Through the Funnel of Abstraction: Why Specific Intent Should Be the Required Mens Rea for Attempted Illegal Reentries

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Illegal reentry occurs when a previously deported alien "enters, attempts to enter, or is at any time found in, the United States" without the express consent of the Attorney General.\(^1\) An alien who is convicted of such an illegal reentry can be fined and/or imprisoned for up to twenty years.\(^2\) Despite the potentially severe penalties that are provided for an illegal reentry, many individuals who are deported each year attempt to reenter the United States in hopes of reuniting with family and friends, securing employment, or for a host of other reasons.\(^3\) This number of illegal reentrants grew dramatically during the 1990s.\(^4\)

One issue in illegal reentry law that currently remains unresolved is whether an attempted illegal reentry, pursuant to 8 USC § 1326(a), is a crime requiring specific intent or general intent. This confusion is precipitated because in 8 USC § 1326, the crime of attempted illegal reentry is described without an explicit reference to the required mens rea. The majority position, adopted by the First,\(^5\) Second,\(^6\) Fifth,\(^7\) and Eleventh Circuits,\(^8\) holds that attempted illegal reentry requires only general intent.

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\(^1\) 8 USC § 1326(a) (2000).

\(^2\) 8 USC § 1326(a)–(b) (2000).

\(^3\) See Bill Wallace, Deported Criminals Stream Back Into the U.S. by the Thousands, San Fran Chron A11 (May 11, 1998) (estimating that in 1997, in San Diego alone, the United States Attorney's office prosecuted over 1,600 § 1326 reentry cases).


\(^6\) United States v Rodriguez, 416 F3d 123, 125 (2d Cir 2005).

\(^7\) United States v Morales-Palacios, 369 F3d 442, 449 (5th Cir 2004).

\(^8\) United States v Peralt-Reyes, 131 F3d 956, 957 (11th Cir 1997).
On the other side of the split, the Ninth Circuit holds that specific intent is required for conviction of an attempted illegal reentry.\(^9\) In essence, the disagreement between the majority position and the Ninth Circuit is one of statutory interpretation, in particular, disagreement over how the word "attempt" in 8 USC § 1326 should be interpreted.\(^10\)

This Comment focuses specifically on the disagreement in reasoning between the Ninth Circuit in *United States v Gracidas-Ulibarry*\(^11\) and the Second Circuit in *United States v Rodriguez*,\(^12\) because *Gracidas-Ulibarry* provides the most comprehensive discussion of the minority position, while the *Rodriguez* opinion is the most recent broad articulation of the majority position.

Because the circuit split is based on differing statutory interpretation, this Comment offers a resolution to the split by providing a more comprehensive statutory interpretation of § 1326 and the word "attempt" than either the *Gracidas-Ulibarry* or *Rodriguez* courts provide in their respective opinions. This comprehensive statutory interpretation is based upon the model advocated by Professors Eskridge and Frickey in their seminal article on practical statutory interpretation, *Statutory Interpretation as Practical Reasoning*.\(^13\) This Comment will employ this practical reasoning model because it most resembles the actual practice of the United States Supreme Court.\(^14\)

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\(^9\) *United States v Gracidas-Ulibarry*, 231 F3d 1188, 1190 (9th Cir 2000). Although no other circuit has held that attempted illegal reentry is a crime requiring specific intent, the Eighth Circuit recently cited with approval the *Gracidas-Ulibarry* finding that statutory attempt crimes require specific intent "absent an indication that Congress intended a different meaning." *United States v Kenyon*, 2007 WL 1039551, *12 (8th Cir). This discussion in *Kenyon* suggests that if an attempted illegal reentry case were to come before the Eighth Circuit they may be inclined to join the minority position.

\(^10\) 8 USC § 1326(a)(2000) ("[A]ny alien who—(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission . . . shall be fined under title 18, or imprisoned not more than 2 years, or both.").

\(^11\) 231 F3d 1188 (9th Cir 2000).

\(^12\) 416 F3d 123 (2d Cir 2005).

\(^13\) William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan L Rev 321, 321 (1990) (suggesting that, as a descriptive matter, judges' approach to statutory interpretation is eclectic, not inspired by "grand theory.").

\(^14\) See Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 Tex L Rev 1074, 1136 (1992) (arguing that the Supreme Court is "eclectic" in its choice of sources in statutory construction cases).
This Comment is divided into four parts. Part I provides the legal landscape and describes the split that has developed between the circuits. Part II presents a general background on the “grand theories” of statutory interpretation. Additionally, this section lays out the “practical reasoning” framework advocated by Eskridge and Frickey. Part III argues that both the Gracidas-Ulibarry and Rodriguez courts implicitly adopt one of the “grand theories” of statutory construction (or a hybrid of the grand theories). This Part contends that the Gracidas-Ulibarry court approaches its interpretation of § 1326 from a new textualist standpoint while the Rodriguez court approaches its interpretation using an intentionalist/purposive framework. Part IV provides a more comprehensive statutory interpretation of § 1326 using Eskridge and Frickey’s “funnel of abstraction” as a model through which to filter and compare various sources of statutory interpretation. This Part concludes that based upon the “totality of sources” the minority opinion is in fact correct and that specific intent ought to be the required mens rea for a § 1326 attempted illegal reentry.

I. SUMMARY OF THE LEGAL CONFLICT

Section 276 of The Immigration and Nationality Act (“INA”),15 codified at 8 USC § 1326, provides criminal sanctions for an alien who has been denied admission, deported, excluded or removed, or who has left the United States while an order of exclusion, deportation, or removal is outstanding and later enters, attempts to enter, or is found in the United States without the express consent of the Attorney General to the alien’s readmission.16

All circuits that have interpreted this section have found only general intent is required for liability under § 1326 if the alien has “entered” or been “found in” the United States.17 For

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17 See United States v Carlos-Colmenares, 253 F3d 275, 278 (7th Cir 2001); United States v Guzman-Ocampo, 236 F3d 233, 237 (5th Cir 2000); United States v Gutierrez-Gonzalez, 184 F3d 1160, 1165 (10th Cir 1999); United States v Martus, 138 F3d 95, 97 (2d Cir 1998) (per curiam); United States v Peralta-Reyes, 131 F3d 956, 957 (11th Cir 1997) (per curiam); United States v Gonzalez-Chavez, 122 F3d 15, 17 (8th Cir 1997); United
example, the Ninth Circuit in *Pena-Cabanillas v United States* found that 8 USC § 1326 contained no "language inferring intent," concluding:

The government need only prove that the accused is an alien and that he illegally entered the United States after being deported according to law. An allegation of willfulness is unnecessary in an indictment under 8 U.S.C. Sec. 1326. . . . *[The presence in the country itself is the conduct which Congress has seen fit to punish.]*

The other circuits that have addressed this particular issue have more or less shared the reasoning of the Ninth Circuit in *Pena-Cabanillas.*

While the circuits are generally in agreement on the mens rea required for an *actual* illegal reentry, the mens rea needed for conviction of an *attempted* illegal reentry has split the circuits. The Ninth Circuit in *Gracidas-Ulibarry* found that attempted illegal reentry was a specific intent crime, which requires that "the defendant [have] the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General." The Ninth Circuit's mens rea standard requires the government, in an attempted reentry case, to prove that the alien possessed a dual intent: (1) the intent to reenter the United States; and (2) the intent to do so "without the express consent of the Attorney General," in other words, the intent to reenter the United States illegally. Presumably this would mean that an alien who attempts to enter the United States with the subjective good-faith belief that he is doing so with the ex-

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18 394 F2d 785 (9th Cir 1968).

19 Id at 789.

20 Id (citations omitted) (emphasis added).

21 See, for example, *United States v Gonzalez-Chavez*, 122 F3d 15, 17 (8th Cir 1997) ("We agree with those courts that have held that specific intent is not an element of the offense [of being found in the United States] in § 1326 prosecutions. Section 1326 is silent on the issue of criminal intent, and while statutory silence alone does not necessarily dictate that intent is not an element of the stated crime, nothing in the legislative history of § 1326 supports inferring an element of specific intent.") (citations omitted).

22 231 F3d at 1196.

23 Consider Joshua Dresser, *Understanding Criminal Law* 384 (Lexis 3d ed 2001) (suggesting that the mens rea for criminal attempts requires a dual intent: (1) the intent to commit the acts that constitute the actus reus; and (2) the specific intention of performing the target crime).
press consent of the Attorney General could not be convicted for an attempted illegal reentry pursuant to 8 USC § 1326(a).24

The Ninth Circuit reached this conclusion regarding specific intent, in large part, because it reasoned that the word "attempt" in § 1326 should retain its common law meaning.25 Under the common law, an attempt was defined as "[a]n overt act that is done with the intent to commit a crime but falls short of completing the crime."26 Generally, attempt crimes require the defendant to possess a higher mens rea than completed crimes because attempt crimes lack a completed actus reus.27 Those who defend this formulation argue that the heightened intent requirement is appropriate because it separates the "heightened dangerousness of intentional wrongdoers" who are likely to attempt the crime again in the future from those who are simply reckless or negligent in their actions.28 This understanding fits well with the reasoning of the Gracidas-Ulibarry court, which expressed concern over limiting criminal sanctions for attempted reentries to those persons who intended to break the law and were likely to attempt do so again in the future.29

All other circuits that have been presented with the issue have declined to share the Ninth Circuit's commitment to the common law reading of "attempt."30 In Rodriguez, the Second

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24 See Gracidas-Ulibarry, 231 F3d at 1196 ("The practical difference between [general and specific intent] . . . is that certain defenses, such as voluntary intoxication and subjective mistake of fact, can negate culpability only for specific intent crimes.") (emphasis added).

25 Id at 1192 ("The common law meaning of 'attempt' is the specific intent to engage in criminal conduct and . . . an overt act which is a substantial step towards committing a crime.").


27 See Gracidas-Ulibarry, 231 F3d at 1193 ("The reason for requiring specific intent for attempt crimes is to resolve the uncertainty whether the defendant's purpose was indeed to engage in criminal, rather than innocent, conduct. This uncertainty is not present when the defendant has completed the underlying crime, because the completed act is itself culpable conduct.") (citations omitted).

28 See Dressler, Understanding Criminal Law at 386 (cited in note 23) (discussing the rationale for requiring specific intent in attempt crimes).

29 Gracidas-Ulibarry, 231 F3d at 1194 ("Congress may have had good reason to incorporate the common law meaning of attempt into the crime of attempted illegal reentry under § 1326. . . . [O]therwise, lawful conduct could be swept up within the proscription of the statute. . . . If attempted illegal reentry were a general intent crime, a previously deported alien intercepted on the way to, or even at, the port of entry to make [a request to reapply for admission to the United States] could be prosecuted under § 1326. True, the alien could try to explain that his or her intent was to comply with the law, not to violate it; but the government would not have to prove beyond a reasonable doubt that the alien's true purpose was to break the law.").

30 Rodriguez, 416 F3d at 125; United States v Morales-Palacios, 369 F3d 442, 449 (5th Cir 2004); United States v Peralt-Reyes, 131 F3d 956, 957 (11th Cir 1997); United
Circuit held that “the offense of attempted illegal reentry under §1326(a) does not require the government to allege or prove that the defendant had the specific intent to reenter the United States without the expressed permission of the Attorney General” because “nothing about the nature of the offense as an ‘attempt’ crime, rather than a completed crime, requires proof of specific intent.” Thus, under the Second Circuit’s mens rea formulation, the government is only required to prove that an alien possessed the intent to enter the United States, and need not prove that the alien possessed the intent to enter illegally.

The Second Circuit premised this general intent formulation on §1326’s regulatory nature. The Rodriguez court argued that since §1326 was a statutory crime, and did not “enshrin[e] in statute a common law offense” the word attempt was “liberated from [its] common law meaning.” The court’s reasoning was based primarily on the Supreme Court’s holding in United States v Balint, which had adopted an exception to the general rule that statutory crimes required an adoption of the scienter just as did common law offenses. In light of the regulatory nature of §1326 and based on the language of Balint, the Second Circuit held that a general intent standard was most in line with “preserv[ing] the purpose[] that the statute [was] meant to achieve” and reflected “Congress’s ‘broad discretion in defining offenses in the area of immigration.’”

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31. Id at 128 (“[T]he statute [8 USC § 1326(a)] does not require the government to allege or prove either that Rodriguez knew that he needed the permission of the Attorney General to reenter or that he knew that he did not have that permission when he intentionally attempted to reenter.”). See also Morales-Palacios, 369 F3d at 449 (“[W]e join the majority of circuits holding that for an attempted illegal reentry under section 1326 specific intent is not an element of the statute. We also note that in proving an attempted illegal reentry it is sufficient that the government demonstrates that a previously deported alien knowingly intended to reenter the United States-general intent with respect to the actus reus of the crime.”).

32. 416 F3d at 126. See also Morales-Palacios, 369 F3d at 447 (providing a thorough discussion of the difference between common law offenses and regulatory offenses).

33. 416 F3d at 126. See also Morales-Palacios, 369 F3d at 447 (providing a thorough discussion of the difference between common law offenses and regulatory offenses).

34. 258 US 250 (1922).

35. Id at 251–52 (“While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it, there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court.”) (citations omitted) (emphasis added).

36. Rodriguez, 416 F3d at 128.

37. Id at 126, quoting United States v Newton, 677 F2d 16, 17 (2d Cir 1982).
Other circuits that have adopted the majority position advocated by the Second Circuit in Rodriguez have advanced similar reasoning. In United States v Morales-Palacios, the Fifth Circuit emphasized § 1326's regulatory nature, noting that it was not persuaded by the common law arguments made by the Ninth Circuit in Gracidas-Ulibarry "because imputing common-law meaning of elements of crimes into statutes is compelling only with respect to traditional crimes as distinct from regulatory offenses." Since the Fifth Circuit did not believe an attempted illegal reentry pursuant to § 1326 was a common law offense, it found that it must "exhibit extreme caution" in allowing defendants charged with regulatory crimes to invoke a mistake of fact defense "where the mere illegal conduct may seriously threaten the community's health or safety."

As the discussion above indicates, the continuing disagreement between the Gracidas-Ulibarry position and the majority position advocated in Rodriguez and Morales-Palacios is a disagreement over the means, methods, and sources of statutory interpretation, specifically the interpretation of "attempt" in 8 USC § 1326. On the one hand, the Gracidas-Ulibarry court is concerned with remaining faithful to the common law meaning of attempt, while the Rodriguez court and the other courts comprising the majority are concerned with Congress's intentions and the purposes behind § 1326.

II. "GRAND THEORIES" & PRACTICAL REASONING

In the mid-20th century Professors Hart and Sacks observed that "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." In the wake of these astute observations, academics and judges have put forth a "cascade of statutory interpretation theories" over the last twenty years.

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38 369 F3d 442 (5th Cir 2004).
39 Id at 447.
40 Id at 448, quoting Staples v United States, 511 US 600, 611 (1994).
These theories range from the textual theories of Justice Scalia\textsuperscript{43} and Judge Easterbrook,\textsuperscript{44} to the “Imaginative Reconstruction” advocated by Judge Posner in the early 1980s,\textsuperscript{45} to the Legal Process method advocated by Hart and Sacks themselves.\textsuperscript{46} Despite this “cascade of statutory interpretation theories,” three general theories or “grand theories” have retained significant influence: textualism, intentionalism, and purposivism.

A. Textual: New Textualism

One of the most prominent “grand theories” of statutory interpretation is new textualism.\textsuperscript{47} New textualists argue that when the words of a statute are clear, judges should resolve the contested issue on the statute’s “plain meaning” alone.\textsuperscript{48} In addition to examining the text, new textualists like Justice Scalia are willing to look to the overall statutory structure, dictionaries, similar statutes, and certain canons of statutory construction to aid in interpreting a statute.\textsuperscript{49} Thus, new textualist statutory construction is premised on the text of the statute in question, considering and interpreting the meaning of a word in light of the sentence, section, act, code, and law generally in which it appears.


\textsuperscript{46} Hart and Sacks, \textit{The Legal Process} (cited in note 41).

\textsuperscript{47} Consider William N. Eskridge Jr., \textit{The New Textualism}, 37 UCLA L Rev 621, 656 (1990) (providing an overview of new textualism, and noting that “In each year that Justice Scalia has sat on the Court . . . his [new textualist] theory has exerted greater influence on the Court’s practice.”).

\textsuperscript{48} See \textit{INS v Cardoza-Fonseca}, 480 US 421, 452 (1987) (Scalia concurring in judgment) (“Although it is true that the Court in recent times has expressed approval of this doctrine [that legislative history can sometimes trump plain meaning], that is to my mind an ill- advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.”).

\textsuperscript{49} See \textit{Green v Bock Laundry Co}, 490 US 504, 528 (1989) (Scalia concurring in judgment) (arguing that the meaning of statutory terms ought to be determined (a) in accordance with their ordinary use and (b) in ways “most compatible with the surrounding body of law”). See also Eskridge, 37 UCLA L Rev at 623–24 (cited in note 47) (stating that the meaning of a particular statutory word or phrase is confirmed “from an examination of the structure of the statute, interpretations given similar statutory provisions, and canons of statutory construction.”); Robert J. Araujo, \textit{The Use of Legislative History in Statutory Interpretation: A Look at Regents v. Bakke}, 16 Seaton Hall Leg J 57, 73 (1992) (stating that a new textualist will “examine[] not only the specific statutory language which is the subject of the litigation, but the entire statute as reflected by other legislation enacted by the same legislature.”).


B. Contextual: Intentionalism & Purposivism

Unlike new textualism, two of the “grand theories” of statutory interpretation, intentionalism and purposivism, can be classified as contextual.\textsuperscript{50} A particularly succinct formulation of contextualism appears in \textit{Park County Sportsmen’s Ranch, LLP v Bargas},\textsuperscript{51} where the Colorado Supreme Court noted that courts interpreting statutes should first look to the “plain and ordinary meaning of the statute,” but if the meaning is still unclear should look to the “object the legislature sought to obtain by its enactment, the circumstances under which it was adopted, the legislative history of the statute, and the legislative declaration or purpose.”\textsuperscript{52}

One branch of contextual interpretation, intentionalism, seeks to resolve statutory ambiguity by discerning the intentions of the legislature that passed the statute in question.\textsuperscript{53} As \textit{Park County} suggests, intentionalists, like new textualists, begin their interpretive inquiry with the actual text; if that text offers a plain meaning, then the inquiry is over. However, statutory meanings that are unambiguous are almost never litigated, therefore this adherence to the “plain meaning” rule is often a perfunctory step in the interpretative process.\textsuperscript{54}

Step two is where textualism and intentionalism diverge. While new textualists rely on certain extrinsic sources, such as dictionaries, other statutes, and the common law, intentionalists often rely heavily on the legislative history of a statute in an attempt to determine the “intent” of the enacting legislature.\textsuperscript{55}

\textsuperscript{50} To classify these two theories as contextual does not mean that they ignore the text, or general statutory scheme; rather, they are contextual in the sense that they consider a broader universe of sources than simply the text. See Robert J. Martineau, \textit{Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Interpretation}, 62 Geo Wash L Rev 1, 9 (1993) (“[Textualism focused on the words of a statute and contextualism embraced either the \textit{intent approach} or the \textit{purpose approach}.”) (emphasis added).

\textsuperscript{51} 986 P2d 262 (Colo 1999).

\textsuperscript{52} Id at 268.

\textsuperscript{53} Eskridge and Frickey, 42 Stan L Rev at 325 (cited in note 13) (“Under [intentionalism], the Court acts as the enacting legislature’s faithful servant, discovering and applying the legislature’s original intent.”).

\textsuperscript{54} See Frank H. Easterbrook, \textit{Text, History, and Structure in Statutory Interpretation}, 17 Harv J L & Pub Pol 61, 61 (1994) (“All judges follow a simple rule: when the statute is clear, apply it. But people rarely come to court with clear cases. Why waste time and money? People come to court when texts are ambiguous, or conflict, or are so old that a once-clear meaning has been lost.”).

\textsuperscript{55} At present there are three major formulations of intentionalist theory: (1) actual, (2) conventional, and (3) imaginative reconstruction. A number of articles discuss these
The second contextual “grand theory” of statutory construction is purposivism. Purposivism appeared in the wake of legal realist critiques of intentionalism, and was expanded by Professors Hart and Sacks into a theory that sought to be faithful to the enacting legislature by discovering the ultimate purpose of any particular act. Purposivism in statutory construction is most often used in cases of apparent textual ambiguity when a judge believes that the words of the statute alone are not enough to determine the true meaning of the language in question, or when the purposes of the statute would be negated by following the plain meaning of the text.

As the above overview of the “grand theories” demonstrates, textual and contextual theories of statutory interpretation all have the same end goal of faithful statutory interpretation. The difference between the theories is how they arrive at that faithful interpretation. On the one hand, new textualists believe faithful interpretation requires the judge to remain true to the actual words of the statute (or broader statutory scheme), using only a limited universe of sources to reach their goal. On the other hand, contextualists, including both intentionalists and purposivists, believe that faithful interpretation means finding the various formulations of intentionalism; however, for this Comment’s purposes simply understanding that intentionalism is focused upon the intentions of the enacting legislature is sufficient. See, for example, Martineau, 62 Geo Wash L Rev at 16 (cited in note 50) (discussing the three formulations of intentionalism); Araujo, 16 Seton Hall Leg J at 85–86 (cited in note 49) (discussing the use of legislative history in interpreting statutes); Posner, 50 U Chi L Rev at 817–18 (cited in note 45) (describing in detail the “imaginative reconstruction” intentionalist approach).


57 Hart and Sacks, The Legal Process (cited in note 41). According to Hart and Sacks “every statute must be conclusively presumed to be a purposive act.” Id at 1124. Since “every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective” the primary goal of statutory interpretation should be to discern what that purpose is, and in turn, to resolve statutory ambiguities so they are most in line with the statute’s determined purpose. Id at 148.

58 See, for example, United Steelworkers v Weber, 443 US 193, 201–02 (1979) (using legislative history and historical context to determine that a literal reading of §§ 703(a) and (d) of the Civil Rights Act of 1964 “would bring about an end completely at variance with the purpose of the statute and must be rejected.”) (quotation omitted); Church of the Holy Trinity v United States, 143 US 457, 459 (1892) (“[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.”).
enacting legislature's true intentions or the true purpose of the statute through a broad universe of interpretative sources.

C. Practical Reasoning

Despite the continued use of these "grand theories" in statutory construction, they have come under attack, both normatively and descriptively, by a number of scholars. In particular, William Eskridge and Philip Frickey have argued that judges should not be beholden to grand theories like textualism, intentionalism, or purposivism. Instead, judges should advocate practical reasoning, whereby a court would critically look at and compare the totality of sources in construing a statute.

Eskridge and Frickey advocate this practical model in large part because they find each of the "grand theories" lacking in some way. In order to remedy the problems they find in each of the "grand theories," Eskridge and Frickey posit a comprehensive model of statutory construction that embodies inquiries into all available and relevant sources. To implement their comprehensive theory of "practical reasoning," Eskridge and Frickey suggest a model through which courts can apply "primary evidentiary inquiries" before coming to a conclusion about the meaning of a particular statutory word or phrase. This model, dubbed by Eskridge and Frickey the "funnel of abstraction," ranks a hierarchy of sources that a court should consider when attempting to discern how a particular statute ought to be interpreted. Eskridge and Frickey suggest that a court, when interpreting a

59 See, for example, Eskridge and Frickey, 42 Stan L Rev 321 (cited in note 13); Zep- pos, 70 Tex L Rev 1074 (cited in note 14); Martineau, 62 Geo Wash L Rev 1 (cited in note 50).

60 Eskridge and Frickey, 42 Stan L Rev at 321–22 (cited in note 13), write

How do judges interpret statutes? How should they? Many commentators argue that judicial interpretation is, or at least ought to be, inspired by grand theory. We think these commentators are wrong, both descriptively and normatively: Judges’ approaches to statutory interpretation are generally eclectic, not inspired by any grand theory, and this is a good methodology. Stated another way, we argue that foundationalism is a flawed strategy for theorizing about statutory interpretation and that a more modest approach, grounded upon 'practical reason,' is both more natural and more useful.

61 See Eskridge and Frickey, 42 Stan L Rev at 327–44 (cited in note 13) (criticizing each of the “grand theories” of statutory construction on a number of grounds).

62 Id at 353. Consider Daniel A. Farber, The Inevitability of Practical Reasoning: Statutes, Formalism, and the Rule of Law, 45 Vand L Rev 533, 533 (1992) (“Practical insight is like perceiving in the sense that it is non-inferential, non-deductive; it is, centrally, the ability to recognize, acknowledge, respond to, pick out certain salient features of a complex situation.”).
statute, statutory phrase, or key word, consider, in order from strongest to weakest: (1) statutory text, (2) specific or general legislative history, (3) legislative purpose, (4) evolution of the statute, and (5) current policy.63 Essentially, the Eskridge and Frickey model boils down to two concepts: (1) an interpreter of statutes should evaluate all available and relevant evidentiary sources, and (2) once those sources have been evaluated, they should be honestly discussed and compared as part of any judicial opinion.64

Eskridge and Frickey's model is both normatively appealing and descriptively accurate. The model is normatively appealing because it promotes judicial candor by placing the evidentiary sources and the thought process of the judge in the open. This sort of openness has value for future courts, legal practitioners, and the public at large because it provides each of them guidance when similar issues arise in the future.65 Eskridge and Frickey find this sort of judicial openness particularly valuable.66

63 According to Eskridge and Frickey, 42 Stan L Rev at 353–59 (cited in note 13), [T]his model identifies the primary evidentiary inquiries in which the Court will engage. . . . It is funnel-shaped for three reasons. First, the model suggests the hierarchy of sources that the Court has in fact assumed. For example, in formulating her preunderstanding of the statute and in testing it, the interpreter will value more highly a good argument based on the statutory text than a conflicting and equally strong argument based upon the statutory purpose. Second, the model suggests the degree of abstraction at each source. The sources at the bottom of the diagram involve more focused, concrete inquiries, typically with a more limited range of arguments. As the interpreter moves up the diagram, a broader range of arguments is available, partly because the inquiry is less concrete. Third, the model illustrates the pragmatistic and hermeneutical insights explained above: In formulating and testing her understanding of the statute, the interpreter will move up and down the diagram, evaluating and comparing the different considerations represented by each source of argumentation.

64 Id at 353, 363.

65 David L. Shapiro, In Defense of Judicial Candor, 100 Harv L Rev 731, 750 (1987) ("[T]he fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders, and thus a good case can be made that the obligation to candor is absolute.").

66 Eskridge and Frickey, 42 Stan L Rev at 364 (cited in note 13), argue

[statutory interpretation ought to . . . acknowledge[e] that to admit that legal interpretations often cannot be established according to clear objective criteria is not to bestow upon the judge unconstrained freedom to reach any interpretation she desires. If performed candidly and with emphatic appreciation for the point of view of others . . . the to and fro movements among the considerations suggested by our practical reasoning mode is a more legitimate approach to statutory interpretation than the supposedly 'objective' foundationalist approaches.

See also Farber, 45 Vand L Rev 533, 539–40 (cited in note 62) ("[P]ractical reason does not mean—as is sometimes mistakenly thought—an embrace of ad hoc decisionmaking. Rather, it means a rejection of the view that rules and precedents in and of themselves
In addition to being normatively appealing, the practical reasoning model presents a descriptively accurate picture of most judges' statutory interpretation. In 1992 Professor Nicholas Zeppos published an empirical analysis on the use of evidentiary authority in Supreme Court statutory construction cases from 1890–1990.67 Zeppos found that, in addition to more traditional sources of statutory interpretation such as text or legislative history, practical considerations and public values play a remarkably important role in Supreme Court statutory construction cases.68 Based on this evidence and other findings throughout the study, Zeppos concluded that, "[t]he court cites to a wide range of authority to justify results in statutory cases. . . . [T]he Court's approach is eclectic, relying not only on text and originalist sources, but on practical considerations and other dynamic sources as well."69 If the Supreme Court really is eclectic in its use of evidentiary sources in statutory construction cases, then courts of appeals should act likewise, considering and comparing a variety of sources in reaching their ultimate conclusion.

Because of this approach's normative and positive value, this Comment employs Eskridge and Frickey's practical model to evaluate whether an attempted illegal reentry pursuant to § 1326 requires specific or general intent.

III. INTERPRETIVE METHODS OF GRACIDAS-ULIBARRY & RODRIGUEZ

Though neither court's interpretive methodology is perfectly in line with one of the "grand theories," the court in Gracidas-Ulibarry appears to adopt a new textualist model,70 while the court in Rodriguez appears to adopt a contextual model,71 basically a hybrid of intentionalism and purposivism.

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68 Id at 1107–1108 ("The data reveal that practical considerations play an important role in the Court's statutory cases. In 28.8% of the cases, the Court invoked a practical consideration as support for its result.").
69 Id at 1120 (emphasis added).
70 See 231 F3d 1188, 1190, 1192–95 (9th Cir 2000).
71 See 416 F3d 123, 125–28 (2d Cir 2005).
A. United States v Gracidas-Ulibarry

New textualist source choice and methodology fits well with the actual method employed by the Gracidas-Ulibarry court. In Gracidas-Ulibarry, the Ninth Circuit began its inquiry by looking to the actual text of 8 USC § 1326; the court concluded that Congress had not included a specific intent requirement in § 1326. However, the court still attempted to resolve the apparent ambiguity in § 1326 on textualist grounds, noting that “[w]hen Congress has used a term that has a settled common law meaning, ‘a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning’ of that term.”

The Ninth Circuit’s reference to the common law, as an extrinsic source to aid in statutory interpretation, is generally accepted by new textualists. This “canon” of statutory construction posits that “well-defined words and phrases in the common law carry over to statutes dealing with the same or similar subject matter.” Reliance on the common law definition of terms is particularly acceptable in the interpretation of criminal statutes, where the crime is described by name only. In 8 USC § 1326,
the crime of attempted illegal reentry is described only by name, without an explicit reference to the required mens rea. In such a case, at least according to *Gracidas-Ulibarry*, the common law understanding of the word ought to be incorporated into the statute and therefore **specific intent** ought to be required for an attempted illegal reentry.\(^{78}\)

The *Gracidas-Ulibarry* court also references Black's Law Dictionary to bolster its textual argument, contending that an attempt, unless otherwise defined, is always an offense requiring a specific intent.\(^{79}\) Finally, the *Gracidas-Ulibarry* court discusses other sections of the INA as evidence that Congress intended the crime of attempted illegal reentry in § 1326 to require specific intent, rather than general intent.\(^{80}\)

While the *Gracidas-Ulibarry* court's opinion may not perfectly fit the mold of new textualism, the Ninth Circuit's choice of sources, including the common law, dictionaries, and statutory structure, indicates a strong adherence to that particular "grand theory" of statutory interpretation.

**B. United States v Rodriguez**

Unlike the *Gracidas-Ulibarry* opinion, the Second Circuit in *Rodriguez* is more contextual than textual in orientation.\(^{81}\) In particular, both the "grand theories" of intentionalism and purposivism appear to provide the interpretive framework for the court's analysis of attempt in § 1326.

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\(^{78}\) See *Gracidas-Ulibarry*, 231 F3d at 1192 (citing a number of cases which hold at common law attempt crimes require specific intent).

\(^{79}\) Id, quoting *Black's Law Dictionary* 123–24 [sic] (West 7th ed 1999) ("Every attempt is an act done with intent to commit the offence so attempted.") (quoted material from Black's appears solely on page 123). As with references to the common law, new textualists like Justice Scalia, often rely on dictionaries to aid in their interpretation of statutory words or phrases. See, for example, *MCI Telecommunications Corp v AT&T*, 512 US 218, 225–28 (1994) (Scalia) (defining the word "modify" with reference to a number of dictionary definitions).

\(^{80}\) *Gracidas-Ulibarry*, 231 F3d at 1194. New textualists often look to the entire statutory scheme as an aid in construing a particular word or phrase. See, for example, *Green v Bock Laundry Co*, 490 US 504, 527–30 (1989) (Scalia concurring in judgment) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.").

\(^{81}\) Similarly, the Fifth Circuit's opinion in *United States v Morales-Palacios*, 369 F3d 442 (5th Cir 2004), adopts a contextual model of statutory interpretation, arguing that "where a statute is silent as to intent, it becomes a question of legislative intent to be construed by the court." Id at 446.
In *Rodriguez*, the Second Circuit appears to adopt a hybrid intentionalist/purposive model for construing the meaning of “attempt” in § 1326. First, the Second Circuit explicitly looked to the legislative history of § 1326 to give the statute’s ambiguous text, the definition of “attempt,” a coherent reading. The court concluded that there was nothing explicit in the legislative history that would suggest that Congress intended courts to adopt a specific intent requirement for an attempted illegal reentry pursuant to § 1326.

Next the court argued that “the legislative purpose served by § 1326 would be obstructed by the imposition of a heightened mens rea standard in attempt prosecutions.” This inquiry looks like a mixture of Judge Posner’s intentionalist “imaginative reconstruction,” under which a judge attempts to give a statute a reasonable interpretation based upon how she believes a reasonable legislator would have addressed the issue, and a straight purposivist approach. Implicit in the Second Circuit’s opinion is the argument that a reasonable legislator would not have required a specific intent for a § 1326 attempted illegal reentry because such a legislator would not have wished to undermine the overall purpose of the statue, which is to keep previously deported aliens from reentering the United States.

Both the Ninth Circuit in *Gracidas-Ulibarry* and the Second Circuit in *Rodriguez* implicitly adopt one (or a hybrid of two) of the “grand theories” of statutory construction as their interpretative framework; however, neither the textual nor the contextual interpretation is entirely fulfilling from a normative or descriptive standpoint.
IV. ATTEMPTED ILLEGAL REENTRY THROUGH THE “FUNNEL OF ABSTRACTION”

The “funnel of abstraction” provides a more satisfactory interpretation of the word “attempt” as used in § 1326 by challenging the interpreter to evaluate and compare the (1) statutory text, (2) specific or general legislative history, (3) legislative purpose, (4) evolution of the statute, and (5) current policy. The following section will compare and evaluate each of these sources to determine whether specific or general intent should be the required mens rea for § 1326(a) attempted illegal reentries.

A. Statutory Text

Eskridge and Frickey’s model begins with the “prevailing Supreme Court assumption that the statutory text is the most authoritative interpretive criterion.” At this stage of inquiry the court should first look to the specific words of the text, being sensitive to “any special senses the words have acquired.” In addition to looking at the specific words in the text, the court should also consider “how the statutory provision at issue coheres with the general structure of the statute, since other provisions in the statute might shed light on the one being interpreted.”

As has been recognized by each of the appellate courts that has considered the issue, the specific words of 8 USC § 1326 provide little guidance as to the mens rea required for an attempted illegal reentry. Section 1326(a), provides in part:

[A]ny alien who—

(1) has been denied admission, excluded, deported, or removed . . . and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States

. . .

shall be fined under title 18, or imprisoned not more than 2 years, or both.

88 Eskridge and Frickey, 42 Stan L Rev at 354 (cited in note 13).
89 Id at 355.
90 Id.
91 8 USC § 1326(a) (2000).
Both the Rodriguez and Gracidas-Ulibarry courts agree that there is nothing in the plain language of 8 USC § 1326 that gives explicit guidance as to the required mens rea.\(^2\) In Rodriguez, the Second Circuit held that there was "nothing in the language . . . of section 1326 to support the proposition that the government must prove specific intent."\(^3\) Likewise, in Gracidas-Ulibarry, the Ninth Circuit found that the text of § 1326 failed to provide any specific indication of the mental element that Congress intended for an attempted illegal reentry.\(^4\)

While both courts agree that the plain language does not explicitly require general or specific intent, the Rodriguez court leaves the plain language inquiry quickly and delves into issues of legislative intent and statutory purpose. On the other hand, the Gracidas-Ulibarry court attempts to resolve the issue by using a more limited universe of interpretive sources to define the term "attempt," and in so doing, resolve the debate on textual grounds without relying on legislative intent or statutory purpose.

As mentioned previously, the Ninth Circuit in Gracidas-Ulibarry uses both the common law and dictionary definitions to give the word "attempt" a coherent meaning.\(^5\) From these sources, the Ninth Circuit concludes that:

Although Congress did not include an explicit intent requirement for the crime of illegal attempt to reenter in § 1326, the term 'attempts' implies the common law meaning that includes specific intent. When Congress has used a term that has a settled common law meaning, 'a court must infer, unless the statute otherwise dictates,

\(^2\) See United States v Rodriguez, 416 F3d 123, 127 (2d Cir 2005); United States v Gracidas-Ulibarry, 231 F3d 1188, 1193 (9th Cir 2000).

\(^3\) Rodriguez, 416 F3d at 127, quoting United States v Newton, 677 F2d 16, 17 (2d Cir 1982). The court in United States v Morales-Palacios, 369 F3d 442, 446 (5th Cir 2004) (citations omitted), explains

In conducting statutory interpretation, we begin our inquiry with the plain language of the statute. Here, the plain language of the statute provides little explicit guidance concerning the intent required for a violation. Under section 1326, the language simply states that a previously deported alien who 'enters, attempts to enter, or is at any time found in' the United States without the express consent of the Attorney General is prohibited.

\(^4\) 231 F3d at 1193 ("Congress did not include an explicit intent requirement for the crime of illegal attempt to reenter in § 1326.").

\(^5\) Id at 1192–94 (discussing dictionaries, treatises, and common law cases, all of which require a specific intent for attempt crimes).
that Congress means to incorporate the established meaning of that term.\textsuperscript{96}

Such deference to the common law meaning of statutory words was explicitly endorsed by the Supreme Court in Morissette v United States.\textsuperscript{97}

Despite the support Morissette provides for the Gracidas-Ulibarry opinion, the Ninth Circuit's reliance on the common law is weakened by the Second Circuit's argument that since § 1326 was a statutory offense, and did not "enshrin[e] in statute a common law offense", the word attempt was "liberated from [its] common law meaning[]."\textsuperscript{98} This argument is based upon the Supreme Court opinion in United States v Balint,\textsuperscript{99} which held that a court may refuse to apply the presumption of common law intent to a statutory crime when such application would obstruct the purpose of the statute.\textsuperscript{100} The Balint exception, however, appears to be a narrow one. Not only must a court invoking Balint clearly articulate a given statute's purpose, a difficult task in itself, but the court must also argue that such a purpose is so important that it ought to trump the typical practice of reading terms in a statute in light of their common law meanings. A later section will discuss the statutory purpose of § 1326 in greater depth and will conclude that the purpose of the section is far from clear.\textsuperscript{101} Without a clear statutory purpose the general rule of Morissette should trump the narrow exception of Balint.

In its textual inquiry the Ninth Circuit also addresses the general structure of the INA as evidence that Congress intended

\textsuperscript{96} Id at 1193, quoting Neder v United States, 527 US 1, 21 (1999) (citations omitted). See also NLRB v Amax Coal Co, 453 US 322 (1981) ("Where Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."); Standard Oil Co of NJ v United States, 221 US 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense.").

\textsuperscript{97} Morissette v United States, 342 US 246, 263 (1952) ([W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.) (emphasis added). The holding regarding common law meanings in Morissette is particularly relevant because it was handed down in 1952, the same year as the INA was enacted.

\textsuperscript{98} Rodriguez, 416 F3d at 126.

\textsuperscript{99} 258 US 250 (1922).

\textsuperscript{100} Id at 251–52.

\textsuperscript{101} See Part IV C.
the word "attempt" in § 1326 to require a specific intent. For instance, in 8 USC §§ 1287, 1306(a), 1306(d), 1324, 1325, and 1328 Congress used terms such as "knowingly," "willfully," "unlawful intent," and "purpose," all of which suggest a specific intent requirement. However, in 8 USC §§ 1306(b), 1306(c), 1321, 1322, 1323, and 1326 Congress failed to explicitly provide the intent required. From this proposition the Ninth Circuit argues that Congress felt the need to explicitly define the intent level for actual crimes, but felt no need to define the intent required for attempt crimes because the common law has always understood such attempt crimes to require specific intent. The statutory structure argument in Gracidas-Ulibarry, essentially boils down to the proposition that Congress needed to define the intent level of actual crimes under the INA because there was no guiding background principle for such regulatory crimes; Congress, however, did not feel the same compulsion to explicitly provide the intent level required for attempt crimes because the common law understanding of attempt crimes provided the background principle.

This statutory structure argument is not particularly convincing. The Gracidas-Ulibarry argument that Congress did not define intent in § 1326 because it believed intent was already understood appears flawed in light of the unambiguous mens rea provisions in other parts of the INA. The fact that Congress explicitly provided for specific intent in other parts of the INA may suggest that it accepted general intent as the default intent for crimes under the INA and chose to explicitly define specific intent for the exceptions. Though the Rodriguez court does not explicitly address this statutory structure argument in its opinion, it is a counter-argument worthy of discussion, particularly since even the Ninth Circuit has recognized that a term explicitly in-

102 Gracidas-Ulibarry, 231 F3d at 1194 ("Congress included explicit intent requirements in other sections of the Immigration and Nationality Act of 1952 that enacted § 1326. Unlike its use of the term 'enters' in § 1326 for the crime of illegal reentry, however, Congress's use of the term 'attempts' does not reflect silence as to intent but is consistent with a purpose to 'adopt[] the cluster of ideas that were attached to [the] borrowed word in the body of learning from which it was taken.' "), quoting Morissette, 342 US at 263.

103 See 8 USC §§ 1287, 1306(a), 1306(d), 1324, 1325, 1328 (2005).

104 See 8 USC §§ 1306(b), 1306(c), 1321, 1322, 1323, 1326 (2005). Consider Pena-Cabanillas v United States, 394 F2d 785, 789 & n 4 (9th Cir 1968) (providing the language regarding intent from various sections of the INA).

105 Gracidas-Ulibarry, 231 F3d at 1194–95.
cluded in one section of the statute should not be implicitly included in another.106

Both courts seem to posit plausible textual arguments in their respective opinions, however, the Ninth Circuit's arguments based on dictionaries and the common law have significant appeal, particularly in light of the Supreme Court's holding in cases like Morissette, that "a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning" of a common law term into the statutory language.107 While the Ninth Circuit offers strong plain language arguments, its statutory structure arguments appear weaker. In fact, the statutory structure appears to support the Second Circuit position that general intent should be the default mens rea required for an attempted illegal reentry pursuant to § 1326 unless there is clear congressional intent to the contrary. If the text were the only source worthy of consideration in the current split, then the Gracidas-Ulibarry opinion would be the more convincing interpretation, despite its questionable structural arguments. Under Eskridge and Frickey's "funnel of abstraction," however, the inquiry does not end here.

B. Specific & General Legislative History

The next step under Eskridge & Frickey's "funnel of abstraction" is to look at the specific and general legislative history. At this stage in the inquiry, the court should consider the "original expectations of the Congress that enacted that statute."108 Ascertaining the "original expectations" of the enacting Congress involves looking at the legislative history of the statute or, if the legislative history is barren, conducting an "imaginative reconstruction" of the legislative intent, looking to the "common law rules when the statute was enacted [and] general assumptions of law held by the enacting Congress."109

As with the statutory text, both the Rodriguez and Gracidas-Ulibarry courts agreed that the legislative history of § 1326 does

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106 See Pena-Cabanillas, 394 F2d at 789 ("In construing statutes, words are to be given their natural, plain, ordinary and commonly understood meaning unless it is clear that some other meaning was intended . . . and where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.") (citations omitted) (emphasis added).
107 Gracidas-Ulibarry, 231 F3d at 1193, quoting Neder, 527 US at 21 (citations omitted).
108 Eskridge and Frickey, 42 Stan L Rev at 356 (cited in note 13).
109 Id at 357.
not explicitly provide any indication as to what mens rea is required for a conviction of an attempted illegal reentry.\textsuperscript{110} Nevertheless, the courts read the lack of legislative history regarding the required mens rea in remarkably different ways. The \textit{Rodriguez} court argued that there was ""nothing in the language or legislative history to support the proposition that the government must prove specific intent.""\textsuperscript{111} In contrast, the \textit{Gracidas-Ulibarry} court argued that ""[n]either the text of § 1326 nor its legislative history gives any indication that Congress intended not to incorporate the common law meaning of the term ‘attempts’ into the crime of attempted illegal reentry.""\textsuperscript{112} The difference between these two readings of legislative silence is not particularly surprising once each court’s default presumption is understood. As the \textit{Gracidas-Ulibarry} court’s textual arguments make clear, the Ninth Circuit believed the common law meaning of “attempt” should be incorporated into § 1326 unless there was clear evidence to the contrary.\textsuperscript{113} The \textit{Rodriguez} court believed that the purpose of the statute must be determined before the court could determine whether or not Congress intended to incorporate the common law meaning of the word “attempt” into the statute.\textsuperscript{114}

Since the legislative history provides no explicit reference to intent, under Eskridge and Frickey’s model the interpreter should attempt to ascertain the legislature’s intent by conducting an “imaginative reconstruction.”\textsuperscript{115} The \textit{Rodriguez} court’s “imaginative reconstruction” is more implicit than explicit and blends almost seamlessly with their purposive arguments. Implicit in the Second Circuit’s opinion is the assumption that the 1952 Congress intended § 1326 to be as broad as possible to deter pre-

\textsuperscript{110} See \textit{Rodriguez}, 416 F3d at 127 ("[T]here is nothing in the language or legislative history of section 1326 to support the proposition that the government must prove specific intent.") (quotation omitted); \textit{Gracidas-Ulibarry}, 231 F3d at 1193 (noting that “Congress did not include an explicit intent requirement for the crime of illegal attempt to reenter in § 1326”). See also \textit{Pena-Cabanillas v United States}, 394 F2d 785, 789 (9th Cir 1968) ("The legislative history of the Immigration and Nationality Act, covered in the 1952 US Code Cong and Adm News, p 1653, appears to be barren as to whether Congress meant to include language inferring ‘intent’ in Section 276 of the Act, 8 USC Sec 1326.").

\textsuperscript{111} \textit{Rodriguez}, 416 F3d at 127, quoting \textit{United States v Newton}, 677 F2d 16, 17 (2d Cir 1982).

\textsuperscript{112} 231 F3d at 1193 (emphasis added), citing HR Rep No 82-1365, 82nd Cong, 2d Sess (1952), reprinted in 1952 USCCAN 1653, 1723–24.

\textsuperscript{113} \textit{Gracidas-Ulibarry}, 231 F3d at 1193.

\textsuperscript{114} 416 F3d at 127–28.

viously deported aliens from reentering the United States. Essential-ly the argument is this: (1) Congress has the power to wield broad discretion in the area of immigration; (2) keeping illegal aliens from reentering the United States is the purpose of the statute; (3) therefore, we must presume that Congress intended to wield its full authority and adopt a broad prohibition on reentry, which would require only general intent for conviction of an attempted illegal reentry. This reconstruction of legislative intent, while plausible, is proffered by the Second Circuit without any tangible support for why they believe Congress intended to exercise their prerogative to “define offenses in the area of immigration” in a new and unusual manner.

The Ninth Circuit’s “imaginative reconstruction” is more defensible. According to the Ninth Circuit in Gracidas-Ulibarry, attempt crimes have a long history of being understood to require specific intent. In light of this extensive history, it would be surprising for the 1952 Congress to do away with the background understanding that specific intent is required in attempt crimes without addressing it explicitly, either in the text or the legislative history of § 1326. This clear statement rule cuts in favor of the “imaginative reconstruction” found Gracidas-Ulibarry, which argues that the common law meaning of “attempt” ought to be adopted unless it is clear that Congress intended otherwise. In the case of § 1326, Congress provided no such clarity, suggesting a Congressional intent to accept the

116 See Rodriguez, 416 F3d at 127 (“This increased danger of conviction imposes added deterrent force, encouraging deported aliens to take additional care should they seek to reenter by limiting the universe of defenses that might be advanced by those who do not meet the requirements for legal reentry. . . . This enhancement of risk is well within the broad discretion of Congress to define offenses in the area of immigration.”) (citations omitted) (emphasis added).
117 Id at 126–27.
118 231 F3d at 1192. See Wooldridge v United States, 237 F 775, 778–79 (9th Cir 1916) (collecting common law sources “holding that, to constitute an attempt, there must be the intent to commit a crime and some act done toward its consummation, and that the term ‘attempt’ signifies both an act and the intent with which it is done.”) (emphasis added).
119 See Chisom v Roemer, 501 US 380, 396 n 23 (1991) (“Congress’ silence in this regard can be likened to the dog that did not bark.”). See also Harrison v PPG Industries, Inc, 446 US 578, 602 (1980) (Rehnquist dissenting) (“In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as made here, I think judges as well as detectives may take into consideration the fact that the watchdog did not bark in the night.”) (emphasis added); William N. Eskridge, Jr. and Philip P. Frickey, The Supreme Court, 1993 Term—Foreword: Law as Equilibrium, 108 Harv L Rev 26, 101 (1994) (A “prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule.”).
common law background principles of requiring specific intent for conviction of an attempt crime.

C. Legislative Purpose

At the third stage in the "funnel of abstraction" a court attempts to determine the legislative purpose. In other words, the court should ask "[w]hat problem was Congress trying to solve, and what general goals did it set forth in trying to solve it?"120 The plain text of § 1326 suggests that the most basic purpose of the provision was to keep previously deported aliens from reentering the United States illegally.121 This purpose was to be accomplished by attaching fines and/or imprisonment to both attempted and actual illegal reentries.122

In Rodriguez, the Second Circuit appears to believe that this statutory purpose can only be obtained by attaching significant penalties to actual and potential violations of § 1326, even if such a broad reading would be over-inclusive. The court argued that it believed that the "legislative purpose served by § 1326 would be obstructed by the imposition of a heightened mens rea standard in attempt prosecutions."123 In support of its purposive interpretation, the Second Circuit put forth three distinct arguments: (1) a broad purpose is most in line with the text of § 1326; (2) a broad inclusive reading of purpose, one requiring only general intent, is necessary to deter an alien from attempting reentry; and (3) a broad reading is acceptable because it will not be a trap for the unwary—deported aliens know that reentry or attempted illegal reentry is a crime. First, the court argued that a broad purposive reading was appropriate in light of the text of § 1326, stating that "[the court] read[s] § 1326 to mean what it says: A previously deported alien who reenters the United States does so at his or her peril, and any subjective belief as to the legality of that act is irrelevant."124

Next, the court reasoned that an increased danger of conviction, which would exist under a general intent regime, would "impose[] added deterrent force, encouraging deported aliens to

120 Eskridge and Frickey, 42 Stan L Rev at 358 (cited in note 13).
121 See 8 USC § 1326(a)-(b) (2000).
122 Id.
123 Rodriguez, 416 F3d at 127.
124 Id, quoting United States v Champegnie, 925 F2d 54, 55–56 (2d Cir 1991). See also United States v Torres-Echavarria, 129 F3d 692, 698 (2d Cir 1997) ("The statute simply, and logically, makes the presumption of unlawful intent conclusive.").
take additional care should they seek to reenter by limiting the universe of defenses that might be advanced by those who do not meet the requirements for legal reentry.”\textsuperscript{125} The court went on to contend that a heightened mens rea would “erode[] significantly” the deterrent force of § 1326 “because increased peril [of conviction] would attach only on successful reentry, imposing only remote force at the moment of decision.”\textsuperscript{126}

Finally, the Second Circuit argued that a broad purposive reading of § 1326 would not implicate truly innocent conduct, because the continued “practice of the [Immigration and Naturalization Service] is to advise [deported aliens] that they face criminal liability for an unlawful return.”\textsuperscript{127} This final claim is perhaps the strongest argument in the entire Rodriguez opinion. At common law, one of the primary reasons for requiring specific intent for attempt crimes was to protect truly innocent conduct from being swept up with blameworthy conduct.\textsuperscript{128} In the case of an attempted illegal reentry, the chance of this happening is reduced significantly by the practice of the Immigration and Naturalization Service (“INS”) of advising an alien upon deportation that any reentry without the express permission of the Attorney General is illegal.

The Ninth Circuit, in Gracidas-Ulibarry, did not find that the INS’s practice of warning deported aliens of the risks of reentry solved the potential problem of sweeping innocent conduct up with blameworthy conduct. One of the primary concerns found in the Gracidas-Ulibarry opinion is separating illegal conduct from innocent conduct.\textsuperscript{129} Specifically, the court worried that if attempted illegal reentry were a general intent crime, then an immigrant, intercepted on his way to request permission to reapply

\textsuperscript{125} Rodriguez, 416 F3d at 127.

\textsuperscript{126} Id.

\textsuperscript{127} Id at 128, quoting Torres-Echavarría, 129 F3d at 697–98. A similar argument was made by the Fifth Circuit in United States v Morales-Palacios, 369 F3d 442, 448 (5th Cir 2004) (“[U]nder section 1326 a specific intent requirement is unnecessary, because the regulatory nature of the statute makes the presumption of unlawful intent conclusive. A previously deported alien has a unique set of knowledge that might not otherwise exist for defendants in traditional common law crimes; upon being deported, an alien has been given both oral and written notice that he or she cannot reenter without the express permission of the Attorney General. The act of attempting to reenter therefore speaks for itself.”) (emphasis added).

\textsuperscript{128} See Dressler, Understanding Criminal Law at 379 (cited in note 23). See also Gracidas-Ulibarry, 231 F3d at 1194.

\textsuperscript{129} 231 F3d at 1194 (“On the face of it, the common law justification for requiring specific intent for an attempt crime appears applicable to attempted illegal reentry; otherwise, lawful conduct could be swept within the proscription of the statute.”).
for admission to the United States, could be prosecuted pursuant to § 1326. In fact, this is exactly what happened in United States v Morales-Tovar, where the District Court for the Western District of Texas dismissed charges against the defendant because the court could not determine if the defendant was attempting an illegal reentry or legally requesting permission to apply for readmission.

The Ninth Circuit, in Gracidas-Ulibarry, seized on the analysis in Morales-Tovar to conclude “Congress may have had a good reason to incorporate the common law meaning of attempt into the crime of attempted illegal reentry under § 1326.” In the Ninth Circuit’s opinion this incorporation of the common law meaning was warranted regardless of the INS’s warning that reentry was illegal, because even if an alien understood actual reentry to be illegal, they could still be prosecuted for an attempted reentry simply by following the prescription of 8 CFR § 212.2(f), which provides a legal method for obtaining reentry to the United States.

Both courts’ arguments regarding legislative purpose appear plausible, however, neither explanation is wholly convincing because both make potentially unwarranted assumptions. The Rodriguez argument, regarding the INS practice of warning de-
ported aliens of the risks of reentry, assumes that deported aliens actually understand the warnings they are being given. Certainly, most deported aliens understand that an actual reentry is illegal, but what they may not understand is the risk of imprisonment they face for a “good faith” attempt to seek permission to reenter the United States. This issue is even more confusing and potentially problematic for aliens given the presence of federal regulations that provide a method for deported aliens to seek to reenter the United States legally.135 Given the potential confusion due to the presence of such regulations, the Rodriguez argument that all aliens understand the risks of attempting to reenter the United States is less convincing.

Unlike the Rodriguez opinion, which may assume too much about an alien’s ability to understand the implications of the INS warning and its interaction with federal regulations, the Gracidas-Ulibarry opinion may assume too little about the expertise of border officials and the limiting effects of prosecutorial discretion. Both the Morales-Tovar and Gracidas-Ulibarry court appear to assume that officials and prosecutors are incapable of using their expertise to distinguish between illegal and legal conduct and, therefore, such discretion should be limited by requiring specific intent for conviction of an attempted illegal reentry. While such an assumption may be crude, fear that overburdened border officials wield excessive discretion over potential immigration violations is not too farfetched—especially in light of federal regulations, which give broad discretion to border officials in determining when and how to pursue potential criminal violations.136 Given this broad grant of discretion, the Gracidas-Ulibarry fear that innocent conduct may be swept up with illegal conduct, unless specific intent is required for an illegal entry conviction, is understandable.

D. Evolution of Statute

The next inquiry in the “funnel of abstraction” looks to the evolution of the statute.137 The penalty for illegal reentry “origi-

135 See id.
136 See 8 CFR § 287.2 (2005) (“Whenever a special agent in charge, port director, or chief patrol agent has reason to believe that there has been a violation punishable under any criminal provision of the immigration and nationality laws . . . he or she shall immediately initiate an investigation to determine all the pertinent facts and circumstances and shall take such further action as he or she deems necessary.”) (emphasis added).
137 See Eskridge and Frickey, 42 Stan L Rev at 359 (cited in note 13) (“The enactment of a statute is often the beginning of a significant process of implementation by courts or
nated in 1929 and was carried forward in the 1952 codification of the Immigration and Nationality Act” at 8 USC § 1326.138 Most of the conduct addressed and penalties prescribed under § 1326 have remained fairly static since the 1952 codification. However, since the codification of the INA in 1952, the penalties for illegal reentries have increased dramatically in certain circumstances. Recent legislation has created specific penalties for aliens who: (1) illegally reenter the United States after having been deported pursuant to INA § 212(a)(3)(B) for suspected terrorist activity, (2) illegally reenter the United States after being deported pursuant to the alien terrorist provisions of INA §§ 501–507, or (3) reenter after having been released from incarceration and removed by the Attorney General pursuant to INA § 241(a)(4)(B).139 Aliens who reenter or attempt to reenter in violation of any of these three provisions can be fined, imprisoned for up to ten years, or both.140

Those circuits supporting a general intent requirement, such as the Rodriguez court, may read this statutory evolution to indicate an increased commitment on the part of Congress to keep previously deported aliens out of the United States. Though not addressed in the context of the evolution of the statute, both the Rodriguez and Morales-Palacios opinions stress that one of the primary reasons why a general intent requirement should govern attempted illegal reentries is to provide strong disincentives to keep aliens, particularly dangerous aliens, out of the United States.141 Supporters of a general intent standard could argue that the statutory evolution, namely the broadened scope of penalties for illegal reentries, suggests Congress’s desire to deter aliens from reentry and that such deterrence would be best served by instituting a general intent mens rea for attempted illegal reentries.

This argument, that Congress has sought to expand the protective scope of § 1326, is not particularly persuasive primarily because § 1326 has not been substantively altered since its codification. Implementation changes the statute, because the statute must be applied—and often subtly redirected—to meet variations of the problem not originally anticipated.”.

139 See id at 2.
140 8 USC § 1326(b) (2000).
141 See, for example, Morales-Palacios, 369 F3d 442, 448 (5th Cir 2004) (“[W]e must exhibit extreme caution in allowing criminal defendants charged with regulatory crimes to utilize a mistake of fact defense where the mere illegal conduct may seriously threaten the community’s health or safety. . . .”).
THROUGH THE FUNNEL OF ABSTRACTION

fication in 1952. In fact, the language of § 1326(a), which makes attempted illegal reentry a crime, as well as the penalties provided for such a crime, has remained almost entirely unchanged since 1952. This suggests that Congress's general intentions regarding the conviction and punishment of attempted illegal reentry have not changed since 1952, despite the fact that it has provided more specific penalties for certain types of deportees, for example, those convicted or suspected of terrorist activity.

Thus, in the present case, the inquiry into the statutory evolution of § 1326 should be treated as a non-factor in the "funnel of abstraction" inquiry, since it supports neither a specific or general intent requirement for attempted illegal reentry. Rather, the lack of statutory evolution makes the inquiry into the original text, intent, and purpose of the statute all the more relevant.

E. Current Policy & Values

At the final stage of inquiry in the "funnel of abstraction" a court considers current American policy and values, including inquiries into "ideas of fairness, related statutory policies, and (most important) constitutional values." Current values continue to affect judicial decisions at all levels of the federal bench, though most often in implicit rather than explicit ways. One example of reliance on current values came in Bob Jones University v United States, where the Court denied tax-exempt status to Bob Jones University, in part, because it engaged in racial discrimination in violation of current public values. Values, such

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142 See INA § 276, 66 Stat at 229, codified at 8 USC § 1326(a) (1952), which provides

Any alien who—(1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded or deported, unless such alien shall establish that he was not required to obtain such advance consent under this Act or any prior Act, shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

143 Eskridge and Frickey, 42 Stan L Rev at 359 (cited in note 13).

144 Consider William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U Pa L Rev 1479, 1538 (1987) (noting that "the current context and public values always exercise some influence on the interpretive enterprise").


146 Id at 592–95 ("We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not chari-
as those discussed in *Bob Jones*, should be examined and discussed as a part of any judicial opinion under the Eskridge and Frickey framework, even if those values ultimately play a minor role in the decision.\textsuperscript{147} Neither the *Rodriguez* nor *Gracidas-Ulibarry* court discusses current values as part of their respective opinions, but there are a number of current policy and values arguments that could be legitimately attributed to the position each court supports.

The *Rodriguez* court advocates adopting only a general intent mens rea for attempted illegal reentries. Implicit in this holding is the belief that America ought to expand its efforts to keep aliens who have been previously deported out of the country by allowing the government to bear less prosecutorial burden in attempted reentry cases.\textsuperscript{148} This belief that "more needs to be done" to counteract illegal immigration into America is shared by a majority of Americans.\textsuperscript{149}

A June 24–27, 2006 public opinion poll conducted by the Los Angeles Times/Bloomberg, found that 87 percent of those polled thought that "[c]ompared to other problems facing the country," immigration was either "one of the most important" or "important."\textsuperscript{150} A CNN poll conducted a few months later, between Sep-

\begin{itemize}
    \item \textsuperscript{147} See Eskridge and Frickey, 42 Stan L Rev at 358 (cited in note 13) ("These are highly abstract inquiries [statutory evolution and current policy] having less connection to text and legislative expectations, and hence less authority in a democracy. Yet these inquiries are pertinent, because the enactment of statutes is part of the dynamic process.").
    \item \textsuperscript{148} See *Rodriguez*, 416 F3d at 127 ("A previously deported alien who reenters the United States does so at his or her peril, any subjective belief as to the legality of that act is irrelevant. This increased danger of conviction imposes added deterrent force, encouraging deported aliens to take additional care should they seek to reenter."), quoting *United States v Champegnie*, 925 F2d 54, 55 (2d Cir 1991).
    \item \textsuperscript{149} See *PollingReport.com* (Polling Report Inc 2006), Quinnipac University Poll, Nov 13–19, 2006, available at <http://www.pollingreport.com/immigration.htm> (last visited Apr 27, 2007) (In poll asking whether or not more measures need to be taken to prevent illegal immigration, 71% said more needed.).
    \item \textsuperscript{150} Id, Los Angeles Times/Bloomberg Poll, June 24–27, 2006 (Poll: "Compared to other problems facing the country, how big a problem is illegal immigration? Would you say it is one of the most important problems facing the country, or is it an important problem
September 29, 2006 and October 10, 2006, asked whether the voter “would favor or oppose building a fence along 700 miles of the border with Mexico?” and found that 54 percent of the roughly one thousand adults polled said they would be in favor of such a measure.\textsuperscript{151} Finally, a Fox News/Opinion Dynamics Poll, conducted between May 16–18, 2006 found that 79 percent of those polled believed that the government should “increas[e] the number of federal agents patrolling the border to stop illegal immigration,” and 63 percent said they favored “[u]sing thousands of National Guard troops temporarily to help border patrol agents along the Mexican border to stop illegal immigration.”\textsuperscript{152} These polls suggest that Americans in 2006 believed that immigration was an important issue, and a majority wished to take increased measures to crack down on illegal immigration, even extreme measures like building a seven hundred mile fence or using the National Guard to defend America’s borders.

The United States government seems to be responding to the majority and has been taking increasingly serious measures to stem the flow of immigration. On October 26, 2006, President Bush signed into law a bill that would provide for the construction of a fence along the Southwestern border, as well as an increased number of vehicle barriers and checkpoints.\textsuperscript{153} This desire for greater immigration deterrence is not a new phenome-
non, but has been an increased concern of Congress since the late-1980s.\footnote{See Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 Georgetown Immig L J 611 (2003) (arguing that since the late-1980s the United States government has engaged in a “criminalization of immigration,” which has sought to increase punishment in order to keep future illegal immigrants out of the United States and punish those who have previously entered illegally).}

The *Rodriguez* court, given what appears to be consensus amongst the majority of Americans and Congress that illegal immigration must be reduced, may stand on firm grounds in arguing that a general intent standard is the more appropriate mens rea for attempted illegal reentries. Such a standard would make it easier for the government to prosecute those who attempt a reentry, and therefore might provide a greater deterrent effect on those who are considering attempting to reenter the United States illegally. Although this may be true, such a “current policy” position would contravene a long held policy of American criminal law, which requires ambiguous statutes, like § 1326, to be read in favor of the defendant.\footnote{See Singer, 2B *Sutherland* § 59:3 (cited in note 76).}

This “long held policy” of American criminal law, known as the rule of lenity, posits that “penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed.”\footnote{Id. For a general discussion, see Lawrence Solan, *Law, Language, and Lenity*, 40 Wm & Mary L Rev 57 (1998) (discussing in depth the origins of the rule of lenity, when it is applied, and its justifications).} This rule has been applied in the immigration context on a number of occasions.\footnote{See, for example, *INS v St Cyr*, 533 US 289, 320 (2001) (applying the rule of lenity to buttress the presumption against retroactive application of ambiguous statutory provisions); *INS v Elias-Zacarias*, 502 US 478, 487 (1992) (Stevens dissenting) (quoting the Court’s decisions directing lower courts to apply the rule of lenity in the immigration context); *INS v Cardoza-Fonseca*, 480 US 421, 449 (1987) (acknowledging “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen].”); *INS v Errico*, 385 US 214, 225 (1966) (stating that “[e]ven if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the [noncitizen].”); *Costello v INS*, 376 US 120 (1964) (noting that even if the statutory interpretation issue before the Court was in doubt it “would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the [noncitizen].”); *Bonetti v Rogers*, 356 US 691, 699 (1958) (arguing that “ambiguity [in immigration statutes] should be resolved in favor of lenity”). Consider Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 Georgetown Immig L J 515 (2003) (advocating the use of the “immigration rule of lenity," and suggesting the rule is consistent with *Chevron* and good public policy).} With regard to § 1326, the language of the statute is ambiguous, or at least involves conceptual difficulties.\footnote{See Solan, 40 Wm & Mary L Rev at 63 (cited in note 156) (arguing that the rule of
is, of course, whether to read § 1326's use of the word "attempt" to indicate that general or specific intent is required for an attempted illegal reentry. As the preceding sections of this Comment have illustrated, this really is a conceptually difficult question, with persuasive textual, historical, and purposive arguments on both sides. Given this conceptual difficulty and lack of clarity over the required mens rea, the rule of lenity could be legitimately applied to the Ninth Circuit's interpretation of § 1326 and the word "attempt." 1

As the preceding discussion illustrates, the current societal policy and values relating to § 1326 are not clear. On the one hand, those supporting a general intent requirement, such as the Rodriguez court, could argue that current American policy is to keep previously deported aliens excluded, even if some "innocent" behavior is punished. On the other hand, supporters of a specific intent standard, like the Ninth Circuit in Gracidas-Ulibarry, could argue that it is the continued policy of American courts to construe ambiguous immigration statutes that criminalize behavior in favor of the defendant. 160

F. Through the Funnel: Resolving the Circuit Split

This Comment illustrates that there is no easy answer as to whether illegal reentry is a crime requiring specific or general intent. The supporters of a specific intent standard, like the court in Gracidas-Ulibarry, possess particularly compelling textual and legislative history arguments, while the supporters of a general intent requirement, like the Rodriguez court, make strong purposive and policy arguments. Although both sides make com-

lenity, although often expressed as a way to resolve "ambiguity," is most often used to help resolve "conceptual difficulties").

159 See Moskal v United States, 498 US 103, 108 (1990) (The rule of lenity should be reserved "for those situations in which a reasonable doubt persists about a statute's scope even after resort to the language and structure, legislative history, and motivating policies of the statute").

160 Although the "immigration rule of lenity" is most often applied in deportation cases, it has been applied to a number of other immigration issues, which suggests its application to attempted illegal reentries may be appropriate. See, for example, St Cyr, 533 US at 320 (2001) (applying the rule of lenity to determinations of whether immigration statutes apply retroactively); Detroit Free Press v Ashcroft, 303 F3d 681, 702 (6th Cir 2002) (applying deference in favor of immigrant to provisions governing the closing of deportation hearings to the public). See also Slocum, 17 Georgetown Immig L J at 523 (cited in note 157) ("Despite the seemingly restrictive language used by courts in describing the immigration rule of lenity as applying to 'deportation provisions,' the rule has been applied in a broader fashion. . . .to a wide variety of statutory provisions. . . .").
PELLING arguments, the Ninth Circuit in *Gracidas-Ulibarry* presents the more persuasive case.

The Ninth Circuit in *Gracidas-Ulibarry* engages most directly with the text of § 1326 and with the intentions of the enacting Congress, making a number of convincing arguments about the background presumptions regarding the required mens rea for attempt crimes at common law. The Ninth Circuit also offers a plausible alternative to the purposive arguments of Rodriguez and Morales-Palacios; this argument suggests that while the purpose of § 1326 is to keep previously deported immigrants from reentering the United States, it is not intended to be a trap for those who are not intending to act illegally. Finally, even if these arguments are not completely convincing, at the very least, they cast a significant degree of doubt upon the majority position which advocates a general intent standard for § 1326 attempted illegal reentries. In light of this ambiguity, a court faced with the question of whether an attempted illegal reentry is a crime requiring specific or general intent should, pursuant to the rule of lenity, resolve the ambiguity in favor of the defendant. Such a resolution would mean adopting a *specific intent* standard for § 1326 attempted reentries.

**CONCLUSION**

This Comment addresses a wide range of available arguments to answer a question that continues to divide the circuits. Both the Rodriguez and Gracidas-Ulibarry courts make strong interpretative arguments in their respective opinions about whether an attempted illegal reentry should be a crime of general or specific intent. Neither court, however, treats the totality of sources and arguments in a fully honest and transparent manner. Using Eskridge and Frickey’s “funnel of abstraction,” this comment provides an honest and transparent discussion of the interpretive sources pertaining to § 1326 attempted reentries.

This Comment recognizes that statutory interpretation is often difficult, and that, when Congress employs ambiguous terms in statutes, courts are often left to determine the meaning of those terms without any formal guidance. Unfortunately for scholars, practitioners, and those subject to the statutes, courts often determine the meaning of the ambiguous term and then

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161 See Part IV.
justify the result by selectively presenting evidence in a way that compromises judicial candor.\textsuperscript{162} This Comment rejects this approach and instead compares arguments from both sides in order to reach a more accurate and transparent statutory interpretation of § 1326.

This accurate and transparent method of interpretation supports the understanding advocated by the Ninth Circuit in \textit{Gracidas-Ulibarry} that specific intent should be the required mens rea for attempted illegal reentries.

\textsuperscript{162} See Eskridge and Frickey, 42 Stan L Rev at 363 (cited in note 13) ("[T]he [Supreme] Court's opinions show a distressing tendency to overstate the case for the result that a majority of the Justices prefer, and to suppress the legitimate arguments cutting in a different direction. This is distressing, because the full advantages of a practical reasoning approach cannot be realized without a candid 'to and fro' play among the various interpretive considerations.").