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# What Is Reasonable Cause To Believe?: The *Mens Rea* Required For Conviction Under 21 U.S.C. § 841

Jonathan L. Hood\*

Over the past decade, a number of circuit courts have examined a seemingly straightforward statute and come to dramatically different conclusions as to its meaning. 21 U.S.C. § 841 provides:

Any person who knowingly or intentionally . . . possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter . . . shall be fined in accordance with Title 18 or imprisoned not more than . . . 20 years . . .<sup>1</sup>

The differences in interpretation involve the statute's phrase "knowing, or having reasonable cause to believe." Specifically, courts differ on whether the statute requires the prosecution to prove that the defendant *knew* the medication would be used for the manufacture of illicit substances, or whether he *should* have known that was the likely outcome.

The cases in which this disagreement has arisen deal with defendants who purchase or sell large amounts of pseudoephedrine, a list I chemical,<sup>2</sup> in violation of § 841. Pseudoephedrine, commonly used in decongestant medications, is also a necessary ingredient for the production of methamphetamine, a highly addictive and debilitating drug

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1. 21 U.S.C. § 841(c) (2006).

2. OFFICE OF DIVERSION CONTROL, DRUG ENFORCEMENT ADMIN., ASSESSMENT OF ANNUAL NEEDS FOR THE LIST I CHEMICALS EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE FOR 2008: PROPOSED (2007), *available at* [http://www.deadiversion.usdoj.gov/fed\\_regs/quotas/2007/fr09203.htm](http://www.deadiversion.usdoj.gov/fed_regs/quotas/2007/fr09203.htm).

that is gaining popularity in the United States, especially in rural areas.<sup>3</sup> Essentially, courts have been forced to decide whether a defendant must know that the pseudoephedrine is going to be used specifically for the production of methamphetamine, or whether, under a reasonable-person standard, he merely should know that this is the case.

The majority of courts have adopted the objective standard, requiring the prosecution to prove that the defendant had “reasonable cause to believe” that his actions would lead to the manufacture of illegal drugs. The Eighth, Ninth, and Eleventh Circuits have all adopted this view.<sup>4</sup> Only the Tenth Circuit has adopted the subjective standard, requiring the prosecution to prove *actual knowledge* on the defendant’s part.<sup>5</sup> Recently, the Seventh Circuit had to address the circuit split when deciding *United States v. Khattab*.<sup>6</sup> The court ultimately avoided choosing between the two competing *mens rea* standards, holding that the defendant would be found guilty under either the objective or the subjective standard. However, the court’s dilemma underscores the gulf between the two competing views of § 841, and ultimately raises the question of how the Supreme Court will define the required *mens rea* if and when it is faced with the same question.<sup>7</sup>

### I. The Role of *Mens Rea* in Criminal Law

*Mens rea* is a core concept in criminal law. It refers to the mental state necessary for conviction of a given offense.<sup>8</sup> The required state of mind is often listed as an element of the crime.<sup>9</sup> The idea of a “guilty mind” is so central to criminal law that courts continue to enforce the common law requirement that every crime include a *mens rea* element.<sup>10</sup>

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3. *Morning Edition: Meth a Growing Menace in Rural America* (NPR radio broadcast Aug. 14, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=3805074>.

4. *See, e.g.*, *United States v. Estrada*, 453 F.3d 1208 (9th Cir. 2006); *United States v. Galvan*, 407 F.3d 954 (8th Cir. 2005); *United States v. Kaur*, 382 F.3d 1155 (9th Cir. 2004); *United States v. Prather*, 205 F.3d 1265 (11th Cir. 2000).

5. *See, e.g.*, *United States v. Truong*, 425 F.3d 1282 (10th Cir. 2005); *United States v. Saffo*, 227 F.3d 1260 (10th Cir. 2000).

6. 536 F.3d 765 (7th Cir. 2008).

7. It should be noted that outside of the five circuits discussed here no other court has explicitly addressed the issue of which *mens rea* is required under § 841.

8. 21 AM. JUR. 2D *Criminal Law* § 117 (2008).

9. *Id.*

10. *United States v. Balint*, 258 U.S. 250, 253 (1922) (cited in *Staples v. United States*, 511 U.S. 600, 605 (1994)).

This rule applies with equal force to statutory crimes, unless the prosecution can show that the legislature either expressly or impliedly waived the requirement.<sup>11</sup> Criminal offenses without a *mens rea* requirement are “generally disfavored,”<sup>12</sup> and the mere fact that a statute does not define or mention a *mens rea* element is not enough to dispense with it entirely.<sup>13</sup> The default requirement of a *mens rea* is rooted in the ages-old notion that “an unwarrantable act without a vicious will is no crime at all,”<sup>14</sup> and reflects the “common sense view of justice that blame and punishment are inappropriate and unfair in the absence of choice.”<sup>15</sup>

There are two broad categories of *mens rea*—subjective and objective. Subjective *mens rea* requires proof of what the defendant actually *knew* at the time of the offense.<sup>16</sup> Objective *mens rea*, by contrast, requires proof of what the defendant *should* have known.<sup>17</sup> The objective standard sets a substantially lower bar for the prosecution, since it can prove “knowledge” from the standpoint of the traditional objective person, rather than having to prove that *a particular defendant* had a certain state of mind.<sup>18</sup> The competing views are often relevant during murder trials. For instance, at least one court has held that first-degree “depraved mind” murder employs a subjective standard, while a second-degree murder conviction requires only an objective standard.<sup>19</sup> The debate over the meaning of “knowledge, or a reasonable cause to believe” in § 841 essentially boils down to one between an objective *mens rea* and a subjective one—is the prosecution required to prove that a defendant *knew* the pseudoephedrine would be used for illicit purposes, or merely that he *should* have known?

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11. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978) (cited in *Staples*, 511 U.S. 600, 616).

12. *U.S. Gypsum Co.*, 438 U.S. at 438 (cited in *Liparota v. United States*, 471 U.S. 419, 426 (1985)).

13. *Id.*

14. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES* 213 (8th ed. 2007).

15. *Id.*

16. Vicki W. Zelle, *Criminal Law – The Anomaly of a Murder: Not All First-Degree Murder Mens Rea Standards are Equal* – *State v. Brown*, 28 N.M. L. REV. 553, 559-60 (1998).

17. *Id.*

18. *See generally id.*

19. *Id.* at 558-59 (citing *State v. McCrary*, 675 P.2d 120 (N.M. 1984)).

A. *Factors to Consider when a Mens Rea Requirement is Ambiguous*

Courts weigh a number of factors in interpreting an ambiguous *mens rea* requirement. Whenever possible, courts look to the plain meaning of the statute in question to determine how it should be applied.<sup>20</sup> Two circuits have held that the plain text of § 841 demands the use of an objective *mens rea* standard. In *United States v. Estrada*, the defendant was found next to an overturned pickup truck that contained 178 pounds of pseudoephedrine pills, along with denatured alcohol and paraphernalia.<sup>21</sup> At trial, Estrada argued that the government had to prove that he knew the pills were pseudoephedrine.<sup>22</sup> The court rejected this argument, holding that such a requirement “would import a second *mens rea* requirement into the statute: knowledge or reasonable cause to believe that the substance will be used in the manufacture of a controlled substance *plus knowledge of the identity of the substance possessed*. . . .”<sup>23</sup> The Ninth Circuit held that, under the statute, the prosecution need only show that the defendant possessed a listed chemical, with reasonable cause to believe it would be used to produce a controlled substance.<sup>24</sup>

In *United States v. Kaur*, another Ninth Circuit case, the defendant was convicted under § 841 after selling large amounts of pseudoephedrine to an informant with the Drug Enforcement Agency (“DEA”) at his convenience store.<sup>25</sup> The court again rejected any subjective interpretation of the statute, reasoning that the statute “clearly presents knowledge and reasonable cause to believe as two distinct alternatives; reasonable cause to believe would be superfluous if it meant knowledge.”<sup>26</sup> The Eighth Circuit echoed this position in *United States v. Galvan*, favorably quoting the *Kaur* court’s assertion that a subjective instruction “would ‘effectively equate . . . reasonable cause to believe with actual knowledge’ and thereby render the ‘reasonable cause to

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20. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 983 (2000) (Thomas, J., dissenting); *Rubin v. United States*, 449 U.S. 424, 430 (1981); *United States v. Vallery*, 437 F.3d 626, 630 (7th Cir. 2006); *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999).

21. *United States v. Estrada*, 453 F.3d 1208, 1209 (9th Cir. 2006).

22. *Id.*

23. *Id.* at 1212 (emphasis added).

24. *Id.*

25. *United States v. Kaur*, 382 F.3d 1155, 1155-56 (9th Cir. 2004).

26. *Id.* at 1157 (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (internal citations omitted)).

believe' phrase redundant."<sup>27</sup>

The Tenth Circuit is thus far alone in adopting the subjective "actual knowledge" standard. In *United States v. Saffo*, the court explained that the standard set forth in § 841 "requires scienter to be evaluated through the lens of *this particular defendant*, rather than from the prospective [sic] of a hypothetical reasonable man."<sup>28</sup> In light of the overwhelming evidence against Saffo, along with the jury's parallel conviction for a money laundering charge, the court was satisfied that the subjective standard had been met, and upheld the conviction.<sup>29</sup> The record showed that Saffo had, *inter alia*, rented storage units under fictitious names, torn labels off boxes before shipping them, ensured that her name was kept off purchase orders, destroyed all paperwork regarding the purchases, and made contradictory statements about her knowledge of "Red Notices," sent to distributors to warn them that pseudoephedrine is often used to manufacture methamphetamine.<sup>30</sup> The wealth of evidence satisfied the court that "Saffo had *actual knowledge* that the pseudoephedrine would be used to manufacture methamphetamine, not that [s]he merely had 'reasonable cause to believe' it would be so used."<sup>31</sup>

The court reaffirmed this view, albeit with a different result, in *United States v. Truong*, where the defendant was convicted at trial of continually selling large amounts of pseudoephedrine to a customer at the defendant's gas station.<sup>32</sup> Copious evidence was offered at trial indicating that the defendant knew his behavior was illegal: he always sold the drugs after the store closed, with the lights out, and concealed the pills in Styrofoam cups for the customer to carry out.<sup>33</sup> In spite of this evidence, however, the court overturned Truong's conviction, holding that while his behavior signaled that he knew the substance would be used illegally, this was not sufficient for conviction under § 841. The court conceded that:

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27. *United States v. Galvan*, 407 F.3d 954 (8th Cir. 2005) (quoting *Kaur*, 382 F.3d at 1157).

28. *United States v. Saffo*, 227 F.3d 1260, 1268-69 (10th Cir. 2000) (emphasis added).

29. *Id.* at 1269.

30. *Id.* at 1264-65.

31. *Id.* at 1269.

32. *United States v. Truong*, 425 F.3d 1282 (10th Cir. 2005).

33. *Id.* at 1285.

the government presented an abundance of evidence from which a jury might reasonably infer that Mr. Truong knew that his customers ‘were up to no good.’ . . . The huge quantity and clandestine circumstances of the sales would surely have put any reasonable person on notice that something nefarious was going on.<sup>34</sup>

Regardless, the court held that “the unusually specific *mens rea* requirement” limits application of the statute “to sellers with the actual knowledge or intent (or, in this Circuit, something ‘akin to actual knowledge’) that it would be used to manufacture methamphetamine.”<sup>35</sup>

## B. *Mens Rea Interpretations in Comparable Cases*

Another factor to consider when interpreting a vague *mens rea* standard is the seriousness of the defendant’s conduct and the extent of its effect on society. Broadly speaking, courts are more willing to require an objective *mens rea* showing when the crime in question has serious repercussions, since a lower burden for the prosecution tends to discourage individuals from committing the crime in the first place.<sup>36</sup> By contrast, courts considering “victimless” or less serious crimes often require a subjective *mens rea* for conviction, since punishment for these crimes may be unnecessary or unjust if the individual did not intend to break the law. Given the relatively small number of cases discussing § 841 in particular, it is helpful to examine which *mens rea* standard courts have required for similarly serious crimes.

### 1. An Objective *Mens Rea* is Preferred for Serious Crimes

Gun crimes provide an illustrative example; in these cases, courts often apply a subjective standard, given the grave consequences of a conviction for the defendant.<sup>37</sup> In *United States v. Staples*, the defendant

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34. *Id.* at 1290 (internal citations omitted).

35. *Id.* at 1291.

36. Simona Agnolucci, *Deportation of Human Rights Abusers: Towards Achieving Accountability, Not Fostering Impunity*, 30 HASTINGS INT’L & COMP. L. REV. 347, 364 (2007).

37. *See, e.g.*, *Staples v. United States*, 511 U.S. 600 (1994); *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989); *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983).

was convicted at trial of possessing a fully automatic rifle, in violation of the National Firearms Act.<sup>38</sup> The evidence showed that the gun had been modified before it was sold to the defendant and that from every outward appearance it looked like a semi-automatic rifle, possession of which is not illegal.<sup>39</sup> The Supreme Court overturned Staples's conviction, ruling that it would be unconscionable to convict a "law-abiding, well-intentioned citizen[ ]" of such a grave felony when he truly and reasonably believed that his gun was not fully automatic.<sup>40</sup>

Indeed, a number of courts have proved unwilling to convict defendants of gun-related felonies without a showing that they knew the true nature of the weapon. In *United States v. Anderson*, the defendant was convicted of possessing automatic firearms, in violation of the National Firearms Act.<sup>41</sup> On appeal, the Fifth Circuit held that for a conviction, the government must prove that the defendant knew the weapons were "firearms" as defined by the Act, not just that they were "firearms" in the general sense of the word.<sup>42</sup> Similarly, in *United States v. Herbert*, the defendants sold guns that were originally semi-automatic weapons, but that had been modified to be fully automatic weapons.<sup>43</sup> The Ninth Circuit overturned the defendants' convictions, holding that when there is no indication that an otherwise legal-looking gun has been modified to bring it within the category of those prohibited by the Act, conviction is improper.<sup>44</sup>

Courts are less united on the issue of whether a subjective or objective *mens rea* is required for drug-related felonies. As with gun crimes, conviction of a drug offense can lead to a lengthy prison term and a serious criminal record. Indeed, courts tend to impose harsh sentences on those convicted of drug crimes, given the detrimental impact these crimes have on others' lives.<sup>45</sup> However, unlike a defendant in a gun crime case, an individual charged with a drug offense has generally caused serious consequences whether he intended to or not. That is, even when a defendant is unaware that he is responsible for the proliferation of controlled substances, the drugs are still being distributed and causing harm to those who purchase them. By contrast, a defendant

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38. *Staples*, 511 U.S. at 615.

39. *Id.*

40. *Id.* (citing *Anderson*, 885 F.2d at 1251, 1253-54).

41. *Anderson*, 885 F.2d at 1248.

42. *Id.* at 1252.

43. *Herbert*, 698 F.2d 981.

44. *Id.* at 986-87.

45. *See, e.g.*, *United States v. Martin*, 239 F. App'x 202, 210 (6th Cir. 2007).



in a gun case ostensibly intends to harm his victim, and whether his rifle is fully or partially automatic plays a minimal role, if any at all. The individual charged with a drug crime need not intend or even know the ramifications of his conduct; its effects on society will generally be the same.

When deciding drug-related cases, courts often weigh the gravity of the defendant's alleged conduct against the possibility that he will be wrongfully or unjustly convicted. In *United States v. Balint*, the defendant was convicted of selling opium, in violation of the Narcotic Act.<sup>46</sup> The defendant argued that because he was unaware that opium was prohibited by the act his conviction must be overturned. The Supreme Court balanced the serious consequences that resulted from the defendant's drug sales against his ignorance of the drug's illegality, and decisively found that the former was more important, stating that "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."<sup>47</sup> The Court went so far as to ignore the common law rule that a *mens rea* must be read into every statute, saying that requiring knowledge of the drug's illegality would completely defeat the purpose of the statute, which is to "minimiz[e] the spread of addiction to the use of poisonous and demoralizing drugs."<sup>48</sup>

By contrast, in *United States v. Londono-Villa*, the defendant was convicted at trial of knowingly or intentionally importing a controlled substance into the United States, in violation of the Comprehensive Drug Abuse Prevention and Control Act.<sup>49</sup> The evidence showed that Londono flew with a DEA informant to Colombia, where he helped him procure cocaine.<sup>50</sup> Although the cocaine was eventually transported to the United States, there was no evidence that Londono intended or even knew that the drugs would be shipped to America.<sup>51</sup> At trial, when asked by the jury for clarification, the district court stated that "the defendant need not have specific knowledge that the cocaine was to be imported into the United States."<sup>52</sup> The Second Circuit reversed the defendant's conviction, noting that the statute explicitly requires a finding that the

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46. *United States v. Balint*, 258 U.S. 250, 254 (1922).

47. *Id.* at 254.

48. *Id.* at 253.

49. *United States v. Londono-Villa*, 930 F.2d 994 (2d Cir. 1991).

50. *Id.* at 996.

51. *Id.*

52. *Id.*

defendant “knowingly or intentionally import[ed] . . . a controlled substance . . . .”<sup>53</sup> This language, the Court said, clearly indicated that the “government is required to prove that the defendant knew or intended that the destination of the narcotics would be the United States.”<sup>54</sup> The Court also noted that a majority of other circuits considering cases under the statute similarly required a showing of intent for a conviction.<sup>55</sup>

## 2. A Subjective *Mens Rea* is Preferred for Negligible Crimes

For crimes involving a greatly reduced danger to the public, courts have been much less willing to convict without a showing that the defendant actually knew he was violating the statute in question. This is consistent with the desire to “provide fair warning concerning conduct rendered illegal . . . .”<sup>56</sup> Allowing conviction for so-called victimless crimes without a *mens rea* requirement of some sort would serve none of the purposes of criminal law. For example, in *Morrisette v. United States*, the defendant was convicted of knowingly converting government property after he salvaged and sold bomb casings he found on government land.<sup>57</sup> Although the defendant testified that he thought the property was abandoned, and that he had no intent to steal anything, the district court ruled that such intent was not necessary for conviction.<sup>58</sup> The Supreme Court reversed, holding that “presumptive intent has no place in this case.”<sup>59</sup> The Court was unwilling to convict the defendant without a clear showing of his intent to violate the statute in question.

Similarly, in *Liparota v. United States*, the defendant was convicted of purchasing food stamps for an amount considerably below their actual value, in violation of a statute governing food stamp fraud.<sup>60</sup> In overturning the defendant’s conviction, the Supreme Court held that it was not enough for the government to show that the defendant possessed the food stamps in a manner prohibited by law and that he knowingly acquired the stamps.<sup>61</sup> Rather, for conviction, the government was required to show that the defendant knew that the manner in which he

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53. *Id.* at 997.

54. *Id.* at 998.

55. *Id.* at 999.

56. *Liparota v. United States*, 471 U.S. 419, 427 (1985).

57. *Morrisette v. United States*, 342 U.S. 246 (1952).

58. *Id.*

59. *Id.* at 275.

60. *Liparota*, 471 U.S. 419 (1985).

61. *Id.* at 429.

acquired the food stamps was prohibited by law.<sup>62</sup> In its holding, the Court noted that without such a requirement, individuals could be punished for conduct that, on its face, seems harmless. The statute approved the use of food stamps only for “food [purchase] in retail food stores which have been approved for participation in the food stamp program at prices prevailing in such stores.”<sup>63</sup> Thus, without requiring a showing of *mens rea*, the government could conceivably prosecute individuals who unwittingly bought groceries at higher-than-approved prices, or individuals not qualified for the food stamp program but who erroneously received them through the mail.<sup>64</sup>

### 3. Crimes Involving Duties to Others

Courts have been very receptive to the objective *mens rea* standard of “reasonable cause to believe” when considering actions taken by government officials in furtherance of their duties.<sup>65</sup> The line of reasoning running through these cases suggests that courts are willing to give a defendant the benefit of the doubt when his conduct was taken in the interest of protecting the public. For example, the Sixth Circuit held that an officer’s entry onto property, without a warrant, to prevent the destruction of evidence, is acceptable if the government can show: “(1) a *reasonable belief* that third parties are inside the dwelling; and (2) a *reasonable belief* that the loss or destruction of evidence is imminent.”<sup>66</sup> Similarly, the Sixth Circuit also held that a finding of probable cause by an arresting officer is based on his *reasonable belief* under the circumstances, and not necessarily on any actual knowledge he has at the time he makes the decision.<sup>67</sup>

In a similar vein, courts have permitted an objective, rather than subjective, *mens rea* standard when an individual fails to act to protect those in his care. In *Farmer v. Brennan*, a transsexual prisoner harmed by other inmates sued prison officials, accusing them of “deliberate

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62. *Id.*

63. *Id.* at 426 (citing 7 U.S.C. § 2016(b) (2002)).

64. *Liparota*, 471 U.S. at 426-27.

65. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *United States v. Gaitan-Acevedo*, 148 F.3d 577 (6th Cir. 1998); *United States v. Straughter*, 950 F.2d 1223 (6th Cir. 1991).

66. *Straughter*, 950 F.2d at 1230 (citing *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1512 (6th Cir. 1988) (emphasis added)).

67. *Gaitan-Acevedo*, 148 F.3d at 577 (citing *Straughter*, 950 F.2d 1223).

indifference” for placing him in the prison population.<sup>68</sup> The Court held that for the guard to be liable the complainant need only show that the official knew of a “substantial risk of harm” and acted (or failed to act) in a manner that did nothing to diminish that risk.<sup>69</sup> In so holding, the Court reasoned that an objective *mens rea* requirement would better motivate prison officials to act to protect the well-being of inmates.<sup>70</sup>

Broadly speaking, these cases suggest that courts generally view an objective *mens rea* as sufficient when the crime in question poses a large risk to the population at large and are willing to accept the risks that this approach may pose to the defendant. In an extreme but illustrative example, the *Balint* court explicitly said that Congress was willing to run the risk of convicting well-meaning opium salesmen, given the far-reaching and severe effects of opium abuse.<sup>71</sup> By contrast, courts considering less harmful crimes like conversion of government property or food stamp fraud seem less willing to convict defendants unless it is shown that they knew their conduct was illegal but proceeded with it anyway.<sup>72</sup> In these situations, the consequences of the defendant’s actions are simply not severe enough to justify conviction unless the conduct is shown to have been deliberate and willful.

## II. Supreme Court Decision on the *Mens Rea* Required by § 841

Should the issue addressed here reach the Supreme Court, it will have to choose between the objective and subjective *mens rea* standards. In making its decision, the Court should examine the previously discussed factors: the plain meaning of the statute, the policy reasons behind its enactment, the severity of the crime in question and its impact on society, and the interest in preventing erroneous or unjust convictions. Balancing these factors, the Supreme Court should apply the objective *mens rea* standard to cases involving § 841. Requiring the prosecution to show merely that the defendant *should* have known that the pseudoephedrine would be used to manufacture a listed chemical is justified for a number of reasons: language in the statute suggests that Congress intended an objective standard, methamphetamine’s

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68. *Farmer*, 511 U.S. 825.

69. *Id.* at 842.

70. *Id.*

71. *United States v. Balint*, 258 U.S. 250, 254 (1922).

72. *See Liparota v. United States*, 471 U.S. 419 (1985); *Morissette v. United States*, 342 U.S. 246 (1952).

debilitating effects and growing popularity justify an approach favoring the prosecution, and several safeguards are in place to prevent erroneous convictions. Additionally, a subjective standard places an extremely high burden on the prosecution, making conviction practically impossible in many cases despite evidence that the defendant clearly knew his conduct was illegal.

A. *Plain Statutory Meaning*

The language of § 841 relating to *mens rea* is relatively straightforward. While the very existence of a circuit split suggests that Congress could have more clearly explained the required level of *mens rea*, there is merit to the *Kaur* court's argument that the statute explicitly lists two alternative *mens rea* sufficient for conviction.<sup>73</sup> It seems unlikely that Congress would have included "having reasonable cause to believe" if they desired an absolute showing that the defendant knew the drugs would be used to produce a list chemical. Indeed, if Congress wanted an absolute showing of knowledge on the defendant's part, they would likely have explicitly required it.<sup>74</sup>

It is worth noting that courts have rejected the argument that the language of § 841 is unconstitutionally vague.<sup>75</sup> For a law to pass constitutional muster, the statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."<sup>76</sup> The court in *Saffo* held that § 841 meets this standard, noting that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that [her] conduct is proscribed."<sup>77</sup>

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73. *United States v. Kaur*, 382 F.3d 1155 (9th Cir. 2004).

74. *See Felton v. Felton*, 679 N.E.2d 672, 678 (Sup. Ct. Ohio 1997) (rejecting the view that issuance of an order of protection requires a "clear-and-convincing" standard of proof, noting that "[t]he General Assembly, had it wanted to do so, knew how to specify a 'clear and convincing' standard. A review of the Revised Code reveals at least nineteen sections in which the General Assembly has specified a 'clear and convincing' standard by using the words 'clear and convincing.'").

75. *United States v. Saffo*, 227 F.3d 1260, 1268-70 (10th Cir. 2000). *See also United States v. Merkosky*, 135 F. App'x 828, 834 (6th Cir. 2005).

76. *Saffo*, 227 F.3d at 1270 (quoting *United States v. Corrow*, 119 F.3d 796, 802 (10th Cir. 1997)).

77. *Id.* at 1270 n.8 (quoting *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982)).

B. *Public Policy and Methamphetamine's Noxious Consequences*

Even assuming that the language of the statute is ambiguous, public policy argues strongly for an objective *mens rea* standard. As with the drug cases discussed *supra*, the conduct that § 841 seeks to regulate—the manufacture of methamphetamine—has extremely serious consequences for society. A United Nations estimate found that methamphetamine is the most widely abused hard drug on earth, used by almost twice as many people as cocaine and heroin combined.<sup>78</sup> It is impossible to exaggerate the toll that methamphetamine takes on its users and those closest to them.

Methamphetamine is listed as a Schedule II stimulant under the Controlled Substances Act, of which § 841 is a part.<sup>79</sup> Schedule II drugs are defined as those with a high potential for abuse, which are available only through a prescription, and excessive use of which may lead to “severe psychological or physical dependence.”<sup>80</sup> Methamphetamine is the most common synthetic, or non-organic, drug in the United States.<sup>81</sup>

Abuse of methamphetamine poses a number of very serious risks. Long-term abuse results in extreme weight loss, severe dental problems, and anxiety or depression, just to name a few.<sup>82</sup> In extreme cases, it can also cause seizures, strokes, hyperthermia (increased body temperature), and even death.<sup>83</sup> Methamphetamine abuse causes structural changes in the brain, some of which are present long after use has stopped and may even be permanent.<sup>84</sup> The drug is also believed to have adverse effects

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78. Virginia Heffernan, *An Illegal Drug From Labs That Can't Be Shut Down*, N.Y. TIMES, Feb. 14, 2006, at E8.

79. 21 U.S.C. § 812 (1990). See also NAT'L INST. ON DRUG ABUSE, INFOFACTS: METHAMPHETAMINE (2008) <http://www.nida.nih.gov/pdf/infofacts/Methamphetamine08.pdf> [hereinafter NIDA INFOFACTS].

80. 21 U.S.C. § 812.

81. WASHINGTON/BALTIMORE HIDTA (HIGH INTENSITY DRUG TRAFFICKING AREA) FUTURES UNIT, METHAMPHETAMINE: A UNIQUE THREAT TO LAW ENFORCEMENT 3, available at [http://www.hidta.org/programs/docs/040922\\_Meth\\_Report.pdf](http://www.hidta.org/programs/docs/040922_Meth_Report.pdf).

82. NIDA INFOFACTS, *supra* note 79, at 2; NAT'L INST. ON DRUG ABUSE, RESEARCH REPORT: METHAMPHETAMINE, ABUSE AND ADDICTION 5-6 (2006) <http://www.drugabuse.gov/PDF/RRMetham.pdf> [hereinafter NIDA RESEARCH REPORT].

83. NAT'L DRUG INTELLIGENCE CTR., METHAMPHETAMINE LABORATORY IDENTIFICATION AND HAZARDS – FAST FACTS, available at <http://www.usdoj.gov/ndic/pubs7/7341/7341p.pdf>; NIDA INFOFACTS, *supra* note 79, at 1-2.

84. NIDA RESEARCH REPORT, *supra* note 82; *Methamphetamine Abuse Linked to Long-Term Damage to Brain Cells*, SCI. DAILY, Mar. 28, 2000, available at

on pregnant women and their children. Although there is little conclusive research in the field,<sup>85</sup> preliminary studies have shown that methamphetamine use during pregnancy can lead to premature delivery, birth deformities, learning disabilities, sleep disturbances, and altered behavior patterns.<sup>86</sup> Moreover, babies born to methamphetamine users are often dependent on the drug themselves, and can suffer severe withdrawal symptoms.<sup>87</sup>

Methamphetamine addicts pose a risk not only to themselves but to society at large. Long-term abuse results in paranoia accompanied by hallucinations and delusions; it is not uncommon for these side effects to lead to violent behavior.<sup>88</sup> Moreover, the risk of HIV and hepatitis transmission increases with methamphetamine use, regardless of how the drug is ingested.<sup>89</sup> While injection of the drug increases transmission risk because of shared or dirty intravenous needles, abuse by any form impairs judgment and lowers inhibition, leading users to engage in especially risky sexual behavior.<sup>90</sup>

While some recent studies suggest decreases in methamphetamine use among certain populations,<sup>91</sup> these studies can be deceiving since the

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<http://www.sciencedaily.com/releases/2000/03/000328084630.htm>.

85. See, e.g., NIDA RESEARCH REPORT, *supra* note 82; Trecia Woules et al., *Maternal Methamphetamine Use During Pregnancy and Child Outcome: What Do We Know?*, 117 N.Z. MED. J. 1 (2004), available at <http://www.nzma.org.nz/journal/117-1206/1180>.

86. N.D. DEP'T OF HEALTH, NEW MOTHER FACT SHEET: METHAMPHETAMINE USE DURING PREGNANCY (2002), available at [http://www.kci.org/meth\\_info/Crank\\_Babies/MethamphetamineUseDuringPregnancy.pdf](http://www.kci.org/meth_info/Crank_Babies/MethamphetamineUseDuringPregnancy.pdf).

87. See, e.g., Cara Hetland, *Children are the Unintended Victims of Meth*, MINN. PUB. RADIO, June 14, 2004, available at [http://news.minnesota.publicradio.org/features/2004/06/14\\_hetlandc\\_methfostercare](http://news.minnesota.publicradio.org/features/2004/06/14_hetlandc_methfostercare); American Pregnancy Association, *Using Illegal Street Drugs During Pregnancy*, <http://www.americanpregnancy.org/pregnancyhealth/illegaldrugs.html>.

88. NIDA INFOFACTS, *supra* note 79, at 2; NIDA RESEARCH REPORT, *supra* note 82, at 5-6.

89. See sources cited *supra* note 88.

90. *Id.*

91. See, e.g., News Release, Substance Abuse and Mental Health Services Administration, *New National Survey Reveals Cocaine, Methamphetamine Use Drop Among Young Adults; Prescription Drug Abuse Increases* (Sept. 4, 2008), available at <http://www.samhsa.gov/newsroom/advisories/0809033637.aspx> (noting that methamphetamine use among young adults fell by a third between 2006 and 2007); Matthew S. Bajko, *California: Crystal Meth Use Drops Among Gay Men*, THE BODY, Nov. 4, 2005, <http://www.thebody.com/content/art24673.html> (noting that methamphetamine use among gay men dropped eight percent between late 2003 and early 2005); Jeremy Smerd,  *Screener Sees Drop in Positive Tests; Presence of Meth*

drug tends to grow in “pockets,” taking a severe toll on certain communities while leaving others essentially unaffected.<sup>92</sup> Even assuming that there have been improvements over the last few years, methamphetamine use has grown considerably since the early 1990s. In 1992, there were approximately 21,000 methamphetamine-related rehabilitation admissions; by 2004, that number had skyrocketed to 150,000.<sup>93</sup> Similarly, a late-2005 survey found that seventy-three percent of respondent hospitals had seen an increase in methamphetamine-related emergency room visits over the preceding five years.<sup>94</sup> The geographic scope of methamphetamine use is growing as well. Since the early 1990s, methamphetamine has grown from a regional drug found mostly in the West to one that is a problem in communities across the country.<sup>95</sup> In 1992, five states reported widespread use; by 2002, that number had ballooned to twenty-one.<sup>96</sup>

These sobering statistics speak for themselves. The Controlled Substances Act was enacted to curtail the manufacture, distribution, and use of illegal drugs in the United States.<sup>97</sup> The overarching purpose was to protect the “health and general welfare of the American people.”<sup>98</sup> The provision in § 841 regulating and penalizing the sale or possession of a listed chemical is a critical tool in reaching this end, especially with regard to methamphetamine. Pseudoephedrine is a nasal decongestant approved by the Food and Drug Administration (“FDA”), commonly found in over-the-counter cold medicines like Sudafed.<sup>99</sup> This otherwise innocuous medication is the main ingredient used to synthesize methamphetamine;<sup>100</sup> indeed, the drug can’t be made without it.<sup>101</sup>

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*Falls*, WORKFORCE MANAGEMENT, July 19, 2006, <http://www.workforce.com/section/00/article/24/44/07.php> (citing drop in presence of methamphetamine in workplace drug tests).

92. Brandee J. Tecson, *Meth Use on the Rise Among Teens*, MTV.COM, Apr. 18, 2005, <http://www.mtv.com/news/articles/1500303/20050418/index.jhtml?headlines=true>.

93. NIDA RESEARCH REPORT, *supra* note 82, at 3.

94. Kate Zernike, *Hospitals Say Meth Cases Are Rising, and Hurt Care*, N.Y. TIMES, Jan. 18, 2006, at A10.

95. Todd M. Durell et al., *Prevalence of Nonmedical Methamphetamine Use in the United States*, 3 SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POL’Y 19 (2008), available at <http://www.substanceabusepolicy.com/content/3/1/19>; NIDA RESEARCH REPORT, *supra* note 82.

96. Durell et al., *supra* note 95.

97. See 21 U.S.C. § 801 (1970).

98. *Id.*

99. eMedicine Health, Medications and Drugs: Brand Names, [http://www.emedicinehealth.com/drug-pseudoephedrine/article\\_em.htm](http://www.emedicinehealth.com/drug-pseudoephedrine/article_em.htm).

100. See Ken Miguel, *Meth labs flourishing due to loophole*, KGO-TV, July 15,



The government's effort to limit the sale of pseudoephedrine is an important tool in the fight against methamphetamine. Section 841 is just one of several laws dealing with this problem. A section of the Patriot Act requires all over-the-counter medications containing pseudoephedrine to be stored behind the pharmacy counter.<sup>102</sup> Additionally, state laws restricting the sale of pseudoephedrine have corresponded with a drop in the number of methamphetamine labs raided.<sup>103</sup> Some have argued that pseudoephedrine needs to be even more tightly regulated.<sup>104</sup>

Importantly, the risk of erroneous or unjust conviction discussed in *Morissette* and *Liparota* does not loom nearly as large in cases involving § 841. The *Truong* court pointed out that DEA agents regularly visit gas stations and convenience stores to notify their attendants of the bottle limit on pseudoephedrine sales, and of the health and legal dangers that are perpetuated by failing to abide by this standard.<sup>105</sup> Additionally, the DEA regularly issues "Red Notices" to pseudoephedrine distributors, warning them about restrictions on its sale.<sup>106</sup> Thus, the risk of an erroneous or unjust conviction of a store worker is greatly diminished by the government's role in informing them of the regulations at issue. In turn, a customer attempting to buy more than the maximum number of bottles will be notified by the attendant that he has exceeded the limit, and is therefore put on notice that attempting to buy additional drugs at

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2009, [http://abclocal.go.com/kgo/story?section=news/assignment\\_7&id=6917364](http://abclocal.go.com/kgo/story?section=news/assignment_7&id=6917364).

101. *Sudafed Restrictions Lead to Decrease in Police Meth Lab Seizures*, TENN. JOURNALIST, June 20, 2007, <http://tnjn.com/2007/jun/20/sudafed-restrictions-lead-to-d> [hereinafter *Sudafed Restrictions*].

102. USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 701-56, 120 Stat. 192 (2006); *Sudafed Restrictions*, *supra* note 101.

103. *North Carolina: Number Of Methamphetamine Labs Drops*, N.Y. TIMES, Apr. 4, 2006, at A20; *Sudafed Restrictions*, *supra* note 101 (noting that after laws required pseudoephedrine to be moved behind the pharmacy counter Oklahoma saw a seventy percent decrease in methamphetamine lab seizures; Tennessee, thirty percent).

104. *See* Heffernan, *supra* note 78 (noting that some experts argue that "the regulations should extend to the bulk sale of ephedrine and pseudoephedrine internationally").

105. *United States v. Truong*, 425 F.3d 1282, 1289-90 (10th Cir. 2005).

106. *United States v. Saffo*, 227 F.3d 1260, 1263 (10th Cir. 2000). *See also* *United States v. Hudspeth*, 525 F.3d 667, 671 (8th Cir. 2008) (noting that the defendant, a chemical company manager, was "provided . . . with a 'Red Notice,' warning that pseudoephedrine and ephedrine products were being seized at meth laboratories, that suspicious orders should be immediately reported to the local DEA office, and that any person distributing or possessing these products with knowledge or reasonable belief that they will be used to manufacture a controlled substance is in violation of [§ 841]").

another store is prohibited by the statute.<sup>107</sup>

C. *The Subjective Mens Rea Standard Results in an Excessive Prosecutorial Burden*

Moreover, the subjective *mens rea* standard is vague at best and makes it extremely difficult for the prosecution to prove a defendant's culpability beyond a reasonable doubt. The Tenth Circuit cases show that even copious evidence implicating a defendant can be insufficient to convict him. In *Truong*, for instance, the defendant kept unmarked bottles underneath the cash register, repeatedly sold large amounts of pseudoephedrine to regular customers, and often "fronted" the medication to them when they were unable to pay immediately.<sup>108</sup> *Truong* obtained the pill bottles from "a man who brought them to the store periodically," and who allowed *Truong* to pay for the drugs after he had sold them.<sup>109</sup> The amount of pseudoephedrine he sold was staggering—one customer regularly bought 1000-count bottles for \$420 each and once bought ten of those bottles at the same time.<sup>110</sup>

Additionally, *Truong* sold the medication in what the court conceded was a "litany of suspicious circumstances."<sup>111</sup> After the store closed and all the lights were turned off, interested customers would knock on the door, at which point *Truong* let them in to buy the pseudoephedrine.<sup>112</sup> He did not enter the sales into the cash register, nor did he provide a receipt, although he performed these actions for any other items the customers bought with the pills.<sup>113</sup> *Truong* regularly concealed the customers' pill bottles in Styrofoam cups, complete with a lid and straw, even though the purchasers never asked him to do so.<sup>114</sup> The court readily admitted that *Truong*'s behavior "would surely have put any reasonable person on notice that something nefarious was going on."<sup>115</sup>

To reverse a defendant's conviction, even with undisputed evidence of such conduct, simply because there was no evidence conclusively

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107. See generally *Saffo*, 227 F.3d at 1263.

108. *Truong*, 425 F.3d at 1285-86.

109. *Id.* at 1285.

110. *Id.* at 1286.

111. *Id.* at 1287.

112. *Id.* at 1286.

113. *Id.*

114. *Id.*

115. *Id.* at 1290.

showing that “Mr. Truong knew that his purchasers would use the substance to manufacture methamphetamine,”<sup>116</sup> sets an impossibly high burden for the prosecution, even considering the heightened standard of proof required in criminal cases. It also does not square with the court’s decision to uphold the conviction in *Saffo*, where the defendant’s conduct was only slightly more incriminating, if at all.<sup>117</sup>

The *Saffo* case, like *Truong*, contained copious evidence indicating that the defendant was up to no good. As previously noted, Saffo ordered that her name be kept off of paperwork, destroyed box labels that contained identifying information, rented storage units under fake names, and provided the DEA with purported customer lists that included non-existent business names.<sup>118</sup> Additionally, during a conversation secretly recorded by the DEA, Saffo acknowledged a Red Notice; later, however, she told the Agency that she had never seen one before.<sup>119</sup> While this evidence is certainly incriminating, to say the least, it does not seem to differ significantly from the facts in *Truong*. Indeed, the court’s sole piece of evidence indicating actual knowledge on Saffo’s part is that she was also convicted of money laundering.<sup>120</sup> The court had no so-called smoking gun statement or definitive admission that Saffo *knew* the pills were being used to make methamphetamine.

One of Saffo’s co-defendants at trial, Nouhad Rached El-Hajjaoui, did make such a statement. When a concerned employee confronted him about bogus customer lists submitted by Saffo’s company, El-Hajjaoui snapped, “How much of this do you think is going out on the street? . . . Seventy to 75 percent of it is going out on the street. And you need to know it, if you can live with that or not.”<sup>121</sup> Such a statement—one that clearly and unequivocally indicates that the defendant knew where the pseudoephedrine would end up—seems to be the only evidence that would definitively satisfy the subjective *mens rea* standard adopted by the Tenth Circuit. For that reason, more than any other, the subjective standard is untenable.

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116. *Id.* at 1291.

117. *United States v. Saffo*, 227 F.3d 1260 (10th Cir. 2000).

118. *Id.* at 1264-66.

119. *Id.* at 1265-66.

120. “The fact that the jury convicted Saffo of money laundering means at the very least that it found Saffo actually knew that she had reasonable cause to believe that the pseudoephedrine would be used to manufacture methamphetamine under [§ 841].” *Id.* at 1269-70.

121. *Id.* at 1264.

Indeed, cases in which the objective *mens rea* standard is employed yield much more reasonable and uniform results. *United States v. Kaur* offers an illustrative example. As in *Truong*, the defendant in this case was a convenience store operator convicted of selling pseudoephedrine in excess of the legal limit.<sup>122</sup> The evidence against Kaur was considerable, to say the least. When a confidential informant with the DEA entered Kaur's store to discuss purchasing a case of pseudoephedrine, Kaur at first seemed receptive and discussed prices with him.<sup>123</sup> However, when the informant produced a Department of Health CPR identification card, Kaur became hesitant and eventually declined to sell him the pills.<sup>124</sup> About a month later, the informant returned and spoke with Kaur's husband, Singh, who also worked at the store, about purchasing a case of pseudoephedrine.<sup>125</sup> Singh said that his wife had confided that she believed the informant was a "cop."<sup>126</sup> Kaur subsequently arrived at the store with two brown grocery bags, containing 159 boxes of pseudoephedrine pills, which the informant purchased.<sup>127</sup> Four days later, the informant purchased another large quantity of pseudoephedrine from Singh.<sup>128</sup>

A DEA search of Kaur's store uncovered more incriminating evidence. Agents found a full case—144 boxes—of pseudoephedrine in the store's back room, but none on the shelves with the other over-the-counter medications.<sup>129</sup> The agents also discovered a letter from the state liquor board warning Kaur that pseudoephedrine is commonly used to make methamphetamine; on the envelope, Kaur had written, "Raj Ji, we have to be very, very careful this product."<sup>130</sup> The Ninth Circuit upheld Kaur's conviction using an objective *mens rea* requirement, holding that:

Ms. Kaur had reasonable cause to believe if she actually knew facts that would alert a reasonable person that the pseudoephedrine would be used to make methamphetamine. . . . [T]he government had to prove

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122. *United States v. Kaur*, 382 F.3d 1155, 1156 (9th Cir. 2004).

123. Brief of Plaintiff-Appellee at 7, *United States v. Kaur*, Nos. 03-30306, 03-30326 (9th Cir. Jan. 7, 2004).

124. *Id.*

125. *Id.* at 8.

126. *Id.*

127. *Id.* at 8-9.

128. *Id.* at 9.

129. *Id.*

130. *Id.*

that Ms. Kaur either knew, or knew facts that would have made a reasonable person aware, that the pseudoephedrine would be used to make methamphetamine.<sup>131</sup>

The evidence in *United States v. Estrada*, another case utilizing an objective standard, was even more incriminating than that in *Kaur*. The defendant, Estrada, was found “conscious but dazed” next to an overturned truck on a remote California road.<sup>132</sup> Inside the truck, officers found 178 pounds of pseudoephedrine pills, along with denatured alcohol, acetone, and other items indicating that the materials would be used to manufacture methamphetamine.<sup>133</sup> Officers recovered a Home Depot receipt for the denatured alcohol, and video footage of a man resembling Estrada leaving Home Depot at the time of the purchase.<sup>134</sup> Police also seized several items from a storage locker, including a type of flask used to make methamphetamine.<sup>135</sup> The flask had Estrada’s fingerprints on it and it contained iodide residue, indicating that it was in fact used to produce the drug.<sup>136</sup> The court upheld Estrada’s conviction, applying an objective *mens rea* standard and even going so far as to hold that Estrada need not know the identity of the chemical for his conviction to stand.<sup>137</sup>

These cases demonstrate the drastically different outcomes that can result from similar facts, depending on which *mens rea* standard is applied. All four cases involve evidence indicating that the defendants at least knew that their conduct was illegal, and likely were aware that the pseudoephedrine they possessed would be used to manufacture methamphetamine. However, as demonstrated by *Truong*, even the most damning evidence may not be enough for conviction when a subjective standard is employed. There is little doubt that had *Truong* been tried in the Ninth Circuit, where *Kaur* and *Estrada* were decided, he would have been convicted. The evidence in *Truong* was more than sufficient to indicate that the defendant had reason to believe the drugs would end up in a methamphetamine lab.

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131. *United States v. Kaur*, 382 F.3d 1155, 1157-58 (9th Cir. 2004).

132. *United States v. Estrada*, 453 F.3d 1208, 1209-10 (9th Cir. 2006).

133. *Id.*

134. *Id.* at 1210.

135. *Id.*

136. *Id.*

137. *Id.* at 1211-12.

### III. Conclusion

In balancing the grave effects of methamphetamine abuse against the danger of erroneous or unjust conviction, it becomes clear that an objective *mens rea* standard is more than sufficient to safeguard the defendant's liberty. A jury will still have to find that the accused, at the very least, should have known that the pseudoephedrine he was distributing would be used to make methamphetamine. If the prosecution does not prove this beyond a reasonable doubt, the defendant will be acquitted. Thus, an objective *mens rea* still puts the burden on the prosecution to show that the defendant acted knowing full well the consequences of his actions (or at the very least, that he was reckless in not foreseeing those consequences). Indeed, this standard is still relatively lenient given the law's admonition that "ignorance of the law is no excuse."<sup>138</sup> Under the objective standard, there will be no conviction without a showing that the defendant should have known where the pseudoephedrine would end up, despite the widely-publicized limits on how much of the cold medication can be purchased at one time.

Equally important, the objective standard will further the critical aim of reducing methamphetamine use in this country. The consequences of methamphetamine abuse for society are too serious, and their effects too wide-reaching, to justify requiring the prosecution to prove absolute knowledge from the subjective standpoint of the defendant. The objective *mens rea* standard will better serve one of criminal law's well-established purposes—deterrence.<sup>139</sup> One of the main assumptions underlying criminal law is that individuals will act in accordance with prohibitions set forth in the law.<sup>140</sup> If a crime is

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138. See, e.g., *Bryan v. United States*, 524 U.S. 184 (1998); *Staples v. United States*, 511 U.S. 600 (1994).

139. The objective standard would be especially instrumental in achieving general deterrence, which serves to discourage individuals other than the accused from committing a crime. See Miriam Gur-Arye, *Reliance on a Lawyer's Mistaken Advice – Should it be an Excuse from Criminal Liability?*, 29 AM. J. CRIM. L. 455, 464 (2002).

140. *Id.* Indeed, some commentators suggest that deterrence is criminal law's "primary" or "core" purpose. Jennifer S. Bard, *Re-Arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illnesses Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense*, 5 HOUS. J. OF HEALTH L. & POL'Y 1, 62 n.315 (2005) (citing Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 957 (2003)). See also KADISH ET AL., *supra* note 14, at 92-97.

narrowly defined, people are more likely to behave in a manner that the law intended to prevent; the statutory language essentially provides a loophole for defendants who have acted contrary to its tenets.<sup>141</sup> Knowing that these loopholes exist, individuals are more likely to simply disregard the law altogether.<sup>142</sup>

One of the chief risks of a subjective *mens rea* standard is that it allows any defendant, no matter how damning his actions, to argue that he “didn’t know” the pseudoephedrine would be used to manufacture methamphetamine. Indeed, the standard set by *Truong* suggests that this defense will very often work. This poses the very real danger of reducing § 841 to a farce, and providing no meaningful legal deterrence to individuals whose actions aggravate the serious and growing methamphetamine problem facing the country.

By contrast, allowing conviction for individuals who, like *Truong* and *Kaur*, sell or distribute large quantities of pseudoephedrine despite having received Red Notices or some other indication that their actions are promoting illegal behavior, puts all others on notice that their behavior is likely to result in conviction as well. The objective *mens rea* standard provides no cover for the defendant to claim that he was unaware of the consequences of his acts, when all available evidence suggests otherwise. This will discourage individuals from acting in any fashion that could be seen as giving them reasonable knowledge that pseudoephedrine in their possession will be used to manufacture methamphetamine, and may even provide them with an incentive to report suspicious activity to the authorities, given their personal stake in the outcome.<sup>143</sup> Thus, an objective *mens rea* standard under § 841 not only makes sound legal sense, but will be an important step in curbing the manufacture and use of methamphetamine in the United States.

All of the factors discussed *supra*—the plain meaning of § 841, the dangers posed to society by methamphetamine, the safeguards in place to prevent erroneous or unjust conviction, and society’s interest in preventing pseudoephedrine from ending up in methamphetamine labs—argue decisively for an objective *mens rea* standard. If America’s methamphetamine problem continues to grow, it will likely be only a

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141. Gur-Arye, *supra* note 139, at 464.

142. *See generally id.*

143. *See generally* Agnolucci, *supra* note 36, at 364. The stakes for individuals convicted under § 841 are considerable. The statute provides for prison sentences of up to twenty years, 21 U.S.C. § 841(c) (2006), and courts are not hesitant to impose lengthy sentences. At trial, *Saffo* was sentenced to concurrent prison terms of 121 and 120 months. *United States v. Saffo*, 227 F.3d 1260, 1263 (10th Cir. 2000).

matter of time before the Supreme Court addresses and resolves the circuit split. If and when that day comes, the high court would be wise to follow the lead of the Eighth, Ninth, and Eleventh Circuits, and require an objective *mens rea* standard.