., concurring).

[13] At times, the term "scienter" will be used to refer to a *mens rea* requirement that involves showing a subjective state of the defendant. By the Model Penal Code ("MPC") scheme of *mens rea* standards, purpose, knowledge, and recklessness are types of scienter because each term refers to a subjective state or state of the defendant's mind at the time the defendant engaged in the offense conduct. *See* MODEL PENAL CODE § 2.02 cmt. 2 (1985) ("In the Code's formulation, both "purposely" and "knowingly," as well as "recklessly," are meant to ask what, in fact, the defendant's mental attitude was."). The fourth MPC standard, negligence, is not a type of scienter because negligence does not require a showing as to the defendant's state of mind, but rather a showing that a "reasonable person" would have had a certain mental state. *Id.* at § 4 ("[Negligence] is distinguished from purposeful, knowing or reckless action in that it does not involve a state of

only two years, the United States Court of Appeals for the Ninth Circuit determined that no showing of culpability was required to convict an alien of the crime.[14] Yet, despite the ten-fold increase in potential penalty for aliens charged with illegal re-entry under section 1326, federal courts continue to follow the Ninth Circuit's rule of no culpability requirement.[15]

II. THE MAJORITY RULE: THE NINTH CIRCUIT'S TWENTY-SIX-YEAR-OLD BAN OF A REASONABLE MISTAKE DEFENSE TO ILLEGAL RE-ENTRY

In *Pena-Cabanillas v. United States*, a case involving prosecution under section 1326, the defendant argued on appeal that the district court erred in refusing to admit evidence of a birth certificate to support his contention that he had no intent to commit the crime.[16] The Ninth Circuit framed the issue as whether the government must prove that the defendant acted with specific intent in order to convict the defendant under section 1326.[17] A "specific intent" requirement would place the burden on the government to prove that the defendant crossed the border with the intent to enter the United States without the government's permission. As a result, the defendant would have a complete defense to the charge if he introduced evidence that he did not know that he was not permitted to re-enter and the government failed to rebut this.

In construing section 1326, the court found that the section did not have a culpability requirement.[18] The court reasoned as follows:

> 1) The statute itself makes no mention of any sort of *mens rea* or culpability requirement. Even so, the Supreme Court has found that courts still may construe a statute, with no reference to a *mens rea* requirement, to contain one.
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> 2) Due to its regulatory nature, however, certain legislation may dispense with the "conventional requirement for criminal conduct":

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awareness."). For that reason, negligence is considered an "objective" standard while the other three MPC standards are considered "subjective."

[14] Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968).

[15] United States v. Rivera-Sillas, 376 F.3d 889 (9th Cir. 2004); United States v. Ortiz-Villegas, 49 F.3d 1435 (9th Cir. 1995); United States v. Ayala, 35 F.3d 423 (9th Cir. 1994).

[16] *Pena-Cabanillas*, 394 F.2d at 786. The birth certificate would support the defendant's contention that he believed he was a U.S. citizen. *Id.* at 790.

[17] *Id.* at 788.

[18] *Id.* at 790.

an "awareness of some wrongdoing."[19]

3) Furthermore, section 1326 is not based on any common-law crime. Rather, it is purely regulatory, in an area over which Congress has exclusive and extensive constitutional authority. In other words, section 1326 is a *malum prohibitum* crime (i.e., a crime based on the legislature's attempt to proscribe or regulate a certain type of conduct) rather than a *malum in se* crime (i.e., a crime based on historically recognized blameworthy conduct).

4) Also, where the statute is "silent" regarding a *mens rea* requirement, the question is one of legislative intent.

5) The legislative history does not reveal whether Congress intended to exclude any reference to a *mens rea* or intent requirement.

6) Section 1326, however, was part of a comprehensive immigration act — the Immigration and Nationality Act of 1952. That Act contained several other new criminal statutes in which Congress made explicit references to intent.

7) Given the lack of any intent language in section 1326, the inclusion of explicit intent language in other criminal provisions within the same act, and the "intensive and searching investigation and study over a three year period" upon which the act was based, it would be "absurd" to conclude that Congress "inadvertently left 'intent' out of Section 1326."[20]

8) Accordingly, "the government need not prove that appellant knew he was not entitled to enter the country without the permission of the Attorney General."[21]

From this conclusion the appellate court drew the further inference that because the defendant's specific intent is immaterial to prove a violation of section 1326, the district court did not err in precluding the defendant's proof concerning his knowledge of his purported birthplace and, therefore, his lack of knowledge of the illegality of his re-entry.[22]

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[19] *Id.* at 788.

[20] *Id.* at 790.

[21] *Id.*

[22] *Id.*

The decision concludes with the following paragraph, entitled "General intent — Voluntary act":

> There still must be the general intent to do the prohibited act, to-wit enter. Obviously if appellant was drugged and carried across the line, he would not be guilty of the offense, although nevertheless subject to deportation. The indictment alleges he . . . knowingly and wilfully [sic] entered the United States . . . thus negating an involuntary act and alleging the general intent to enter. There is no real dispute as to this issue. Appellant does not contend that he entered involuntarily. In any event the jury found against the appellant on this issue.[23]

Thus, the Ninth Circuit (1) concludes that section 1326 is not a "specific intent" crime, but rather a "general intent" crime;[24] yet (2) equates a

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[23] *Id.*

[24] The three-fold *mens rea* scheme of the common law, in which offenses were labeled either specific intent, general intent, or strict liability crimes, generally exacerbates rather than diminishes the conceptual confusion over what is the *mens rea* standard contained in a federal criminal offense. As will be discussed below, the Supreme Court in *United States v. Bailey* acknowledged the confusion and tried to ameliorate it by resorting to the MPC *mens rea* scheme. United States v. Bailey, 444 U.S. 394, 403 (1980). For our purposes, the following explanations of the common-law terms "specific intent" and "general intent" provide some initial guidance:

> [T]he most common usage of "specific intent" is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime . . . . while by comparison general intent is only the "intention to make the bodily movement which constitutes that which the crime requires."

WAYNE R. LAFAVE, CRIMINAL LAW § 5.2(e) 254 (4th ed. 2003) (quoting State v. James, 560 A.2d 426 (Conn. 1989)).

The foregoing definition of "general intent," oft repeated with little thought, is a prescription for doctrinal disaster. Following such a definition, the notion of general intent quickly degenerates into something very much akin to, if not virtually identical with, strict liability. Two common steps in this degenerative process are: (1) the rule that diminished capacity is a defense to a specific intent crime, but not to a general intent crime and (2) the rule that proof of the *actus reus* suffices as proof of *mens rea* for a general intent crime. *See, e.g.*, United States v. Foppe, 993 F.2d 1444 (9th Cir. 1993) (reasoning that because bank robbery is general intent crime, "[t]he court should not instruct the jury on specific intent because the jury can infer the requisite criminal intent from the fact that the defendant took the property of another by force and violence, or intimidation") (citing United States. v. Porter, 431 F.2d 7, 10 (9th Cir. 1970), *cert. denied*, 400 U.S. 960 (1970)); United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975). The corrective to this degeneration of the general intent standard is the Supreme Court's clarification in *Bailey v. United States* of the common-law standard of general intent through the use of the MPC standard of knowledge. *See infra* text accompanying notes 50-70. The teachings of *Bailey* and *Staples v. United States* did not disabuse lower courts of their erroneous conceptions of general intent. For example, the Seventh Circuit Court of Appeals joined the other circuit courts of appeals in holding

general intent crime with a strict liability crime by only allowing involuntariness as a defense to the crime. It should be noted before going further that the example given by the *Pena-Cabanillas* court (i.e., being dragged across the border while drugged) is a defense not to a general intent crime, but to a strict liability crime because the requirement of voluntariness is part of the *actus reus*, not the *mens rea* of a crime.[25]

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that section 1326, although labeled a general intent crime, does not allow a mistake defense. *See infra* Part V.

[25] More recent Ninth Circuit cases exhibit ever more confusion and incoherence when it comes to the requisite mental components of the section 1326 offense. In *United States v. Quintana-Torres*, 235 F.3d 1197, 1200 (9th Cir. 2000), the defendant contended that the government failed to produce any evidence that he had entered the United States voluntarily and therefore his section 1326 conviction must be reversed. The government argued that it was not required to prove that the defendant entered this country voluntarily. The court rejected both positions. The court began from the premise that "[t]here is no crime without an intentional act of some kind." *Id.* at 1199 ("No crime without volition is the foundational axiom of our criminal law."). From this premise, the court inferred that "the voluntariness of the return is an element of the crime and, as such, must be proved beyond a reasonable doubt by the prosecution." *Id.* at 1200. The court then recognized that there might be situations in which an alien could be present in this country after a previous deportation and yet not have entered this country voluntarily. For example, the alien could have been extradited to this country against his will, could be paroled in by the proper authorities, could be sleeping on a train which against his expectations enters this country or could be on a plane flying over United States territory when engine trouble forces the plane to make an emergency landing. Because such examples are unlikely possibilities, however, the reasonable juror may infer as a matter of fact, not a presumption of law, that an alien present in this country entered voluntarily. *Id.* Accordingly, unless a section 1326 defendant affirmatively demonstrates one of these or a similar possibility actually occurred, it is appropriate to find a voluntary entry on the alien's part. *Id.*

In *United States v. Rivera-Sillas*, 376 F.3d 887 (9th Cir. 2004), the Ninth Circuit employed very different, indeed contradictory, reasoning in affirming a section 1326 conviction. In that case, the defendant argued that his conviction must be reversed because the government neither pleaded nor proved that he entered the country voluntarily. The panel's first response to this argument was that such proof is unnecessary because the defendant was prosecuted under the "found in" prong of section 1326, a crime not requiring proof of any action whatsoever on the defendant's part. *Id.* at 890-91. Anticipating that response, the defendant in *Rivera-Sillas* further argued that if proof of a voluntary entry is not required for a conviction pursuant to section 1326, then an alien who is forcibly transported to the United States against his or her will is still subject to conviction for illegal re-entry. *Id.* at 893. In response to this *reductio ad absurdum* argument, the *Rivera-Sillas* court cited *Quintana-Torres* for the proposition that an unknowing or involuntary entry into the United States can be a defense to a section 1326 charge. *Id.* However, the government is not required to prove a voluntary entry; rather, "unknowing or involuntary entry" is an affirmative defense for which the defendant has the burden of producing the requisite evidence. *Id.* The reason for this shift of the burden of proof from government to defendant is that "involuntary presence in the United States is the exception and not the rule . . . ." *Id.* The court went on to explain that "[w]e are comfortable presuming that a defendant who is found in the United States willfully and knowingly

As a result of *Pena-Cabanillas*, the Ninth Circuit model jury instruction for a section 1326 prosecution reads as follows:

> The defendant is charged in Count ___ of the indictment with reentry of deported alien in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
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> First, the defendant is an alien;
>
> Second, the defendant was deported from the United States; and
>
> Third, the defendant reentered the United States without the consent of the Secretary of the Department of Homeland Security or of any representative of the department.[26]

The third element here is actually two elements: (i) that the defendant re-entered (ii) without governmental consent. The Ninth Circuit's model jury instruction reaffirms in a comment that the crime of illegal re-entry is a "general intent" crime, as opposed to attempted illegal re-entry, which is a specific intent crime.[27]

As noted above, the *Pena-Cabanillas* court made its decision at a time when the maximum penalty for a violation of section 1326 was two years imprisonment. In two subsequent cases, which were decided after Congress had raised the maximum penalty to twenty years, the Ninth Circuit scoffed at the argument that the rule of *Pena-Cabanillas* must be reconsidered in light of the substantially increased penalty provision of § 1326.[28] In both decisions, the argument for reconsideration of the *Pena-*

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acted in order to enter this country." *Id.* at 893.

Neither decision is doctrinally coherent. Given that the *Rivera-Sillas* court holds that the "found in" prong of section 1326 does not include a showing of a voluntary return (or of any voluntary action), it is difficult if not impossible to explain how the court can hold that lack of voluntariness is a defense to the crime, albeit an affirmative defense. Given that the *Quintara-Torres* court holds that voluntary and knowing entry are elements of the crime of illegal re-entry, it is incomprehensible that the court can allow that such elements need not be pleaded or proved by the government, but rather can be deemed to have been demonstrated on the basis of a factual presumption made by the jury when the government shows that the defendant is an alien previously deported and later found in this country.

[26] MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT Instruction 9.5 (2004).

[27] *Id.* cmt. (citing United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1190 (9th Cir. 2000) for proposition that attempted illegal re-entry is specific intent crime).

[28] *See* United States v. Ortiz-Villegas, 49 F.3d 1435 (9th Cir. 1995); United States v. Ayala, 35 F.3d 423 (9th Cir. 1994).

Cabanillas rule was rejected summarily without any discussion much less any reasoning.

III. THE EVANESCENT MINORITY RULE: THE SEVENTH CIRCUIT ALLOWED A REASONABLE MISTAKE

The Seventh Circuit reached a contrary result on the issue of whether section 1326 includes a *mens rea* requirement. In *United States v. Anton*,[29] the appellate court addressed whether the district court properly excluded evidence concerning the defendant's reasonable belief that he was legally entitled to re-enter the United States. That exclusion was proper unless there is a reasonable mistake defense to the charge of re-entry. Whether a reasonable mistake defense exists depends on whether there is a scienter component to the government's proof requirement in a section 1326 prosecution to the effect that the defendant did not have the express consent of the Attorney General to re-enter this country.

The *Anton* court held that there is a reasonable defense belief in a section 1326 prosecution. The court's reasoning proceeded as follows:

> 1) On its face, the statute does not mention intent. Under Supreme Court precedent, however, that omission is not dispositive of whether the statute requires a showing of intent.[30]
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> 2) When the language of a statute is not clear and unequivocal, the court must look to the legislative intent in order to resolve the ambiguity.[31] The first step is to consider the relevant legislative history. In this instance, there is none regarding this specific issue. Therefore, the court must then turn to principles of the common law as well as precepts suggested by the Model Penal Code ("the MPC").[32]
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> 3) The Ninth Circuit's construction of the statute in *Pena-Cabanillas* must be rejected. The Ninth Circuit's first reason was that the statute is of a regulatory nature and, therefore, a *malum prohibidum*, not a *malum in se* crime. This reason must be rejected because section 1326 is not a regulatory offense analogous to public welfare

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[29] United States v. Anton, 683 F.2d 1011 (7th Cir. 1982), *overruled by* United States v. Carlos-Comenares, 253 F.3d 276 (7th Cir. 2001). On the legitimacy of this "overruling" of one Seventh Circuit three-judge panel by a subsequent three-judge panel, see *infra* note 107.

[30] *Anton*, 683 F.2d at 1013-14 (citing United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978)).

[31] *Id.* at 1014.

[32] *Id.* (citing United States v. Bailey, 444 U.S. 394, 406 (1980)).

offenses that carry no intent requirement.[33] Rather, illegal re-entry does not involve the same type of harm inherent in other strict-liability regulatory offenses such as selling narcotics or possessing an unregistered dangerous weapon. The harm caused by illegal re-entry is mitigated in the case of an alien who re-enters pursuant to a reasonable belief that he or she is entitled to do so. Also, the availability of a civil remedy, namely deportation, mitigates the potential harm.[34]

4) The Ninth Circuit's second reason for eschewing an intent requirement is that the statute contains no intent language whereas other statutes in the same act contain intent language. This reason is premised on a statutory construction maxim: "When Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."[35] Although this is an "accepted canon of statutory construction,"[36] it is only an "aid" to statutory construction and not a binding rule of law.[37]

5) The term "intent" designates a variety of culpable states including purpose, knowledge, recklessness and negligence.[38] Omission of terms such as "willful" or "knowing" is not determinative of a statute's *mens rea* requirement. Additionally, the *mens rea* component may vary between elements of the same crime.

6) With regard to the third element of proof in a section 1326 prosecution, that the alien re-entered without the government's consent, it does not make sense to conclude that an alien, who reasonably believes he or she is legally entitled to re-enter this country, is engaging in conduct within the purview of the statute. In other words, if the alien reasonably believes that his or her re-entry is legally authorized, then the alien has no criminal culpability. In that case, the alien's conduct is not marked by

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[33] *Id.* at 1015 (citing Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 83 (1933)); United States v. Dotterweich, 320 U.S. 277, 280-81 (1943).

[34] The Court also could have noted the availability of an alternative criminal remedy, to wit, 8 U.S.C. § 1325 (2000). That statute proscribes any illegal entry into this country and carries for a first-time offense a statutory maximum six-month term of incarceration. 8 U.S.C. § 1325(a)(3) (2000). Moreover, given the misdemeanor statute, failure to ascribe any scienter element to that statute does not contravene the principle that public welfare offenses may be strict liability crimes. *See id.*

[35] *Anton*, 683 F.2d at 1016.

[36] *Id.*

[37] *Id.*

[38] *Id.* (citing United States v. Bailey, 444 U.S. 394, 403-04 (1980)).

> purpose, knowledge, recklessness, or negligence with regard to the third element of proof.[39]
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> 7) Additionally, the common law does not permit a strict liability standard for an offense punishable by imprisonment or other severe sanctions.[40]
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> 8) Furthermore, the rule of lenity counsels that the ambiguity in this statute should be resolved in favor of lenity.[41]
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> 9) Finally, again citing the Supreme Court for a common-law principle, the court reasons that interpreting a statute to include a *mens rea* component is the rule, rather than the exception, "in Anglo-American criminal jurisprudence."[42]

After concluding that section 1326 has some intent requirement, the *Anton* court then considered whether the alien's specific defense, that he believed he was legally entitled to enter the United States, was viable. The court first discussed the traditional distinction between a mistake of fact and a mistake of law. The former is a viable defense that negatives the intent requirement, while the latter usually is not a defense.[43] The alien's mistake, though roughly categorized as a mistake of law, had to do with the legal "events that preceded his return to the United States."[44] Thus, the alien's mistake is much more like a mistake of fact and cannot be treated the same as the typical plaint that the defendant did not know "the law." The court called this mistake "a collateral mistake of law," and reasoned that such a mistake, when reasonable, negatives criminal intent just as with a mistake of fact.[45] Accordingly, in such circumstances, it is appropriate to permit a limited mistake of law defense that requires a reasonable mistake or a reasonable, but erroneous

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[39] *Id.* The court was careful to distinguish its conclusion from a holding that ignorance of the law is a defense. *See id.* at n.8. In this case, the alien did not contend that he did not generally know that the law precluded his re-entry; rather, the alien contended that he had a reasonable belief that under the law his re-entry was not barred.

[40] *Id.* at 1016-17 (citing, inter alia, United States v. United States Gypsum Co., 438 U.S. 422, 442 n.18 (1978)). The court also relies on section 2.05 of the MPC for the proposition that no strict liability offense should carry a sentence of imprisonment. *Id.* at 1016-17.

[41] *Id.* (citing United States v. Bass, 404 U.S. 336, 347 (1971)).

[42] *Id.* at 1017 (citing United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978)).

[43] *Id.* at 1017-18 (citing United States v. Barker, 546 F.2d 940, 946 (D.C. Cir. 1976)).

[44] *Id.* at 1018.

[45] *Id.*

belief.[46]

In dissent, Judge Posner contended that:

> 1) The statute is not ambiguous. Its language is designed to make prima facie liability as broad as possible, and, thereby, the defense of government consent as narrow as possible. Accordingly, there is simply no room to read into the statute an intent requirement.
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> 2) The harsh result of imposing strict liability for a re-entry is not unreasonable given that the alien was previously deported from this country.[47] Judge Posner draws an analogy between the re-entry statute and statutory rape. In the latter case, there is strict liability as to the victim's age because "overdeterrence" is acceptable when society wants to discourage the proscribed activity. A bright line rule of strict liability facilitates enforcement. Similarly, overdeterrence is acceptable to discourage illegal re-entry.
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> 3) A review of prior alien exclusion and re-entry statutes demonstrates that Congress specifically intended to tighten the consent element by adding the term "express consent of the Attorney General," thereby placing the burden on the alien to show authorized re-entry.[48]

In speaking about Congress not unreasonably placing the burden on previously deported aliens to show authorized re-entry, Judge Posner misses the point. The majority holding of the case does place the burden on the alien defendant to demonstrate that he mistakenly, but

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[46] *Id. But see* W. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.6(b) (2d ed. 2005) (criticizing "uncritical general acceptance" that mistake which negates element of a crime must be reasonable).

[47] *Anton*, 683 F.2d at 1019. Other circuits have relied on this logic to conclude "that an alien who has broken our laws once should not be given the benefit of the doubt." *See* United States v. Soto, 106 F.3d 1040, 1041 (1st Cir. 1997) (Posner, J., dissenting); *see also* United States v. Torres-Echavarria, 129 F.3d 692, 697-98 (2d Cir. 1997) (citing Judge Posner and noting that "[t]he statute simply, and logically, makes the presumption of unlawful intent conclusive").

[48] Judge Posner wrote:

> The origin of the statute during the wartime "Red Scare" that swept this country after the communist revolution in Russia in 1917, the extension of the statute in the 1920s, shortly after America abandoned its historic policy of essentially unrestricted immigration, from subversive aliens to all aliens, and its strengthening in 1952, during another xenophobic wartime period, make it doubtful that concern for the welfare of previously deported aliens has ever figured in the congressional thinking on this legislation.

Anton, 683 F.2d at 1021 (Posner, J., dissenting).

reasonably, believed that the Attorney General had given him consent to enter the country. Judge Posner seems to use the language of allocating burden in a more figurative rather than technical sense: for him it is quite appropriate to presume, categorically, that the alien's mistake was not reasonable.

IV. THE SUPERIORITY OF *ANTON*'S RULE TO *PENA-CABANILLAS*'S RULE

A good place to start in evaluating the doctrinal conflict between *Pena-Cabanillas* and *Anton* is to explore a very salient commonality between the two decisions: both courts issued their holdings at a time when the maximum statutory penalty for violating section 1326 was two years. Six years after *Anton*, Congress increased that penalty provision ten-fold, to twenty years. Yet, no circuit court has revised the *mens rea* requirement for the statute in light of its severely heightened sanction.

It should be noted that the majority rule deeming section 1326 a "strict liability crime" sweeps more broadly than just what was at stake in *Pena-Cabanillas*, the third element of re-entry without the permission of the government. The first element of the crime, that the defendant is an alien, is also included. Thus, if a defendant reasonably, but mistakenly, believes that he is an American citizen, such a belief is barred as a defense.[49] Also, a situation in which a defendant reasonably, but mistakenly, believes that he has not crossed the border, but rather has remained in his own country, would not afford the defendant a defense to the charge.

The next task is to understand thoroughly the disparity between the rules of the two cases. *Pena-Cabanillas* held that with respect to the government's requirement to prove that the alien defendant did not have the express consent of the Attorney General to re-enter this country, there is no culpability or "intent" requirement whatsoever. *Anton* held that there is a culpability requirement such that if the defendant can prove he was reasonably mistaken about whether the Attorney General gave him express consent to enter, the defendant has a defense to the charge.

How does the *Anton* rule translate into a culpability requirement? The answer must be that the requirement is a matter of negligence, and that the defendant was reasonable in having a mistaken belief that caused

[49] *See* United States v. Valles, No. 00-101117, 2001 WL 537772 (9th Cir. 2001) (holding in unpublished decision that defendant's reasonable belief that he was American citizen at time of his re-entry is barred as defense to section 1326 charge under *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968)).

him to engage in the offensive conduct. If the defendant's mistaken belief was unreasonable, then he is guilty of illegal re-entry. Moreover, according to *Anton*, the culpability inherent in the express consent element is not a proof requirement for the government, but rather an affirmative defense for the defendant.[50]

What is the proper rule? One key to the analysis is the minimal culpability standard the Seventh Circuit assigned to the express consent element in *Anton*, despite reasoning that would seem to call for a more robust standard. The *Anton* court cited and relied upon the Supreme Court's decision in *United States v. Bailey*[51] at three different junctures, including a citation for the proposition that when a statute is silent about *mens rea*, it is necessary to turn to common-law principles and the MPC.[52] Yet, the *Anton* court ignored the holding and reasoning of *Bailey*, a case in which the Supreme Court construed a statute closely analogous to the illegal re-entry statute and found an implied *mens rea* requirement of knowledge.

In *Bailey*, the government prosecuted the defendants for violating 18 U.S.C. § 751(a), which criminalizes escape from the custody of the Attorney General.[53] The defendants raised the defenses of duress and necessity due to the conditions at the jail.[54] The district court excluded these defenses, and the defendants were convicted.[55] On appeal, the D.C.

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[50] *See generally Anton*, 683 F.2d 1011.

[51] United States v. Bailey, 444 U.S. 394 (1980).

[52] *Anton*, 683 F.2d at 1014, 1014 n.3, 1016.

[53] *Bailey*, 444 U.S. 394 (1980). At the time of the *Bailey* decision, 18 U.S.C. § 751(a) provided as follows:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both, or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 751(a) (1994).

The *Bailey* Court enumerated the elements of this offense as follows: (1) defendant had been in the custody of the Attorney General; (2) as a result of conviction or felony arrest; and (3) had escaped from that custody (i.e., had absented himself from custody without permission). *Bailey*, 444 U.S. at 407.

[54] *Bailey*, 444 U.S. at 397.

[55] *Id.* at 398.

Circuit reversed the convictions, holding that section 751(a) required the government to prove that a defendant, in leaving the jail, intended to avoid confinement.[56] That is, the D.C. Circuit believed that the statute, though silent on any *mens rea* requirement, must be read to include a specific intent showing.

The Supreme Court reversed the D.C. Circuit's decision.[57] The Court agreed with the circuit court that some scienter requirement must be read into the statute, but concluded that only general intent, rather than specific intent, was necessary.[58] How the Court reached that conclusion, as well as how the Court explicated the notion of general intent, are very instructive to the issue at hand.

The Court began with a quotation very familiar in cases involving a *mens rea* issue: criminal liability is based on an concurrence of two factors, "an evil-meaning mind [and] an evil-doing hand. . . ."[59] Unlike the *Pena-Cabanillas* and *Anton* courts, however, the *Bailey* Court was not satisfied to launch into its *mens rea* inquiry without achieving some measure of clarity regarding the basic standards at issue. The Court noted that the "venerable distinction" between specific and general intent "has been the source of a good deal of confusion."[60]

As a result, the Court preferred to use the MPC's alternative scheme of culpability standards and, specifically, the Code's distinction between purpose and knowledge as *mens rea* standards. A person acts purposefully with regard to a certain result he or she causes if she consciously desires that result. A person acts knowingly with regard to a certain result she causes if the person is aware that the result is practically certain to follow from her conduct. Thus, one may act knowingly with regard to a certain result without any desire for that result, indeed, even with a preference that the result not occur.[61]

The Court then posited "loose" correspondences between the MPC notion of purpose and the common-law notion of specific intent, and between the MPC notion of knowledge and the common-law notion of general intent. The Court recognized the superior clarity and precision of the MPC culpability scheme and approved its use in federal criminal law.[62] The Court also adopted from the MPC the basic principle that

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[56] *Id.*

[57] *Id.* at 417.

[58] *Id.* at 408-09.

[59] *Id.* at 402 (quoting Morissette v. United States, 342 U.S. 246, 251 (1952)).

[60] *Id.* at 403.

[61] *Id.* at 404.

[62] *Id.*

mens rea is element-specific. In other words, the *mens rea* inquiry must determine and assign to each of the elements of a crime the appropriate culpability standard.[63] Thus, talk of "general intent crimes" and "specific intent crimes" is misleading and should be left behind when the proof requirements for a federal crime are in dispute.

Before determining the level of *mens rea* that should attach to the third element of the federal escape statute, that the defendant absented himself from custody without permission, the Court cited the following *mens rea* principles:

> 1) For most crimes, the *mens rea* of knowledge is sufficient and the heightened requirement of purpose is unnecessary.[64]
>
> 2) In determining the appropriate level of mental culpability, courts must first follow Congressional intent.[65]
>
> 3) Congressional silence on that issue (i.e., omission of any mention of *mens rea* in the statutory language) cannot be construed as eliminating *mens rea* from the crime.[66]
>
> 4) In determining the appropriate *mens rea* for a crime, courts must also heed practical concerns germane to "the administration of the federal system of criminal justice" and not be "obsessed with hair-splitting distinctions. . . that Congress neither stated nor implied when it made the conduct criminal."[67]
>
> 5) "[T]he general rule is that criminal liability requires an 'evil-meaning mind.'"[68]

That is, felony convictions should include a *mens rea* proof requirement.

A corollary of the foregoing principle is that strict liability, or the absence of a *mens rea* requirement, is the exception and appropriate only with regard to a limited set of offenses that are not punishable by imprisonment. The *Bailey* Court does not explicitly adopt this corollary, but cites to the MPC as having adopted the rule that only violations

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[63] *Id.* at 406 (citing MODEL PENAL CODE cmt. 123 (Proposed Official Draft 1962)).

[64] *Id.* at 404.

[65] *Id.* at 406.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 404 n.4 (directing comparison between Morissette v. United States, 342 U.S. 246, 250-63 (1952) and United States v. Dotterweich, 320 U.S. 277, 280-81 (1943)).

punishable by fine can be strict liability offenses.[69]

Having clarified basic principles and terms, the Court then turned to the third element of section 751(a), the requirement that the prosecution show that the defendant absented himself from custody without permission.[70] The Court made quick work of the D.C. Circuit's conclusion. The Court held that knowledge is a sufficient *mens rea* requirement based on the general principle that knowledge is sufficient for most offenses, and nothing in the language or legislative history of section 751(a) indicates otherwise.[71] Furthermore, the MPC and the proposed revision of the Federal Criminal Code agree that knowledge is a sufficient *mens rea* requirement for this crime.[72]

In holding that knowledge is sufficient and purpose is unnecessary, the Court was careful to note that it was deciding only between those two standards; the Court did not address the question of whether a lower or less demanding *mens rea* standard, such as recklessness or negligence, would be adequate.[73] Be that as it may, *Bailey* stands for the proposition that some level of *mens rea* must attach to the third element of the escape statute, but not the heightened level of purpose. If so, then a defendant facing such a charge may offer a reasonable mistake defense. If the defendant did not know that he was leaving confinement without permission, then that fact negatives the element of the government's proof that the defendant had the requisite *mens rea*. Thus, the defendant must be acquitted. Even if the *mens rea* standard is lowered to recklessness or negligence, the defendant will still have a good faith or reasonable mistake defense that operates to negative an element of the offense rather than as an affirmative defense.

Following this reasoning, it is incumbent upon the Ninth Circuit, and any other circuit following the rule of *Pena-Cabanillas*, to demonstrate why, with respect to *mens rea*, the third element of section 1326 is to be treated differently from the third element of section 751(a). For ease of comparison, a chart follows.

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[69] *Id.* at 406 n.4 (citing MODEL PENAL CODE § 2.05(1)(a)).

[70] *Id.* at 407.

[71] *Id.* at 405-06.

[72] *Id.* at 408-09.

[73] *Id.* at 407-08 ("A court may someday confront a case where an escapee did not know, but should have known, that he was exceeding the bounds of his confinement or that he was leaving without permission.").

Comparison of Elements of Two General Intent Federal Crimes

	Escape from Custody, 18 U.S.C. § 751(a)	Illegal Re-entry After Deportation, 8 U.S.C. § 1326
1	Defendant had been in custody of Attorney General	Defendant is an alien
2	as a result of conviction or felony arrest; and	who was deported from the United States; and
3	had escaped from that custody (i.e., defendant had absented himself from custody without permission).	re-entered the United States without the consent of the Government (i.e., Secretary of the Department of Homeland Security).

The question that screams out is why a defendant previously convicted of a felony offense who then escapes from custody should be accorded a greater *mens rea* proof standard and, therefore, a mistake defense, when an alien previously deported is not. Indeed, these two offenses are very similar in nature for two reasons: the first element of both offenses is a legally defined status and the third element of both offenses is a quasi-legal condition — an element whose meaning derives from the presence or absence of facts that have legal effect. In one case, the alleged escapee cannot be convicted unless the government proves that the jail exit was without permission. In the other case, the alien re-entrant cannot be convicted unless the government proves that the border entrance was without permission. Why one felony should carry protection for a defendant acting in good faith, while the other does not, appears inexplicable.

Two responses might be forthcoming. First, it might be contended that escape was a crime at common law, and, at common law, courts deemed it a general intent crime. In contrast, illegal re-entry has no common-law precedent because it is entirely a creature of statute. Added to this last point may be the observation that illegal re-entry is a regulatory crime unlike traditional criminal offenses. Therefore, because of its regulatory nature, a *mens rea* element is not required, making it a strict liability crime.

Second, much might be made of the idea that Congress has plenary power to control our borders. To achieve this end, it may be argued that whatever proof problems prosecutors might have in winning convictions under the re-entry statute should be dissolved in order to allow effective

policing of our borders.

Both of these responses ignore two salient facts about the *Pena-Cabanillas* rule. First, this is a statute that carries a statutory maximum punishment of twenty years. It is not a misdemeanor carrying a punishment of no more than one year or merely a violation punishable by a fine. Second, the strict liability version of the offense can easily lead to convictions of innocent defendants.

With regard to the distinction between a common-law and a regulatory crime, the *Bailey* Court cited both earlier Supreme Court precedent (e.g., the *Morissette* and *Dotterweich* decisions) and the MPC for the proposition that strict liability is only appropriate for crimes that do not impose significant sanctions such as imprisonment terms.[74] Justice Blackmun, while sitting as a circuit court judge, drew up a handy list of criteria for strict liability crimes:

> [T]here is. . . no mention of an intent in the statute or regulation; the duty imposed is reasonable, under the circumstances, and adherence properly expected; the statutory scheme is not one taken from the common law and congressional purpose is supported; *and conviction does not gravely besmirch one's reputation, involving only a misdemeanor.*[75]

Stretching Justice Blackmun's misdemeanor criterion to two years arguably might be appropriate. Retaining strict liability as the standard for a crime punishable by a twenty-year term of imprisonment, however, blatantly contravenes the rule the Supreme Court has repeatedly upheld: scienter (i.e., a proof requirement that the defendant acted with some sort of mental or subjective state) must attach to all crimes except for a limited set of crimes created by Congress and known as "public welfare

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[74] The Model Penal Code states:

> It has been argued, and the argument will undoubtedly be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement precludes litigation of the culpability of alleged deviation from legal requirements, the enforcers cannot rightly demand the use of penal sanctions for the purpose. Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed.

MODEL PENAL CODE § 2.05 cmt. at 283 (1985).

[75] United States v. Unser, 165 F.3d 755, 762-63 (10th Cir. 1999) (citing Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960)) (emphasis added); Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 362 (2001).

offenses."[76]

More importantly, in 1994, the Supreme Court definitively rejected the argument raised here that no *mens* rea element is required for a regulatory or public welfare offense with no common-law antecedent. In *Staples v. United States*, the Court held that even for a registration offense involving a machine gun, the government must prove that the defendant knew that the weapon in question was capable of automatic fire.[77] The statute at issue was 28 U.S.C. § 5861, which makes it a crime punishable by up to ten years imprisonment for possession, inter alia, of a machine gun without proper registration.

The government argued that no *mens rea* requirement was appropriate with regard to the machine gun element because the offense at issue was a regulatory or public welfare offense. The fact that the registration statute bore no common-law antecedent, much less an antecedent with a *mens* rea requirement attached, supported the government's argument. The *Staples* Court, however, flatly rejected the government's position, identifying the harsh penalty of up to ten years imprisonment for the registration offense as "a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*."[78]

The *Staples* decision may be fairly read to give an emphatic nod to the *Anton* court's approach over that of *Pena-Cabanillas*. The registration statute at issue in *Staples* contained no *mens rea* language, while other provisions of the same legislative act, the National Firearms Act,[79] explicitly specified intent requirements.[80] Also, the crime had no common-law antecedent with a scienter requirement,[81] and the harm against which Congress legislated was very substantial: possession and possible use of a very dangerous type of weapon, machine guns.[82] Despite these factors, which are very similar to those that the *Pena-*

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[76] *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 69-72 (1994).

[77] Staples v. United States, 511 U.S. 600, 602 (1994).

[78] *Id.* at 616.

[79] 26 U.S.C. §§ 5801-72 (2004).

[80] The *Staples* majority was unswayed by the dissent's argument that the Court should not import a *mens rea* element into section 5861(d) because Congress omitted any mention of intent while including it in other sections of the same legislative act. *Staples*, 511 U.S. at 636 n.21 (Stevens, J., dissenting). Rather, the majority concluded that the overriding importance of a *mens rea* element cannot be inferentially negated by omission. *Id.* at 619.

[81] *Id.* at 605-06; *see also id.* at 620 n.1 (Ginsburg, J., concurring) ("[W]e have not confined the presumption of *mens rea* to statutes codifying common-law offenses, but have also applied the presumption to offenses that are entirely 'creatures of statute.'").

[82] *Id.* at 608 (noting government's argument that all guns are dangerous devices that put their owners fairly on notice that they must determine at their hazard if there are registration requirements for their weapons).

Cabanillas and *Anton* courts considered, the *Staples* Court insisted that the presumption in favor of *mens rea* must be applied to a statute regulating machine guns.

It is of critical importance that the reasoning of *Staples* amounted to a significant turn in the Court's *mens rea* jurisprudence. As noted above, the Supreme Court, in a series of cases, most notably the *Morissette* decision, took an approach that began by borrowing the general principle that criminal liability required a *mens rea* proof requirement from the common law.[83] The Court, however, then carved out a set of exceptions known as public welfare offenses, in which public policy justified strict liability.[84] Furthermore, the limited penalties involved in public welfare offenses assuaged the concern about not having a culpability requirement. The *Staples* Court discussed this principle and its rationale:

> The potentially harsh penalty attached to violation of § 5861(d) — up to 10 years' imprisonment — confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*. Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary. As commentators have pointed out, the small penalties attached to such offenses logically complemented the absence of a *mens rea* requirement: In a system that generally requires a "vicious will" to establish a crime, imposing severe punishments for offenses that require no *mens rea* would seem incongruous.[85]

The Court then aptly formulated the principle as a rule of statutory construction: "In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*."[86]

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[83] Liparota v. United States, 471 U.S. 419 (1985); United States v. United States Gypsum Co., 438 U.S. 422 (1978); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922).

[84] *Staples*, 511 U.S. at 607.

[85] *Id.* at 616-17 (citations omitted).

[86] *Id.* at 618.

The *Staples* Court, however, was not willing to adopt "such a definitive rule of construction. . . ."[87] The Court's language in rejecting a definitive rule is indicative of a critical turn in the Court's approach to *mens rea*:

> Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.[88]

Thus, rather than a formalistic approach that looks at the presence or absence of the imprisonment sanction to determine if *mens rea* is required, the *Staples* Court's approach puts front and center the inquiry whether, without a *mens rea* requirement, the defendant could be blameless, and yet, still convicted of an offense carrying significant sanctions. Central to the *Staples* Court's reasoning was the consideration of an entire class of defendants charged under section 5861(d) who, despite their innocence, would be convicted if not for a *mens rea* requirement:

> Here, there can be little doubt that . . . the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state — ignorance of the characteristics of weapons in their possession — makes their actions entirely innocent. . . . But in the Government's view, any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be automatic.[89]

Therefore, if there is potential for innocents to suffer felony conviction without a *mens rea* requirement, then, unless Congress has explicitly directed otherwise, a *mens rea* requirement must be read into the statute.

One astute legal scholar, John Wiley, has demonstrated that the reasoning of the *Staples* Court is emblematic of a distinct *mens rea* methodology for statutory construction that the Court adopted in an

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[87] *Id.*

[88] *Id.* at 618-19.

[89] *Id.* at 615.

important series of recent cases.[90] Professor Wiley, purporting to connect with a straight line the points from the Supreme Court decisions in *Liparota v. United States*,[91] *Ratzlaf v. United States*,[92] *Staples*,[93] and *United States v. X-Citement Video, Inc.*,[94] formulates what he calls the "Principle of Mandatory Culpability." Professor Wiley described this principle as follows:

> The Court will interpret a statute to require the government to prove moral blameworthiness if the Court can imagine an extreme hypothetical in which the government's interpretation would reach action that is not culpable according to an unwritten moral code. . . . The basic culpability rule would ask whether the government's interpretation would incriminate innocent conduct, conduct that is not inevitably nefarious.[95]

As conventional wisdom suggests, the proof is in the pudding.

Just one year after Professor Wiley articulated his principle of mandatory culpability, a good test of its descriptive (and predictive) power arose when the Supreme Court addressed the *mens rea* requirements of the federal bank robbery statute, 18 U.S.C. § 2113(a).[96] In *Carter v. United States*,[97] the Court held that bank larceny, a crime under 18 U.S.C. § 2113(b), is not a lesser included offense of bank robbery because, in part, bank robbery does not require proof of specific intent to steal or purloin and does not require an intent to carry away (i.e., asportation).[98] In contrast, bank larceny requires proof of both.

In reaching its holding, the Court applied the methodology of hypotheticals consistent with the mandatory culpability principle. Contrasting the crimes of federal bank larceny and federal bank robbery,

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[90] John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1042-46 (1999).

[91] Liparota v. United States, 471 U.S. 419 (1985) (stating in food stamp fraud prosecution that government must prove defendant knew possession or acquisition of food stamps was unauthorized despite lack of any *mens rea* requirement in statutory language).

[92] Ratzlaf v. United States, 510 U.S. 135 (1994) (stating that willfulness element in criminal structuring statute requires government to prove that defendant acted with knowledge that structuring activity was unlawful).

[93] *Staples*, 511 U.S. 600.

[94] United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (stating term "knowingly" in federal child sexual exploitation statute requires government to prove that defendant knew victim was minor).

[95] Wiley, *supra* note 90, at 1053.

[96] 18 U.S.C. § 2113(a) (2004); *see* Carter v. United States, 530 U.S. 255, 270 (2000).

[97] *Carter*, 530 U.S. 255.

[98] *Id.* at 258-59.

the Court reasoned that if bank larceny did not have the specific intent *mens rea* element of "intent to steal or purloin," there would be the risk that seemingly innocent conduct would be punished. For example, a defendant may be punished for taking money that she believes is her own.[99] In the case of bank robbery, however, where the crime requires proof of a forceful taking, the Court noted that even when the defendant believed that the money belonged to her, the forceful taking of it "falls outside the realm of the 'otherwise innocent.'"[100] Using the hypothetical innocent defendant methodology described by Professor Wiley, the Court concluded that a specific intent requirement need not be read into the bank robbery statute.[101] The Court thereby concluded that bank robbery, as opposed to bank larceny, is a general intent crime.[102]

The mandatory culpability principle must be applied to illegal re-entry. The alien who re-enters with the reasonable but erroneous belief that he has obtained the explicit permission of the government to do so is no more culpable than the citizen who fails to register her machine gun because she is unaware that what she possesses is a machine gun. What, then, separates illegal re-entry from felonious escape, felonious failure to register a machine gun, and bank larceny, such that the latter all carry scienter requirements and allow for a mistake of fact defense, whereas the former is a strict liability crime?

The only point of distinction *Staples* does not cover is that in illegal re-entry cases the context is border control, and Congress has plenary power to regulate our borders. This seems, however, a rather feeble basis for putting aside, for one group of defendants, an element of proof that the Supreme Court and the MPC clearly consider an essential requisite of criminal liability. As the *Anton* court noted, the government always has the civil remedy of deporting illegal aliens.[103] Affording criminal defendants protection against felony conviction for innocent conduct in all cases except for aliens re-entering the country raises the specter of unjust and unequal treatment based on nationality because

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[99] *Id.* at 269.

[100] *Id.* The Court's use of the innocent defendant hypothetical is arguably flawed in this instance. Federal bank robbery requires proof that the defendant used force or intimidation. *See* 18 U.S.C. § 2113(a) (2002). If a bank manager has illicitly taken money from my account and I confront that manager in anger and say to him that he better give me the money back, this episode of self-enforcement of property rights hardly seems to be bank robbery. Rather, such conduct on my part far more easily falls within what society would consider innocent conduct.

[101] *Carter*, 530 U.S. at 269-70.

[102] *Id.* at 269-72.

[103] United States v. Anton, 683 F.2d 1011, 1015 (7th Cir. 1982).

aliens are defined as those lacking American citizenship.

Judge Posner, in his *Anton* dissent, believed that Congress would not mind that a few innocent aliens were convicted of a federal felony. He wrote: "This in turn makes it unlikely that if Congress had thought about the issue raised in this case it would have wanted to compromise the effectiveness of the statute for the sake of a few illegal aliens who might be caught unwittingly in its toils."[104] Such an attitude, which Judge Posner imputes to Congress seemingly with approval, is blatantly prejudicial toward aliens.

V. THE MAJORITY RULE BECOMES THE UNIVERSAL RULE

Regrettably, and despite the Supreme Court *mens rea* jurisprudence of mandatory culpability, all the other circuit courts have followed Judge Posner's rationale.[105] Indeed, in a subsequent opinion authored by Judge Posner,[106] a three-judge panel of the Seventh Circuit purported to overrule *Anton* in the case of *United States v. Carlos-Colmenares*, based on the unanimous agreement among all other circuit courts that *Anton* was erroneous. This occurred despite the fact that the Seventh Circuit refused to reconsider the issue addressed by both the *Anton* and *Carlos-Colmenares* panels *en banc*, the only legitimate way to overrule an earlier decision of a three-judge panel short of a Supreme Court decision.[107]

Two points are notable in Judge Posner's decision. First, the decision acknowledges Supreme Court precedent on *mens rea*, *Staples* and *Liparota*, but implicitly deems such precedent inapposite. Second, the judge repeats the mistake in his *Anton* dissent by stating that his panel's construction of section 1326 is not that of strict liability because an alien returned to this country involuntarily would have a defense to the charge.[108] Involuntariness is not a *mens rea* defense because the voluntariness requirement is an element of the crime's *actus reus*, not its *mens rea*. This is hornbook law.[109]

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[104] *Id.* at 1021 (Posner, J., dissenting).

[105] As Judge Posner himself noted in a later decision, every circuit court to address the issue of the requisite *mens rea* for section1326 has agreed with *Pena-Cabanillas* and disagreed with *Anton*. United States v. Carlos-Comenares, 253 F.3d 276, 278 (7th Cir. 2001).

[106] *Id.*

[107] *See, e.g.*, United States v. Hoover, 246 F.3d 1054 (7th Cir. 2001) (noting that under principle of stare decisis, it is improper for one panel to reconsider or overrule decision of another panel after request for rehearing *en banc* has been denied).

[108] Carter v. United States, 530 U.S. 255, 279 (2000).

[109] *See, e.g.*, LAFAVE, *supra* note 24, § 6.1(c), at 304-05.

Disturbingly, Judge Posner's entire line of argument is specious:

> Granted that there are moral and practical objections to visiting severe sanctions on what may be pure accident, the objections are compelling only with respect to traditional crimes as distinct from regulatory offenses. By "traditional" crimes we mean ones that anyone might be accused of committing, such as murder or robbery or selling illegal substances or evading taxes. People would feel insecure if they thought they could be sent to prison for accidental violations, such as failing to pay taxes they had no reason to know were due or killing in the reasonable belief that it was self-defense. "Regulatory" offenses are those that arise out of *optional* activities, such as having sex with very young women (who may be minors), or engaging in business activities that can cause great harm (such as the manufacture of food or drugs) — or coming back to the United States after having been deported. The risk of violating a statute that regulates an optional activity can be eliminated simply by not engaging in the regulated activity. A person who has been deported from the United States can avoid any risk of violating 8 U.S.C. § 1326 just by not returning to the United States; he knows he is not welcome. If nevertheless he decides to return, he had better make sure he has the Attorney General's express consent.[110]

This passage is rife with errors of law and logic, so much so that it could be useful as a teaching aid for students learning to recognize what is and is not sound legal reasoning.

To start, the definition of "regulatory offenses" as those arising out of "optional activities" is bizarre. According to that definition, re-crossing the border illegally is an optional activity while murder is not and, therefore, re-entry is a regulatory crime and murder is not. To the contrary, courts and commentators have universally drawn the line between regulatory or public welfare offenses on the one hand and traditional or common-law crimes on the other hand in one or both of two ways. First, traditional crimes had common-law antecedents, while regulatory crimes did not. Second, traditional crimes are *mala in se* (i.e., conduct historically considered blameworthy by extra-legal moral standards) while regulatory crimes are *mala prohibida* (i.e., conduct that has not been considered inherently blameworthy but that legislation has proscribed). "Having sex with very young women," contrary to Judge Posner's and the *Carlos-Colmenares* court's classification, is considered a traditional rather than regulatory crime because of its common-law

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[110] *Carter*, 530 U.S. at 279-80.

provenance and because it qualifies as a *malum in se*.

Having gotten the critical distinction entirely wrong, it is not surprising that the *Carlos-Colmenares* court ignores two important guidelines provided by the Supreme Court. First, the court ignores the overriding *mens rea* principle that the Supreme Court restated in the *Carter* case: "The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[111] Second, the exception to that presumption for "regulatory offenses" applies only to a very limited class of offenses that do not expose defendants to felony imprisonment. As argued in the foregoing, because section 1326 carries a maximum potential penalty of twenty years imprisonment, it should not, and does not under Supreme Court precedent, fall outside the presumption in favor of scienter.

As with his dissent in *Anton*, Judge Posner's position appears to rest on the entirely suspect premise that any re-entry defendant is already blameworthy, already placed on adequate notice, and, therefore, deserving of being placed in peril for inadvertently illegal conduct because of his prior deportation. That premise is erroneous for several reasons.

There can be many situations in which the factual circumstances provide a reasonable alien with a sound basis for believing that he has explicit permission to re-enter this country. For example, in *United States v. Ahumada-Aguilar*,[112] the defendant, charged with illegal re-entry, argued that he was a United States citizen because he had been born in Mexico to an American citizen father.[113] Yet, he had previously been deported twice.[114] Even so, the Ninth Circuit agreed with the defendant that he was a citizen and reversed his conviction for illegal re-entry.[115] More generally, a previous deportation means only that an Article I court in a civil proceeding has found proof by a preponderance that the alien is deportable. That finding is legally insufficient proof of a re-entry defendant's alienage in an illegal re-entry prosecution.[116]

Additionally, Judge Posner's reliance on the premise of blameworthiness begs a critical question. As the *Staples* Court pointed out, the government's argument that the acute dangerousness of

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[111] *Id.* at 269 (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)).

[112] United States v. Ahumada-Aguilar, 189 F.3d 1121 (9th Cir. 1999).

[113] *Id.* at 1122.

[114] *See id.* at 1123.

[115] *See id.* at 1127.

[116] *See* United States v. Ortiz-Lopez, 24 F.3d 53, 55-56 (9th Cir. 1994).

machine guns places the possessor on notice of illegality must be rejected because if the possessor does not know that the gun possessed is a machine gun, then the dangerousness of machine guns does not operate to provide notice.[117] Here, the question is whether a defense should be afforded to a re-entry defendant who had a reasonable belief that he or she was permitted to re-enter — that is, to just those defendants whose prior deportation did not, from the standpoint of the proverbial reasonable person, place him on notice that he could not re-enter. Under Supreme Court rulings, and under our shared intuitions about blameworthiness, such an illegal re-entry defendant should not be found guilty nor subjected to punishment potentially as severe as twenty years imprisonment.

CONCLUSION

Sadly, despite its dubious procedural legitimacy, the *Carlos-Colmenares* rule of strict liability for section 1326 violations seems to be recognized as the law of the Seventh Circuit,[118] thereby dissolving any conflict between the Seventh Circuit and the other circuits. Illegal re-entry defendants are thus universally barred from mounting a defense available to other similarly situated criminal defendants. Without a circuit conflict, it is unlikely that the Supreme Court will remedy the unjust treatment to which section 1326 subjects re-entry defendants. Accordingly, the strict liability rule will likely remain the law of this land and innocent re-entry defendants may serve lengthy terms of imprisonment. Federal courts have nodded with regard to the due process and equal protection rights of aliens charged with illegal re-entry into the United States.

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[117] Staples v. United States, 511 U.S. 600, 609 (1994) ("Moreover, our analysis in *Freed* likening the Act to the public welfare statute in *Balint* rested entirely on the assumption that the defendant *knew* that he was dealing with hand grenades — that is, that he knew he possessed a particularly dangerous type of weapon . . . possession of which was not entirely 'innocent' in and of itself. The predicate for that analysis is eliminated when, as in this case, the very question to be decided is *whether* the defendant must know of the particular characteristics that make his weapon a statutory firearm.").

[118] *See* United States v. Sandoval-Gomez, 295 F.3d 757, 761 n.1 (7th Cir. 2002) (citing *Carlos-Colmenares* as overruling *Anton*) ("[T]he law in this Circuit has changed and the government is no longer required to prove that the defendant intended to reenter the United States unlawfully.").

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