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ARTICLE

Solving General and Specific Intent: A Mapping on the MPC and Applications to the Categorical Approach

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Abstract. The terms "general intent" and "specific intent" are riddled with confusion that has persisted in both federal courts and academia. For the first time, this Article will alleviate this confusion by translating the two terms to the clearer and better-understood mens rea defined in the Model Penal Code ("MPC"). But the Article does not stop there; it will apply its translation to the categorical approach—for which an accurate comparison between the mens rea of different crimes is critical—to show how federal courts have been misapplying the law due to their misunderstanding of general and specific intent.

The Article will proceed in three Parts. Part I will map general intent onto the MPC. It will establish that general intent best matches the MPC's mens rea of negligence. However, there is a wrinkle: a defendant can be convicted of a general intent crime if he (1) is negligent of another crime subsumed by the charged crime and (2) committed the acts required by the charged crime, regardless of his mens rea of those acts. General intent, therefore, acts as an in for a penny, in for a pound crime that this Article will call "felony negligence."

Part II will tackle the much more straightforward translation of specific intent. It will establish that specific intent is equivalent to the MPC's purposely mens rea. Finally, Part III will apply the translations from Parts I and II to the categorical approach and will show how

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Introduction

At common law, offenses were generally classified as either "general intent" or "specific intent." The dichotomy originated as an attempt to "achieve a compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender";[1] specific intent crimes allowed for intoxication defenses, while general intent crimes did not. In time, however, the terms have outgrown their purpose but have come to dominate the criminal common law.[2]

A hodgepodge of definitions has emerged. For example, general intent is sometimes characterized as requiring that the culprit "intend to do the act that the law proscribes."[3] In other words, it requires doing something illegal. At the same time, under specific intent, "[t]he defendant must also act with the purpose of violating the law."[4] In other words, it requires doing something illegal.

These vague and overlapping definitions turned out hard to apply. The Supreme Court referred to general and specific intent as "overlapping and, frankly, confusing"[5] and "the source of a good deal of confusion."[6]

State courts share this frustration. The Supreme Court of California, sitting en banc, noted that "[c]onfusion often seems to accompany any attempt to distinguish what is meant by the phrases 'specific intent,' and 'general intent.'"[7] In *People v. Hood*,[8] Chief Justice Traynor echoed the sentiment: "Specific and general intent have been notoriously difficult terms to define and apply . . . ."[9] Similarly, one scholar noted that "[d]espite the prevalent usage of the terms general intent and specific intent at common law . . . the terms are ambiguous."[10] The MPC's authors described general intent as "an abiding source of confusion and ambiguity in the penal law."[11] Professor Wayne R. LaFave aptly summarizes the mess:

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1 People v. Hood, 462 P.2d 370, 377 (1969).

2 *See* United States v. Bailey, 444 U.S. 394, 403 (1980).

3 United States v. Kimes, 246 F.3d 800, 806 (6th Cir. 2001) (quoting United States v. Gonyea, 140 F.3d 649, 653 (6th Cir. 1998)).

4 *Id.*

5 Voisine v. United States, 579 U.S. 686, 698 (2016).

6 *Bailey*, 444 U.S. at 403.

7 State v. Huber, 356 N.W.2d 468, 472 (1984).

8 462 P.2d 370 (1969).

9 *Id.* at 377.

10 Karen Rosenfield, *Redefining the Question: Applying a Hierarchical Structure to the Mens Rea Requirement for Section 875(c)*, 29 CARDOZO L. REV. 1837, 1843 (2008).

11 MODEL PENAL CODE § 2.02 cmt. 1, n.3 (AM. L. INST. 1985) [hereinafter MPC].

> "General intent" is often distinguished from "specific intent," although the distinction being drawn by the use of these two terms often varies. Sometimes "general intent" is used in the same way as "criminal intent" to mean the general notion of mens rea, while "specific intent" is taken to mean the mental state required for a particular crime. Or, "general intent" may be used to encompass all forms of the mental state requirement, while "specific intent" is limited to the one mental state of intent. Another possibility is that "general intent" will be used to characterize an intent to do something on an undetermined occasion, and "specific intent" to denote an intent to do that thing at a particular time and place.[12]

Although LaFave brought this criticism several decades ago, it still holds true. The enduring confusion sparks countless appeals that congest the courts and delay closure for both defendants and victims.[13]

The ambiguity plagues both courts and juries alike. Many jury instructions define crimes using specific and general intent, often puzzling jurors.[14] Even worse, some instructions, as the Supreme Court noted,[15] define specific intent in terms of general intent, compounding the uncertainty.[16]

The lack of uniform application of these terms has also sparked accusations that the courts are usurping legislative power. One commentator noted that, by picking and choosing from a wide array of general and specific intent definitions, courts seamlessly influence the outcome of the case before them without binding themselves in future cases.[17] For example, general intent can be defined to look like strict liability, negligence, recklessness, or knowledge.[18] Selecting one definition

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12 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 201–02 (1972).

13 Marc M. Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 MINN. L. REV. 437, 437 (1990) ("Three-and-one-half years pass [since the trial]. John Doe has served more than half of his minimum sentence and his appeals still have not been heard.").

14 *See, e.g.*, Liparota v. United States, 471 U.S. 419, 433 n.16 (1985) (suggesting that jury instructions "eschew use of difficult legal concepts like 'specific intent' and 'general intent'"); United States v. Arambasich, 597 F.2d 609, 611 (7th Cir. 1979) ("[T]he distinction the instructions attempt to make between [general and specific] intent, are not enlightening to juries.").

15 *Liparota*, 471 U.S. at 433 n.16.

16 *See, e.g.*, Jury Instructions at 33, United States v. Medlock, No. 14-CR-024-CVE (N.D. Okla. July 31, 2014), 2014 WL 4960349 ("Specific intent, as the term implies, means more than the general intent to commit the act."); Jury Instructions at 25, United States v. Rodriguez, No. 3:08-CR-00242 (D.P.R. May 16, 2011), 2011 WL 2914781.

17 *See generally* Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341 (2001) (claiming the wide range of mens rea definitions is the result of "a judiciary unwilling to leave the definition of mental requirement to the legislature").

18 Watson v. Dugger, 945 F.2d 367, 370 (11th Cir. 1991) ("General intent crimes, however, still require some showing of culpability, either a knowing, reckless, or negligent, rather than intentional, action." (citing P. LOWE, J. JEFFRIES, JR. & R. BOONE, CRIMINAL LAW: CASES AND MATERIALS 232 (1982))); Larry Kupers, *Aliens Charged with Illegal Re-Entry Are Denied Due Process and, Thereby, Equal Treatment Under the Law*, 38 U.C. DAVIS L. REV. 861, 867 n.24 (2005) ("The foregoing definition of 'general intent,' oft repeated with little thought, is a prescription for doctrinal disaster. Following such a definition,

over another can significantly alter the prosecution's burden, all but deciding the outcome of the case.

This outdated terminology persists despite widespread criticism. State and federal court opinions frequently use the terms when discussing myriad statutes that still embrace the general and specific intent framework. Given how frequently the terminology comes up, it is wasteful to simply disregard settled judicial precedent. There is, however, another option: Courts can "translate" these terms into the MPC mens rea, which is better understood and more well-defined.[19] By pinpointing equivalents to general and specific intent in the MPC, courts can substitute the confusing common law terms with the MPC's while remaining faithful to binding precedents. For the first time, this Article provides such a translation.

The Article proceeds in three Parts. Part I tackles general intent. By piecing together two Supreme Court decisions, this Part concludes that general intent best matches the MPC's mens rea of negligence. However, that match is not perfect. Recall that under the felony murder regime, a defendant can be convicted of murder if (1) he committed a felony and (2) the victim died—regardless of the defendant's mens rea of the death. Similarly, Part I shows that a defendant can be convicted of a general intent crime if he (1) committed a negligent crime that the main crime comprises and (2) committed the acts required by the main crime—regardless of the defendant's mens rea of that main crime. Thus, general intent is not equivalent to the MPC's negligence, but is more akin to a lower mens rea that this Article calls "felony negligence."

Part II is more straightforward. It shows that specific intent maps onto the MPC's mens rea of purposely.

Finally, Part III applies the translations developed in Parts I and II in the context of the categorical approach. The categorical approach requires courts to compare the mens rea of two crimes—specifically of a definitional crime and of the committed crime—to determine, for example, if an immigrant is subject to deportation, or if a higher sentence should be imposed. When the definitional crime uses an MPC mens rea

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the notion of general intent quickly degenerates into something very much akin to, if not virtually identical with, strict liability.").

[19] Even if some literature has implied a solution along these lines, it has not been implemented or developed before. *See, e.g.*, 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2(e) (3d ed. 2018) ("It has been suggested, however, that greater clarity could be accomplished by abandoning the 'specific intent'-'general intent' terminology, and this has been done in the Model Penal Code." (footnote omitted)); United States v. Bailey, 444 U.S. 394, 403–04 (1980) ("This ambiguity has led to a movement away from the traditional dichotomy of intent and toward an alternative analysis of *mens rea*. This new approach [is] exemplified in the American Law Institute's Model Penal Code . . . ." (citation omitted)).

but the committed crime uses a general or specific intent mens rea, an accurate understanding of how the two systems of mens rea map onto each other is crucial. Unsurprisingly, given the confusion surrounding general and specific intent, Part III concludes that several federal courts have erred because they considered, for instance, the general intent to be equivalent to a higher MPC mens rea than it actually is.

This Article focuses on how federal courts treat general and specific intent crimes. State courts are beyond its scope. Attempting to extract a unitary principle across all American courts is reserved for future work.

I. General Intent's Equivalency to Felony Negligence

This Part establishes that general intent best matches the MPC's mens rea of negligence. However, the match is not perfect. Similar to a felony murder crime where a defendant can be convicted of murder if (1) he committed a felony and (2) the victim died—regardless of the defendant's mens rea of the death—a defendant can be convicted of a general intent crime if he (1) committed a negligent crime that the main crime comprises and (2) committed the acts required by the main crime—regardless of the defendant's mens rea of that main crime. Thus, general intent acts as a "felony negligence."

A. *Understanding General Intent: The* Carter *Piece*

In *Carter v. United States*,[20] the Supreme Court attempted to lay out a definition of general intent. However, the definition's ambiguity requires further examination to understand how federal courts treat general intent crimes.

Floyd J. Carter decided to rob the Collective Federal Savings Bank. Once inside, he leaped over the counter into a teller window.[21] He successfully removed nearly $16,000[22] before fleeing.[23] Police apprehended him shortly after.[24] Subsequently, the government charged Carter under 18 U.S.C. § 2113(a),[25] which punishes "[w]hoever, by force . . . takes . . . any property or money . . . belonging to, or in the care, custody, control, management, or possession of, any bank."[26] On appeal, the Supreme Court

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20 530 U.S. 255 (2000).

21 *Id.* at 259.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Carter*, 530 U.S. at 261–62.

was tasked with deciding whether § 2113(a) qualified as a specific or general intent crime.[27]

Carter held general intent is satisfied when "the defendant possessed knowledge with respect to the actus reus of the crime."[28] In turn, it defined the actus reus of § 2113(a) as "the taking of property of another by force and violence or intimidation."[29] The "force and violence or intimidation" element was crucial to the Justices' resolution of the case.[30] Justice Thomas observed that the absence of that element would warrant reading in a requirement that the defendant specifically intended to steal; without it, the statute would punish "a defendant who peaceably takes money believing it to be his."[31] Thus, the majority noted that even when a defendant has a good-faith claim of right to the money he takes forcefully or violently, his conduct is not innocent, which makes him guilty under § 2113(a).[32] Since having knowledge of the actus reus of the crime was sufficient to ensure the defendant was guilty, *Carter* concluded that § 2113(a) is a general intent crime.[33]

Although lower courts widely accept *Carter*'s interpretation of general intent, the term actus reus makes that acceptance uncertain and questionable.[34] Even though *Carter* specified the actus reus for § 2113(a), it did not supply a test to determine the actus reus for general intent crimes. Actus reus can be defined in several ways. First, it may be construed as the conduct or act that "a person must perform in order to incur liability for a crime."[35] In *Carter,* that conduct was forcibly taking the money.

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27 *Id.* at 268–69.

28 *Id.* at 268.

29 *Id.*

30 *Id.* at 268–69.

31 *See id.* at 269–70. Although here Justice Thomas discusses 18 U.S.C. § 2113(b) without the "intent to steal or purloin" element, § 2113(a) without the "force and violence, or by intimidation" element would read substantially the same. *Compare* § 2113(a) ("Whoever . . . takes . . . any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . ."), *with* § 2113(b) ("Whoever takes and carries away . . . any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association . . . .").

32 *Carter*, 530 U.S. at 269–70.

33 *Id.* at 269.

34 *See, e.g.*, United States v. Doctor, 842 F.3d 306, 311 (4th Cir. 2016) (adopting general intent rational from *Carter* because there was "no reason why South Carolina robbery should be viewed any differently"); United States v. Starnes, 583 F.3d 196, 209 (3d Cir. 2009) (using *Carter* rationale to contrast specific and general intent); United States v. Taylor, 454 F.3d 1075, 1081 (10th Cir. 2006) (same).

35 GEORGE E. DIX & M. MICHAEL SHARLOT, CRIMINAL LAW: CASES AND MATERIALS 154 (3d ed. 1987).

Alternatively, actus reus can be defined much more broadly to encompass "all nonmental elements" of the crime, such as: conduct, nature of conduct, attendant circumstances, and results of conduct.[36] The last three elements are also often described as "material elements of an offense."[37] In *Carter*, for example, the money being in the bank's custody is an attendant circumstance.[38] It follows that *Carter*'s definition is not as clear cut as it might first appear and requires further analysis of precedent.

Precedent reveals that general intent merely requires the defendant have knowledge of his conduct. In other words, courts define actus reus to mean simply the conduct or act that a person must perform to incur liability for a crime. However, courts do not require the defendant to have knowledge of the material elements of the crime. The MPC defines those elements as (1) nature of conduct, (2) attendant circumstances, and (3) result.[39]

1. General Intent Does Not Require a Mens Rea for Nature of Conduct

At this juncture, it is helpful to first understand the difference between conduct and nature of conduct, which is one of the three material elements of general intent. The MPC provides a useful way of thinking about this distinction. For example, it defines the mens rea of knowingly as follows: "A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the *nature of his conduct* . . . he is aware that his *conduct* is of that nature . . . ."[40] Although it is often hard to distinguish conduct from its nature,[41] 49 U.S.C. § 46504 is an instructive example. It punishes "individual[s] on an aircraft . . . who, by assaulting or intimidating a flight crew member or flight attendant, interferes with the performance of [their] duties."[42] Without obsessing

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36 *Id.*

37 *See* MPC § 2.02(2)(a)–(b).

38 *See* MPC § 1.13(10) ("'[M]aterial element of an offense' means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct.").

39 *See* MPC § 1.13(9) ("'[E]lement of an offense' means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as . . . .").

40 MPC § 2.02(2)(b) (emphasis added).

41 For example, the forcible and violent action of the defendant in *Carter v. United States*—the way he took the bank's money—is the nature of his conduct, rather than the conduct itself, because the criminal statute punishes people that take "by force and violence." 530 U.S. 255, 259 (2000) (citing 18 U.S.C. § 2113(a)). The conduct, then, would be the physical action of grabbing the cash. *See id.*

42 49 U.S.C. § 46504.

over "hair-splitting distinctions,"[43] the offense contains the following material elements: (1) "on an aircraft" is the attendant circumstance; (2) "intimidating" is the nature of conduct; and (3) "interferes with . . ." is the result. For instance, a defendant aboard a Delta flight (attendant circumstance) can yell and curse at the crew (conduct). His actions being intimidating (nature of conduct), the flight attendants fail to properly perform their duties of demonstrating the safety features of the aircraft (result of conduct). Therefore, conduct is the act itself while the nature of the conduct is the characteristic of that conduct relevant to the crime.

With that distinction in mind, the main question is whether the loudmouth defendant in the above example, under a general intent standard, must know his conduct is intimidating (nature of conduct).

In *United States v. Hicks*,[44] the Court of Appeals for the Fifth Circuit answered that question in the negative.[45] The court upheld a conviction for intimidating flight crew members so as to interfere with their duties, punishable under 49 U.S.C. § 1472(j) (predecessor to § 46504).[46] Hicks boarded the plane with a "boombox," a portable stereo system with radio capabilities.[47] Shortly after takeoff, the flight attendants advised him that playing the boombox was interfering with the plane's navigational equipment. However, the defendant continued blasting music.[48] Repeated pleas from the crew to surrender the stereo were met with anger and expletives.[49] Ultimately, the captain was forced to perform an unscheduled landing because the radio was interfering with the plane's systems, and the captain was unwilling to direct the flight attendants to retrieve the boombox by force.[50] The jury convicted Hicks.[51]

On appeal, the Fifth Circuit concluded that because violation of § 1472(j) was a general intent crime, the defendant did not need to know that the nature of his conduct was intimidating the crew. The court upheld the conviction, concluding Hicks was guilty because "the extreme and repeated profanity . . . when combined with the angry tenor of [his]

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43 United States v. Bailey, 444 U.S. 394, 407 (1980).

44 980 F.2d 963 (5th Cir. 1992).

45 *Id.* at 974.

46 *Id.* at 965.

47 *Id.*

48 *Id.* at 966.

49 *Id.* at 966–67.

50 *Hicks*, 980 F.2d at 967.

51 *Id.* at 968.

words, certainly would intimidate a reasonable person."[52] It follows that the conviction turned not on the culprit's knowledge that he was intimidating the crew, but on a reasonable person's perception that the defendant's heated language (conduct) was intimidating (nature of conduct).[53] *Hicks* held that the defendant does not need to know the nature of conduct was intimidating.[54] More generally, a defendant need not know the nature of his conduct to be guilty of a general intent crime.

2. General Intent Does Not Require a Mens Rea for Attendant Circumstances

Carter itself demonstrates that the defendant need not have knowledge of attendant circumstances, the second type of material element. Section 2113(a) requires that the stolen money belong to a bank, an attendant circumstance.[55] The Court initially took the position that the defendant must know he is taking the money of another by force and violence or intimidation.[56] The Court, however, then retreated on the "of another" element. A "forceful taking," Justice Thomas noted, "even by a defendant who takes under a good-faith claim of right," is enough to find guilt.[57] *Carter* explains that the defendant need not know the cash belongs to someone else.

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[52] *Id.* at 974; *see also* United States v. Turner, 754 F. App'x 664, 664–65 (9th Cir. 2019) (holding the defendant does not have to intimidate knowingly to be liable under 49 U.S.C. § 46504 (49 U.S.C. § 1472(j)'s successor)); United States v. Ziba, 653 F. App'x 809, 810 (5th Cir. 2016) (per curiam) (same).

[53] The Supreme Court did not disturb *Hicks*'s holding in *Elonis v. United States* when it found that whether a communication is a threat cannot be judged from a reasonable person's perspective. 575 U.S. 723, 740 (2015); *see also* United States v. Petras, 879 F.3d 155, 166 (5th Cir. 2018) ("Accordingly, *Elonis* did not unequivocally overrule *Hicks*'s holding that § 46504 is a crime of general intent."); United States v. Williams, 864 F.3d 826, 829–30 (7th Cir. 2017) ("The reasoning of *Elonis* does not extend to bank robbery, where the concerns about innocent conduct . . . do not apply."); *Ziba*, 653 F. App'x at 810 (holding § 46504 "is a crime of general intent where conduct can prove guilt"). The Fifth Circuit based its finding of guilt on defendant's "conduct," not mere "words," *Hicks*, 980 F.2d at 974–75, thus avoiding the First Amendment issue present in *Elonis*. *See, e.g.*, Clay Calvert, *Beyond Headlines & Holdings: Exploring Some Less Obvious Ramifications of the Supreme Court's 2017 Free-Speech Rulings*, 26 WM. & MARY BILL RTS. J. 899, 904, 920 (2018) (noting *Elonis* dodged the First Amendment question by requiring a mens rea higher than negligence); *see generally* Cass R. Sunstein, *The Supreme Court 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996) (discussing the frequency of judges "decid[ing] no more than they have to decide").

[54] *Hicks*, 980 F.2d at 974.

[55] 18 U.S.C. § 2113(a) (including the phrase "belonging to, or in the care, custody, control, management, or possession of, any bank").

[56] *See* Carter v. United States, 530 U.S. 255, 268 (2000) (noting that the actus reus of § 2113(a) is "the taking of property of another by force and violence or intimidation").

[57] *Id.* at 270.

This perspective is equally apparent in the Court's hypothetical statute which lacks the "force and violence or intimidation" requirement. That statute, Justice Thomas warned, would punish a defendant "who peaceably takes money" even when he believes it to be his.[58] Thus, contrary to the Court's initial statement, the defendant does not need to know the money is "of another" or "belonging to . . . any bank," an attendant circumstance. All that is required is knowledge of conduct, which in *Carter* is taking money by force.[59]

3. General Intent Does Not Require a Mens Rea for Result

In addition to nature of conduct and attendant circumstances, a defendant also does not need to know the result of her conduct—the remaining material element of three. In *United States v. Doe (R.S.W.)*,[60] twelve-year-old R.S.W. set fire to a paper towel protruding from a school bathroom dispenser.[61] She blew it out and left.[62] Unfortunately, she failed to extinguish the fire properly and it set the school ablaze.[63] The government charged the minor under 18 U.S.C. § 81, which criminalizes "willfully and maliciously set[ting] fire to or burn[ing] a building."[64] On appeal, the Ninth Circuit accorded little weight to the elements "willfully and maliciously," as the legislative history was silent on the definition of these chameleon-like terms.[65] Instead, the court focused on the background common law of arson and concluded that § 81 is a general

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58 *Id.* at 269.

59 Note that § 2113(a) required that the defendant take money "by force and violence, *or by intimidation*." § 2113(a) (emphasis added). However, *Carter* did not shed light on whether the defendant had to know his conduct intimidated the bank's employees. *Hicks* provides further insight. *See Hicks*, 980 F.2d at 974 (5th Cir. 1992) (adopting a general intent standard for 49 U.S.C. § 1472(j), which criminalized interfering with flight crew members).

60 136 F.3d 631 (9th Cir. 1998).

61 *Id.* at 633–34.

62 *Id.*

63 *Id.* at 634.

64 *Id.*

65 *See id.* ("Prior interpretations of 'willfully' are not necessarily binding or helpful, for as the Supreme Court has noted, '"[w]illful," . . . is a "word of many meanings," and "its construction [is] often . . . influenced by its context."'" (alterations in original) (quoting Ratzlaf v. United States, 510 U.S. 135, 141 (1994) (internal citation omitted))).

intent crime.[66] It then upheld the conviction, reasoning that R.S.W. knowingly set fire to the paper towel.[67]

Importantly, the court of appeals discarded as irrelevant the district court's finding that R.S.W. knew her conduct was likely to damage the school.[68] The Court of Appeals for the Ninth Circuit held that such knowledge is not required to convict under a general intent crime.[69]

The corollary is that R.S.W. knowingly setting fire to the paper towel was enough to satisfy general intent. It was of no import that she knew the likely result would be burning the building down. The *R.S.W.* court is thus explicit about what *Carter* and *Hicks* strongly implied: A general intent crime only requires performing conduct knowingly (in *R.S.W.*, setting fire to the paper towel), but it does not require knowing that a certain result will occur (the result of burning a building).

The *Hicks* (nature of conduct), *Carter* (attendant circumstances), and *R.S.W.* (result) cases show that, to be convicted of a general intent crime, the defendant need only have knowledge of her conduct. Knowledge of the material elements of the offense—of the nature of conduct (e.g., intimidating conduct), of the attendant circumstances (e.g., money being of another), or of results (e.g., burning the school down)—is not required.

B. Carter*'s Missing Piece*

As defined by *Carter*, general intent merely requires the commission of a knowing act. However, that requirement is practically indistinguishable from the sole demand under strict liability crimes, which is the commission of a *voluntary* act. The two standards are, for all intents and purposes, identical.

A "knowing" act under the general intent standard is equivalent to a "voluntary" act under the MPC. The MPC posits that "[a] person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act."[70] To convict a defendant, the MPC thus requires the commission of a voluntary act. Similarly, general intent demands the commission of a knowing act.[71] Notably, both have the same (somewhat

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66 *R.S.W.*, 136 F.3d at 634–35 ("In the absence of any indication to the contrary, we must assume that when Congress adopted the common law definition of the crime of arson—the willful and malicious burning of a building—it intended to adopt the meaning that common law gave that phrase.").

67 *Id.* at 636 ("R.S.W. intentionally, and without justification, set fire to a paper towel in a dispenser attached to a partition in the building. Those findings suffice to support the conviction.").

68 *Id.* ("Given that common law arson is a general intent crime, that finding is surplusage.").

69 *Id.*

70 MPC § 2.01(1).

71 *See* Carter v. United States, 530 U.S. 255, 269 (2000).

odd) exception: the defendant performing an act while sleepwalking is not acting voluntarily under the MPC,[72] nor is he acting knowingly under general intent.[73]

Further, it is hard to fathom any distinction between voluntary and knowingly. Voluntariness, as defined under the MPC, requires at least a bodily movement produced by the effort and determination of the actor.[74] The defendant in *Carter* took money by force—a product of his effort and determination to rob the Collective Federal Savings Bank.[75] He satisfies the voluntariness definition set out in the MPC, as well as the knowing act requirement set out in *Carter*. It seems that a voluntary act and a knowing act are interchangeable. Similarly, in *Hicks*, the defendant was found guilty of knowingly cursing at the airline crew.[76] There, too, the cursing was a voluntary act, the result of the defendant's desire to express himself. *R.S.W.* is yet another example. The Court of Appeals for the Ninth Circuit upheld the conviction of the minor because, as a result of her effort and decision to entertain herself, she lit the paper towel on fire.[77] The lighting of the paper towel was voluntary—requiring that she flick the lighter and hold the flame up to the paper towel. Thus the MPC's "voluntary act" is identical to general intent's "knowing act" in application.[78] The direct implication is that general intent merely requires the commission of a voluntary act.

The same is true of strict liability crimes. Although not requiring a mens rea, strict liability crimes also require a voluntary act. *United States v. Citgo Petroleum Corp.*[79] articulates the principle well. 16 U.S.C. § 703, a strict liability statute, makes it a misdemeanor to "pursue, hunt, [or] take" any protected bird "by any means or in any manner."[80] A jury convicted CITGO for taking birds that landed on and subsequently perished in CITGO's oil-water separator tanks, which the law required to be covered.[81]

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72 MPC § 2.01(2)(b) (stating that "a bodily movement during unconsciousness or sleep" is not a voluntary act).

73 *See Carter*, 530 U.S. at 269 ("Section 2113(a) certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking.").

74 *See* MPC § 2.01(2)(d).

75 *See Carter*, 530 U.S. at 259.

76 United States v. Hicks, 980 F.2d 963, 974 (5th Cir. 1992).

77 United States v. Doe (R.S.W.), 136 F.3d 631, 634, 636–37 (9th Cir. 1998).

78 Indeed, many courts describe general intent crimes as requiring the commission of a voluntary act. *See, e.g.*, United States v. Martus, 138 F.3d 95, 97 (2d Cir. 1998); United States v. Loera, 923 F.2d 725, 728 (9th Cir. 1991).

79 801 F.3d 477 (5th Cir. 2015).

80 *Id.* at 488.

81 *Id.* at 480–81.

The Court of Appeals for the Fifth Circuit reversed.[82] Although strict liability crimes dispense with mens rea requirements, the court noted that an actus reus was still required.[83] It found that a defendant must still commit a voluntary act to be liable.[84] The Fifth Circuit reasoned that, while CITGO failed to cover the tanks, it did not "take an affirmative action to cause [the] migratory bird deaths."[85] The case demonstrates that voluntary commission of an act is always required for criminal liability, even under a strict liability standard.

Another instructive way to perceive the difference, or lack thereof, between the two standards is by thinking of the same statute under each standard. For example, it is hard to articulate a distinction between a strict liability statutory rape crime and a general intent statutory rape crime. Statutory rape is usually defined as sexual intercourse with a minor,[86] and is considered a strict liability offense in most states.[87] While the defendant needs to voluntarily commit the sexual act, he need not be aware of the age of his partner.[88] However, some courts consider statutory rape a general intent crime.[89] Under *Carter*'s definition of general intent, this relabelling achieves nothing; the defendant would need to voluntarily engage in the sexual act (the equivalent of taking the money), but would not need to be aware that he is doing so with a minor, an attendant circumstance (the equivalent of being aware that the money belongs to the bank). These examples suggest that strict liability and general intent, as defined by *Carter*, are equivalent; both merely require the commission of a voluntary act.

This result is bad. The Supreme Court has largely disavowed strict liability because it exposes innocent actors to criminal punishment.[90] To shield blameless actors, the Court has developed a practice of reading in a mens rea of knowledge.[91]

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82 *Id.* at 479.

83 *Id.* at 492.

84 *Id.*

85 *Citgo*, 801 F.3d at 492.

86 *See, e.g.*, CAL. PENAL CODE § 261.5(a) (West, Westlaw through Ch. 1 of 2023–24 2nd Ex. Sess., and all laws through Ch. 1017 of 2024 Reg. Sess.).

87 *See, e.g.*, Garnett v. State, 632 A.2d 797, 805 (Md. 1993).

88 *See, e.g.*, Hughes v. State, 198 N.W.2d 348, 350 (Wis. 1972).

89 *See, e.g.*, Francis v. Gov't of the Virgin Islands, 236 F. Supp. 2d 498, 501 (D.V.I. 2002) (per curiam).

90 *See, e.g.*, Morissette v. United States, 342 U.S. 246, 263 (1952). This Article defines "innocent actors" as those found guilty without having any mens rea of one or more material elements of a statute.

91 *See, e.g.*, Rehaif v. United States, 588 U.S. 225, 229 (2019) ("We apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text.").

The Justices first took their disapproving stance on strict liability crimes in *Morissette v. United States*.[92] Morissette stumbled upon heaps of spent bomb casings while hunting.[93] The casings exhibited intensive rusting, suggesting they had been exposed to the elements for years.[94] Morissette assumed the casings were abandoned, loaded three tons of them into his truck, then sold them as scrap metal for $84.[95] It turned out that those casings were government property.[96] He was prosecuted under 18 U.S.C. § 641, which punishes "'whoever embezzles, steals, purloins, or knowingly converts' government property."[97] The Supreme Court overturned Morissette's conviction.[98]

Writing for the majority, Justice Jackson noted that, although the statute did not specify a mens rea, strict liability should be presumed only in "public welfare" offenses.[99] The rationale is that in public welfare cases, the danger to the public outweighs the risk of exposing innocent actors to criminal punishment.[100] Importantly, the Court refused to expand the class of acceptable strict liability offenses any further. Relying on the jurisprudential backdrop against which Congress legislated, Justice Jackson concluded that "mere omission . . . of any mention of intent will not be construed as eliminating [the intent requirement]."[101] The Court held that the government failed to prove "criminal intent" and so could not convict Morissette, clarifying the need to shield innocent defendants.[102]

The Court reaffirmed its stance on strict liability crimes in *Liparota v. United States*.[103] Following its previous practice, it read a knowing mens rea into a provision that criminalized acquiring and possessing food stamps in a manner contrary to the statute.[104] The crux of the opinion mirrors *Morissette*'s: The Court was hesitant to criminalize innocent conduct

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92 342 U.S. 246 (1952).

93 *Id.* at 247.

94 *Id.*

95 *Id.*

96 *Id.* at 248.

97 *Id.* (quoting 18 U.S.C. § 641).

98 *Morissette*, 342 U.S. at 276.

99 *See id*. at 260–63, 262 nn.20–21 (citing Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73, 84 (1933), which provides a useful overview of the doctrine.).

100 *See id*. at 255–56.

101 *Id.* at 263.

102 *See id.* at 263, 276.

103 471 U.S. 419 (1985).

104 *Id.* at 433.

beyond "public welfare" offenses.[105] The Justices continued this trend in *United States v. X-Citement Video*.[106] Instead of adopting the "most natural grammatical reading"[107] of the statute, Justice Rehnquist imputed a "knowingly" mens rea requirement to the age element of actors in adult videos[108]—all in the name of avoiding "criminaliz[ing] otherwise innocent conduct."[109]

The same pattern is evident in more recent cases, such as *Rehaif v. United States.*[110] In reversing a conviction for possessing a firearm while unlawfully in the United States, the Court again read in the knowingly mens rea requirement. The *Rehaif* Court determined that the government must prove: (1) "the defendant knew he possessed a firearm," and (2) "he knew he belonged to the relevant category of persons barred from possessing a firearm."[111] Just as in previous cases, after recounting the *Morissette* line of precedent,[112] the Court noted that imputing a heightened mens rea requirement "helps to separate wrongful from innocent acts."[113] Time and again, the Supreme Court has shown eagerness to impute a heightened mens rea requirement of knowledge in strict liability crimes to protect guiltless defendants.

Since, under *Carter*'s definition, general intent is equivalent to strict liability, the Supreme Court's disapproval of strict liability crimes indicates that *Carter*'s definition must be missing a piece. Put differently, it is extremely unlikely that the Supreme Court intended general intent to be equivalent to strict liability given how much it discourages strict liability crimes.

C. *Understanding General Intent: The* Feola *Piece*

The Court acknowledged the risk that general intent is equivalent to strict liability in *United States v. Feola*.[114] It then provided a clue—albeit in dicta—on how to mitigate that risk. Feola and his confederates attempted

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105 *See id.* at 425–26; *see also* Staples v. United States, 511 U.S. 600, 602 (1994) (requiring the prosecution to prove that defendant knew the weapon he possessed had characteristics that brought it within the statutory definition of machine gun).

106 513 U.S. 64 (1994).

107 *Id.* at 68.

108 *Id.* at 78.

109 *Id.* at 71–73.

110 588 U.S. 225 (2019).

111 *Id.* at 237.

112 *Id.* at 231.

113 *Id.* at 232.

114 420 U.S. 671 (1975).

to "rip-off" undercover federal agents by selling them sugar instead of heroin; the plan failed.[115] The gang found itself in an armed confrontation with the agents, mistaking them for ordinary customers.[116] Subsequently, the dealers were indicted—"to their undoubted surprise"—with assault of federal officers.[117] The defendants were convicted under 18 U.S.C. § 111,[118] which punishes "assault upon a federal officer while engaged in the performance of his official duties."[119] The Court first considered whether assault upon a federal officer depends upon the assailant knowing the official identity of the officer.[120] After analyzing the legislative history,[121] the Court concluded the defendants need not "be aware that [their] victim is a federal officer."[122]

However, the opinion also suggests—again in dicta, but consistently with the strict liability cases—that an individual lacking a mens rea should not bear punishment. When "an officer fails to identify himself or his purpose," Justice Blackmun noted, "his conduct in certain circumstances might *reasonably* be interpreted as the unlawful use of force directed either at the defendant or his property."[123] The Court reasoned that in such a case, due to an "honest mistake of fact," the defendant might be justified in assaulting the officer—and thus not be liable under § 111.[124] Under *Feola*, when a defendant holds an honest and reasonable belief that, if true, would render his conduct not wrongful, the defendant shall not be convicted under a general intent crime.

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115 *Id.* at 674.

116 *Id.* at 674–75.

117 *Id.* at 675.

118 *Id.* at 673.

119 *Id.*

120 *See Feola*, 420 U.S. at 676.

121 *See id.* at 679–84.

122 *Id.* at 684. *Feola*'s holding reinforces the conclusion this Article has drawn from *Carter* that the defendant need not have knowledge of attendant circumstances. *See supra* Section I.B.

123 *Feola*, 420 U.S. at 686 (emphasis added).

124 *Id.*

In a footnote, the Court blessed us with four examples of cases illustrating this defense.[125] The most instructive is *United States v. Young*,[126] which resulted in a vacated conviction.[127] According to Young, as he was driving, a car "abruptly pulled [up] in front" of him.[128] In an attempt to escape what he perceived to be "local rowdies" harassing him, Young swerved out of the way.[129] He ended up striking the car.[130] Unfortunately for Young, the "local rowdies" were neither local nor rowdies; instead, they were FBI agents trying to arrest Young.[131] He was prosecuted and convicted for assaulting federal officers in violation of § 111.[132] The Court of Appeals for the Fifth Circuit vacated.[133] While concluding that "knowledge of the official capacity of the person assaulted is unnecessary for conviction,"[134] the court of appeals held that the defendant was entitled to present a mistake-of-fact defense.[135] If the jury believed Young acted out of a reasonable belief that the FBI agents were thugs set out to hurt him, the court noted, a conviction could not stand; in such a case, the assault was done with "legal excuse."[136]

The Court of Appeals for the Tenth Circuit aptly explained *Feola*'s mistake defense in *United States v. Quarrell*.[137] The Quarrell brothers faced charges under the Archaeological Resources Protection Act ("ARPA") for excavating an "archaeological resource located on public lands" without a

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125 *Id.* at 686 n.19 (providing the following four examples: United States v. Perkins, 488 F.2d 652 (1st Cir. 1973); United States v. Ulan, 421 F.2d 787 (2d Cir. 1970); United States v. Goodwin, 440 F.2d 1152 (3d Cir. 1971); and United States v. Young, 464 F.2d 160 (5th Cir. 1972)). Interestingly, *Goodwin* relies on the availability of the mistake-of-fact defense to distinguish general intent from strict liability. *Goodwin*, 440 F.2d at 1156 ("Since the statute does not encompass those types of 'public welfare offenses' which have abolished the requirement of mens rea, a mistake of fact which negates the existence of the necessary criminal intent will constitute a defense." (footnote omitted)); *see also* Francis v. Gov't of the Virgin Islands, 236 F. Supp. 2d 498, 501 (D.V.I. 2002) (per curiam) (noting that a minority of courts that consider statutory rape crimes general intent, as opposed to strict liability, offenses allow reasonable mistake-of-fact defenses).

126 464 F.2d 160 (5th Cir. 1972).

127 *Id.* at 161.

128 *Young*, 464 F.2d at 161.

129 *Id.* at 162–63.

130 *Id.* at 162.

131 *Id.* at 161.

132 *Id.*

133 *Id.*

134 *Young*, 464 F.2d at 163.

135 *Id.*

136 *Id.*

137 310 F.3d 664 (10th Cir. 2002).

permit.[138] On appeal, the brothers argued the district court erred in not allowing them to present a mistake defense that the brothers believed they were excavating on private, not public, land.[139] However, this did not suffice for the Tenth Circuit. As in *Feola* and *Young*, the court agreed that the defendants were entitled to present a reasonable and honest mistake-of-fact defense.[140] However, the court noted that the brothers must have argued they believed: (1) they were excavating on private land, and (2) they had permission to do so.[141] The court found the brothers' defense that they believed they were excavating on private land lacking—even if the belief was reasonable and honest—because excavating on private land without a permit is still unlawful.[142] The *Quarrell* case provides context to *Feola*'s defense: For a mistake-of-fact defense to be effective, the defendant must believe facts that, if true, would make his conduct lawful. Thus, *Feola*'s defense protects innocent actors from general intent liability by allowing for a reasonable and honest mistake. Although *Feola* laid out its defense in dicta, federal courts should adopt it to meaningfully distinguish general intent crimes from discouraged strict liability crimes.

Finally, although two other alternatives to meaningfully distinguish general intent crimes from strict liability crimes are plausible, they should both be discarded.

1. The *Elonis* Alternative Is Inadequate

Justice Thomas articulated the first alternative to *Feola* in his lone dissent in *Elonis v. United States*,[143] but it is not generally applicable and risks further muddying general intent doctrine.

Elonis posted menacing Facebook messages directed at his ex-wife, resulting in a conviction under 18 U.S.C. § 875(c), which made it a federal crime to transmit "any communication containing any threat . . . to injure the person of another."[144] While the majority's opinion used the MPC terms of negligence and recklessness,[145] Justice Thomas proposed characterizing the crime in terms of general intent.[146] In his view, to be convicted, the defendant needs to know only the facts that make his

138 *Id.* at 670.

139 *Id.* at 674.

140 *Id.* at 675.

141 *Id.*

142 *Id.*

143 575 U.S. 723 (2015).

144 *Id.* at 731–32.

145 *Id.* at 741.

146 *Id.* at 750–51, 755 (Thomas, J., dissenting).

conduct illegal.[147] Justice Thomas applied this test to the statute and concluded the provision requires only that the defendant: (1) know he transmitted a communication, (2) know the words used in that communication, and (3) understand the ordinary meaning of those words in the relevant context.[148]

It is unclear, however, why these facts are enough to make the defendant's conduct illegal. It seems plausible to think that the defendant should know the victim will interpret the communication as a threat, for instance.[149] After all, what seems appalling about this crime is the subjective fear the act instills in the recipient of the message. What if the defendant believed the victim would interpret the menacing text as a farce? After all, a message that appears menacing to an outside observer may be a mere inside joke between friends. It is challenging to determine what conduct would *always* be blameworthy since limitless circumstances generate potentially criminal conduct.

If it is hard to devise a generally applicable standard for a single statute, it is even harder to devise one for all offenses. In *Elonis*, Justice Thomas had to rely on narrowly tailored, early twentieth-century precedents to determine the facts that the defendant needs to know, which made the resulting standard inapplicable outside the narrow scope of transmitting threats.[150]

So far, the Supreme Court has not accepted, or even suggested, a test that applies broadly to general intent crimes, leaving the looming confusion over general intent in place. Such inapplicability underscores the need for *Feola* defenses, which turns the problem on its head. Specifically, instead of declaring by judicial fiat that voluntarily performing a certain act makes the defendant guilty, *Feola* looks to the conduct that the defendant actually performed.[151] *Feola*, then, allows the jury to decide if the defendant was blameworthy given the circumstances as he reasonably believed them to be.[152] Recall how the *Young* court

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147 *Id.* at 755.

148 *Id.*

149 Note that requiring the defendant to know his victim will interpret the communication as a threat is not the same as hinging defendant's guilt on an eggshell plaintiff's perception. The former focuses on the culprit's subjective mental state, the latter on the victim's.

150 *Elonis*, 575 U.S. at 754–56.

151 *See, e.g.*, Carter v. United States, 530 U.S. 255, 270 (2000) ("[A] forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of the 'otherwise innocent.'").

152 United States v. Feola, 420 U.S. 671, 686 (1975); *see also* United States v. Perkins, 488 F.2d 652, 655 (1st Cir. 1973) ("[T]he district court properly and adequately charged the jury that if the defendant . . . could not be convicted unless he used more force than was necessary to protect the person or property of himself or others . . . .").

avoided assuming that, just because the defendant hit the officers' car, he was guilty under § 111.[153] Instead, the court gave Young the chance to present a reasonable and honest mistake defense explaining why his conduct was innocent.[154] The flexibility of *Feola*'s defense relieves the courts of arduously drawing arbitrary distinctions between what conduct counts as innocent or guilty.

2. *Feola*'s Defense Is More Appropriate for General Intent Crimes

The second alternative to *Feola* is to infer a knowingly mens rea from general intent crimes, which is the Supreme Court's preferred approach in strict liability cases. *Morissette* and its progeny shield innocent actors by imputing the heightened mens rea of knowingly. Though favorable to defendants, it is unnecessary in general intent prosecutions, which typically require the knowing commission of a wrongful act. Additionally, *Morissette*'s practice risks running roughshod over Congress's commands.

The Supreme Court has expressed major concerns about criminalizing blameless conduct in strict liability cases. The Justices do not want to punish collecting seemingly abandoned rusting scraps of metal,[155] buying food stamps,[156] distributing adult videos,[157] or owning a gun in and of itself.[158] The rationale is that acts committed without a mens rea should not result in punishment.

However, general intent crimes are different from strict liability crimes. Taking money by force and violence is wrongful, as is igniting paper towels in the dispenser of the school's bathroom. The act is considered wrongful if a reasonable person would have known that there was a substantial risk that (1) the nature of his conduct was against the law, (2) attendant circumstances would have made the conduct illegal, or (3) the result of the conduct would have been illegal.[159] In other words, the act is wrongful if the actor was negligent in knowing that his conduct was against the law.[160] For example, a reasonable person would have known

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153 United States v. Young, 464 F.2d 160, 163 (5th Cir. 1972).

154 *Id.* ("[T]he jury should have been clearly instructed that it could not find Young guilty of the offenses charged unless the jury believed that Young intended to threaten or attempted to injure [the agent].").

155 Morissette v. United States, 342 U.S. 246, 247 (1952).

156 Liparota v. United States, 471 U.S. 419, 433 (1985).

157 United States v. X-Citement Video, Inc., 513 U.S. 64, 65–66 (1994).

158 Rehaif v. United States, 588 U.S. 225, 237 (2019).

159 What type of conduct satisfies this test is an interesting question which could shed light on how to categorize crimes as a general or specific intent offense. It is also, sadly, beyond the scope of this Article.

160 MPC § 2.02(2)(d).

that taking a briefcase by force and violence from a bank employee is accompanied by a substantial risk that the money is of another. Similarly, a reasonable actor would have known there is a high chance that a major fire will result from igniting paper towels. *Carter* and *R.S.W.* imply the actor loses his innocence when he commits the wrongful act.[161] Both strict liability and general intent crimes require a voluntary act, but in the former, the act committed is innocent; in the latter, the act committed is wrongful.

The fundamental problem with general intent, however, is that merely requiring knowledge of conduct will not guarantee the actor's guilt. Compare *Morissette* with *Carter*, both of which punish a form of theft. The former case reads in a mens rea of knowledge of the bomb casings belonging to someone else.[162] This mens rea is enough to ensure the actor is guilty because he voluntarily removes property that he knows belongs to someone else.

In contrast, *Carter* concludes that knowingly taking property by force is guilty.[163] While in most circumstances, knowingly taking property by force would imply knowing that the property belongs to someone else, that is not always the case. Every act must be viewed in context, which *Carter* does not account for. Suppose a man, David, withdraws a significant amount of cash at his local bank. After placing the cash into his backpack, he makes a quick stop at the bathroom where he forgets his belongings. He realizes his backpack is missing as he is about to walk out of the bank. Panicked, David looks around the rotunda and spots a man named Victor who is carrying an identical backpack. David then runs up to Victor and forcibly snatches the backpack from his hands. It turns out Victor is a bank employee transporting the bank's money. Even though David has a good-faith, and arguably reasonable, belief that the money he was grabbing was his, he is guilty under § 2113(a). Such a result punishes an innocent actor and goes against the *Morissette* line of cases. It follows that, even if general intent liability mostly hinges on wrongful acts, it can also scoop in innocent parties.

Feola's defense provides a refined approach that allows courts to weed out innocent parties they might punish otherwise. General intent's requirement that the actor be aware of his conduct will often mean a reasonable actor knows his conduct is wrongful. There is no need, thus, to read in a mens rea of knowledge as the Court does in *Morissette* and its progeny. All courts must do to shield innocent actors is ensure that, given

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161 *See* Carter v. United States, 530 U.S. 255, 269 (2000); United States v. Doe (R.S.W.), 136 F.3d 631, 635 (9th Cir. 1998).

162 *See* Morissette v. United States, 342 U.S. 246, 275–76 (1952).

163 *See Carter*, 530 U.S. at 257.

the circumstances, a reasonable person would be aware the actions are reprehensible.

Additionally, although favorable to defendants, increasing the mens rea to knowledge may contravene Congress's will. For example, the Court in *Feola* found that "to effectuate the congressional purpose of according maximum protection to federal officers," § 111 cannot be read to require specific intent to harm the officer.[164] It follows that, had the Court read in a knowledge requirement, it would have disregarded Congress's command. Instead, it chose to allow for a reasonable and honest mistake defense.[165] *Feola* demonstrates that such defenses allow for the separation of innocent conduct from guilty conduct, all while respecting Congress's will.

Unless Congress indicates otherwise, the jurisprudential backdrop dictates that courts should assume every crime is of general intent type.[166] Reading in a mens rea of knowledge goes against such a presumption because general intent maps best onto the MPC's negligence, not knowledge, mens rea.

Similarly, Congress often ties courts' hands when it grounds a federal offense in common law. Even absent explicit language, it is a general rule that "a common-law term comes with its common-law meaning."[167] If, at common law, the crime was a general intent crime, then there is a strong presumption that Congress intended the same for the federal counterpart.[168] Because general intent and knowledge are not equivalent, imputing a knowledge mens rea would contravene the legislature's aim. On the other hand, *Feola*'s defense has some roots in the common law of general intent and thus is more compatible with Congress's goals. For example, jurisdictions treating statutory rape—a classic strict liability crime—as general intent often allow defendants to present a reasonable

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164 United States v. Feola, 420 U.S. 671, 684 (1975).

165 *Id.* at 686.

166 *See, e.g.*, United States v. Bailey, 444 U.S. 394, 406–08 (1980) (inferring the statute was a general intent offense based on absence of text or legislative history to the contrary); United States v. Martinez, 49 F.3d 1398, 1401 (9th Cir. 1995) (assuming general intent absent any indicia to the contrary) *superseded by statute*, Carjacking Correction Act of 1996, Pub. L. No. 104-217, 110 Stat. 3020, *as recognized in* United States v. Randolph, 93 F.3d 656 (9th Cir. 1996); United States v. Brown, 915 F.2d 219, 225 (6th Cir. 1990) (same).

167 Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 102 (2011).

168 For example, in *R.S.W.*, the Court of Appeals for the Ninth Circuit concluded that violation of § 81 was a general intent crime because arson was such a crime at common law. 136 F.3d 631, 635 (9th Cir. 1998).

mistake defense regarding the victim's age.[169] Thus, it is more faithful to Congress's aims to adopt *Feola*'s defense over *Morissette*'s solution.[170]

Last, but not least, reading in a knowledge mens rea would go against clearly established Supreme Court precedent. Recall, in *Carter*, the Court indicated that for a general intent conviction, the defendant need not know the money he was forcibly taking was "of another."[171] In Section I.B, this Article observed the same pattern in lower court cases such as *R.S.W.* For example, the Ninth Circuit found that the minor did not need to know her action would set the school ablaze.[172] In addition, in *Hicks*, the Fifth Circuit held that the defendant did not need to know his angry cursing would intimidate the flight crew.[173] Imputing a knowingly mens rea would go against those settled precedents.

Feola's defense goes far enough to protect innocent actors, but no further. A defendant can be convicted based on his wrongful conduct, even if the facts he believed, if true, make him guilty of a different crime than the one he was indicted for. This effect suggests that general intent is essentially an in for a penny, in for a pound crime. Take *Feola*, for instance, where the defendants had no idea their victims were police officers, yet had no legally acceptable reason for assaulting them.[174] If the Court took the facts as defendants believed them to be, it would have found them guilty of mere assault (the penny). However, the jury actually convicted them of assaulting federal officers under § 111 (the pound).[175] Similarly, in *Quarrell*, the brothers' belief that they were excavating without a permit on private land (the penny) made them guilty of an ARPA violation, which prohibited unapproved excavations on public land (the pound).[176]

The protection of innocent actors is paramount. Hence, lower courts should accept the mistake-of-fact defense referred to in *Feola*. Although

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169 *See, e.g.*, Francis v. Gov't of the Virgin Islands, 236 F. Supp. 2d 498, 501 (D.V.I. 2002) (per curiam) (noting a minority of courts that consider statutory rape crimes general intent offenses allow reasonable mistake-of-fact defenses).

170 Allowing a *Feola* defense does not go against *Carter*'s statement that even a defendant who forcefully takes the money under "a good-faith claim of right" is guilty. *See* Carter v. United States, 530 U.S. 255, 270 (2000). A reasonable mistake is based on a non-negligent belief, an objective standard, while good faith is a subjective standard. *See infra* Section III.A. Thus, even under *Feola*, a defendant's mere good-faith belief is not enough for acquittal; the belief must also be reasonable.

171 *Carter*, 530 U.S. at 257.

172 *R.S.W.*, 136 F.3d at 636.

173 United States v. Hicks, 980 F.2d 963, 974 (5th Cir. 1992).

174 United States v. Feola, 420 U.S. 671, 674–75 (1975).

175 *Id.* at 673.

176 United States v. Quarrell, 310 F.3d 664, 668 (10th Cir. 2002).

some courts of appeals have sparingly accepted a mistake defense,[177] many have not.[178] As described above, rejecting such a defense leads to punishing blameless conduct—the very outcome the Court repeatedly cautioned against in its *Morissette* line of cases. Thus, *Feola*'s mistake of fact defense provides the right balance between protecting innocent defendants while respecting Congress's legislative aims.

D. *Felony Negligence*

So what is the MPC's equivalent of general intent? This Section explains that, as mistake-of-fact defenses negate the mens rea of the statute, the availability of a mistake-of-fact defense indicates a crime of negligence. Moreover, general intent and negligence bear striking similarities: Both permit reasonable and honest mistake defenses, forbid intoxication defenses, and focus on the defendant's objective—rather than subjective—perceptions. Finally, the common law and numerous treatises support the conclusion that general intent corresponds to negligence.[179] There is, however, a difference.[180] In contrast to negligence as outlined in the MPC, a prosecutor can secure a conviction under general intent by demonstrating the defendant was negligent for any crime—not necessarily the one the defendant was charged with.[181] In this way, general intent acts not as a pure mens rea of negligence but as a felony negligence: The defendant can be convicted of the crime he was charged with by (1) committing a subsumed crime and (2) performing the acts required by the main crime, regardless of his mens rea.

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177 *See, e.g.*, United States v. Young, 464 F.2d 160, 163 (5th Cir. 1972); United States v. Perkins, 488 F.2d 652, 654–55 (1st Cir. 1973); United States v. Ulan, 421 F.2d 787, 791 (2d Cir. 1970); United States v. Goodwin, 440 F.2d 1152, 1156 (3d Cir. 1971); *Quarrell*, 310 F.3d at 676; United States v. Ettinger, 344 F.3d 1149, 1154–58 (11th Cir. 2003).

178 *See, e.g.*, United States v. Garcia, 288 F. App'x 888, 889 (4th Cir. 2008) (per curiam); United States v. Smith-Baltiher, 424 F.3d 913, 924 (9th Cir. 2005) ("[M]istake of fact is not a defense to the general intent crime of illegal reentry . . . ."); United States v. Iron Eyes, 367 F.3d 781, 785–86 (8th Cir. 2004).

179 *See infra* Section I.D.2.

180 *See infra* Section I.D.3.

181 Another way of thinking about general intent is to make it equivalent to negligence *of the charged crime*, but modify MPC § 2.04(2) to exclude the last sentence, thus leaving: "Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed."

1. General Intent Best Matches MPC's Negligence

General intent is most equivalent to negligence because, under either standard, the prosecution can carry its burden by showing the defendant possessed any mens rea: negligence, recklessness, knowledge or purpose.

Recall that *Feola*'s mistake-of-fact defense needs to be (1) honest and (2) reasonable.[182] Thus, to better this defense, one needs to determine what an honest belief is. The Supreme Court never squarely addressed this question in the context of criminal law. However, *New York Times Co. v. Sullivan*[183]—decided about a decade before *Feola*—suggests a belief is not honest if it is reckless or if the defendant acted with knowledge.[184] Sullivan, a police department supervisor, sued the New York Times for libel over an article that misrepresented the police's role in suppressing African American voting rights.[185] The Supreme Court reversed Sullivan's victories in the lower courts.[186] Drawing heavily from criminal law, Justice Brennan explained that the First Amendment requires a defamatory statement be made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[187] In other words, he equated "actual malice" with a mens rea of recklessness or knowledge. At the same time, Justice Brennan explained that the requirement of actual malice "immuniz[es] honest misstatements of fact" from liability.[188] Thus, as the Court explained, "actual malice" is the opposite of having an "honest" mistake defense and corresponds to a mens rea of recklessness or knowledge.[189]

In addition, since *Feola*'s mistake-of-fact defense needs to be reasonable, it follows that a defendant cannot be negligent. Mistake-of-fact defenses are successful only if they negate the mens rea. The corollary is that, based on the type of defense allowed, one can infer the mens rea of the crime. A higher bar for a defense corresponds with a lower mens rea of the crime, and vice versa. An unreasonable (or negligent) mistake of fact

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182 *See infra* Section II.C.

183 376 U.S. 254 (1964).

184 *See id.* at 279–80.

185 *Id.* at 256–59.

186 *Id.* at 264.

187 *Id.* at 279–80.

188 *Id.* at 282 & n.21; *see also* Sophia Qasir, *Anonymity in Cyberspace: Judicial and Legislative Regulations*, 81 FORDHAM L. REV. 3651, 3655 n.22 (2013); Amy Gajda, *The Justices and News Judgment: The Supreme Court as News Editor*, 2012 BYU L. REV. 1759, 1782 (2012) ("[In *New York Times*] . . . the Court protected journalists from lawsuits brought by public officials when the publication had made an honest mistake of fact."); Randy S. Frisch, *New Technologies on the Block:* New Kids on the Block v. News America Publishing, Inc., 10 CARDOZO ARTS & ENT. L.J. 51, 55 n.26 (1991).

189 *N.Y. Times Co.*, 376 U.S. at 279–80, 292 n.30.

can negate a mens rea of recklessness or above, but not a mens rea of negligence. After all, a defendant cannot prevail against a charge for a crime of negligence by relying on his unreasonable or negligent belief: That just demonstrates his negligence. Only a reasonable mistake of fact can nullify a mens rea of negligence. Piecing together this observation with the rationale from *Sullivan* suggests *Feola*'s requirement that the mistake be reasonable and honest indicates that the defendant cannot have a mens rea of negligence, recklessness, or knowledge.

Further, under general intent, the government can prevail by proving the defendant acted purposely because purpose requires knowledge. For example, if the defendant intends to harm a federal officer, he will first need to know his victim is a federal officer. Therefore, under *Feola*, the government can prevail if it shows the defendant was negligent, reckless, or acted with knowledge or purpose.

But the same options are available to the prosecution when pursuing a negligence crime under the MPC. The MPC arranges mens rea in order of increasing culpability: negligence, recklessness, knowledge, and purpose.[190] A showing that the defendant acted with a certain mens rea also satisfies showing any mens rea lower on the scale.[191] For example, if the prosecution succeeds in proving that the defendant acted purposely—the highest mens rea on the scale—then it also satisfies its burden of proof for any other mens rea. Thus, if the prosecution proves that a defendant's mistake was reckless, or that he acted with knowledge or purpose, it also proves that the defendant was negligent.[192]

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190 MPC § 2.02(2).

191 MPC § 2.02(5) ("When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.").

192 One of the most misleading Supreme Court mappings of general intent on the MPC is United States v. Bailey, 444 U.S. 394 (1980). In *Bailey*, the Court, citing the MPC, stated that "'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *Id.* at 405 (citing MPC § 2.02, cmts. at 125 (AM. L. INST., Tentative Draft No. 4, 1955)). The statement is confusing because, indeed, specific intent roughly corresponds with the mens rea of purpose. *Compare* Pierre v. Att'y Gen. of the U.S., 528 F.3d 180, 189 (3d Cir. 2008) ("Specific intent requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result."), *with* MPC § 2.02(2)(a) ("A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result . . . ."). However, general intent does not require knowledge of a crime's material elements, and is thus not a mens rea; it is more akin to a voluntariness requirement. *See supra* Sections I.A, I.B. Thankfully, this misleading statement was subsequently ignored by the Court.

General intent maps best onto negligence because both deal with objective rather than subjective states of mind. For a general intent crime, the prosecution will secure a conviction if it shows the actor's belief was negligent—a requirement that focuses on an objective state of mind. In contrast, specific intent focuses not on a reasonable person's apprehension of the situation, but instead on the actor's subjective intent.[193] Similarly, in the MPC realm, negligence is the only mens rea focusing on a reasonable person's perception.[194] Recklessness, knowledge, and purpose, on the other hand, demand inquiries into what the actor "consciously disregard[ed]," was "aware" of, or had a "conscious object" to do.[195] General intent and the MPC's negligence, then, both focus exclusively on objective, rather than subjective, facts.

Another similarity is that neither general intent nor negligence allows defendants to present an intoxication defense. The general intent jurisprudence, albeit muddy, consistently holds that a defendant charged with a general intent crime cannot present an intoxication defense.[196] Drunk defendants cannot invoke their inebriation to claim that they were not performing the acts knowingly.[197] Nor is such an option available to a defendant charged with a negligence crime.[198]

Finally, many state cases, federal precedents, and commentators support the conclusion that general intent is equivalent to negligence. The Supreme Court of Louisiana held that general intent exists when "the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result."[199] Thus, mere negligence that the prohibited result will occur would suffice for a conviction. Similarly, the Maryland Court of Appeals held that general intent includes acts that are negligent.[200] By the same token, the Ninth Circuit held that under § 111, a general intent crime, "the

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193 *See, e.g.*, *Pierre*, 528 F.3d at 189; United States v. Kimes, 246 F.3d 800, 806 (6th Cir. 2001) ("The defendant must also act with the purpose of violating the law.").

194 *Compare* MPC § 2.02(2)(d) (negligently), *with* §§ 2.02(2)(a)–(c) (purposely, knowingly, and recklessly).

195 MPC § 2.02(2)(a)–(c).

196 *See, e.g.*, Matthew J. Boettcher, *Voluntary Intoxication: A Defense to Specific Intent Crimes*, 65 U. DET. L. REV. 33, 43 (1987) (noting that the common law developed the general and specific intent dichotomy, in part, to determine which crimes should allow for intoxication defenses).

197 *See, e.g.*, United States v. Jim, 865 F.2d 211, 212 (9th Cir. 1989) ("Voluntary intoxication is not a defense to a general intent crime.").

198 *See* MPC § 2.08 cmt. 1 ("When, on the other hand, recklessness or negligence . . . suffices to establish the offense, an exculpation based on intoxication is precluded by the law.").

199 State v. Daniels, 109 So. 2d 896, 899 (La. 1958), *overruled on other grounds by* State v. Gatlin, 129 So. 2d 4, 7–8 (La. 1961).

200 Ricketts v. State, 436 A.2d 906, 912 (Md. 1981).

only issue would be whether a reasonable man would find that the defendant's actions should have put a federal officer in apprehension of bodily harm."[201] These state and federal precedents support the conclusion that general intent corresponds to negligence.

Commentators share this perspective. Black's Law Dictionary states that "general intent usually takes the form of . . . negligence (involving blameworthy inadvertence)."[202] The MPC echoes the sentiment, stating that "[g]eneral criminal intent is present whenever . . . the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act."[203] Similarly, Professor Frank J. Remington defines the term as an act rendered morally blameworthy because of a lack of due care on the defendant's part.[204] Thus, both judges and academics agree that general intent corresponds with negligence.

2. General Intent Acts as a Felony Negligence

General intent best matches the MPC's mens rea of negligence. However, *Feola*'s in for a penny, in for a pound approach makes a defendant guilty of a general intent crime even if his negligence would only make him guilty of a crime requiring a lesser mens rea.

Recall that, in *Quarrell*, the brothers were found guilty of violating ARPA by excavating without a permit on public land even though they believed they were excavating on private land.[205] If they had believed they were excavating on private land *with a permit*, and the government had shown their permit-holding belief was negligent, the brothers would still have been guilty.[206] In both scenarios, the logic is the same: The brothers are guilty under ARPA because they (1) engaged in voluntary conduct (excavating) and (2) were at least negligent of the fact that their behavior made them guilty of a crime (excavating on private land without the permit). Thus, what makes the defendants guilty of an ARPA violation is not their negligence of violating ARPA, but their negligence of excavating on *private* land without a permit.

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201 United States v. Jim, 865 F.2d 211, 212–13 (9th Cir. 1989).

202 *General Intent*, BLACK'S LAW DICTIONARY (12th ed. 2024).

203 MPC § 2.02 cmt. 1 n.3.

204 *See* Frank J. Remington & Orrin L. Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644, 651 (1952).

205 United States v. Quarrell, 310 F.3d 664, 675–76 (10th Cir. 2002).

206 *Id.*

In contrast, the MPC takes a different approach. Section 2.04(2) provides that the defendant will be guilty of the crime he believes he was committing:

> Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant *would be guilty of another offense* had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant *shall reduce the grade and degree of the offense* of which he may be convicted to those of the offense of which he would be guilty *had the situation been as he supposed*.[207]

Per the second sentence, the brothers' reasonable and honest belief that they were excavating without a permit on private land would have made them guilty of only that crime, not of violating ARPA. Similarly, had *Feola* been decided under the MPC's scheme, the drug dealers would have been merely guilty of assault, and not of violating § 111.

Therefore, under general intent, the government carries its burden if it succeeds in showing the defendant: (1) engaged in voluntary conduct; (2) satisfied the material elements of the statute presented in the indictment (ARPA and § 111); and (3) was negligent or possessed any higher mens rea of at least one crime, whether the same crime was the one in the indictment (excavating on private land without a permit) or not.[208] General intent, thus, maps onto negligence under the MPC—but negligence with respect to any crime, whether listed in the indictment or not.

II. Specific Intent's Equivalency to Purposely

General intent is roughly equivalent to negligence; but specific intent also has an MPC equivalent. Both precedent and commentators agree that specific intent is equivalent to the MPC's purposely mens rea.

A translation is perfect if, given any set of evidence presented to the jury, the outcome would be the same under the original and translated standards. Specifically, the burdens of the prosecution and the defense must be the same under either standard. To see why, consider a statute requiring proof that the defendant acted with general intent when taking someone else's property. Under general intent, intoxication is not a defense. Imagine translating general intent to knowingly, which, under the MPC, allows for an intoxication defense. All else equal, the translation is not ideal because, under the MPC, intoxicated defendants could be acquitted.

There is general agreement that specific intent maps onto the MPC's mens rea of purposely.[209] The Supreme Court has repeatedly stated that

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[207] MPC § 2.04(2) (emphasis added).

[208] *See supra* note 181 and accompanying text.

[209] *See* LAFAVE & SCOTT, JR., *supra* note 12, at 197–98; United States v. Bailey, 444 U.S. 394, 405 (1980).

"'purpose' corresponds loosely with the common-law concept of specific intent."[210] Indeed, specific intent crimes typically require proof the defendant acted purposely to bring about a result.

The little overlap between the mens rea of purposely and knowingly does not warrant jumping to conclusions. The Supreme Court noted that "[i]n the case of most crimes, 'the limited distinction between knowledge and purpose has not been considered important since "there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results."'"[211] Thus, the caselaw can be murky about whether a defendant has to possess specific intent or merely knowledge. The MPC fares no better. Table 1 summarizes the definitions of each mens rea for result, nature of conduct, and attendant circumstances.

Actus Reus	**Purposely**	**Knowingly**
Result	it is his conscious object . . . to cause such a result	he is aware that it is practically certain that his conduct will cause such a result
Nature of Conduct	it is his conscious object to engage in conduct of that nature	he is aware that his conduct is of that nature
Attendant Circumstances	he is aware of the existence of such circumstances or he believes or hopes that they exist	he is aware . . . that such circumstances exist

Table 1[212]

For result and nature of conduct, the MPC substantively distinguishes between the two mens rea—a "conscious object" is required for purposely, while mere "aware[ness]" suffices for knowingly.[213] The federal caselaw neatly maps specific intent onto purposely for both result and nature of conduct.

However, attendant circumstances makes this translation more confusing. Purposely can be defined as: (1) a defendant is aware of the existence of such circumstances or (2) he believes or hopes that they exist.

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210 *Bailey*, 444 U.S. at 405.

211 *Id.* at 404 (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 445 (1978) (quoting LAFAVE & SCOTT, JR., *supra* note 12, at 197)).

212 *See* MPC § 2.02(2).

213 *Compare* MPC § 2.02(2)(a)(i), *with* MPC § 2.02(2)(b)(i).

The first part of the definition mirrors knowingly for attendant circumstances. The second part, however, offers an alternate way for the government to prove the defendant acted purposely. Unlike for knowingly, which requires the factual existence of the circumstances, the second part of purposely merely requires the defendant to believe or hope those circumstances exist—they need not actually exist. In this odd way, the purposely mens rea is *lower* than knowingly because it allows for this alternate avenue of liability.

A. *Specific Intent Is Equivalent to Purposely for Results*

When the material element is a result, the MPC states the defendant acts purposely if "it is his conscious object . . . to cause such a result."[214] But knowingly for a result under the MPC only requires the actor to be "aware that it is practically certain that his conduct will cause such a result."[215] Throughout this analysis, it is important to keep these two definitions in mind and pay close attention to how courts characterize specific intent to avoid mismapping specific intent.

United States v. Griffith[216] aptly demonstrates that specific intent maps onto purposely when it comes to results. The appellees in that case were corporations and individuals who operated movie theaters.[217] In the previous five years, the appellees managed to expand their empires from 37 towns to 85, in part, due to securing exclusive privileges to run new movies.[218] The criminal complaint alleged violations of the Sherman Act.[219] The crucial question for the Court was whether antitrust laws required specific intent to either restrain trade or build a monopoly.[220] The Justices answered in the negative.[221] They found that "[i]t is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements."[222] The Court found no "intent or purpose" is required if the restraint of trade or monopoly is a "necessary and direct result" of a defendant's conduct.[223] The Court thus equated

214 MPC § 2.02(2)(a)(i).

215 MPC § 2.02(2)(b)(ii).

216 334 U.S. 100 (1948).

217 *Id.* at 101–02.

218 *Id.* at 102–03.

219 *Id.* at 102.

220 *See id.* at 105.

221 *Id.*

222 *Griffith*, 334 U.S. at 105.

223 *Id.* at 106, 108.

showing "intent or purpose" with "specific intent."[224] Comparing these statements to the MPC's definition of knowingly and purposely, acting knowingly (achieving a "necessary and direct result") is enough for a conviction under the Sherman Act; proof of purpose ("intent or purpose"), however, is not required.

Similarly, in *Holder v. Humanitarian Law Project*,[225] the Court strongly implied that specific intent requires a "conscious object," or purpose, to achieve a result.[226] The statute at issue punished whoever "knowingly provided material support" to a designated terrorist organization.[227] The appellants wanted to assist the Partiya Karkeren Kurdistan with training "on how to use humanitarian and international law to peacefully resolve disputes" and the Liberation Tigers of Tamil Eelam on how to engage in "political advocacy on behalf of Tamils who live in Sri Lanka."[228] Because providing such support would have exposed the appellants to criminal punishment, they brought a constitutional challenge under the Due Process Clause and the First Amendment.[229] They also, however, offered the Court a way out of the constitutional question.[230] By construing the statute to require proof that "a defendant intended to further a foreign terrorist organization's illegal activities," the Justices could have avoided the constitutional challenge because appellants had no such purpose.[231] The Court declined the offer,[232] finding Congress plainly required knowledge about the organizations' connection to terrorism, and not "specific intent to further the . . . activities."[233] Once again, the Court equated specific intent with the conscious object of achieving a prohibited result.

B. *Specific Intent Is Equivalent to Purposely for Nature of Conduct*

The mapping is similarly easy when the material element is nature of conduct. A defendant acts purposely, the MPC states, when "it is his conscious object to engage in conduct of [the prohibited] nature."[234] In

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224 *See id.* at 105–06; MPC § 2.02(2)(a)(i).

225 561 U.S. 1 (2010).

226 *See id.* at 56 (Breyer, J., dissenting).

227 *Id.* at 8, 36 (majority opinion).

228 *Id.* at 21–22, 37.

229 *Id.* at 10–11.

230 *Id.* at 16.

231 *Holder*, 561 U.S. at 16.

232 *Id.*

233 *Id.* at 16–17.

234 MPC § 2.02(2)(a)(i).

contrast, mere "aware[ness] that his conduct is of that nature" is required to act knowingly.[235] For example, the defendant in *United States v. Yermian*[236] lied about his checkered past on his security clearance application to the Department of Defense, as part of his new job for a defense contractor.[237] He was then charged under 18 U.S.C. § 1001, which punishes "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations."[238] His sole defense at trial, and the only question presented to the Supreme Court, was whether the statute required knowledge that his statements would be transmitted to the federal government.[239] In analyzing the legislative history of § 1001's predecessor, Justice Powell noted the requirement that the defendant possess "specific intent to deceive the Federal Government" did not survive a 1934 amendment.[240] Because, in the Court's view, specific intent was equivalent to an "intent" to engage in fraudulent conduct, specific intent corresponds to the MPC's mens rea of purposely when the material element of the statute is nature of conduct.[241]

C. *Specific Intent Is Equivalent to Purposely for Attendant Circumstances*

The MPC definitions of purposely and knowingly for attendant circumstances are overlapping.[242] Under the MPC, a defendant acts purposely when (1) "he is aware of the existence of such circumstances" or (2) "he believes or hopes that they exist."[243] In turn, the MPC postulates that the defendant acts knowingly when "he is aware . . . that such circumstances exist."[244] The former necessarily includes the latter. Indeed, the first part of the definition of purposely is exactly the definition of knowingly.

According to the MPC, for a defendant to act knowingly the circumstances must "exist."[245] Section 2.02(7) and the comments accompanying it make that clear: "When knowledge of the existence of a

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235 *Id.* § 2.02(2)(b)(i).

236 468 U.S. 63 (1984).

237 *Id.* at 65.

238 *Id.* at 68.

239 *Id.* at 66.

240 *Id.* at 71.

241 *See id.* at 71, 74.

242 *Compare* MPC § 2.02(a) (purposely), *with* MPC § 202(b) (knowingly).

243 *Id.* § 2.02(2)(a)(ii).

244 *Id.* § 2.02(2)(b)(i).

245 *Id.*

particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence . . . ."[246] Alternatively, the comment explains that a defendant acts knowingly when he is aware "of a high probability of [the fact's] existence."[247] In contrast, for the accused to act purposely, the circumstances do not have to exist; it is enough that the defendant thinks, or "believes or hopes," that they do.[248]

Showing that specific intent translates to purposely for attendant circumstances requires showing two conditions. First, merely being aware of existing circumstances will show the defendant acted with specific intent. Second, the prosecution can carry its burden by showing the defendant believed or hoped the circumstances existed. Importantly, the second condition implies the defendant can be convicted for a crime even though the attendant circumstances did not actually exist.

1. Cases Where the Circumstances Existed

The few Supreme Court cases discussing this issue indicate that knowledge is the appropriate substitute when the circumstances exist. The defendants in *United States v. Freed*[249] were charged under the National Firearms Act with the crime of receiving hand grenades not registered to them.[250] The Court, finding this a strict liability crime, noted that "[t]he Act requires no specific intent or knowledge that the hand grenades were unregistered."[251] The Justices thus equated specific intent with knowledge mens rea for registering the weapons (attendant circumstance).

The Court again implicitly equated the two in *United States v. Yermian*.[252] The defendant there was charged under 18 U.S.C. § 1001, punishing whoever "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements."[253] The Court rejected the defendant's sole defense that "he had no actual knowledge that his false statements would be transmitted to a federal agency."[254] It noted that the statute lacked "any requirement that the prohibited conduct be

246 *Id.* § 2.02(7).

247 *Id.*

248 MPC § 2.02(2)(a)(ii).

249 401 U.S. 601 (1971).

250 Brief for the United States at 4–5, United States v. Freed, 401 U.S. 601 (1971).

251 *Freed*, 401 U.S. at 607.

252 468 U.S. 63 (1984); *id.* at 73.

253 *Id.* at 65, 68.

254 *Id.* at 66, 68.

undertaken with specific intent to deceive the Federal Government, or with actual knowledge that false statements were made in a matter within federal agency jurisdiction."[255] Again, specific intent and knowledge were treated as equivalent when the element at issue was an attendant circumstance.[256]

In *United States v. Pomponio*,[257] the Court endorsed the jury instruction entered by the district court in a tax evasion case that "[t]o establish the specific intent the Government must prove that these defendants . . . fil[ed] these returns, knowing that they were false, purposely intending to violate the law."[258]

In general, cases that mention specific intent when describing the mens rea attaching to attendant circumstances are hard to come by. Indeed, since specific intent is generally thought of as purpose, it is linguistically awkward to say that someone acted purposely with respect to an attendant circumstance. Thus, Courts often use specific intent when discussing other types of elements but switch to knowledge when describing attendant circumstances.[259] Even the MPC had to borrow the definition of knowledge when defining purposely.[260]

Lower courts similarly equate knowledge and specific intent when it comes to attendant circumstances. For example, in *United States v. Hussein*,[261] the defendant was convicted of entering the United States after deportation and without the permission of the Attorney General.[262] In affirming, the Court of Appeals for the Sixth Circuit noted that "the Government need not prove specific intent, that is, that appellants knew they were not entitled to reenter the country without the permission of the Attorney General."[263] The attendant circumstance in this case was the absence of the Attorney General's permission, and the court clearly equated specific intent with knowledge.

The Court of Appeals for the Second Circuit showed a similar understanding in *United States v. Roper*.[264] In that case, the defendant was

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255 *Id.* at 73 (emphasis omitted).

256 *Id.*

257 429 U.S. 10 (1976) (per curiam).

258 *Id.* at 11 n.2 (first alteration in original). Note the requirement that defendants intended "to violate the law" in addition to committing the prohibited acts is a tax-crime-specific requirement and can be ignored for this Article's purposes. *See id.* at 10–11.

259 *See* United States v. Bailey, 444 U.S. 394, 403–05 (1980).

260 *See* MPC §§ 1.13(13), 2.02(2)(a).

261 675 F.2d 114 (6th Cir. 1982) (per curiam).

262 *Id.* at 115.

263 *Id.* at 116.

264 215 F. App'x 32 (2d Cir. 2007).

convicted of disorderly conduct in a Veteran's Affairs hospital.[265] The court characterized Roper's argument as accusing the lower court of erring "in not requiring a showing of specific intent—that is, by failing to require a showing that Roper knew that his conduct was obstructing the usual use of the facilities."[266] Again, the court equated specific intent with the attendant circumstance of knowingly obstructing the use of facilities. Thus, when attendant circumstances exist, courts—including the Supreme Court—often treat specific intent as knowledge.

2. Cases Where the Circumstances Did Not Exist

Further, when attendant circumstances do not exist, courts find that the defendant acted with specific intent if he merely believed those circumstances were present. Although the Supreme Court has not taken a case where the attendant circumstances did not exist, lower courts have often done so. These cases typically involve investigators impersonating minors in online chatrooms.[267] For example, in *United States v. Root*,[268] the defendant appealed his conviction for knowingly attempting to persuade a minor to engage in sexual activity after he arranged a meeting with an FBI agent posing as a thirteen-year-old girl.[269] He mainly argued that an actual minor is required.[270] In rejecting that argument, the Court of Appeals for the Eleventh Circuit noted that the government successfully proved Root had the specific intent to engage in a sexual act with a minor, even though none was involved.[271] Similarly, the court pointed out that an attempt—requiring specific intent to engage in the underlying criminal act—is not rendered invalid if "the defendant could not have achieved the final required act because it would have been impossible to commit the actual crime."[272] Thus, the court was clear that specific intent can be satisfied even in counterfactual scenarios. It is, therefore, enough for a defendant to counterfactually believe that an attendant circumstance—such as the age of the victim being below a number—is present for him to satisfy the requirements of specific intent.

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265 *Id.* at 33.

266 *Id.* at 34.

267 *See* Audrey Rogers, *Protecting Children on the Internet: Mission Impossible?*, 61 BAYLOR L. REV. 323, 348–50 (2009).

268 296 F.3d 1222 (11th Cir. 2002).

269 *Id.* at 1223–24.

270 *Id.* at 1227.

271 *Id.* at 1228–29.

272 *Id.* at 1229.

Overall, specific intent neatly maps onto the MPC's mens rea of purposely when the conduct is a result, an attendant circumstance, or a nature of conduct.

D. *Other Considerations*

Additionally, both specific intent and purposeful mens rea under the MPC may be conditional. Under the MPC, a defendant possesses the purposeful mens rea even if such purpose is conditional.[273] Similarly, in *Holloway v. United States*,[274] the Supreme Court concluded specific intent is satisfied even when conditional.[275] Holloway was carjacking vehicles by pointing his gun at the drivers and threatening to use it unless the drivers surrendered their keys.[276] Although the defendant's plan was to steal cars without hurting the victims, the defendant also admitted he would have used the gun had any of the drivers given him a "hard time."[277] Defendant was convicted for carjacking "with the intent to cause death or serious bodily harm."[278] He appealed, arguing the statute required a specific and unconditional intent.[279] In particular, since he did not have the intent to harm the drivers unless they resisted, he did not possess the requisite intent to cause death or serious bodily harm; the Justices disagreed.[280] In affirming the conviction, the Court relied on "the cases and the scholarly writing[s] that have recognized that the 'specific intent' to commit a wrongful act may be conditional."[281] Notably, to bolster his argument, Justice Stevens noted that the MPC also understands specific intent may be conditional.[282] As proof, he cited MPC § 2.02(6): "Requirement of Purpose Satisfied if Purpose is Conditional."[283] Thus, not only does *Holloway* confirm that specific intent may be conditional, it directly strengthens the previous conclusion that specific intent corresponds to MPC's purposely mens rea.

Both specific intent and purposely allow for an intoxication defense. The MPC allows intoxication defenses for crimes requiring a mens rea of

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273 MPC § 2.02(6).

274 526 U.S. 1 (1999).

275 *Id.* at 7–8, 12.

276 *Id.* at 3–4.

277 *Id.* at 4.

278 *Id.* at 3.

279 *Id.* at 7.

280 *Holloway*, 526 U.S. at 7, 12.

281 *Id.* at 9.

282 *Id.* at 10–11.

283 *Id.* at 11 n.11.

knowingly or purposely.[284] In turn, courts have recognized such a defense for specific intent crimes but not general intent crimes. Therefore, specific intent neatly translates onto the MPC's purposely mens rea.

III. An Illustrative Translation Use: Categorical Approach

This Part applies the translations derived in Parts I and II in the context of the categorical approach—a judicial doctrine that exceeds general and specific intent in messiness. Dealing with both (general and specific intent as well as the categorical approach) at the same time is headache squared.

Courts have criticized the categorical approach as "vague and confusing,"[285] "oft-confusing,"[286] and requiring "a tedious, imperfect, confusing, and at times conflicting analysis."[287] The Supreme Court opined that the categorical approach is "problematic"[288] and "not always easy to apply."[289] Academics agree.[290]

In general, the categorical approach is used to determine if a crime fits into a given definition.[291] This issue often comes up in immigration and sentencing law.[292] For example, immigrants may be subject to deportation or deprivation of certain privileges if they are convicted for a "crime involving moral turpitude," an "aggravated felony," or under a "law . . . relating to a controlled substance."[293] Similarly, a defendant's sentence can depend on whether he was convicted of a "crime of violence."[294] For example, 18 U.S.C. § 924 defines a crime of violence as a felony that:

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284 *See* MPC § 2.08.

285 Ovalles v. United States, 905 F.3d 1231, 1257 (11th Cir. 2018).

286 United States v. Armes, 953 F.3d 875, 880 (6th Cir. 2020).

287 United States v. Ross, 977 F.3d 1295, 1296 (8th Cir. 2020).

288 United States v. Davis, 588 U.S. 445, 453 (2019).

289 Nijhawan v. Holder, 557 U.S. 29, 35 (2009).

290 *See, e.g.*, Shelby Burns, *The* Johnson & Johnson *Problem: The Supreme Court Limited the Armed Career Criminal Act's "Violent Felony" Provision—and Our Children Are Paying*, 45 PEPP. L. REV. 785, 802 (2018) ("Needless to say, statutory interpretation, the categorical and modified categorical approach, and divisible and indivisible statutes all yield tangled opinions from the courts that are dense, confusing, and not always accurate."); Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It's Hard to Get Them*, 92 DENV. U. L. REV. 933, 944 (2015) ("Commentators have characterized the categorical approach as complex, controversial, and confusing.")

291 Burns, *supra* note 290, at 799–800.

292 *Id.* at 801–02; Sharpless, *supra* note 290, at 948.

293 8 U.S.C. § 1227(2)(A)–(B).

294 18 U.S.C. § 924(c)(1)(A).

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[295]

Element (A) is known as the "force clause," while element (B) is known as the "residual clause."[296]

Under the categorical approach, a court needs to decide whether a defendant's conviction—often resulting from a state crime—is based on a crime of violence. Crucially, at this stage, the court *cannot* look at the conduct the defendant actually committed.[297] Instead, it can only look at the *elements* of the two statutes, including the required mens rea. Based on these elements, the court needs to decide whether the elements of the definitional statute (here, 18 U.S.C. § 924) are *required* for a conviction under the state statute.[298] In other words, the court needs to determine whether the jury had to find the elements of the definitional statute to convict the defendant.[299] For example, in the context of a crime of violence, the court would decide if the defendant's conviction required him to use force knowingly. If so, the court would find a categorical match for this element. If not, and the statute required only a reckless use of force, the court would find there is no categorical match.

The translations from general and specific intent to the MPC's mens rea standards become crucial here. If the definitional statute uses the MPC mens rea but the conviction statute uses the general and specific intent mens rea, the court must translate between the two types.

Given the confusion surrounding general intent, it is not surprising that courts get the categorical approach wrong. Based on this Article's analysis in Part I, a general intent crime cannot satisfy the "force clause."[300] This is because courts hold that for the "force clause" to be satisfied, a defendant must use force intentionally, not just recklessly or negligently.[301] Yet general intent corresponds not to knowingly, but to negligently. Recall that *Feola* requires the mistake-of-fact defense to be "reasonable" in addition to being "honest."[302] In other words, a defendant can be convicted of a general intent crime even if he did not know that he

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295 *Id.* § 924(c)(3)(A)–(B).

296 United States v. Watson, No. 14-00751-01, 2016 WL 866298, at *3 (D. Haw. Mar. 2, 2016).

297 United States v. Dixon, 805 F.3d 1193, 1197 (9th Cir. 2015).

298 United States v. Deiter, 890 F.3d 1203, 1213 (10th Cir. 2018).

299 *Id.*

300 *See supra* Part I.

301 *Dixon*, 805 F.3d at 1197.

302 *See supra* Section I.C.

was intimidating his victim. All that is required is the defendant was reckless or negligent in doing so.

Courts have often overlooked this somewhat nuanced distinction. For example, in *United States v. Deiter*,[303] the Court of Appeals for the Tenth Circuit held that a conviction under 18 U.S.C. § 2113(a)—the same statute analyzed in *Carter*—satisfied the "force clause" because it "requires more than mere recklessness or negligence."[304] Not so. In reaching its holding, the Tenth Circuit relied on *Carter*'s statement that § 2113(a) "requir[es] proof of general intent—that is, that the defendant possessed knowledge with respect to the actus reus of the crime (here, the taking of property of another by . . . intimidation)."[305] The court then concluded that violation of § 2113(a) was a "violent felony" because, on its reading of *Carter*, the defendant needs to have intimidated knowingly.[306]

But the Tenth Circuit misread the actus reus. As used in *Carter*, that term does not refer to a material element of the crime but to "all nonmental elements."[307] A proper synthesis of *Carter* and *Feola* leads to the conclusion that a defendant can be convicted under § 2113(a) for intimidating a bank teller negligently—as long as he committed the intimidating acts knowingly but was not reckless or negligent that the victim was intimidated. Section 2113(a) does not require a defendant to intimidate knowingly and thus does not qualify as a "violent felony."[308]

And the *Deiter* court is far from alone when it comes to misconstruing what the confusing general intent requires—numerous courts have committed this mistake when conducting the categorical approach.[309]

By providing a translation between general and specific intent and the MPC, this Article aims to correct a misapplication of the law. However, there are other uses for these translations. For example, when interpreting statutes with common law analogues but using the MPC mens rea, courts can use this Article's translation to better divine the legislature's intent. In addition, legislatures can use these translations to fix the mess of general

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303 890 F.3d 1203 (10th Cir. 2018).

304 That is, the same "force clause" that the "crime of violence" requires. *Id.* at 1213.

305 *Id.* (alteration in original) (emphasis omitted).

306 *Id.* at 1213–14.

307 *See* DIX & SHARLOT, *supra* note 35, at 154.

308 *Deiter*, 890 F.3d at 1213–14.

309 *See, e.g.*, United States v. Campbell, 865 F.3d 853, 857 (7th Cir. 2017) (erroneously rejecting the argument that "general intent crimes could not constitute crimes of violence"); United States v. Salinas, No. 1:08-CR-0338, 2017 WL 2671059, at *5 (E.D. Cal. June 21, 2017) (incorrectly finding that "'general intent,' here . . . corresponds to knowledge, which requires higher degree of culpability than either recklessness or negligence"); United States v. Lopez-Galvan, No. 1:99-CR-5338, 2017 WL 3896304, at *5 (E.D. Cal. Sept. 6, 2017) ("Section 2113 cannot be satisfied by mere negligence or recklessness, and therefore it satisfies the intent element for a crime of violence.").

and specific intent by rewriting criminal laws to use the MPC terms instead. A similar effort to translate confusing mens rea requirements in state court precedents is worthwhile.

Conclusion

The current "general" and "specific" intent terms cause unnecessary and widespread confusion. This Article provided, for the first time, a translation from general and specific intent to the MPC mens rea.

Part I established that general intent best matches the MPC's mens rea of negligence. However, it also showed a defendant can be convicted for a general intent crime if he (1) negligently commits a subsumed negligence crime and (2) performs the acts required by the main crime, regardless of his mens rea of those acts. Thus, general intent acts as an in for a penny, in for a pound felony negligence.

Part II showed that specific intent is equivalent to the MPC's purposely mens rea. And finally, Part III applied these translations to the categorical approach and showed that several federal cases have erred because they misunderstood what general intent is.