Spring 1995

26 U.S.C. 5861(d) Requires Mens Rea as to the Physical Characteristics of the Weapon

Martin T. Lefevour

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation
26 U.S.C. § 5861(d) REQUIRES MENS REA AS TO THE PHYSICAL CHARACTERISTICS OF THE WEAPON


I. INTRODUCTION

In Staples v. United States, the United States Supreme Court held that 26 U.S.C. § 5861(d) requires mens rea. Specifically, the Court, reversing the Tenth Circuit Court of Appeals, ruled that the Government was required to prove that the petitioner, Harold E. Staples, III, knew the features of his weapon that brought it within the scope of § 5861(d).

This Note argues that the Court reached the wrong conclusion. The petitioner should have been found guilty for violating § 5861(d) because he was "reckless" as to the fact that his weapon was a statutory "firearm." This Note asserts that because the Court did not properly analyze § 5861(d), it failed to decide the proper mens rea that § 5861(d) requires. The Court concluded that § 5861(d) requires only a single mens rea. This Note, however, argues that § 5861(d) actually requires three separate and distinct mens rea; one for each objective element of § 5861(d). This Note also argues that the required mens rea as to the physical characteristics of a weapon that make it a statutory "firearm" is actually lower than the mens rea the Court established. Unlike the "knowing" level of intent the Court required, this Note argues that "reckless" is a sufficient level of intent.

Additionally, this Note agrees with the Court's definition of what items should alert a possessor of a weapon to the possibility of strict regulation. However, this Note disagrees with how the Court applied its definition to the facts of this case. The Court reasoned that guns have enjoyed a tradition of legality in this country, and therefore...
would not alert a possessor to the probability of strict regulation. The
gun involved in this case, however, had been visibly altered, and this
Note argues that visibly or knowingly altered weapons have not en-
joyed a tradition of legality in this country. Finally, this Note agrees
with the Court’s conclusion that § 5861(d) is not a public welfare of-
fense because it carries too harsh a penalty.

II. BACKGROUND

Congress enacted the National Firearms Act (NFA), 26 U.S.C.
§§ 5801-5872, in 1934 in response to an increase in criminal gang ac-
tivity. With the NFA, Congress sought to curtail this rise in criminal
gang activity by depriving gangsters of their most dangerous weap-
os. However, Congress did not want the NFA to restrict legitimate
gun use by hunters, sportsmen, and people who kept a weapon for home protection. Therefore, Congress limited the NFA to only those
weapons that gangsters typically used. This category of weapons was
defined in the statute as “firearms,” and included machine guns and
sawed-off shotguns. Congress felt that “there [was] no reason why
anyone except a law officer should have a machine gun or a sawed-off
shotgun.”

The NFA, however, was not an outright ban on statutory “fire-
arms.” Rather, the NFA required owners of “firearms” merely to reg-
ister their weapons with the government. Congress took this narrow
approach because it was afraid that the Supreme Court would strike
down an outright ban on “firearms” as an unconstitutional, federal
invasion into reserved state powers. Consequently, Congress, at the

---

6 S. REP. No. 1444, 73d Cong., 2d Sess. 1-2 (1934). The Senate Report explained: “The gangster as a law violator must be deprived of his most dangerous weapon, the machine gun. Your committee is of the opinion that limiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time.” Id.
7 Id.
8 Id.
10 S. REP. No. 1444, 73d Cong., 2d Sess. 2 (1934).
11 Hardy, supra note 5, at 591-92.
13 The constitutionality of federal intervention in state actions was a controversial issue in the 1930s. The Supreme Court of 1934 favored the states’ right to conduct intrastate activities under the Tenth Amendment without federal intervention. The Court viewed federal intervention as an invasion of the states’ police powers. The Court further exhibited this view over the next few years with its decisions in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and United States v. Butler, 297 U.S. 1 (1936). Then, in 1937, four years after Congress enacted the NFA, the Court’s attitude changed during the famous “switch in time that saved nine.” This change of attitude ushered in a new era of
express advice of Attorney General Cummings, modeled the NFA after the Narcotic Drug Act of 1914.\textsuperscript{14} The Narcotic Drug Act derived its power from the taxing clause.\textsuperscript{15} The Supreme Court had already held that the Narcotic Drug Act was constitutional and did not invade the states' reserved powers.\textsuperscript{16} Therefore, by modeling the NFA after the Narcotic Drug Act, Congress hoped that the Court would construe the NFA in a similar manner.\textsuperscript{17} In addition to this benefit, Congress hoped that the courts would comparably construe NFA provisions that were similar to Narcotic Drug Act provisions.\textsuperscript{18} In particular, the Supreme Court had already held that certain Narcotic Drug Act provisions did not require proof that the defendant knew all of the facts that made his conduct illegal.\textsuperscript{19}

\textit{United States v. Balint}\textsuperscript{20} was one of the cases Congress hoped the courts would use as a guide for interpreting the NFA.\textsuperscript{21} In \textit{Balint}, the defendants were charged with unlawfully selling restricted drugs without a written order from the Commissioner of the Internal Revenue.\textsuperscript{22} The defendants argued that the charges should be dismissed because they did not know that the drugs they were selling were restricted.\textsuperscript{23} The Supreme Court did not accept this argument.\textsuperscript{24} The Court acknowledged that the common law required intent as a necessary element of every crime.\textsuperscript{25} The Court further acknowledged that this was true even when the statute was silent as to intent.\textsuperscript{26} However, when the statute is promoting the public welfare, and proving intent would hinder prosecution, the Court decided that the Government need not prove that defendants knew their activities were illegal.\textsuperscript{27} These types of statutes have become known as public welfare statutes.\textsuperscript{28}

\textsuperscript{14} Id. at 591. Narcotic Drug Act, Pub. L. No. 63-223, 38 Stat. 785 (1914). \\
\textsuperscript{15} Hardy, supra note 5, at 591. \\
\textsuperscript{16} United States v. Doremus, 249 U.S. 86 (1919). Four Justices, including the Chief Justice, dissented on grounds that the statute invaded the reserved police powers of the state. \textit{Id.} at 95. \\
\textsuperscript{17} National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means, 73d Cong., 2d Sess. 6 (1934). This explains why the NFA is in Title 26, the Internal Revenue Code, rather than in Title 18, Crimes and Criminal Procedure. \\
\textsuperscript{18} Staples v. United States, 114 S. Ct. 1793, 1808 (1994) (Stevens, J., dissenting). \\
\textsuperscript{19} \textit{Id.} \\
\textsuperscript{20} 258 U.S. 250 (1922). \\
\textsuperscript{21} \textit{Staples}, 114 S. Ct. at 1808 (Stevens, J., dissenting). \\
\textsuperscript{22} \textit{Balint}, 258 U.S. at 251. \\
\textsuperscript{23} \textit{Id.} \\
\textsuperscript{24} \textit{Id.} at 254. \\
\textsuperscript{25} \textit{Id.} at 251. \\
\textsuperscript{26} \textit{Id.} at 251-52. \\
\textsuperscript{27} \textit{Id.} at 252. \\
As Congress hoped, consistent with *Balint*, the courts uniformly construed the NFA as not requiring proof that defendants knew their acts were illegal. In other words, the courts did not require any mens rea. For the first thirty years of its enforcement, the courts, across the board, did not require proof of mens rea for an NFA conviction.

In 1971, the Supreme Court interpreted § 5861(d) of the NFA in *United States v. Freed*. In *Freed*, the Government indicted the defendants for possessing and conspiring to possess unregistered hand grenades in violation of § 5861(d). The District Court dismissed the indictment, partly because it failed to allege that the defendants knowingly did not register their hand grenades. The Supreme Court, however, on direct appeal, reversed. The Court held that § 5861(d) protected the public welfare, and as a result, similar to *Balint*, did not require proof that the defendants knew of the registration requirement for hand grenades.

---


30 Id. at 1812-13. "[I]n 1963, then-Judge Blackmun reviewed the earlier cases and concluded that the defendant's knowledge that he possessed a gun was 'all the scienter which the statute requires.' Sipes v. United States, 321 F.2d 174, 179 [(8th Cir.)], cert. denied, 375 U.S. 913 (1963)." Id.

Congress' treatment of the NFA over the years also supported the courts' interpretation of section 5861(d). Id. Congress amended the NFA twice, once in 1968 and again in 1986. Id. Each of these amendments added knowledge requirements to other portions of the NFA, but neither amendment added a knowledge requirement to section 5861(d). Id. Significantly, in the 1968 amendment, Congress added a mens rea requirement to section 5861(1). 26 U.S.C. § 5861(1) (making it unlawful "to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false"). Id. at 1813 n.21. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Rodriguez v. United States, 480 U.S. 522, 525 (1987) (internal quotation marks and citations omitted); see also Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 267-68 (1985).

31 401 U.S. 601.

32 Id.

33 Id.

34 Id.

35 Id. at 610.

36 Id. at 609. The Court distinguished cases like Morissette v. United States, 342 U.S. 246 (1952) (finding defendant could not be convicted of taking government property without knowledge that the property belonged to the government), and Lambert v. California, 355 U.S. 225 (1957) (ruling unconstitutional a local ordinance making it a crime for a felon to remain in Los Angeles for more than five days without registering with the chief of police). The Court implicitly reasoned that the defendants in these two cases could not have reasonably anticipated government regulation. *Freed*, 401 U.S. at 608-09.
addressed the issue of whether the defendants had to know they were possessing a statutory "firearm." The Court glazed over this issue because it felt the defendants knew they possessed an item which should have alerted them to strict regulation; "one would hardly be surprised to learn that possession of hand grenades is not an innocent act."\textsuperscript{37}

The Court did note, though, that "the only knowledge required to be proved was knowledge that the instrument possessed was a firearm."\textsuperscript{38} Unfortunately, the Court never clearly defined whether it was referring to a firearm in the statutory or general sense.\textsuperscript{39} The Court was probably referring to firearms in the general sense because the subsequent sentence of the opinion cited \textit{Sipes v. United States},\textsuperscript{40} a case which referred to firearms in the general sense. The Court's failure to explicitly define the term "firearm," and its flippant analysis of the issue set the stage for the confusion which has developed around § 5861(d).

For the twelve years after \textit{Freed}, every federal court interpreting § 5861(d) held that the mens rea required was only that defendants knew they possessed a firearm in the general sense.\textsuperscript{41} In 1983, in \textit{United States v. Herbert},\textsuperscript{42} the Ninth Circuit broke away from this trend, and held that the Government must prove that defendants knew the internal characteristics of their weapon which made it a statutory "firearm" when nothing external would have "alert[ed] one to the likelihood of regulation."\textsuperscript{43} After this decision, the circuit courts began to split.\textsuperscript{44} Most circuits continued to follow the established line of precedent, and did not require proof of any mens rea for conviction under § 5861(d).\textsuperscript{45} For instance, in \textit{United States v. Ross},\textsuperscript{46} the Seventh Cir-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{37} \textit{Freed}, 401 U.S. at 609.
\item \textsuperscript{38} \textit{Id.} at 607.
\item \textsuperscript{39} See \textit{id}.
\item \textsuperscript{40} 321 F.2d 174, 179 (8th Cir.), \textit{cert. denied}, 375 U.S. 913 (1963).
\item \textsuperscript{42} 698 F.2d 981 (9th Cir.), \textit{cert. denied}, 464 U.S. 821 (1983).
\item \textsuperscript{43} \textit{Id.} at 987.
\item \textsuperscript{44} United States v. Harris, 959 F.2d 246, 260 (D.C. Cir.), \textit{cert. denied}, 113 S. Ct. 362 (1992).
\item \textsuperscript{46} 917 F.2d 997 (7th Cir. 1990), \textit{cert. denied}, 498 U.S. 1122 (1991), \textit{cert. granted and judgment vacated}, 114 S. Ct. 2129 (1994).
\end{itemize}
\end{footnotesize}
cuit, following the established precedent, held that § 5861(d) did not require mens rea. The court reasoned that since the Supreme Court in Freed held that § 5861(d) dispensed with mens rea for the registration of the weapon, it implied that mens rea was also unnecessary as to a defendant knowing the characteristics of his “firearm.”

The Tenth Circuit adopted this same logic. In United States v. Middleider, the Tenth Circuit, questioning the validity of the Herbert opinion, upheld a jury instruction which did not require proof that the defendant knew the weapon he possessed was a statutory “firearm.”

Other circuits, however, have disagreed with this reasoning, and have concluded that § 5861(d) requires mens rea. In United States v. Anderson, for example, the defendant was arrested and convicted for violating § 5861(d). He possessed two automatic weapons and silencer parts. The Fifth Circuit reversed the conviction because the only proof that the jury instruction required was that the defendant knew the guns were firearms in the general sense. The court was concerned that juries would convict innocent defendants. Under the jury instruction, defendants who had no knowledge of the internal characteristics of their weapon could have been convicted for possessing a gun which had no external indications that it was a statutory “firearm.” The court reasoned that Congress plainly did not intend to imprison pistol owners, who innocently and reasonably believed that their weapon was legal, because, unknown to them, it was modi-

---

47 Id. at 1000.
48 Id. The Seventh Circuit acknowledged the split that had developed over the years, and acknowledged that the word “firearm” had a legal and a lay definition, but it concluded this was all irrelevant in light of Freed. Id.
50 Id. at 774. This jury instruction was based on an instruction found in 2 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 59.04 (3d ed. 1977).
52 885 F.2d 1248 (5th Cir. 1989). A panel of the Fifth Circuit had affirmed Anderson’s conviction under an instruction requiring the jury to find him guilty if he knew the guns were firearms in the general sense as opposed to knowing that they were statutory “firearms.” United States v. Anderson, 853 F.2d 313 (5th Cir. 1988). However, the panel majority urged that the case be reheard en banc to reexamine Fifth Circuit precedent. Id. at 317-21. The court granted the motion for a rehearing en banc. 885 F.2d at 1249.
53 Anderson, 885 F.2d at 1249.
54 Id.
55 Id. at 1249-50. The court held that the proper instruction for a jury instruction is that the defendant must have knowledge that the weapon was a “firearm” according to the NFA. Id. at 1255-56.
56 Id. at 1250.
57 Id. at 1251.
fied to be fully automatic.\textsuperscript{58} Consequently, the court held that for a § 5861(d) conviction, the government must prove that the defendant knew the weapons were statutory "firearms."\textsuperscript{59}

The District of Columbia Circuit, in \textit{United States v. Harris},\textsuperscript{60} agreed with the Fifth Circuit's reasoning in \textit{Anderson}. It also held that a § 5861(d) conviction requires proof that the defendant knew he possessed a statutory "firearm."\textsuperscript{61} To further support this conclusion, the court in \textit{Harris} advanced two additional arguments. First, the court highlighted the fact that Congress, through the NFA, limited gun registration to only "highly dangerous" weapons.\textsuperscript{62} Therefore, the court stated that if it adopted a standard that would allow a defendant to be convicted for knowingly possessing a gun of any type, the defendant would be absolutely liable for possessing a statutory "firearm."\textsuperscript{63} The court held that this would effectively expand Congress' registration requirement to cover all guns.\textsuperscript{64} Second, the Court found that requiring mens rea would "comport[ ] better with the traditional understanding of the criminal law as punishing only truly culpable conduct."\textsuperscript{65} The court relied on \textit{Liparota v. United States}\textsuperscript{66} to support this contention. In \textit{Liparota}, the Supreme Court held that convictions under the federal statute governing food stamp fraud, 7 U.S.C. § 2024(b)(1), which is also silent as to the required mens rea, require proof that the defendant knew his conduct was prohibited by statute or regulations.\textsuperscript{67} The Supreme Court reasoned that interpreting a statute as requiring mens rea is especially necessary if to interpret otherwise would "criminalize a broad range of apparently innocent conduct."\textsuperscript{68} The court in \textit{Harris} concluded that the case before it was similar to \textit{Liparota}, and therefore, to interpret § 5861(d) as not requiring mens rea would also "criminalize a broad range of apparently innocent conduct."\textsuperscript{69}

\textsuperscript{58} \textit{Id.} at 1254.
\textsuperscript{59} \textit{Id.} at 1249.
\textsuperscript{61} \textit{Id.} at 261.
\textsuperscript{62} \textit{Id.} at 260.
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.} The court acknowledged the split on the issue and then followed the lead of the Fifth, Sixth, and Ninth Circuits. \textit{Id.}
\textsuperscript{66} 471 U.S. 419 (1985).
\textsuperscript{67} \textit{Id.} at 425.
\textsuperscript{68} \textit{Id.} at 426.
\textsuperscript{69} \textit{Harris}, 959 F.2d at 261.
III. FACTS AND PROCEDURAL HISTORY

On 29 December 1989, local police and the Bureau of Alcohol, Tobacco and Firearms (BATF) executed a search warrant on petitioner, Harold E. Staples, III, at his home. One of the items they recovered was an AR-15 assault rifle. The AR-15 is the civilian version of the military's fully automatic M-16 rifle. Unless modified, the AR-15 is a semiautomatic weapon. The National Firearms Act (NFA), 26 U.S.C. §§ 5801-5872, specifically 26 U.S.C. § 5861(d), does not require semiautomatic weapons to be registered. Therefore, an unmodified AR-15 does not have to be registered.

Under the NFA, fully automatic weapons, however, must be registered. The M-16 is a fully automatic weapon, and therefore, it must be registered. Many of the M-16 parts are interchangeable with AR-15 parts, and it is possible to use these parts to convert the AR-15 into a fully automatic weapon. To inhibit this conversion, AR-15 manufacturers construct the gun with a metal stop on its receiver. This metal stop is designed to prevent an M-16 selector switch installed on an AR-15 from rotating to the fully automatic position.

The AR-15 that the BATF agents found at Staples’ home had been modified. The metal stop had been filed away, and the rifle contained several M-16 parts including a selector switch, a hammer, a disconnector, and a trigger. Suspecting that Staples’ weapon had been modified to achieve fully automatic firing capability, the BATF agents seized the weapon. Subsequently, Staples was indicted for unlawful possession of an unregistered machine gun in violation of

---

72 Id.
73 Id. at 1796.
74 Id.
75 The NFA requires registration of all “firearm[s].” 26 U.S.C. § 5861(d). The term “firearm” covers all “machine gun[s].” 26 U.S.C. § 5845(a)(6). The NFA further defines a “machine gun” as “any weapon which shoots ... or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.” 26 U.S.C. § 5845(b).
76 Staples, 114 S. Ct. at 1796.
77 Id.
78 Id.
79 Id.
80 The M-16 is a selective fire rifle that allows the operator to choose semiautomatic or fully automatic by rotating a selector switch. Id.
81 Id.
82 Id.
83 Id.
84 Id.
§ 5861(d). 

During the trial, BATF agents testified that Staples’ AR-15 fired more than one shot with a single pull of the trigger when it was tested. Therefore, Staples’ modified AR-15 was within the statutory definition of a “machine gun.” Furthermore, it was undisputed that Staples’ weapon was not registered as § 5861(d) requires for all “machine guns.” Staples argued that because he was ignorant of his weapon’s automatic firing capability, he had not violated § 5861(d). To support his claim, Staples testified that no one had ever fired the rifle automatically while in his possession. He further testified that his AR-15 could only operate semiautomatically. He explained that even when he fired his AR-15 semiautomatically, it fired imperfectly, often requiring manual ejection of the spent casing and manual chambering of the next round. Consequently, Staples requested jury instructions that would have forced the Government to prove beyond a reasonable doubt that Staples “knew that the gun would fire fully automatically.”

Rejecting this request, the district court instead gave the following jury instruction:

The Government need not prove the defendant knows he’s dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation.

Relying on this understanding of the law, the jury convicted Staples of unlawful possession of an unregistered “firearm.” Subsequently, consistent with federal sentencing guidelines, the District Court sentenced Staples to five years probation and a $5,000 fine. The Tenth Circuit Court of Appeals affirmed the District Court’s decision, stating that it was bound by its decision in United States v. Mittleider. The court concluded that the Government “need not prove a

85 Id.
86 Id.
87 Id. at 1795 n.1; see supra note 75 (definition of a “machine gun”).
88 Staples, 114 S. Ct. at 1796.
89 Id.
90 Id.
91 Id.
92 Id.
93 Id.
94 Brief for Appellant, Appendix 1 at 42, United States v. Staples, 971 F.2d 608 (10th Cir. 1992) (No. 91-5033).
95 Staples, 114 S. Ct. at 1796.
96 Id.
97 United States v. Staples, 971 F.2d 608, 609 (10th Cir. 1992).
98 835 F.2d 769 (10th Cir. 1987), cert. denied, 485 U.S. 980 (1988). Mittleider contained a
defendant's knowledge of a weapon's physical properties to obtain a conviction under § 5861 (d).”

The United States Supreme Court granted certiorari to resolve the conflict among the Courts of Appeals concerning the proper mens rea that § 5861 (d) requires.

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

Writing for the majority, Justice Thomas disagreed with the Tenth Circuit Court of Appeals. Justice Thomas concluded that § 5861 (d) is subject to a mens rea requirement; namely, a person has to know that his weapon falls within the statutory definition of a “firearm,” before he can violate the statute’s requirements.

Justice Thomas started his analysis with a recognition that the determination of a statute’s mens rea is a matter of statutory construction. Therefore, Justice Thomas continued, the Court has to examine § 5861 (d)’s language to determine if Congress intended a mens rea requirement. Justice Thomas recognized that § 5861 (d) provides little guidance since it does not mention any mens rea. Section 5861 (d) simply states that “[it] shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.” Justice Thomas noted, however, that congressional silence is not determinative of whether mens rea is required. He continued that in the absence of congressional guidance, the statute must be construed “in light of the background rules of the common law.” Following the principles of the common law, Justice Thomas determined that “[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” Justice

99 Staples, 971 F.2d at 612-13.
102 Chief Justice Rehnquist and Justices Scalia, Kennedy, and Souter joined in Justice Thomas' opinion.
103 Staples, 114 S. Ct. at 1796.
104 Id. at 1804.
105 Id. at 1796.
106 Id. at 1796-97.
107 Id. at 1797.
109 Staples, 114 S. Ct. at 1797.
110 Id.
111 Id.
Thomas further noted that in the past the Court has generally disfavored construing offenses as not requiring any mens rea. As a result, Justice Thomas required either an express or implicit congressional elimination of mens rea from an offense.

Having established what rules govern the statutory interpretation of § 5861(d), Justice Thomas next addressed the Government's first argument. The Government argued that courts should not construe § 5861(d) as having a mens rea requirement because § 5861(d) is a public welfare or "regulatory" offense. Justice Thomas, however, pointed out that the Court has only recognized public welfare offenses in "limited circumstances." He continued that, typically, such offenses regulate "potentially harmful or injurious items." In those "limited circumstances," Justice Thomas said that the Court has reasoned that the offender should have known that "he [was] dealing with a dangerous device of a character that place[d] him 'in a responsible relation to a public danger,'" and subsequently, he should have been alerted to the probability that his use or ownership of that item was strictly regulated. Therefore, Justice Thomas concluded that the Court must look to the "nature of the statute and the particular character of the item regulated" to determine if Congress intended the statute to be a public welfare offense.

Having laid this foundation, Justice Thomas attacked the Government's contention that courts should treat § 5861(d) as a public welfare offense for three reasons. First, the Government primarily relied on the Supreme Court's holding in United States v. Freed to assert that § 5861(d) was a public welfare offense. Justice Thomas rejected this assertion because Freed did not address the same issue. Justice Thomas explained that Freed merely decided that § 5861(d) qualified as a public welfare statute, and mens rea should not be part of the offense.

---

112 Id. (citing Liparota v. United States, 471 U.S. 419, 426 (1985)).
113 Id.
114 Id.
115 Id.
116 Id. at 1798 (citing United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978)).
117 Id.
118 Id. (citing United States v. Dotterweich, 320 U.S. 277, 281 (1943)).
119 Staples, 114 S. Ct. at 1798.
120 Id. The Government argued that § 5861(d) qualified as a public welfare statute, and mens rea should not be part of the offense. Id. The Government further argued that all guns, whether or not they are statutory "firearms," are dangerous devices. This dangerous nature of an item should alert the owner that these items are subject to strict regulation. Id.
121 Id. at 1798-99.
123 Staples, 114 S. Ct. at 1799.
124 Id.
did not require proof that the offender should have known that his firearm was unregistered, while the issue in the instant case was whether § 5861(d) requires proof that the owner should have known the particular characteristics of his weapon which make it a statutory "firearm." Justice Thomas explained that "different elements of the same offense can require different mental states," therefore, the holding in *Freed* was inapposite.

Second, Justice Thomas attacked the Government's argument that courts should consider § 5861 (d) a public welfare statute because it regulates highly dangerous devices that should alert an owner to the probability of strict regulation. Justice Thomas rejected this argument because some gun ownership is not regulated strictly. Unlike hand grenades or dangerous narcotics, some gun ownership has enjoyed a long tradition of legality in this country. Based on this tradition, Justice Thomas reasoned that one would not expect gun ownership to be generally illegal, even though guns are dangerous items. He explained further that guns are not the type of highly dangerous item that should put an owner on notice that he stands "in responsible relation to a public danger." He concluded, therefore, that a gun owner would not be alerted to the probability of strict regulation. Justice Thomas further pointed out that the Government's argument ignored the considerable care the Court had taken in past cases to avoid construing a statute as dispensing with mens rea if doing so would "criminalize a broad range of apparently innocent conduct."

Third, Justice Thomas highlighted the harsh penalty that § 5861 (d) imposes on offenders to further support his contention that § 5861 (d) is not a public welfare offense. Justice Thomas explained that public welfare offenses, since they dispense with a mens rea requirement, impose light penalties and do "no grave damage to an offender's reputation." Justice Thomas pointed out, however, that violation of § 5861 (d) is a felony and imposes both a substantial

---

125 Id.
126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 Id. at 1800 (citing United States v. Dotterweich, 320 U.S. 277, 281 (1943)).
133 Id.
134 Id. at 1799 (citing Liparota v. United States, 471 U.S. 419, 426 (1985)).
135 Id. at 1802.
136 Id. at 1809.
137 Id. at n.16. Title 18 U.S.C. § 3559 (1994) makes any crime punishable by more than
prison sentence and a fine. Consequently, it cannot be a public welfare offense.

Based on this analysis, Justice Thomas held that the district court should have required the Government to prove that Staples knew his weapon was a statutory "firearm." Justice Thomas determined that the common law rule favoring mens rea governed the interpretation of § 5861(d). Justice Thomas emphasized, though, that his holding was a narrow one. He further commented that the Court, in a situation such as this, must make a common-sense evaluation of the nature of the item Congress has subjected to regulation, and the expectations that individuals may legitimately have in dealing with this regulated item. Justice Thomas concluded by stating that if "Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and [intended to] subject them to lengthy prison terms, it would have spoken more clearly to that effect."

B. JUSTICE GINSBURG'S CONCURRENCE

Justice Ginsburg agreed with the majority that § 5861(d) requires a mens rea—i.e., a "knowledge"—requirement. However, Justice Ginsburg determined that a more specific explanation of the "knowledge" involved was necessary. Accordingly, Justice Ginsburg identified three distinct levels of knowledge that could have been in issue: "(1) knowledge simply of possession of the object; (2) knowledge, in addition, that the object is a dangerous weapon; (3) knowledge, beyond dangerousness, of the characteristics that render the object subject to regulation, for example, awareness that the weapon is a machine gun."

Justice Ginsburg explained that the first level of knowledge, knowledge simply of possession, would effectively dispense with mens rea. This interpretation would criminalize "apparently innocent conduct."

a year in prison a felony. Id.
138 26 U.S.C. § 5871 (1994). An offender can be sentenced to up to ten years in prison and be fined not more than ten thousand dollars.
139 Staples, 114 S. Ct. at 1804.
140 Id.
141 Id.
142 Id.
143 Id.
144 Justice O'Connor joined Justice Ginsburg's opinion.
145 Id. (Ginsburg, J., concurring in the judgment). An example of "apparently innocent
MENS REA

was arguing for the second level of knowledge, knowledge that the object is a dangerous weapon. Justice Ginsburg concluded, however, that the Government’s argument failed because it did not “take adequate account of the ‘widespread lawful gun ownership’ Congress and the States have allowed to persist in this country.” In support, she pointed out that the nation’s legislators require registration of a limited class of firearms, those they consider especially dangerous. Therefore, she reasoned that only the third level of knowledge, knowledge of the characteristics of the object which subject it to regulation, satisfies the purpose of mens rea—namely, “to shield people against punishment for apparently innocent activity.” Applying this level of knowledge to the facts of Staples’ case, Justice Ginsburg concluded that the Government should have had to prove that Staples knew he possessed not simply a gun, but a machine gun.

C. JUSTICE STEVENS’ DISSENT

Writing for the dissent, Justice Stevens concluded that the majority had overstepped its bounds by construing § 5861(d) to require proof of mens rea. Justice Stevens determined that the language of § 5861(d) and prior Supreme Court precedent clearly indicate that § 5861(d) does not impose mens rea. Thus, Justice Stevens accused the majority of adding to the text of the statute “[t]o avoid a slight possibility of injustice to unsophisticated owners of machine guns and sawed-off shotguns.” He also asserted that the majority was preoccupied with guns that “generally can be owned in perfect innocence.” Justice Stevens pointed out that the weapon discovered at Staples’ home was a semiautomatic weapon that was readily convertible into a machine gun: “a weapon that the jury found to be ‘a dangerous device of a type as would alert one to the likelihood of regulation.’” Consequently, he argued that the majority’s focus on guns that can be found in almost “50 percent of American homes” was

conduct” would be a defendant who possessed what he thought was a toy or violin case, but which in fact was a machine gun. Id. (Ginsburg, J., concurring in the judgment). Justice Ginsburg explained that this was the reason the Government did not advocate this knowledge level. Id. (Ginsburg, J., concurring in the judgment).

149 Id. (Ginsburg, J., concurring in the judgment).
150 Id. (Ginsburg, J., concurring in the judgment).
151 Id. (Ginsburg, J., concurring in the judgment).
152 Id. at 1806 (Ginsburg, J., concurring in the judgment).
153 Justice Blackmun joined this dissenting opinion.
154 Staples, 114 S. Ct. at 1806 (Stevens, J., dissenting).
155 Id. (Stevens, J., dissenting).
156 Id. (Stevens, J., dissenting).
157 Id. (Stevens, J., dissenting).
158 Id. (Stevens, J., dissenting).
irrelevant to Staples' case.\textsuperscript{159}

To support his analysis, Justice Stevens set forth three unambiguous guideposts that he believed should have led the Court to the correct answer: (1) the text and structure of the NFA; (2) the Court's cases construing both the NFA and similar regulatory legislation; and (3) the NFA's history and interpretation.\textsuperscript{160}

Focusing on the first guidepost, Justice Stevens began by noting that § 5861(d) \textit{does} provide explicit guidance, contrary to the majority's conclusion.\textsuperscript{161} He acknowledged that § 5861(d) does not specify a mens rea.\textsuperscript{162} However, he explained that the absence of an express knowledge requirement is not dispositive; rather, it demonstrates that Congress did not intend the Government to prove that the defendant knew all of the facts that made his conduct illegal.\textsuperscript{163} Justice Stevens then provided a lengthy historical analysis of § 5861(d) which led him to conclude that § 5861(d) is "unquestionably" a public welfare offense.\textsuperscript{164} He asserted that both the majority's and Justice Ginsburg's conclusions were wrong, because both relied "erroneously" upon the "tradition[al]" innocence of gun ownership in determining that § 5861(d) was not a public welfare offense.\textsuperscript{165} He was also shocked that the majority claimed that guns are more like food stamps than hand grenades.\textsuperscript{166}

Justice Stevens then explained that the majority's error stemmed from its mistaken belief that the Government argued that "all guns" are dangerous devices that should put a gun owner on notice.\textsuperscript{167} The majority, he claimed, should have limited the category of guns to those similar to the petitioner's gun—semiautomatic weapons that are readily convertible to machine guns.\textsuperscript{168} This type of weapon should

\textsuperscript{159} Id. at 1807-08 (Stevens, J., dissenting).
\textsuperscript{160} Id. (Stevens, J., dissenting).
\textsuperscript{161} Id. at 1807 (Stevens, J., dissenting).
\textsuperscript{162} Id. (Stevens, J., dissenting).
\textsuperscript{163} Id. (Stevens, J., dissenting) (discussing Morissette v. United States, 342 U.S. 246 (1952) and citing Justice Jackson: "[C]ongressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime . . . well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act." 342 U.S. at 262.).
\textsuperscript{164} Id. at 1810. (Stevens, J., dissenting).
\textsuperscript{165} Id. (Stevens, J., dissenting).
\textsuperscript{166} Id. (Stevens, J., dissenting). The majority stated that some guns are more like the food stamps in \textit{Liparota} than the hand grenades in \textit{Freed} because some guns have had a history of legal ownership and someone would be surprised to find out that these guns are strictly regulated. Id. at 1799.
\textsuperscript{167} Id. (Stevens, J., dissenting).
\textsuperscript{168} Id. at 1811 (Stevens, J., dissenting).
put an owner on notice to the probability of strict regulation.\textsuperscript{169}

V. Analysis

Justice Thomas properly held that 26 U.S.C. § 5861(d) requires mens rea, and that it is not a public welfare offense.\textsuperscript{170} However, this Note argues that he failed to properly analyze the offense. He did not analyze the objective elements of § 5861(d) individually, and consequently, did not determine the proper mens rea that § 5861(d) requires. As a result, his opinion is confusing and muddled. This Note argues that an “element analysis” of § 5861(d) would have been more understandable and would have yielded the proper mens rea.

A. The Major Source of Confusion: Justice Thomas Failed to Establish the Proper Analytical Framework for Analyzing 26 U.S.C. § 5861(d)

Justice Thomas’ analysis of § 5861(d) is confusing and muddled because he failed to establish the proper analytical framework before starting his analysis.\textsuperscript{171} He started his analysis by recognizing that § 5861(d) does not indicate the mens rea Congress intended.\textsuperscript{172} However, as Justice Thomas correctly pointed out, Congressional silence is not dispositive.\textsuperscript{173} From this point forward, his analysis faltered. Justice Thomas asserted that courts should construe § 5861(d), as a whole, “in light of the background rules of the common law.”\textsuperscript{174} As a result, he discussed § 5861(d) as requiring only a single mens rea.\textsuperscript{175} He never individually examined the separate objective elements of § 5861(d). In effect, Justice Thomas applied an “offense analysis” approach of statutory interpretation, as opposed to an “element analysis” approach.\textsuperscript{176} According to the “offense analysis” approach, a statute, generally, has only a single mental state for the entire offense.\textsuperscript{177} In contrast, the “element analysis” approach separates a statute into its objective elements, and then links each objective element to a corresponding culpability element.\textsuperscript{178} The “offense analysis” approach has

\textsuperscript{169} Id. (Stevens, J., dissenting).
\textsuperscript{170} Staples v. United States, 114 S. Ct. 1793, 1804 (1994).
\textsuperscript{171} See id. at 1796. Justice Thomas’ analysis of § 5861(d)’s mens rea requirement starts in Section II A of the opinion.
\textsuperscript{172} Id. at 1797.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} PAUL H. ROBINSON, FUNDAMENTALS OF CRIMINAL LAW 212 (1988).
\textsuperscript{178} ROBINSON, supra note 176, at 212. The objective elements of an offense are its con-
a number of pitfalls that the "element analysis" approach avoids. First, "offense analysis" uses common law terms to define mens rea. The common law terms, however, are ambiguous. Second, since "offense analysis" requires only one mental state for the entire offense, it fails to recognize that each individual element of the offense may require a different culpability.

The Model Penal Code (MPC) was developed to address these problems. The MPC introduced the previously discussed concept of "element analysis" to criminal statute interpretation. The MPC made two enlightening realizations. First, as mentioned, it linked each objective element of an offense with a corresponding culpability element. Second, it pointed out that mens rea does not have a single definition. Rather, the MPC defines mens rea as several identifiable and analytically distinct levels of intent. These distinct levels are purpose, knowledge, recklessness, and negligence. As a result, this method of analysis is more precise than the older, more ambiguous "offense analysis" approach to statutory interpretation. Had Justice Thomas applied an MPC "element analysis" to § 5861(d), rather than an "offense analysis," his opinion would have been more cogent, and would have reached different conclusions.
**B. COMPARISON OF ANALYSES OF 26 U.S.C. § 5861(d)**

The following section of this Note interprets § 5861 (d) according to the MPC "element analysis" approach, and compares these results to Justice Thomas' results. Initially, to apply the "element analysis" approach, the offense must be broken down into its objective elements: the conduct, the result, and the circumstances.¹⁹⁰ Section 5861 (d) reads: "[i]t shall be unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."¹⁹¹ This offense has one conduct element, no result element, and two circumstance elements. The conduct element is "to receive or possess." The first circumstance element is "a firearm," and the second circumstance element is "not registered to him in the National Firearms Registration and Transfer Record."

1. "Element Analysis" of the Conduct Element: "To Receive or Possess"

Next, it is necessary to address separately the culpability level of each individual objective element. First, the conduct element, "to receive or possess," requires a culpability level of "knowing" according to MPC section 2.01(4).¹⁹² Therefore, a § 5861 (d) offender has to "knowingly" possess a weapon. In Staples' case, he "knowingly" possessed the AR-15.¹⁹³ As a result, this element of § 5861 (d) is not in dispute.¹⁹⁴

¹⁹⁰ MODEL PENAL CODE § 1.13(9) (Official Draft 1985). "The Code does not define 'result' or 'circumstance'. It defines 'conduct,' but uses seemingly contradictory forms of that term in different Code provisions. Section 1.13 takes a narrow view, suggesting that 'conduct' simply requires a bodily movement. Section 2.02, in contrast, uses 'conduct' in a broad sense to mean bodily movement and all its relevant characteristics." Robinson & Grall, supra note 177, at 707. As a result, this analysis will utilize the definitions that are described in Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond for these terms. Id. According to this article, "conduct" should be defined narrowly to mean pure conduct. Id. at 719. "Result" elements are circumstances which are changed by the actor. Id. at 724. "Circumstance" elements, then, would be all other elements. Id. For a more detailed discussion of how to define the Model Penal Code's terms, see Robinson & Grall, supra note 177.


¹⁹² MODEL PENAL CODE §2.01(4) (Official Draft 1985) states “[p]ossession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.”


¹⁹⁴ Staples was also charged with possession of an M-1 .30 caliber World War II carbine rifle. However, the jury found him not guilty on this count because he did not "knowingly" possess the M-1. Id. at 5.
2. "Element Analysis" of the First Circumstance Element: "A Firearm,
The Critical Element

Second, determining the culpability of the first circumstance element, "a firearm," is a more complicated task. This is the critical issue in this case. Justice Thomas implicitly concluded that "knowing" should be the culpability level for this objective element. Specifically, he said that the Government should have shown that Staples "knew . . . the features of his AR-15 that brought it within the scope of the Act." The MPC, on the other hand, would not have placed the requisite culpability that high. Instead, according to section 2.02(3) of the MPC, offenders would be liable if they were merely "reckless" as to the first circumstance element—i.e., if they consciously disregarded a substantial and unjustifiable risk that their weapon was subject to strict regulation—e.g., that the term "firearm" is statutorily defined.

Following this MPC approach, the more refined issue of the case becomes whether Staples' modified AR-15 should have alerted him to a probability of strict regulation—a probability high enough that for him to disregard this fact was a substantial and unjustifiable risk. Justice Thomas ultimately addressed a similar question in his opinion. However, since Justice Thomas never clearly laid out his analysis, this issue became lost in the confusion of his opinion.

196 Id. (emphasis added).
197 MODEL PENAL CODE § 2.02(3) (Official Draft 1985): "Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of the offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto."

In other words, the minimum culpability of any undefined objective element is "reckless."

198 Robinson & Grall, supra note 177, at 697, Chart I: Model Penal Code § 2.02(2) Culpability Definitions: "Reckless as to Circumstance" equals "He consciously disregards a substantial and unjustifiable risk that the material element exists." Id. The MPC drafters realized that by requiring at least reckless culpability towards the attendant circumstances, a person would not be found liable for ignorance of the law, when the law served only to define the attendant circumstance and not the offense. "It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element . . . . The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense." MODEL PENAL CODE § 2.02 cmt. 11 (Official Draft 1985).
200 Id.
201 See id. at 1798-1800.
The task of determining what items should alert a person to the probability of strict regulation is not clear cut. The items that are subject to strict regulation cover a spectrum of dangerousness. At one end of the spectrum, items exist that are "potentially harmful and injurious"\textsuperscript{202} enough that mere possession should undoubtedly alert a person to the probability of strict regulation. \textit{United States v. Freed}\textsuperscript{203} is such an example. In \textit{Freed}, the defendant possessed hand grenades, undeniably dangerous weapons.\textsuperscript{204} The Court reasoned that because grenades are not entirely "innocent" in and of themselves, the defendant should have known they were subject to strict regulation.\textsuperscript{205}

At the other end of the spectrum, items exist that are innocuous enough that no one would expect them to be subject to strict regulation. In \textit{Liparota v. United States},\textsuperscript{206} for instance, the defendant possessed unauthorized food stamps. Food stamps are not particularly dangerous items, and "can hardly be compared to a hand grenade."\textsuperscript{207} Therefore, the Court held that food stamps do not have any characteristics that would alert a possessor to the probability of strict regulation.\textsuperscript{208}

The weapon in Staples' possession, a modified AR-15 assault rifle, falls somewhere between these two extremes. The characterization of this middle ground is critical to determining what violates § 5861(d). Justice Thomas, though he never explicitly acknowledged it, attempted to define this middle ground.\textsuperscript{209} Justice Thomas' definition was not an inclusionary one; rather, he defined what items § 5861 (d) should not cover.\textsuperscript{210} According to Justice Thomas, § 5861 (d) should not cover items that have enjoyed a long tradition of widespread lawful acceptance in this country.\textsuperscript{211} Justice Thomas' exclusionary definition arguably coincides with the preceding MPC analysis. Items that have enjoyed a long tradition of widespread lawful acceptance in this

\textsuperscript{202} \textit{Id.}

\textsuperscript{203} 401 U.S. 601 (1971).

\textsuperscript{204} \textit{Id.} at 609.

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} 471 U.S. 419 (1985).

\textsuperscript{207} \textit{Id.} at 433.

\textsuperscript{208} \textit{Id.}


\textsuperscript{210} \textit{Id.}

\textsuperscript{211} \textit{Id.} The Government's argument to the Court failed because it tried to encompass too broad a group of weapons that should put a person on notice. The Government argued that "all guns" should put a person on notice to the probability of strict regulation. Justice Thomas rejected the Government's argument because not "all guns" are illegal, and a tradition of lawful private gun ownership has existed in this country for a long time. As a result, Justice Thomas thought the Government's position would "criminalize a broad range of apparently innocent conduct." \textit{Id.}
country would also not alert a person to a high probability of strict regulation which, if disregarded, would be considered a substantial and unjustifiable risk.

Based on his middle ground definition, Justice Thomas reasoned that Staples might not have known that his AR-15 was subject to strict regulation because guns have enjoyed a long tradition of widespread lawful use in this country. Consequently, Justice Thomas concluded that Staples did not have the intent required to violate § 5861(d). Justice Thomas erred. Guns and AR-15’s have enjoyed a tradition of acceptance in this country; however, legal weapons that have been visibly or knowingly altered have not enjoyed this lawful tradition. Staples’ modified AR-15 had a visible “fully automatic” selector switch, and the weapon had a shiny spot on the receiver. Therefore, Staples could easily have seen that someone had tampered with his AR-15, and evidence of tampering should have alerted him to the probability of strict regulation. According to the MPC analysis, then, Staples did have the requisite intent under § 5861(d). Staples was reckless. He consciously disregarded a substantial and unjustifiable risk that the probability of strict regulation—i.e., that the term “firearm” was statutorily defined—existed. Therefore, based on the MPC, Justice Thomas’ exclusionary definition should carry the caveat that if an item that usually has enjoyed a lawful tradition has an irregular aspect to it, the possessor should be alerted to the probability of strict regulation.

3. “Element Analysis” of the Second Circumstance Element: “Not Registered to Him in the National Firearms and Transfer Record”

The analysis of the second circumstance element is easier. The

---

212 Id. This interpretation of § 5861(d) creates a major loophole in the statute. Under this interpretation, a person who has converted his weapon could claim that he did not know it was converted, and thereby escape conviction.

213 Id. at 1804.

214 In 1986, Congress enacted the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308. The FOPA amended the definition of “machine gun” in 26 U.S.C. § 5845(b) to include “any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.”

215 Staples, 114 S. Ct. at 1796.

216 United States v. Staples, 971 F.2d 608, 613 (10th Cir. 1992).

217 For example, a weapon that has been visibly altered or tampered with, United States v. Herbert, 698 F.2d 981, 987 (9th Cir. 1983) (stating in dicta that external modifications might “alert one to the likelihood of regulation”), that was bought from an unlicensed gun dealer, or that fired fully automatic instead of semiautomatic.
second circumstance element is "not registered to him in the National Firearms Registration and Transfer Record."\footnote{218} Again, since a culpability is not mentioned, section 2.02(3) of the MPC inserts a "reckless" standard. However, the Supreme Court specifically addressed this element in United States v. Freed.\footnote{219} The Supreme Court assigned absolute liability to this element of §5861(d).\footnote{220} This conclusion, however, is not inconsistent with an MPC analysis. The MPC recognizes absolute liability offenses.\footnote{221} According to the MPC, when the legislature meant a material element to have absolute liability, then sections 2.01 and 2.02 of the MPC do not apply. The second circumstance element then, according to Freed and supported by the MPC, does not require mens rea.\footnote{222}

In summary, §5861(d) requires mens rea under both analyses. However, the "element analysis" approach recognizes three separate mens rea. The conduct element, "to receive or possess," requires a mens rea of "knowing." Staples satisfied this element. The first circumstance element, "a firearm," requires a mens rea of "recklessness." Staples satisfied this element as well, since he was dealing with a visibly modified weapon. Justice Thomas, however, disagreed on this conclusion, and held that the mens rea required for this element is "knowing." Lastly, the second circumstance element, "not registered to him in the National Firearms Registration and Transfer Record," requires no mens rea according to the Supreme Court. Therefore, according to an "element analysis," the MPC approach, Staples had the mens rea that §5861(d) requires; however, according to an "offense analysis," Justice Thomas' approach, he did not.

c. 26 U.S.C. §5861(d) is not a public welfare offense because its penalty is too harsh

Justice Thomas pointed to the harsh penalty of §5861(d) to demonstrate that it is not a public welfare offense, and consequently, to confirm his conclusion that §5861(d) requires mens rea.\footnote{223} He noted that §5861(d) is a felony,\footnote{224} and historically, felonies cannot be

\footnote{218} 26 U.S.C. §5861(d) (1994).
\footnote{219} 401 U.S. 601 (1971).
\footnote{220} Id. at 607.
\footnote{221} Model Penal Code §2.05(1)(b) (Official Draft 1985) states: "The requirements of culpability prescribed by sections 2.01 and 2.02 do not apply to: offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears."
\footnote{222} Freed, 401 U.S. at 607.
\footnote{223} Staples v. United States, 114 S. Ct. 1793, 1802 (1994). This argument is laid out in Section II C of the opinion.
\footnote{224} Id. at 1804. 18 U.S.C. §3559 (1994) makes any crime punishable by more than one
public welfare offenses. Justice Thomas explained that historically, to determine whether a statute was a public welfare offense, the courts looked to the severity of the penalty that the statute imposed. Justice Thomas further explained that public welfare offenses usually have "penalties [that] are relatively small, and conviction[s] [that do] no grave damage to an offender's reputation." Felonies, however, are "as bad a word as you can give to a man or thing."

The MPC would support Justice Thomas' conclusion. The MPC acknowledges absolute liability or public welfare offenses in section 2.05. The MPC further states that convictions for public welfare offenses can only be "violations." According to the MPC, "violations" cannot "constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense." As noted, conviction under § 5861 (d) is a felony. Therefore, the MPC does not recognize § 5861 (d) as an absolute liability offense and, as described in the previous section, requires proof of mens rea for a § 5861 (d) conviction. The MPC supports Justice Thomas' "common-sense" conclusion that § 5861 (d) is not an absolute liability, public welfare offense.

D. RECENT DEVELOPMENTS IN SEMIAUTOMATIC GUN REGULATION

On 13 September 1994, the Violent Crime Control and Law En-
forcement Act of 1994 became law. This Act has made possession of all semiautomatic weapons illegal unless they were owned legally prior to enactment of the new law. Under the current law, possession of an AR-15 is now illegal, regardless of whether it has been converted or not. The Government, under the new law, definitely would not have had to prove mens rea to convict Staples. In fact, Congress described in explicit detail the weapons this new amendment covers. This new legislation effectively makes § 5861(d) moot, because registration is not possible if the weapon itself is illegal. However, the preceding analysis still provides a useful framework for analyzing other offenses which are silent as to the required mens rea.

VI. Conclusion

In Staples v. United States, the Court held that § 5861(d) required proof that the defendant knew the characteristics of his weapon that made it a statutory "firearm." The Court also held that items


\[235\] This Act amended 18 U.S.C. § 922 adding the new subsection (v)(1). "It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon." 26 U.S.C. § 5861(d), over the years, has essentially become moot due to the addition of subsections (o) and (p) to 18 U.S.C. § 922. § 922(o)(1) states "it shall be unlawful for any person to transfer or possess a machine gun," and § 922(p)(1) states "it shall be unlawful for any person to... possess, any firearm—..." These amendments were outright bans on "machine guns" and "firearms", thus, making a registration requirement irrelevant.

\[236\] 18 U.S.C.A. § 922(v)(2) (West Supp. 1994): "[Unlawful possession of a semiautomatic weapon] shall not apply to the possession... of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection."


(A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as—

(i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);
(ii) Action Arms Israeli Military Industries UZI and Galil;
(iii) Beretta Ar70 (SC-70);
(iv) Colt AR-15;
(v) Fabrique National FN/FAL, FN/LAR, and FNC;
(vi) SWD M-10, M-11, M-11/9, and M-12;
(vii) Steyr AUG;
(viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and
(ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12;

(B) ...
that have enjoyed a long tradition of lawful acceptance in this country would not alert a person to the probability of strict regulation. Based on the facts in this case, the Court specifically noted that guns have enjoyed a tradition of legality in this country, and possession of a gun would not alert a person to the probability of strict regulation. Therefore, the Court concluded, the Government should not have been able to convict Staples without proving that he knew the characteristics of his weapon that made it a statutory “firearm.” Justice Thomas further held that § 5861(d) is not a public welfare offense because it is a felony, and public welfare offenses, historically, have imposed small penalties and do not gravely damage a person’s reputation.

Justice Thomas properly concluded that § 5861(d) requires mens rea and that it is not a public welfare statute. However, since Justice Thomas applied an “offense analysis” to § 5861(d), rather than an “element analysis,” he failed to determine the actual mens rea that § 5861(d) requires. According to an “element analysis,” a Model Penal Code analysis, of § 5861(d), § 5861(d) actually requires three separate mens rea; one for each objective element. Section 5861(d) requires the following material elements: (1) “knowing” possession; (2) “recklessness” as to the weapon being a statutory “firearm;” and (3) no mens rea as to the registration status of the “firearm.” Therefore, for a § 5861(d) conviction, the Government should have had to prove only that Staples was “reckless” as to his weapon being a statutory “firearm.” Under this instruction, he would have probably been convicted because he was “reckless” as to his weapon’s status. His AR-15 had visible modifications that should have alerted him to tampering and the probability of strict regulation.

The recently passed Violent Crime Control and Law Enforcement Act of 1994 makes Staples’ possession of an AR-15, converted or not, illegal.

MARTIN T. LEFEVOUR

241 Id. at 1799.
242 Id.
243 Id. at 1804.
244 Id.
245 Id. at 1803.
246 See supra note 238.