THE MANN ACT AND CROSSING STATE LINES: MAYBE YOU SHOULD HAVE KNOWN

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INTRODUCTION

It is now a well-established concept in American jurisprudence that for an actor to be convicted of a crime, the act in question must have taken place with an evil intent, or mens rea.[1] However, prior to the Supreme Court's 1952 decision in *Morissette v. United States*,[2] federal criminal statutes that did not contain explicit words of mens rea were frequently applied as strict liability offenses.[3] *Morissette* marked a shift from that approach, and the Court added a mens rea requirement to a statute that did not explicitly contain one, in order to protect an unknowing defendant from prosecution when a single element distinguished innocent from culpable conduct.[4]

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1 Staples v. United States, 511 U.S. 600, 605 (1994) ("[W]e must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded." (citation omitted)); Morissette v. United States, 342 U.S. 246, 250–52 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."); Dennis v. United States, 341 U.S. 494, 500 (1951) ("The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."). Black's Law Dictionary defines "mens rea" as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." *Mens Rea*, BLACK'S LAW DICTIONARY (10th ed. 2014). Some courts use the terms "scienter" and "mens rea" interchangeably. "Scienter" is defined as "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly, esp. as a ground for civil damages or criminal punishment." *Scienter*, BLACK'S LAW DICTIONARY (10th ed. 2014).

2 *Morissette*, 342 U.S. at 246.

3 Black's Law Dictionary defines "strict-liability crime" as "[a]n offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state; specif., a crime that does not require a mens rea element, such as traffic offenses and illegal sales of intoxicating liquor." *Strict-Liability Crime*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See, e.g.*, United States v. Balint, 258 U.S. 250, 254 (1922) (concluding that the government need not prove the defendant's mens rea under the Anti-Narcotic Act, because "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"); United States v. Behrman, 258 U.S. 280, 287 (1922) ("If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.").

4 *Morissette*, 342 U.S. at 246. The Court noted that the federal conversion statute at issue criminalized actions that were recognized offenses under common law. *Id.* at 260–62. The *Morissette* opinion is viewed as a significant turning point for the Court. A later Supreme Court opinion stated, "[i]ndeed, the holding in *Morissette* can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretative presumption that *mens rea* is required." United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978). Some scholars argue that the Supreme Court promulgated an unworkable rule with the *Morissette* opinion. *See* Matthew T. Fricker & Kelly Gilchrist, Case Comment, United States v. Nofziger *and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803, 820 (1990) ("*Morissette* failed because it established a vague rule for the application of an ambiguous concept. *Morissette*'s division of crimes into common law offenses or public welfare offenses is vague because there is no clear distinction between the two categories."); Note, *Mens Rea in Federal*

A distinct concept of mens rea jurisprudence emerged following the Supreme Court's 1975 decision in *United States v. Feola*,[5] where the Court recognized that elements included in a statute solely to confer federal jurisdiction do not ordinarily require the same level of culpability as the substantive elements of the offense.[6]

The Supreme Court then shifted focus away from the innocence approach promulgated in *Morissette* in the 2009 opinion of *Flores-Figueroa v. United States*.[7] The Court broadened its approach by applying the statute's mens rea to all the subsequent elements of the offense, regardless of whether the conduct was apparently innocent, because that is how the statute would be understood if it were written or spoken in ordinary English.[8]

With these cases, two possibly conflicting concepts of mens rea jurisprudence emerged: (1) a stated mens rea requirement is generally applicable to all elements of an offense,[9] and (2) an element conferring federal jurisdiction need not carry an element of intent.[10] Since *Flores-Figueroa*, many lower federal courts have considered whether these two concepts remain separate and distinct, or whether the ordinary English language approach of applying a written mens rea to all subsequent

Criminal Law, 111 HARV. L. REV. 2402, 2404 (1998) ("[T]he Court in Morissette failed to tackle several of the difficult questions that the statute presented: notably, whether specific knowledge of the statute was required, and whether the knowledge requirement was subjective (requiring proof that the defendant possessed actual knowledge) or objective (requiring proof only that the defendant should have possessed such knowledge).").

5 420 U.S. 671 (1975).

6 *Id.* at 676 n.9 (noting that if an element is deemed to be "jurisdictional," then "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute").

7 556 U.S. 646 (2009).

8 *Id.* at 647. The Court concluded that under 18 U.S.C. § 1028A(a), which imposes an additional two-year sentence on a defendant who "knowingly transfers, possesses, or uses without lawful authority, a means of identification of another person," the government must show that the defendant knew that the means of identification actually belonged to another person, despite already having to show that the defendant knowingly transferred, possessed, or used a means of identification without lawful authority. *Id.* This approach has the potential to protect individuals from conviction who would have been convicted under previous approaches to statutory interpretation. In this case, Flores-Figueroa knowingly used false social security cards and was, therefore, not an "innocent" actor. *Id.* at 649. However, because he did not realize the social security number had been assigned to an actual person, his conviction was reversed. *Id.*

9 The aggravated identity theft statute at issue in *Flores-Figueroa* began with the word "knowingly" and was followed by a list of elements. *Id.* at 657. The Court concluded, "we cannot find indications in statements of its purpose or in the practical problems of enforcement sufficient to overcome the ordinary meaning, in English or through ordinary interpretive practice, of the words that it wrote." *Id.*

10 *Id.* at 671–72.

elements of the offense was meant to disrupt the line of cases that treat jurisdictional elements as distinct from substantive elements.[11]

Illustrative of the possible conflict between these two canons of construction is the Mann Act, which makes it a crime to "knowingly transport[] any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense."[12]

Now consider the following hypothetical scenario: three brothers, Albert, Bob, and Carl, are pimps in a local prostitution business in clear violation of state law. The brothers all share the proceeds equally and they take turns answering the phones, taking orders, and driving the women to their customers. One day, while Albert and Bob were sleeping, Carl received a call from an out-of-state phone number and transported women a few miles down the road to the neighboring state to engage in prostitution. Have Albert and Bob violated the Mann Act as a result of Carl crossing the state line?

Prior to 2009, the answer would almost certainly have been yes.[13] Today, the answer depends on whether or not this takes place in a jurisdiction that requires the government to prove that the defendants had knowledge of crossing state lines to sustain a Mann Act conviction.[14]

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11 For example, this question has arisen in lower federal courts interpreting the federal embezzlement law, which provides for up to ten years of imprisonment for anyone who "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof." 18 U.S.C. § 641 (2012); *accord* United States v. Crape, 472 F. App'x 581, 583 (9th Cir. 2012) (finding *Flores-Figueroa* inapplicable to the jurisdictional element of § 641, concluding that "knowledge of government ownership is unnecessary to convict"); United States v. Jeffery, 631 F.3d 669, 675 (4th Cir. 2011) ("Every circuit to have considered the question, including this one, has concluded that, with regard to § 641, government ownership of the stolen property is a jurisdictional fact only and that knowledge of the government's ownership is not an element of § 641. . . . Jeffery, however, contends that the Supreme Court's recent decision in [*Flores-Figueroa*] changes the analysis and compels the conclusion that knowledge of government ownership is an element of § 641." (citation omitted)); United States v. Rehak, 589 F.3d 965, 974 (8th Cir. 2009) ("Defendants would apply [the *Flores-Figueroa*] construction to section 641: to be convicted, they must know the property they steal is owned by the United States. The Context of section 641 defeats this interpretation. Courts have consistently held that the government is not required to prove a defendant knew the property he stole was owned by the United States because the United States' ownership merely provides the basis for federal jurisdiction.").

12 18 U.S.C. § 2421(a). A defendant convicted under this section of the Mann Act is subjected to fines, imprisonment of up to ten years, or both. *Id.*

13 Before *Flores-Figueroa* was decided, this question would likely have been resolved with reference to *United States v. Feola*, 420 U.S. 671 (1975), and knowledge of the jurisdictional element of an offense would not have been a barrier to prosecution under the Mann Act. *See infra* Section I.A.1.

14 In other words, the question centers on whether "knowingly" modifies "in interstate or foreign commerce" of the Mann Act statute.

The Seventh and the Second Circuits considered this question of statutory interpretation and reached differing conclusions. The Seventh Circuit, in *United States v. Hattaway*,[15] resolved the question by interpreting the interstate element as a typical jurisdictional element with no separate mens rea requirement.[16] The Second Circuit, in *United States v. Shim*,[17] resolved this same question by following the Supreme Court's approach in *Flores-Figueroa* and applying the knowledge requirement to all subsequent elements of the offense, including the interstate element.[18]

As illustrated by the hypothetical scenario above, this distinction has potential consequences for individuals who are engaged in prostitution but are not personally involved in the transportation,[19] as well as for individuals who are directly involved in the transportation and inadvertently cross a state line. This Note explores how the case law suggests an approach to the interstate element of the Mann Act that could limit exposure to federal criminal liability for some of these actors.

Part I of this Note provides a general overview of the Supreme Court's mens rea jurisprudence and the approach to jurisdictional elements. It then presents a brief legislative history of the Mann Act. Part II discusses how the Seventh and Second Circuit approached the mens rea requirement of the "in interstate or foreign commerce" element of 18 U.S.C. § 2421 in *United States v. Hattaway*[20] and *United States v. Shim*,[21] respectively. Part III analyzes the flaws of the Seventh Circuit's approach by comparing and contrasting how various courts of appeals have approached the mens rea requirement of a similar statute,

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15 740 F.2d 1419 (7th Cir. 1984).

16 *Id.* at 1427.

17 584 F.3d 394 (2d Cir. 2009) (per curiam).

18 *Id.* at 395–96.

19 For a Mann Act conviction, "[t]he government does not have to prove that the defendant personally transported [said individual(s)] across a state line." 3 MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL § 64.01 (second alteration in original). As the Second Circuit explained in 2004,

> [w]e cannot agree with the proposition that an operator of a prostitution ring may escape liability by accepting a bus company's offer to "Leave the Driving to Us." Inviting travel, purchasing tickets, and accompanying individuals on trips is more than sufficient to establish that a defendant "transport[ed]" the individuals within the meaning of Section 2421. The word "transport" is not strained by including those who purchase the means of transportation and accompany the person in question even though they do not physically drive the bus, operate the locomotive, pilot the airplane, or captain the vessel.

United States v. Holland, 381 F.3d 80, 86–87 (2d Cir. 2004) (second alteration in original) (footnote omitted) (citation omitted).

20 *Hattaway*, 740 F.2d at 1419.

21 *Shim*, 584 F.3d at 394.

the Trafficking Victims Protection Act,[22] particularly in the wake of *Flores-Figueroa*. It then analyzes the problems created by the Second Circuit's application of the *Flores-Figueroa* framework to the interstate element of the Mann Act. Finally, Part IV proposes that courts should adopt an alternate approach to the jurisdictional element of the Mann Act, a "knew or should have known" standard,[23] and it explores the practical implications of this solution.

I. BACKGROUND PRINCIPLES IMPLICATED BY THE CIRCUIT SPLIT

A. *The Progression of the Supreme Court's Mens Rea Jurisprudence*

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."[24] Despite this bold statement, it has been no easy task for the Supreme Court to delineate the proper analysis and application of mens rea requirements in ambiguous federal criminal statutes, and the Court's approach has changed over time.

1. Protecting "Innocent" Conduct by Requiring Proof of Mens Rea

In the earliest cases interpreting the mens rea of federal statutes, the Supreme Court dispensed with the general requirement that the government had to prove a defendant's mens rea and upheld criminal convictions without regard for the defendant's state of mind.[25] In *United States v. Balint*,[26] the Court reasoned that the purpose of the statute at issue was to achieve a greater social good by regulating activity, and because Congress intentionally excluded a mens rea element from the text, the Court should not include one.[27] The Court followed that line of

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22 *See infra* Section III.A.

23 Using "knew or should have known" rather than simply using a knowledge standard allows for prosecution in cases where interstate travel was reasonably foreseeable. The "knew or should have known" standard was suggested in a footnote of *United States v. Yermian*, 468 U.S. 63 (1984). *See infra* notes 84–85 and accompanying text.

24 Morissette v. United States, 342 U.S. 246, 250 (1952).

25 *See infra* notes 26–31 and accompanying text.

26 258 U.S. 250 (1922).

27 *Id.* The case involved a prosecution under the Anti-Narcotic Act, which prohibited the sale of opium- and coca-based drugs without certain paperwork. *Id.* at 251. The defendants challenged the indictment, claiming they were unaware that the drugs they had sold fell within this category. *Id.* The Court recognized that the "general rule at common law was that the

reasoning twenty years later in *United States v. Dotterweich*,[28] solidifying a public welfare[29] exception to the general mens rea requirements.[30] Following these decisions, some critics urged the need to limit the applicability of the public welfare exception.[31]

The next occasion for the Supreme Court to interpret mens rea in a federal statute was in *Morissette v. United States*,[32] where the Court attempted to resolve the confusion surrounding the public welfare doctrine and limit its applicability.[33] The statute at issue made it a crime to unlawfully and knowingly steal property belonging to the United

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scienter was a necessary element in the indictment and proof of every crime . . . [but] 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." *Id.* at 251–52. In determining the intent of Congress, the Court concluded that "[i]ts manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him." *Id.* at 254. *United States v. Behrman* was decided on the same day as *Balint*, and also involved an Anti-Narcotic Act prosecution. United States v. Behrman, 258 U.S. 280 (1922). Citing to *Balint*, the Court in *Behrman* stated, "[i]f the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent." *Id.* at 288.

28 320 U.S. 277 (1943).

29 A "public-welfare offense" is defined as "[a] minor offense that does not involve moral delinquency and is prohibited only to secure the effective regulation of conduct in the interest of the community." *Public-Welfare Offense*, BLACK'S LAW DICTIONARY (10th ed. 2014).

30 *Dotterweich*, 320 U.S. at 277. This case involved a prosecution of a pharmaceutical company's president and general manager for violating the Federal Food, Drug, and Cosmetic Act by shipping misbranded drugs in interstate commerce. *Id.* at 278. The purpose of the penalties was to serve as effective means of regulation to protect individuals who cannot protect themselves. *Id.* at 280–81. The state of mind of the defendant need not be proven because Congress preferred to place the burden on the defendant, "rather than to throw the hazard on the innocent public who are wholly helpless." *Id.* at 285.

31 Professor Francis Bowes Sayre argued, "[i]t is fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent." Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 82 (1933). Sayre proposed "two cardinal principles" that can be used to draw a line between statutes that should require a mens rea and those that should not: the character of the offense and the possible penalty. *Id.* at 72. Regarding the character of the offense, "[c]rimes created primarily for the purpose of singling out individual wrongdoers for punishment or correction are the ones commonly requiring *mens rea*; police offenses of a merely regulatory nature are frequently enforceable irrespective of any guilty intent." *Id.* As to the possible penalty involved, where the offense is punishable by imprisonment, "the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind." *Id.* Sayre then delineated eight general classes of offenses that should not require mens rea: (1) illegal sales of intoxicating liquor; (2) sales of impure or adulterated food or drugs; (3) sales of misbranded articles; (4) violations of anti-narcotic acts; (5) criminal nuisances; (6) violations of traffic regulations; (7) violations of motor vehicle laws; and (8) violations of general police regulations, passed for the safety, health or well-being of the community. *Id.* at 73.

32 342 U.S. 246 (1952).

33 Following the *Balint* and *Dotterweich* cases, *see supra* notes 26–30 and accompanying text, lower federal courts were struggling with the proper mens rea requirements for federal statutes rooted in common law crimes and the Supreme Court attempted to remedy the confusion with the *Morissette* decision. Fricker & Gilchrist, *supra* note 4, at 819–20.

States.[34] The defendant argued that he had no wrongful intent to steal because he thought the property had been abandoned.[35] The trial judge instructed the jury that the only relevant question of intent was whether the defendant intended to take the property, which was presumed by his actions and confessions.[36]

The Supreme Court ultimately reversed Morissette's conviction and concluded that the statute required not only knowledge that the actor was taking property, but also knowledge that the property belonged to another and had not been abandoned.[37] In reaching this conclusion, the Court stated that a criminal act requires the "concurrence of an evil-meaning mind with an evil-doing hand," and that "wrongdoing must be conscious to be criminal."[38] Even where the text of the statute is silent as to mens rea, such a requirement should be presumed unless the statute defines a public welfare offense.[39] Unlike

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34 *Morissette*, 342 U.S. at 248 n.2 (discussing 18 U.S.C. § 641 (1946), which, at the time, provided that "[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or any department or agency thereof . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both").

35 *Id.* at 249. The defendant was a scrap iron collector who knowingly took the used bomb casings from a government-owned field. *Id.* at 247–48. However, the defendant believed that the bomb casings were abandoned property. *Id.*

36 *Id.* The appellate court then relied on the Supreme Court's precedent and concluded that due to Congress's failure to include mens rea in the statute, the government need not prove any state of mind. *Id.* at 250. However, the Supreme Court expressed concern over the lower court's reliance on *United States v. Behrman*, 258 U.S. 280 (1922), and *United States v. Balint*, 258 U.S. 250 (1922), stating that a review of the historical backgrounds of the cases "is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law." *Id.* at 250.

37 *Id.* at 271 ("[I]t is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property.").

38 *Id.* at 251–52. The Supreme Court's holding in this case demonstrates a general disfavor for strict liability offenses and was relied upon in subsequent cases regarding federal mens rea. *See, e.g.*, Staples v. United States, 511 U.S. 600 (1994) (holding that knowledge of the character of a firearm to bring it within the regulation was required under the statute); United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (holding that knowledge of the minority age status of the individual depicted in pornography was required under the statute prohibiting the transportation of sexually explicit depictions involving minors); Liparota v. United States, 471 U.S. 419 (1985) (holding that knowledge of the illegality of food stamp possession was required under a food stamp regulation).

39 *Morissette*, 342 U.S. at 262. The Court explained the differences between public welfare offenses and those crimes where mens rea is required, noting that

> [c]ongressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act. Because the offenses before this Court in the *Balint* and

statutes that have origins in common law, public welfare offenses are regulatory measures intended to prevent actions that are harmful to society regardless of the actor's intent, and the harm can generally be avoided through reasonable care and responsibility.[40] The federal conversion statute originated in common law offenses that predated any legislation,[41] and even without a mens rea requirement in the language of the statute, it was clear that the government had to prove the defendant's state of mind.[42]

Following *Morissette*, the Supreme Court continued applying mens rea requirements to protect individuals who believed they were engaged in innocent conduct from criminal liability. In *Liparota v. United States*,[43] the Supreme Court was tasked with interpreting a federal statute criminalizing food stamp fraud.[44] Liparota purchased food stamps from an undercover agent for substantially less than face value and he was prosecuted for unlawfully acquiring and possessing food stamps.[45] Liparota argued that the government should have to prove

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Behrman cases were of this latter class, we cannot accept them as authority for eliminating intent from offenses incorporated from the common law.

Id. Several cases have recognized specific public welfare offenses. *See* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (declining to require proof of the defendant's knowledge of the regulations relating to the shipment of corrosive liquids because when certain dangerous items are involved, "the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation"); United States v. Freed, 401 U.S. 601 (1971) (holding that under the federal statute criminalizing possession of an unregistered firearm, the government need not prove that the recipient of unregistered hand grenades knew that they were unregistered); United States v. Dotterweich, 320 U.S. 277, 280–81 (1943) (declining to find a mens rea requirement for a provision of the Federal Food, Drug, and Cosmetic Act that prohibited the delivery of misbranded drugs because such "penalties serve as effective means of regulation"); United States v. Balint, 258 U.S. 250, 254 (1922) (holding that certain requirements for the sale of specific drugs under the Narcotic Act did not require knowledge that the drugs came within this requirement because "[i]ts manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute"); *see also* Sayre, *supra* note 31.

40 *Morissette*, 342 U.S. at 255–56 ("[W]hatever the intent of the violator, the injury is the same . . . . The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. . . . Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime.").

41 *Id.* at 261.

42 *Id.* at 261–62.

43 471 U.S. 419 (1985).

44 *Id.* at 420. The federal statute that was at issue, 7 U.S.C. § 2024(b)(1) (2012), subjects someone who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" to fines or imprisonment. *Id.* (alteration in original).

45 *Id.* at 421.

specific intent[46] that he knowingly committed an act that was forbidden under the law.[47] The judge instructed the jury that the government need only show that Liparota was aware that he was acquiring or possessing food stamps, but not that he knew his actions were unlawful.[48]

Despite the word "knowingly" appearing in the text,[49] the Supreme Court found the statute to be ambiguous as to the mens rea requirement of the specific element at issue, and the legislative history was inconclusive.[50] In agreeing with the defendant's conception of the appropriate mens rea, the Court explained that holding otherwise would effectively criminalize a broad range of acts that are "apparently innocent."[51] The Court rejected the government's contention that the

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46 "Specific intent" is a term used in criminal law to describe a state of mind "where circumstances indicate that an offender actively desired certain criminal consequences, or objectively desired a specific result to follow his act or failure to act." 21 AM. JURIS. 2D *Criminal Law* § 114 (2016). On the other hand, "general intent" requires only "intention to make the bodily movement that constitutes the act that the crime requires." *Id.* § 113. Because of the potential hardship in differentiating between general and specific intent, the drafters of the Model Penal Code (MPC) did not include the specific/general intent dichotomy, opting for a hierarchy of culpability instead. *See* MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 1962). For further discussion regarding specific intent and the MPC, see Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 OR. L. REV. 777, 792 (2009).

47 *Liparota*, 471 U.S. at 421–22. There is a fine line between a mistake of law defense and a mistake of fact defense.

> *Ignorantia legis neminem excusat*—ignorance of law excuses no one. At times, the idea is expressed in terms of a presumption, viz., everyone is presumed to know the law. The presumption is, of course, absurd. But the principle that ignorance of the law is no excuse is born not of logic but of necessity, since otherwise a premium would be placed upon ignorance and any defendant could free himself from the grasp of the law merely by pleading ignorance.

1 WHARTON'S CRIM. L. § 79 (15th ed. 2014) (footnotes omitted). While a mistake of law will not excuse a defendant, "[a] person who engages in penally prohibited conduct is relieved of criminal liability therefor if, because of ignorance or mistake of fact, he did not entertain the culpable mental state required for commission of the offense." *Id.* § 78 (footnote omitted).

48 *Liparota*, 471 U.S. at 423.

49 *See supra* note 44.

50 *Liparota*, 471 U.S. at 424. The Court explained, "[a]lthough Congress certainly intended by use of the word 'knowingly' to require *some* mental state with respect to *some* element of the crime defined in [the statute], . . . [t]he legislative history of the statute contains nothing that would clarify the congressional purpose on this point." *Id.* at 424–25.

51 *Id.* at 426. In further support of the defendant's argument, the Court deferred to the rule of lenity, which requires ambiguous criminal statutes to be resolved in favor of the defendant. *Id.* at 427. The Court stated,

> [a]lthough the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear. In the instant case, the rule directly supports petitioner's contention that the Government must prove knowledge of illegality to convict him under § 2024(b)(1).

Id. at 427–28. Black's Law Dictionary defines the "rule of lenity" as "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or

statute should be viewed as a public welfare offense[52] and imposed a mens rea requirement on the particular element.[53]

Nine years later, the Supreme Court further expanded its mens rea protection when the Court interpreted the National Firearms Act in *Staples v. United States*.[54] The Act made it unlawful to possess an unregistered machinegun, which includes any weapon that can automatically fire more than one shot from a single pull of the trigger.[55] Staples owned a semiautomatic rifle that, unbeknownst to him, had been modified to allow for automatic firing.[56]

The specific provision of the Act was silent concerning mens rea, and the government argued that this was evidence of congressional intent to create a public welfare offense. [57] The Court noted the tradition

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inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." *Rule of Lenity*, BLACK'S LAW DICTIONARY (10th ed. 2014). It is said that the rule of lenity is intended to preserve the due process principle that "no individual be forced to speculate, at peril of indictment, whether his or her conduct is prohibited." 73 AM. JUR. 2D *Statutes* § 188 (2016).

52 *Liparota*, 471 U.S. at 432–33. The Court stated, "the offense at issue here differs substantially from those 'public welfare offenses' we have previously recognized." *Id.* For examples of those previously recognized public welfare offenses, see cases cited *supra* note 39.

53 Although the majority did not intend to create an ignorance of the law defense, the dissent argued that that is precisely what the holding in this case established. *Liparota*, 471 U.S. at 436 (White, J., dissenting). Some commentators view the *Liparota* holding as a departure from precedent, which had held that knowingly violating a regulation did not require actual knowledge of the law. *See* Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 879 (1999) ("*Liparota* is the first of several cases of recent vintage in which the Supreme Court has confronted a claim of ignorance of law . . . [and] may be seen as the first wedge undermining the entire doctrine . . . ."); Katherine R. Tromble, Note, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 VAND. L. REV. 521, 530, 533 (1999) (noting that in *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), the Court had held that to convict under the Sherman Act, the government need not prove that the defendant had knowledge of the Act, and that acting knowingly simply means knowledge of the "likely effects" of one's actions).

54 511 U.S. 600, 619 (1994) (interpreting the mens rea requirement under 26 U.S.C. § 5861(d) and concluding that the "background rule of the common law favoring *mens rea*" was applicable).

55 *Id.* at 605. The National Firearms Act provides that "[i]t shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 5861(d)). The Act defines "firearm" to include machineguns, and "machinegun" is further defined as "any weapon which shoots, is designed to short, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." *Id.* § 5845.

56 *Staples*, 511 U.S. at 603. This modification brought the firearm within the statutory definition of a machinegun, although Staples testified that the rifle had never fired automatically while in his possession. *Id.* The Court noted that the metal stop on the rifle had been filed away, turning it into an automatic weapon, but did not specify who was responsible for making the modification to the weapon. *Id.*

57 *Id.* at 606–08. The government argued that all guns are dangerous and owners of dangerous items are on notice that their weapon may be subject to regulation. *Id.* at 608.

of lawful gun ownership in this country, allowing for guns to be owned in perfect innocence despite their potential for harm.[58] Even though the government regulates guns, owners were not sufficiently put on notice of the likelihood of strict regulations so as to deem the Act a regulatory measure that would not require proof of mens rea.[59] Additionally, the potential ten-year sentence bolstered the need for the government to prove knowledge in order to obtain a conviction.[60] With this conclusion, the Court strongly endorsed a preference for requiring the government to prove mens rea, which allowed for a mistake of fact defense in this context.[61]

The innocence-based focus demonstrated by *Morissette* culminated in *United States v. X-Citement Video*,[62] where the Court rejected the plainest reading of the statute, and concluded instead that the mens rea requirement should apply to every element of the statute that criminalizes conduct that would otherwise be innocent.[63] The federal statute at issue prohibited the interstate shipment of visual depictions of minors engaged in sexually explicit conduct.[64] During a sting operation,[65] the defendant provided an undercover officer with pornographic films of a female who turned out to be underage.[66]

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58 *Id.* at 611.

59 *Id.* at 613–15 ("[T]he Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent.").

60 *Id.* at 615 ("We concur in the Fifth Circuit's conclusion on this point: 'It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment . . . .'").

61 For an in-depth analysis of the importance of the *Staples* opinion, see Singer & Husak, *supra* note 53, at 896–901. For a brief explanation on the mistake of fact defense, see *supra* note 47.

62 513 U.S. 64 (1994).

63 *Id.* at 72–73 ("*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct. . . . [O]ne would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults. Therefore, the age of the performers is the crucial element separating legal innocence from wrongful conduct.").

64 *Id.* at 67–68. The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2252, made it a crime for anyone who "knowingly transports or ships in interstate or foreign commerce by any means . . . any visual depiction, if—(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct." *Id.* at 68.

65 A "sting" is defined as "[a]n undercover operation in which law-enforcement agents pose as criminals to catch actual criminals engaging in illegal acts." *Sting*, BLACK'S LAW DICTIONARY (10th ed. 2014). In this case, police officers learned that Traci Lords had appeared in pornographic films while under the age of eighteen. *X-Citement Video*, 513 U.S. at 66. The officer then expressed an interest in obtaining tapes of Traci Lords, and the defendant, owner of the X-Citement Video store, complied. *Id.*

66 *X-Citement Video*, 513 U.S. at 66.

Although the most natural reading of the statute would not extend the term "knowingly" to the element of the minority of the performer, the Court concluded that for this type of offense a mens rea requirement must be presumed absent express evidence of congressional intent to the contrary.[67] The age of the performer was deemed the "crucial element separating legal innocence from wrongful conduct" that made the mens rea requirement fully applicable.[68]

Although the Court's interpretive tools changed slightly over time, the Court consistently expanded protection for defendants through application of mens rea elements in ambiguous federal criminal statutes.

2. A Different Interpretive Framework for "Jurisdictional" Elements

The element conferring federal jurisdiction has historically been treated differently than other substantive elements.[69] In *United States v. Feola*,[70] the defendants were charged with assaulting and conspiring to assault federal officers in the performance of their official duties.[71] The

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67 *Id.* at 71–72.

68 *Id.* at 73. The First Amendment protects shipping of pornography that involves adults so long as it is not obscene. *Id.* at 73 ("[O]ne would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults.").

69 *See* Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS. 109, 113 (2012) ("The distinctive nature of federal criminal law, in which offenses often include elements specifying the basis for federal jurisdiction, has led to a presumption of strict liability for jurisdictional elements. These elements rarely play a normative role in defining criminal wrongdoing."); Richard Singer, *The Model Penal Code and % (Three % (Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139 (2000) (explaining how courts have declined to interpret elements conferring federal jurisdiction as requiring mens rea).

70 420 U.S. 671 (1975). Federal law makes it a crime to "forcibly assaul[t] . . . any [officer of the United States] while engaged in or on account of the performance of his official duties." 18 U.S.C. § 111 (2012). The defendants were charged with conspiracy to assault federal officers under 18 U.S.C. § 111. *Feola*, 420 U.S. at 672–73.

71 *Feola*, 420 U.S. at 673 n.1. After concluding that knowledge of the official identity of the assault victim is unnecessary under 18 U.S.C. § 111, the Court considered whether the rule should be different under the conspiracy charge of 18 U.S.C. § 371. *Id.* at 686. The court of appeals relied heavily on *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941), where Judge Learned Hand concluded that in order to be convicted on a conspiracy charge, the government must prove knowledge of the factual element conferring federal jurisdiction, despite that knowledge being unnecessary to convict on the substantive charge. *Id.* at 675. The Supreme Court stated, "in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." *Id.* at 686. Ultimately, the Supreme Court rejected the *Crimmins* line of cases and based on the text of the conspiracy statute and prior precedent, the Court concluded that knowledge of the officer's identity was equally irrelevant to the charge of conspiracy to commit the substantive offense. *Id.* at 696.

charges arose out of a planned narcotics rip-off[72] that resulted in an assault, but the defendants were unaware that the victims were undercover agents.[73] Faced with determining whether the federal officer element was simply "jurisdictional"[74] or an element that carried its own mens rea requirement, the Court concluded that the government need not prove intent to assault a federal officer specifically, just a general intent to assault.[75] This approach to jurisdictional elements was consistent with typical mens rea doctrine—regardless of whether the victim was a federal official or not, the statute was "no snare for the unsuspecting" as that element did not differentiate between innocent and wrongful conduct.[76]

After *Feola*, the question remained open as to whether a different interpretation of jurisdictional elements was necessary when the underlying actions are not wrongful, but for the federal element. This question arose in *United States v. Yermian*,[77] with a statute that made it a federal crime to a make a false or fraudulent statement within the jurisdiction of a federal agency.[78] When filling out a security

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72 Feola and his codefendants arranged to sell heroin to some buyers. *Id.* at 674. However, they planned to replace the heroin with sugar and sell it for a substantial sum of money, and if that went wrong, they planned to rob the buyers of the cash they brought along to make the purchase. *Id.*

73 *Id.* at 674.

74 *Id.* at 676 n.9 ("Labeling a requirement 'jurisdictional' does not necessarily mean, of course, that the requirement is not an element of the offense Congress intended to describe and to punish. Indeed, a requirement is sufficient to confer jurisdiction on the federal courts for what otherwise are state crimes precisely because it implicates factors that are an appropriate subject for federal concern. With respect to the present case, for example, a mere general policy of deterring assaults would probably prove to be an undesirable or insufficient basis for federal jurisdiction; but where Congress seeks to protect the integrity of federal functions and the safety of federal officers, the interest is sufficient to warrant federal involvement. The significance of labeling a statutory requirement as 'jurisdictional' is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.").

75 *Id.* at 685–86.

76 *Id.* at 686. The Court explained, "[a]lthough the perpetrator of a narcotics 'rip-off,' such as the one involved here, may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful." *Id.* at 685.

77 468 U.S. 63 (1984).

78 At that time, 18 U.S.C. § 1001 provided,

> [w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Id. at 64 n.1.

questionnaire to obtain Department of Defense security clearance, Yermian purposely did not disclose a prior conviction and falsely reported previous employment.[79] The issue before the Court was whether the government had to prove knowledge of the jurisdictional element, namely that the false statement was made to a federal agency.[80]

The Supreme Court determined that the federal agency element was jurisdictional, and was meant only to identify the mechanism by which a false statement can become an appropriate concern for federal jurisdiction.[81] Jurisdictional language does not carry the same culpability requirement as other elements, and the natural reading of the statute supported the same conclusion.[82] The defendant argued that this reading turned the statute into a "trap for the unwary" by imposing criminal liability on seemingly innocent conduct, but the Court did not find that sufficient to overcome what it considered to be the express statutory language.[83]

Although the jurisdictional element did not require actual knowledge, a footnote in the *Yermian* opinion left open the possibility that the jurisdictional element required reasonable foreseeability through the use of a "knew or should have known" jury charge.[84] Several lower courts have since grappled with this open question, and most concluded that the government need not prove any mens rea as to jurisdictional elements, until and unless the Supreme Court specifically addresses this issue.[85]

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79 *Id.* at 65.

80 *Id.* at 68.

81 *Id.* Ordinarily, it is not a crime to make a false statement, so the federal agency element is necessary "to identify the factor that makes the false statement an appropriate subject for federal concern." *Id.*

82 *Id.* at 69 ("Any natural reading of § 1001, therefore, establishes that the terms 'knowingly and willfully' modify only the making of 'false, fictitious or fraudulent statements,' and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency.").

83 *Id.* at 74 ("Whether or not respondent fairly may characterize the intentional and deliberate lies prohibited by the statute (and manifest in this case) as 'wholly innocent conduct,' this argument is not sufficient to overcome the express statutory language of § 1001.").

84 *Id.* at 75 n.14. The jury was instructed that the government must prove that the defendant "knew or should have known" that the statements were within the federal agency jurisdiction, and the prosecution did not object. *Id.* Because the government did not object to this reasonable-foreseeability instruction to the jury, it was not before the Court to decide "whether that instruction erroneously read a culpability requirement into the jurisdictional phrase." *Id.* The only question before the Court was whether knowledge was the required level of mens rea. *Id.*; *see also* Liparota v. United States, 471 U.S. 419, 432 (1985) ("[T]he Court explicitly reserved the question whether *some* culpability was necessary with respect even to the jurisdictional element.").

85 United States v. Bakhtiari, 913 F.2d 1053, 1059–60 (2d Cir. 1990) ("The footnote in the *Yermian* opinion, the fact that the decision was decided by a bare 5–4 majority that included justices no longer on the Court, and the language in *Liparota* have led at least one judge to go so far as to conclude—incorrectly, in our view—that *Yermian* is no longer good law. Whatever

Jurisdictional elements frequently appear in Commerce Clause legislation, and understanding their function in those statutes is vital to this analysis.[86] One example of Congress using an interstate nexus to confer federal jurisdiction under the Commerce Clause is the federal Wire Fraud statute, which requires that the wire cross a state line.[87] Lower federal courts have considered whether the interstate nature of the wire requires a separate showing of mens rea, specifically asking whether a "reasonably foreseeable" instruction is appropriate. Most

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the future of *Yermian*'s holding in the Supreme Court, it is our task to apply it and accept its clear implications until the Supreme Court decides otherwise. . . . We agree with three of our sister circuits . . . and hold today that no mental state is required with respect to federal involvement in order to establish a violation of § 1001." (citations omitted)); *see also* United States v. Leo, 941 F.2d 181, 190 (3d Cir. 1991); United States v. Gibson, 881 F.2d 318, 323 (6th Cir. 1989); United States v. Suggs, 755 F.2d 1538, 1542 (11th Cir. 1985); United States v. Green, 745 F.2d 1205, 1209 (9th Cir. 1984).

86 The United States Constitution confers upon Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Before the Civil War, federal crimes were used only to regulate matters of direct federal concern or matters that the states were incapable of addressing. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138 (1995). These early federal crimes included theft from a federal bank by a bank employee, arson on a federal vessel outside of any state's jurisdiction, immigration and customs offenses, tax fraud, and smuggling. *Id.* at 1139. It was not until after the Civil War that Congress began enacting criminal laws outside of traditional federal concern. *Id.* During this time period, Congress enacted the Post Office Act of 1872, criminalizing the mailing of lottery tickets or obscene matters, or using the mails to defraud. *Id.* at 1140. This was consistent with principles of federalism because the states lacked jurisdiction to regulate the postal system and could not prevent the problems associated with interstate gambling. *Id.* As access to railroads and automobiles increased and made crime more mobile across state boundaries, Congress began relying on the Commerce Clause to continue the federalization of criminal law, criminalizing activities that specifically involved movement across state lines. *Id.* at 1142. Early twentieth century acts of Congress under the Commerce Clause included "the Mann Act (prohibiting transporting a woman across state lines for illicit purposes), the Dyer Act (prohibiting transporting a stolen vehicle across state lines), the Volstead Act (just plain Prohibition), and statutes forbidding interstate transportation of lottery tickets, interstate transportation of obscene literature, and selling liquor through the mail." *Id.* (footnotes omitted).

87 In 1952, the federal wire fraud statute was enacted and required that the fraud be transmitted "by means of wire, radio, or television communication in interstate or foreign commerce." 18 U.S.C. § 1343 (2012). The wire fraud statute was intended to mirror the mail fraud statute, which was enacted in 1872 under the Postal Power Clause. 18 U.S.C. § 1341. *See* S. REP. NO. 82-44, at 14 (1951) (the wire fraud statute was intended as "a parallel [to the] provision now in the law for fraud by mail"); C.J. Williams, *What Is the Gist of the Mail Fraud Statute?*, 66 OKLA. L. REV. 287, 305 (2014) ("While the legislative history is sparse, Congress enacted the wire fraud statute in 1952 and explicitly modeled it after the mail fraud statute. The statutory language was identical in all principal respects, save the jurisdictional element." (footnote omitted)). Both statutes begin with the language, "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Compare* 18 U.S.C. § 1341 (mail fraud statute), *with* 18 U.S.C. § 1343 (federal wire fraud statute).

courts have rejected the proposed instruction, concluding that the government need not prove any mens rea for the interstate nexus.[88]

Based on this line of cases, it seems evident that an element used to confer federal jurisdiction does not require a separate showing of mens rea, even when the statute's language includes some other words of intent.

3. *Flores-Figueroa v. United States*: A New Approach to Mens Rea?

In *Flores-Figueroa v. United States*,[89] the Supreme Court again demonstrated its aversion to applying strict liability to various elements of a crime, but this time the Court strayed from previously established interpretive tools and resolved the case with reference to the statute's meaning in ordinary English.[90]

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88 Several circuits have concluded that the government need not prove any mens rea regarding the interstate nature of the wire. United States v. Jinian, 725 F.3d 954 (9th Cir. 2013) ("[T]he government is not required to prove under [the wire fraud statute] that the interstate nature of the wire was reasonably likely or foreseeable, because the statute 'does not condition guilt upon knowledge that interstate communication is used' and 'use of interstate communication is logically no part of the crime itself' . . . ." (citations omitted)); United States v. Richards, 204 F.3d 177, 207 (5th Cir. 2000) ("For a defendant to be convicted of wire fraud, it is sufficient that the defendant could reasonably have foreseen the use of the wires; the interstate nature of the wire communication need not have been reasonably foreseeable."); United States v. Lindemann, 85 F.3d 1232, 1241 (7th Cir. 1996) ("It need not prove that the interstate nature of the calls was foreseeable."); United States v. Bryant, 766 F.2d 370, 375 (8th Cir. 1985) ("[T]he requirement seems clearly to be only jurisdictional. The interstate nature of the communication does not make the fraud more culpable. Thus, whether or not a defendant knows or can foresee that a communication is interstate, the offense is still every bit as grave in the moral sense."). The Second Circuit resolved this question by creating an interesting dichotomy. Where an entirely innocent and uninvolved third party made the interstate communication, the Second Circuit adopted a reasonable foreseeability test, "avoid[ing] both a premium on ignorance and a vast range of liability for remote and unlikely physical consequences." United States v. Muni, 668 F.2d 87, 90 (2d Cir. 1981). However, in a case where the defendant caused a third party to make the wire communication and was liable as a co-conspirator or an aider or abettor, the Second Circuit concluded that "it is sufficient that appellants could reasonably have foreseen the use of a wire communication by [the third party], whether or not the interstate nature of that communication was reasonably foreseeable." United States v. Blackmon, 839 F.2d 900, 908 (2d Cir. 1988) (citing United States v. Blassingame, 427 F.2d 329 (2d Cir. 1970) (involving a defendant who personally made the interstate wire communication without knowledge that it was interstate)); *accord* Williams, *supra* note 87, at 307 ("The use of the wires is only a jurisdictional hook to allow for federal prosecution . . . ."). *But see* Sean Hewens, *Mail and Wire Fraud*, 41 AM. CRIM. L. REV. 865, 879–80 (2004) ("Proof of a violation of the wire fraud statute generally requires knowledge and foreseeability of the interstate nature of the wire communication. However, four circuits have held that a violation of § 1343 does not require such knowledge or foresight." (footnote omitted)).

89 556 U.S. 646 (2009).

90 *See* Leonid Traps, Note, *"Knowingly" Ignorant: Mens Rea Distribution in Federal*

Flores-Figueroa used false social security information and alien registration cards on two occasions to obtain employment in the United States.[91] On the second occasion, the number on the social security card happened to belong to a real person.[92] Among other charges, Flores-Figueroa was charged with aggravated identity theft, which applies if an offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."[93] The defendant argued that the word knowingly should modify "of another person," and the government should have to prove that he knew that the social security number he used was assigned to a real person.[94]

The Supreme Court began its analysis by noting that "[a]s a matter of ordinary English grammar," it was natural that the word "knowingly" would apply to all the subsequent elements of the crime.[95] In holding that the government had to prove that the defendant knew the identification information belonged to another person, the Court

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Criminal Law After Flores-Figueroa, 112 COLUM. L. REV. 628, 643–44 (2012) ("By choosing a kind of distributive default rather than reaffirming its predecessors' emphases on protecting innocence and on extratextual precedential criminal law principles, the Court signaled a change in direction in its mens rea jurisprudence.").

91 *Flores-Figueroa*, 556 U.S. at 648–49.

92 *Id.* at 649.

93 18 U.S.C. § 1028A(a)(1) (2012). The aggravated identity theft statute adds an additional two years' imprisonment only if the offender is convicted of an underlying offense. *See id.* Flores-Figueroa was charged with two predicate offenses: entering the United States without inspection in violation of 8 U.S.C. § 1325(a), and misusing immigration documents in violation of 18 U.S.C. § 1546(a). *Flores-Figueroa*, 556 U.S. at 649.

94 *Flores-Figueroa*, 556 U.S. at 649. The government argued that "knowingly" did not extend to the last three words. *Id.* at 650.

95 *Id.* The Court provided examples from ordinary conversations that supported the conclusion that when "knowingly" is used in a sentence, it is used to signify knowledge of every aspect that follows:

> [I]f a bank official says, "Smith knowingly transferred the funds to his brother's account," we would normally understand the bank official's statement as telling us that Smith knew the account was his brother's. . . . If a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy *and* that he toy belongs to his sibling. If we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese.

Id. at 650–51. The Court could not imagine a single counterexample where the word knowingly is used in a sentence, but would not be understood to extend to the entire sentence. *Id.* at 651. The Court stated,

> the Government has not provided us with a single example of a sentence that, when used in typical fashion, would lead the hearer to believe that that the word "knowingly" modifies only a transitive verb without the full object, *i.e.*, that it leaves the hearer gravely uncertain about the subject's state of mind in respect to the full object of the transitive verb in the sentence.

Id. at 651–52.

concluded that there was no evidence of congressional intent to the contrary and the potential problems of proof were insufficient to overcome the understanding of the statute in ordinary English.[96] Although the Court did make brief mention of precedent in reaching this conclusion,[97] the Court's approach was focused on its ordinary understanding of the text, rather than the more typical approach of imputing a knowledge requirement where necessary to protect an otherwise innocent actor.[98]

Justice Alito wrote a separate concurrence to warn against reading the holding as creating an "overly rigid rule of statutory construction."[99] While Justice Alito stressed that context may be more important than the ordinary English reading,[100] the majority opinion suggested that

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96 *Id.* at 656–57 ("[H]ad Congress placed conclusive weight upon practical enforcement, the statute would likely not read the way it now reads. Instead, Congress used the word 'knowingly' followed by a list of offense elements. And we cannot find indications in statements of its purpose or in the practical problems of enforcement sufficient to overcome the ordinary meaning, in English or through ordinary interpretive practice, of the words that it wrote.").

97 *Id.* at 652 (citing with approval United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Liparota v. United States, 471 U.S. 419 (1985)).

98 Under the *Liparota* approach, whether the identification belonged to an actual person is not an element that criminalizes otherwise innocent conduct, so the element would not require mens rea protection. *See Liparota*, 471 U.S. at 426. For an analysis of how the *Flores-Figueroa* approach signified a marked break from precedent in mens rea interpretation, see Traps, *supra* note 90, at 641–45.

99 *Flores-Figueroa*, 556 U.S. at 659 (Alito, J., concurring in part and concurring in the judgment). While in Justice Breyer's opinion the Court could not fathom a single counterexample where "knowingly" would not apply to all subsequent words in a sentence, Justice Alito provided counterexamples and wrote that the Court's reliance on ordinary English usage was overstated. *Id.* "For example: 'The mugger knowingly assaulted two people in the park—an employee of company X and a jogger from town Y.' A person hearing this sentence would not likely assume that the mugger knew about the first victim's employer or the second victim's hometown." *Id.* Significantly, Justice Alito distinguished the way ordinary writers or speakers construct sentences from the complex structure often used in statutes. *Id.* Ultimately, Justice Alito agreed with the decision of the Court because the government's interpretation would lead to odd results:

> Under that interpretation, if a defendant uses a made-up Social Security number without having any reason to know whether it belongs to a real person, the defendant's liability under § 1028A(a)(1) depends on chance: If it turns out that the number belongs to a real person, two years will be added to the defendant's sentence, but if the defendant is lucky and the number does not belong to another person, the statute is not violated.

Id. at 661.

100 *Id.* Justice Alito wrote in his concurrence, "I think it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense, but it must be recognized that there are instances in which context may well rebut that presumption." *Id.* at 660. As an example, Justice Alito referred to 18 U.S.C. § 2423(a) of the Mann Act, which makes it a crime to "knowingly transport[t] an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution." *Id.* (alterations in original). He noted that the courts of appeals that have interpreted this statute

absent a "special context," the mens rea requirement follows the ordinary English reading and applies to all subsequent elements of a statute.[101]

After exploring the *Morissette* approach concerning the protection of innocent actors[102] and the *Feola* line of cases dealing with jurisdictional elements,[103] it seems that *Flores-Figueroa* presents a slightly different approach, which focuses primarily on a plain reading of the statute rather than the practical implications. Before discussing how these principles are implicated in the specific question of statutory interpretation of the Mann Act at the heart of this circuit split, one must first understand the relevant statute.

B. *Understanding the Mann Act and Its Origins*

The Mann Act of 1910, also known as the White Slave Traffic Act, originally provided that any person who knowingly transports a woman in interstate commerce "for the purpose of prostitution or debauchery, or any other immoral purpose," shall be punished by fines or imprisonment of up to five years.[104] The legislation was enacted on the

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have uniformly held that knowledge of the victim's age is not necessary for the government to obtain a conviction. *Id.*

101 The majority discussed the government's proposed reading of the statute, stating that "the Government has not provided us with a single example of a sentence that, when used in typical fashion, would lead the hearer to believe that the word 'knowingly' modifies only a transitive verb without the full object," and concluding that the likely reason for the dearth of any such example, "is that such sentences typically involve special contexts or themselves provide a more detailed explanation of background circumstances that call for such a reading." *Id.* at 651–52 (majority opinion).

102 *See supra* Section I.A.1.

103 *See supra* Section I.A.2.

104 White-Slave Traffic Act (Mann Act), Pub. L. No. 2771, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)). At the time of enactment, section 2 provided

> [t]hat any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any tickets or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of

heels of an international treaty obligation to prevent the trafficking of white women, and as a response to moral concerns regarding prostitution and sexuality.[105] The legislative history reveals a concern that the states were unable to effectively control the issue, because women were being imported from other countries and being transported across jurisdictions.[106] Supporters of the Mann Act legislation stressed that it was not intended to interfere with the police power of the states, and was meant only to regulate commerce by preventing the interstate transportation of women being forced into prostitution.[107]

> a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Id. Section 3 applied to one who "persuade[s], induce[s], entice[s], or coerce[s]" a woman to "go from one place to another in interstate or foreign commerce" for the "purpose of prostitution or debauchery." *Id.* Section 4 applied to any person who knowingly "persuade[s], induce[s], entice[s], or coerce[s] any woman or girl under the age of eighteen years" to travel from one state to another for such purposes. *Id.*

105 *See* H.R. REP. NO. 61-47 (1909); S. REP. NO. 61-886 (1910); DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 4 (1994) ("It was widely thought and feared that large-scale rings of 'white slavers' were preying upon young women in the nation's cities."); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3016 (2006) ("Much of the zeal of the Mann Act arose out of growing concern with prostitution among white women; this was accompanied by a sense that white women, as opposed to women of color, would never willingly engage in acts of prostitution, and therefore must be 'enslaved' innocent victims.").

106 Representative James Robert Mann, the Act's chief sponsor, wrote of his bill that

> [t]he legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.

H.R. REP. NO. 61-47.

107 *Id.* Representative Mann wrote,

> [t]he results of careful investigation into this subject disclose the fact that the inmates of many houses of ill fame are made up largely of women and girls whose original entry into a life of immorality was brought about by men who are in the business of procuring women for that purpose—men whose sole means of livelihood is the money received from the sale and exploitation of women who, by means of force and restraint, compel their victims to practice prostitution.

Id. Despite the possibility that the Act was intended to encompass only commercial sex, the Supreme Court upheld its application under an expansive reading of "immoral purposes," in a case involving an interstate trip for the purpose of a sexual affair between two consenting adults. Caminetti v. United States, 242 U.S. 470 (1917). For a brief summary of the Supreme Court's early treatment of the Mann Act, see Note, *Interstate Immorality: The Mann Act and the Supreme Court*, 56 YALE L.J. 718 (1947).

For seventy-five years there were no significant changes to the statute.[108] It was not until Congress passed the 1986 amendment that the statute became gender-neutral and the immoral purposes clause was removed, allowing for the statute's application only when transportation was for the purposes of prostitution or other illegal sexual activity.[109]

The Seventh Circuit decided *United States v. Hattaway*[110] prior to this 1986 amendment, while the Second Circuit decided *United States v. Shim*[111] after the amendment. Yet, it is important to note that differences between these versions of the statute are not relevant for the specific question at issue, as the ambiguity regarding the mens rea of the interstate element persisted throughout the amendment.

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108 The Mann Act was amended twice between 1910 and 1986. The 1948 amendment reproduced language that was virtually the same as the original statute under new codification, as §§ 2421–2422. Mann Act, Pub. L. No. 80-772, 62 Stat. 812 (1948). The 1949 amendment replaced the word "induct" with the word "induce." Mann Act, Pub. L. No. 81-72, sec. 47, 63 Stat. 96 (1949).

109 Mann Act, Pub. L. No. 99-628, sec. 5(b)(1), 100 Stat. 3511 (1986). Section 2421 dealt with transportation generally and provided,

> [w]hoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both.

Id. § 5(b). Section 2422 dealt with coercion and enticement and provided, "[w]hoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce . . . to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense," shall be subject to fines or imprisonment. *Id.* Section 2423 prohibited the transportation of minors and provided, "[w]hoever knowingly transports any individual under the age of 18 years in interstate or foreign commerce . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense," shall be fined or imprisoned up to ten years. *Id.* The Mann Act was most recently amended as part of the Justice for Victims of Trafficking Act of 2015. Pub. L. No. 114-22, Title III, § 303, 129 Stat. 255 (2015). With this amendment, the substantive offense in section 2421 remains exactly the same, but a new section 2421(b) was drafted to permit the attorney general to cross designate an offense for prosecution by state attorneys general. *Id.*

110 740 F.2d 1419 (7th Cir. 1984).

111 584 F.3d 394, 395 (2d Cir. 2009) (per curiam).

II. THE CIRCUIT SPLIT OVER THE INTERSTATE ELEMENT OF THE MANN ACT

A. *The Seventh Circuit Follows the Typical Jurisdictional Element Approach*

In *United States v. Hattaway*, the Seventh Circuit held that interstate travel was merely an element conferring federal jurisdiction that did not require proof of the defendant's knowledge of crossing state lines.[112] The charges in *Hattaway* arose out of the abduction and transportation of a woman from North Carolina to Illinois and Indiana by several members of a motorcycle gang.[113] The question of statutory interpretation as to section 2421 of the Mann Act was raised by one of the defendants, George Burroughs.[114]

Burroughs was only with the group once they arrived in Illinois and he was never directly involved in transporting the victim across state lines.[115] However, he transported her to and from various locations within Illinois, he sexually assaulted her, and she then stayed with him after other defendants took her to Indiana and drove her back to Illinois.[116] Burroughs was found guilty of conspiring to violate the Mann Act.[117] On appeal, he argued that the evidence did not support his

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112 *Hattaway*, 740 F.2d 1419.

113 *Id.* at 1422. The charges included conspiracy, kidnapping, unlawful use of firearms, and violation of the Mann Act. *Id.* The six defendants were involved in different capacities and different aspects of the overall story, which led to various convictions that reflected their different levels of culpability. *Id.* at 1423 n.3 (providing a chart of the charges and convictions for each defendant).

114 *Id.* at 1427.

115 *Id.*

116 *Id.* at 1422–23. The facts, as explained by the Seventh Circuit, reveal that prior to Burroughs' direct involvement, two defendants abducted Darlene Callahan in North Carolina and drove her to Illinois, sexually assaulting her on the way. *Id.* at 1422. Two more defendants joined them in Illinois, driving Callahan to several hotels within Illinois to sexually assault her. *Id.* On the following day, George Burroughs joined the group. *Id.* Burroughs then transported Callahan to another hotel in Illinois, where he sexually assaulted her. *Id.* Burroughs told Callahan he could get her a job as a prostitute, and warned her that he controlled women by cutting them across the forehead and making them bleed. *Id.* Burroughs then drove her to a house in Illinois, where several defendants discussed Callahan's future as a prostitute. *Id.* Another defendant then took Callahan from Illinois to Indiana for five days, where Callahan was sexually assaulted. *Id.* Callahan was then taken back to Illinois, and she stayed with Burroughs and several other defendants. *Id.* at 1423.

117 *Id.* at 1423 n.3. Five of the six individuals were convicted, despite advancing the defense that Callahan consented to be taken to Chicago. *Id.* at 1422–23. By finding that Callahan had not consented to being taken to Chicago, this seems to effectively bridge the gap between the statute as it existed at the time of the case (which applied to interstate travel for any immoral purposes), and the current version of the Mann Act (which only applies to transportation for prostitution or other criminal sexual activity) as applied to the facts of the case, i.e., if Callahan

conviction because he was not aware that the victim had been taken across state lines.[118]

Relying on the general rule that the interstate element was meant only to establish federal jurisdiction, the Seventh Circuit determined that the substance of the offense was the transportation of a woman for immoral purposes, not the crossing of a state line.[119] The court rejected the defendant's reading of the statute because it would have made ignorance of geography a valid defense to the Mann Act.[120] This holding remains in effect in the Seventh Circuit today, despite the potential for shifts in mens rea jurisprudence following *Flores-Figueroa*.[121]

B. *The Second Circuit Adopts the* Flores-Figueroa *Framework*

Some twenty-five years after *Hattaway* was decided, the Second Circuit addressed the same question in *United States v. Shim*.[122] In *Shim*, the Mann Act conspiracy charges arose out of a criminal operation[123] that smuggled women into the United States and then forced them into prostitution to pay off the debts incurred by their smugglers.[124] The women were placed at various prostitution businesses owned by the

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was taken to Chicago to be sexually assaulted against her will, the defendants would still have been found guilty under the current state of the law. *See id.*

118 *Id.* at 1427. The government argued that the interstate transportation element of the offense was an element of federal jurisdiction that did not require a showing of knowledge. *Id.*

119 *Id.* at 1427–28. The Seventh Circuit cited to the Supreme Court's decision in *United States v. Feola*, 420 U.S. 671 (1975), concluding that "a defendant's knowledge of the federal aspect of the crime is not required to support a conviction; rather, the interstate or other federal requirement is intended only to establish federal jurisdiction." *Id.* at 1427; *see also supra* notes 69–76.

120 *Hattaway*, 740 F.2d at 1427. Because knowledge of crossing a state line was not necessary for a Mann Act conviction, the Seventh Circuit concluded it was not necessary to support a conviction for conspiring to violate the Mann Act. *Id.* at 1428 (citing *Feola*, 420 U.S. 671).

121 United States v. Sawyer, 733 F.3d 228, 231 (7th Cir. 2013) ("It is well established that a defendant need not have known he was crossing state lines to be guilty under section 2421." (citing *Hattaway*, 740 F.2d at 1428)).

122 584 F.3d 394, 395 (2d Cir. 2009) (per curiam).

123 United States v. Daneman, No. 06 Cr. 717(AKH), 2008 WL 2260745, at *1 (S.D.N.Y. May 30, 2008) (the facts of the case as summarized in the Amended Order Denying Motions for New Trial). These five defendants were arrested as part of a larger human trafficking ring involving over thirty defendants who owned and operated prostitution businesses throughout the Northeast United States. Press Release, U.S. Attorney, S. Dist. of N.Y., Five Convicted of Human Trafficking Offenses by Manhattan Jury (Nov. 9, 2007) [hereinafter Five Convicted of Human Trafficking Press Release], http://www.justice.gov/usao/nys/pressreleases/November07/koreantraffickingconvictionpr.pdf.

124 United States v. Thompson, No. S4 06 Cr. 717(AKH), 2008 WL 6856770 (S.D.N.Y. Feb. 28, 2008) (Objection to Presentence Investigation Report and Defendants Sentencing Memorandum); Five Convicted of Human Trafficking Press Release, *supra* note 123.

defendants and were transported to different locations by a network of drivers.[125]

After being convicted for conspiring to violate the Mann Act, Shim argued that the government should have had to prove that she knew that the victims were being transported across state lines.[126] The government argued that "knowingly" only modifies "transport," not the "interstate commerce" element.[127] The Second Circuit found that the government's reading would have rendered the word "knowingly" superfluous, because the next element of the offense began with the word "intent."[128]

Guided by the Supreme Court's decision in *Flores-Figueroa*,[129] the Second Circuit applied the ordinary English approach and concluded that "knowingly" applies to the interstate element of the statute.[130] Beginning with the presumption that a specified mens rea applies to all subsequent elements of the offense, the court found no special context under section 2421 of the Mann Act to rebut this presumption.[131]

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125 Five Convicted of Human Trafficking Press Release, *supra* note 123; *see also Daneman*, 2008 WL 2260745, at *1 ("[T]he 'hub' of the conspiracy, a taxi driver named Tae Hoon Kim, who provided prostitutes to business along the eastern seaboard.").

126 *Shim*, 584 F.3d at 395.

127 *Id.* at 396.

128 *Id.* As the court explained,

> [s]ection 2421 requires that the defendant both "knowingly transport[] [an] individual in interstate or foreign commerce" and that the defendant have the "intent that such individual engage in prostitution." One could not unknowingly transport an individual while simultaneously intending that the individual engage in prostitution; if, as the Government argues, "knowingly" modifies only the word "transport," rather than "interstate commerce," then "knowingly" is superfluous. We are not inclined to accept an interpretation of the statute that would nullify one of its key terms.

Id. (alterations in original).

129 Before *Flores-Figueroa*, the Second Circuit had occasion to analyze the jury instructions given for a Mann Act charge under section 2423. *See* United States v. Griffith, 284 F.3d 338, 350 (2d Cir. 2002). In the district court, the judge instructed the jury that, "[i]n addition to 'transportation,' the word 'knowingly' might modify 'in interstate commerce,' thus eliminating the superfluous problem, i.e., although it may be difficult to travel 'unknowingly,' one could easily travel knowingly without realizing that the travel was interstate." *Id.* (alteration in original). Although the question before the court was not the appropriate mens rea for the jurisdictional element, the Second Circuit concluded that this instruction was generally not in error. *Id.* at 351.

130 *Shim*, 584 F.3d at 395 ("[W]e have little difficulty concluding that if we were to say that a person knowingly transported women in interstate commerce, one would normally assume she knew both that she was transporting the women *and* that she was transporting them in interstate commerce.").

131 *Id.* at 396 (citing Flores-Figueroa v. United States, 556 U.S. 646, 659 (2009) (Alito, J., concurring in part and concurring in the judgment)).

C. *Other Circuits that Have Discussed this Issue*

Several other circuits have touched upon this same question of statutory interpretation. The Ninth Circuit determined that knowledge of the interstate travel is an element of the Mann Act, but when dealing with a Mann Act conspiracy charge, the requisite degree of knowledge is inversely related to how involved the defendant was with the core agreement.[132] Although mentioned only in dicta, the Fourth Circuit suggested that a "readily foreseeable" standard would suffice for a Mann Act conspiracy charge.[133] The Fifth Circuit analyzed the interstate

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132 Twitchell v. United States, 313 F.2d 425 (9th Cir. 1963), *vacated in part on other grounds and remanded sub nom.* Rogers v. United States, 376 U.S. 188 (1964). In *Twitchell*, a police officer was charged with conspiring to violate the Mann Act by receiving pay offs from several "madams" in exchange for tolerating their houses of prostitution. *Twitchell*, 313 F.2d at 428. The Ninth Circuit concluded that in an ordinary Mann Act charge, knowledge of the interstate nexus is required, but for a conspiracy charge, the government must show either:

> 1. he directly agreed to the illegal interstate transportation, or directly agreed to a scheme which could not be consummated without illegal interstate transportation, or directly agreed to a scheme in which it was known that the likelihood of illegal interstate transportation was great . . . or 2. he evidenced his indirect agreement by substantial participation in the scheme with actual knowledge of the proposed, or completed, illegal interstate transportation.

Id. at 429. Several years later, the Ninth Circuit reiterated the *Twitchell* holding in *United States v. Roselli*, 432 F.2d 879, 892 (9th Cir. 1970). Although *Roselli* did not involve Mann Act charges, a footnote in the opinion delved into the history of the Act to support this assertion and stated,

> [t]he words of the Mann Act ('Whoever knowingly transports in interstate or foreign commerce,' etc.) strongly suggests that knowledge of the interstate transportation is an element of the offense. Moreover, the Act's legislative history establishes that Congress' purpose was not to control local immorality but rather to deny the use of interstate facilities to a traffic viewed as evil.

Id. at 892 n.21.

133 United States v. Singh, 518 F.3d 236 (4th Cir. 2008). The case involved a prostitution ring that operated out of two West Virginia motels and used newspaper advertisements to recruit prostitutes from Maryland and Virginia. *Id.* at 241. The two defendants, who owned the motels, were charged with conspiring to violate the Mann Act, but argued that they were unaware of the interstate component of the prostitution ring, so could not be convicted of conspiracy. *Id.* at 252. Although the Fourth Circuit noted that the record contained adequate evidence that they did indeed have knowledge of the interstate component, a lack of such knowledge would "not necessarily have been dispositive in their favor." *Id.* at 253. The court suggested that there would have been sufficient evidence to support a Mann Act conspiracy charge anyway because it was "readily foreseeable" that the women would be induced to cross state lines given the proximity of the hotels to the state boarders. *Id.* Interestingly, two years before *Singh* was decided, the Fourth Circuit interpreted section 2423(a) of the Mann Act, which is almost identical to section 2421 of the Act, but provides that the individual being transported is under eighteen years old. United States v. Jones, 471 F.3d 535 (4th Cir. 2006). The Fourth Circuit concluded that the statute does not require proof of knowledge of the victim's minority, because "[i]t is clear from the grammatical structure of § 2423(a) that the adverb 'knowingly' modifies the verb 'transports.' Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to

element of a different section of the Mann Act and determined that it is jurisdictional with no mens rea requirement.[134]

III. UNDERSTANDING THE CONFLICTING APPROACHES

The different conclusions reached by the circuits begs the following questions: Does the ordinary English approach from *Flores-Figueroa* apply with equal force to all elements of a crime, or does the distinct jurisdictional element approach from *Feola* remain in effect?[135] If the *Flores-Figueroa* approach is inapplicable to the jurisdictional element of the Mann Act, what then is the appropriate standard for mens rea?

To begin answering these questions, it is necessary to assess the implications of the different approaches taken by the Seventh and Second Circuit.

A. *The Seventh Circuit Fails to Consider the Importance of the Specific Language Used*

The Seventh Circuit's opinion in *Hattaway* adopted the approach from *Feola*, that jurisdictional elements simply do not carry additional mens rea requirements.[136] This approach still holds true in that Circuit.[137] Such a simple canon of construction may be appealing when considering the ease of application by lower courts,[138] but adherence to this canon without considering the specifics of the actual statute at issue

recoil." *Id.* at 539. The court found nothing on the face of the statute to suggest that knowingly was intended to modify the other components of the offense beyond the verb "transports," in both sections of the Mann Act. *Id.*

134 United States v. Bennett, 258 F. App'x 671 (5th Cir. 2007). The Fifth Circuit resolved the question of statutory interpretation of the interstate element of section 2423 of the Mann Act. *Id.* The issue arose in the context of a defendant challenging the propriety of the venue where his case was heard. *Id.* at 686. By citing prior Fifth Circuit cases involving interstate kidnapping charges under 18 U.S.C. § 1201, the court determined that the interstate element of the Mann Act is similarly just jurisdictional, and not an element of the offense. *Id.*

135 The Supreme Court has not yet had occasion to interpret the applicability of the ordinary English approach of *Flores-Figueroa* in the context of jurisdictional elements, leaving the lower federal courts to confront this question with little instruction. *See infra* notes 150–61 and accompanying text (discussing how courts have interpreted the TVPA in light of *Flores-Figueroa*).

136 United States v. Hattaway, 740 F.2d 1419, 1427 (7th Cir. 1984).

137 *See infra* notes 153–56 and accompanying text.

138 *See generally* 73 AM. JUR. 2D *Statutes* § 64 (2016) ("Canons of statutory interpretation are designed to help judges determine the legislature's intent as embodied in particular statutory language, and other circumstances evidencing congressional intent can overcome their force.").

before the court may be an oversimplified approach to statutory interpretation.[139]

For example, consider the juxtaposition of the Mann Act with the Trafficking Victims Protection Act (TVPA).[140] The TVPA was passed in 2000 to recognize human and sex trafficking[141] as a separate federal offense.[142] It was meant to buttress existing criminal law and provide the federal government with the necessary tools to combat trafficking, to ensure effective punishment of traffickers, and to protect victims.[143] Section 1591 of the TVPA punishes,

> [w]hoever knowingly . . . in or affecting interstate or foreign commerce . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . . knowing, or . . . in reckless disregard of the fact, that means of force, threats of force, fraud, [or] coercion . . . will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act.[144]

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139 For one reason, "[c]anons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001).

140 *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). One section of the statute is further identified as the Trafficking Victims Protection Act of 2000 (codified as amended at 22 U.S.C. §§ 7101–7110 (2012), incorporating 18 U.S.C. §§ 1589–1594 (2000)) [hereinafter TVPA]. President Clinton signed the TVPA into law on October 28, 2000. *See* Presidential Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 36 WEEKLY COMP. PRES. DOC. 2662 (Oct. 28, 2000).

141 The TVPA defines "sex trafficking" as "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act." 22 U.S.C. § 7102(10).

142 Terry Coonan, *The Trafficking Victims Protection Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99, 101–02 (2006); Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1250 (2011).

143 22 U.S.C. § 7101. Congress found that "[a]t least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year." *Id.* § 7101(b)(1). Congress found that many of these individuals are trafficked into the international sex trade. *Id.* § 7101(b)(2).

144 18 U.S.C. § 1591 (2012), *amended by* Pub. L. 114-22, Title I, §§ 108(a), 118(b), 129 Stat. 238, 247, May 29, 2015. As explained in the Modern Federal Jury Instructions,

> [s]ince Congress invoked the broadest limits of its authority by the use of the phrase 'in or affecting interstate or foreign commerce,' the government needs to prove only a minimal contact with interstate commerce. Thus, there is authority that proof that the victims engaged in acts of prostitution in hotels used by interstate travelers is sufficient, as is proof that the victims used condoms distributed in interstate commerce, or telephones, and that the defendant advertised on the Internet.

2 MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 47A.03 (Matthew Bender 2015).

Prior to the enactment of the TVPA, cases involving transportation of individuals for sexual purposes, including sex trafficking, were brought under the Mann Act.[145] The TVPA requires proof that the defendant employed "means of force, threats of force, fraud, [or] coercion,"[146] an element which is absent from the Mann Act.[147] Similar to the Mann Act,[148] courts have questioned the proper mens rea requirement of the TVPA's interstate element, "in or affecting interstate or foreign commerce."[149]

In *United States v. Myers*,[150] the Eleventh Circuit examined whether *Flores-Figueroa* overturned the Circuit's precedent that held that "knowingly" did not modify the interstate commerce element of the TVPA.[151] The court distinguished the substantive element at issue in *Flores-Figueroa* with the jurisdictional element at issue in the TVPA, concluding that *Flores-Figueroa* was wholly inapplicable to this question of interpretation.[152]

The Seventh Circuit reached a similar conclusion in *United States v. Sawyer*.[153] The court could think of no reason why Congress would limit the TVPA's application to instances when the government could prove that the defendant knew of the interstate nature of the action, and wrongfulness of the action did not depend on whether the defendant was aware of the interstate aspect.[154] No clear signal in the language of the statute suggested a departure from the general rule of *Feola* that jurisdictional language does not require mens rea.[155] The Seventh Circuit found the defendant's argument regarding section 1591(a) to be analogous to the interstate transportation of section 2421 of the Mann Act.[156]

Most recently, the Fifth Circuit conducted an in-depth analysis of the applicability of the *Flores-Figueroa* approach to the TVPA in *United*

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145 *See* Mattar, *supra* note 142, at 1251.

146 18 U.S.C. § 1591.

147 *See generally* 18 U.S.C. § 2421(a).

148 *See* discussion *supra* Part II.

149 *See infra* notes 150–62 and accompanying text.

150 430 F. App'x 812 (11th Cir. 2011) (per curiam).

151 *Id.* at 815–16 (citing United States v. Evans, 476 F.3d 1176, 1180 n.2 (11th Cir. 2007)) (noting that the government did not have to prove that the defendant knew his actions were "in or affecting interstate commerce" under section 1591 of the TVPA).

152 *Id.*

153 733 F.3d 228 (7th Cir. 2013).

154 *Id.* at 230 ("Nothing in the statute's legislative history suggests such an intent [to limit prosecutions], and the wrongfulness of a sex trafficker's conduct is not mitigated because he is unfamiliar with the boundaries of Congress's constitutional powers.").

155 *Id.* at 231.

156 *Id.* ("It is well established that a defendant need not have known he was crossing state lines to be guilty under section 2421." (citing United States v. Hattaway, 740 F.2d 1419, 1428 (7th Cir. 1984))).

States v. Phea.[157] The court considered the grammatical differences between the element of the aggravated identity theft statute in *Flores-Figueroa*[158] and the element at issue in section 1591(a), which is an adverbial phrase.[159] The Fifth Circuit concluded that *Flores-Figueroa* did not speak directly to whether an adverb such as "knowingly" would extend to an adverbial phrase such as "in or affecting interstate or foreign commerce."[160] The Fifth Circuit, therefore, joined the Seventh and Eleventh Circuit in concluding that "knowingly" did not modify the interstate nexus of section 1591(a) of the TVPA.[161]

The courts of appeals seem to be in agreement that the interstate element of section 1591 of the TVPA, "in or affecting interstate commerce," is strictly a jurisdictional element with no mens rea requirement.[162] Recall that the purpose of the TVPA is to prevent the trafficking of women and children into the sex trade.[163] Precisely as with the Mann Act, there is no indication that Congress intended only to prevent trafficking in instances where the defendant was aware of his effect on interstate commerce.[164]

However, the TVPA and the Mann Act utilize different jurisdictional language. Whereas the TVPA requires actions "in or

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157 United States v. Phea, 755 F.3d 255 (5th Cir. 2014).

158 The element of the aggravated identity theft statute, "of another person," was a characteristic of "means of identification," the direct object of the transitive verbs, "transfers, possesses, or uses." *Id.* at 265.

159 *Id.* The Fifth Circuit explained,

> [t]he interstate nexus element of § 1591(a)—"in or affecting interstate or foreign commerce"—is not a part of the direct object of the transitive verbs "recruits, entices, harbors, transports, provides, obtains, or maintains by any means." The direct object in the sentence is "a person"; however, it is not the person who must be in or affecting interstate or foreign commerce. Rather, it is the actions described by the transitive verbs that must occur in, or affect, interstate or foreign commerce. The interstate nexus element is in essence an adverbial phrase modifying the transitive verbs.

Id.

160 Because of the different statutory structures in the TVPA and the aggravated identity theft statute, the court held that the *Flores-Figueroa* approach was inapplicable to this statute. *Id.* ("The Supreme Court's decision in *Flores-Figueroa* does not speak directly to whether an adverb (such as knowingly) that modifies a transitive verb also extends to adverbial phrases that also modify the transitive verb.").

161 *Id.*

162 *See supra* notes 150–61 and accompanying text.

163 *See supra* notes 141–44 and accompanying text; *see also* H.R. REP. NO. 106–939 (2000) (Conf. Rep.); H.R. REP. NO. 106-487, pt. 2 (2000); H.R. REP. NO. 106-487, pt. 1 (1999). Congressional findings included that human trafficking substantially affects interstate and foreign commerce, so the United States has an obligation to eradicate the burdens on commerce and to prevent the channels of commerce from being used for these immoral and injurious purposes. H.R. REP. NO. 106-487, pt. 1.

164 H.R. REP. NO. 106-487, pt. 1.

affecting interstate commerce,"[165] the Mann Act requires transportation "in interstate or foreign commerce,"[166] which requires the actual crossing of a state line.[167] Actually crossing a state line is a more rigorous standard because it is harder for an actor to accomplish without some intentionality.[168] Both the Mann Act and the TVPA were enacted under the Commerce Clause, but Congress used different language to establish federal jurisdiction. This was surely no accident and the difference implicates a different statutory interpretation.[169]

The Seventh Circuit's jurisdictional approach of not requiring any mens rea regardless of the specific statutory language employed may result in extreme inequities in certain factual scenarios. Federal criminal statutes frequently criminalize activity that is already a crime under state law, giving both federal and state governments concurrent jurisdiction

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165 18 U.S.C. § 1591(a)(1) (2012). For example, the Eleventh Circuit concluded that the interstate commerce element of the TVPA was satisfied by the placement of a paid online advertisement, because the electronic payments were transferred in interstate commerce. United States v. Myers, 430 F. App'x 812, 817 (11th Cir. 2011). Similarly, in the Fifth Circuit, the interstate nexus was satisfied by the defendant purchasing a cell phone for his victim and including that phone number in online advertisements for prostitution services. *Phea*, 755 F.3d at 263.

166 18 U.S.C. § 2421(a).

167 The Mann Act requires something that section 1591 does not: "that the victim was actually transported in interstate commerce, that is, across a state line or nation border, while section 1591, which uses broader 'in or affecting' language, does not." 2 MODERN FEDERAL JURY INSTRUCTION—CRIMINAL ¶ 47A.03 (Matthew Bender 2015); *accord* KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FED. JURY PRAC. & INSTR. § 60:04 (6th ed. 2014) (explaining that "in or affecting interstate . . . commerce" is a broader standard than the Mann Act's "in interstate commerce" (alteration in original)); Mattar, *supra* note 142, at 1247.

168 While it does not seem difficult to inadvertently use some item that is affecting interstate commerce as a part of a sex trafficking scheme (i.e., a cell phone, an internet advertisement, or condoms purchased in interstate commerce), it intuitively does seem more difficult to accidentally cross over state lines. While it is possible that one would be unfamiliar with geographical boundaries of a state, it is perhaps this assumption that most people generally understand when they cross between states that lead courts to resolve the issue without any mens rea. But for this very reason, because it is usually the case that individuals know when they cross a state line, it should not be a difficult task to prove in most cases if proof of mens rea was required.

169 "Where different language is used in different parts of a statute, it is presumed that the language is used with a different intent. Likewise, the use of differing language in otherwise parallel statutory provisions supports an inference that a difference in meaning was intended." 73 AM. JUR. 2D *Statutes* § 122 (2016). Deborah A. Widiss explains this "meaningful-variation" canon of construction:

> [C]ourts assume that a difference between statutes that are otherwise similar is a purposeful signal by Congress that the statutes should bear distinctly different meanings on the relevant point. At times, this conclusion is reasonable, particularly when language in the statute is specific enough to establish that Congress intended the distinction to be significant. But in the absence of legislative language establishing purposive distinctions, the inference of intentionality may often be unwarranted.

Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 873–74 (2012) (footnotes omitted).

over the same basic actions.[170] However, there are many practical differences for defendants being prosecuted in state versus federal court.[171] The Mann Act is one example of Congress using the Commerce Clause to criminalize acts that were otherwise subject only to state prostitution laws,[172] and for a defendant who is unaware that he is crossing state lines while engaging in prostitution, it may be unjust to subject him to federal prosecution.[173] The inequities become even more pronounced in the conspiracy context, where multiple individuals are

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170 This process is referred to as the "federalization" of criminal law. As one scholar explained, "'[f]ederalization of crime' is a term of art used (generally with a derogatory scowl) to describe congressional legislation that provides for federal jurisdiction over criminal conduct that could also be prosecuted by state or local authorities." Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1030 n.2 (1995). For example, until and unless a state line is crossed, an individual in New York State who is engaged in transporting an adult for the purposes of prostitution would be guilty of Promoting Prostitution in the Fourth Degree. N.Y. PENAL LAW § 230.20 (McKinney 2008).

171 "Defendants who are prosecuted in federal court often fare far worse than similarly situated defendants who are prosecuted in state court. . . . [T]he most important difference between federal and state prosecution is a substantive one: the severity of the resulting sentence." Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 916 (2000). The difference in sentencing guidelines can be stark. For example, "penalties for state drug offenses are relatively light when compared with their sometimes draconian federal counterparts." Brickey, *supra* note 86, at 1164. Additionally, the "more lenient federal standards governing the issuance of search warrants, the granting of permission to engage in electronic surveillance, and the use of informants," may assist the federal government in creating a stronger case against a defendant than would be possible by state officials. *Id.*

172 As early as 1913, the Supreme Court upheld the constitutionality of the Mann Act. Hoke v. United States, 227 U.S. 308 (1913).

> [T]hat Congress has power over transportation 'among the several states;' [sic] that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. We have no hesitation, therefore, in pronouncing the [Mann Act] a legal exercise of the power of Congress.

Id. at 323 (citation omitted).

173 The Fifth Amendment to the United States Constitution provides in part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This is known as the Double Jeopardy Clause, which prevents a single government entity from twice prosecuting the same offense, but it does not prevent two separate sovereigns from prosecuting the same underlying conduct in two separate prosecutions. *Id.* So if a defendant's actions come within federal jurisdiction by virtue of crossing a state line, and he is also in violation of state law, the defendant may be subject to two separate prosecutions—one by the state and one by the federal government. *See* Heath v. Alabama, 474 U.S. 82, 88 (1985) ("The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'"); United States v. Wheeler, 435 U.S. 313, 317 (1978) (holding that separate prosecutions under the laws of separate sovereigns does not violate the prohibition against double jeopardy).

engaged in state-level prostitution, but an individual might be totally unaware of his coconspirator's journey across a state line.[174]

The use of different jurisdictional language in the TVPA and the Mann Act suggests that Congress may have been making an intentional nuanced distinction as to the proper mens rea requirement of the two statutes. However, the Seventh Circuit's approach does not distinguish between the various methods that Congress uses to confer federal jurisdiction, and instead applies the *Feola* approach to jurisdictional language.[175]

B. *The Second Circuit's Approach Does Not Solve the Problem*

In contrast to how other courts of appeals interpreted the interstate element of the TVPA, the implication of the Second Circuit in *United States v. Shim* is that *Feola* no longer stands for the proposition that jurisdictional elements are not always treated differently than substantive elements of an offense.[176] Rather, the Second Circuit's opinion suggests that the first step of any statutory interpretation (for substantive and jurisdictional elements alike) is applying an ordinary English approach, and only then determining whether a special context exists to trigger a different rule of interpretation.[177]

While at first glance this sounds like a proper individualized approach to statutory interpretation, the Second Circuit's opinion suffers from two significant flaws. First, the court found no special context in section 2421 of the Mann Act to warrant straying from the *Flores-Figueroa* approach, but that holding was confined to the specific statutory provision of the Mann Act that was at issue.[178] The *Shim* opinion cited the concurrence in *Flores-Figueroa*, where Justice Alito provided section 2423 of the Mann Act as an example of context rebutting the presumption that a specified mens rea applies to all

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174 This concern about subjecting coconspirators to federal prosecution was likely the rationale for the Ninth Circuit's approach to a Mann Act conspiracy charge. *See* Twitchell v. United States, 313 F.2d 425, 429 (9th Cir. 1963); *supra* note 132 and accompanying text.

175 The Seventh Circuit wrote, "a plethora of reported decisions involving other federal criminal statutes have held that a defendant's knowledge of the federal aspect of the crime is not required to support a conviction," citing to various federal statutes without differentiating between the statutes' uses of jurisdictional language. United States v. Hattaway, 740 F.2d 1419, 1427 (7th Cir. 1984).

176 United States v. Shim, 584 F.3d 394, 395 (2d Cir. 2009) (per curiam) (stating that *Flores-Figueroa* guided the court's opinion, and concluding that in ordinary English, "knowingly" would apply to the interstate element).

177 *See id.* at 396 (the court found no special context present for section 2421).

178 *Id.*

subsequent elements of an offense.[179] Section 2423(a) makes it unlawful to "knowingly transport[] an individual who has not attained the age of 18 years in interstate or foreign commerce" for the purposes of prostitution.[180] Justice Alito noted that the courts of appeals have uniformly held that the government need not prove knowledge of the victim's age to obtain a conviction under this section of the Mann Act.[181]

Playing this out to its logical extreme, if "knowingly" only modifies "an individual," but does not modify "who has not attained the age of 18" of section 2423 of the Mann Act, it cannot possibly surpass any approach to statutory interpretation that "knowingly" should then reactivate to modify "in interstate or foreign commerce" after skipping over the intervening element of the statute.[182] One would then be hard-pressed to argue that the various sections of the Mann Act, all enacted to control different aspects of the same evil, should have different

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179 *Id.* at 396 n.2 (citing Flores-Figueroa v. United States, 556 U.S. 646, 660 (2009) (Alito, J., concurring in part and concurring in the judgment)).

180 18 U.S.C. § 2423(a) (2012).

181 *Flores-Figueroa*, 556 U.S. at 660 (Alito, J., concurring in part and concurring in the judgment).

182 Under the statutory approach flowing from *Morissette* and its progeny, *see supra* Section I.A.1, the jurisdictional element is not what separates culpable conduct from innocent conduct and would, therefore, not require a separate mens rea, as a defendant knowingly transporting someone for the purposes of prostitution or other illegal sex act is engaged in culpable conduct long before crossing any state lines. Under *Feola*, the Mann Act is certainly "no snare for the unsuspecting," United States v. Feola, 420 U.S. 671, 685 (1975), even without a mens rea attached to the jurisdictional element. *See supra* text accompanying notes 70–76. An ordinary English approach seems to turn up the same result: after accepting that "knowingly" does not apply to the individual's minority status, one would be hard pressed to argue that knowledge should then be resurrected to apply for the later part of the statute. For example, the Fourth Circuit in United States v. Jones emphatically stated that "[i]t is clear from the grammatical structure of § 2423(a) that the adverb 'knowingly' modifies the verb 'transports.' Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil." 471 F.3d 535, 539 (4th Cir. 2006); *accord supra* note 133. The Modern Federal Jury Instructions for section 2423 of the Mann Act points out that

> several courts . . . have held that *Flores Figueroa* does not require that the knowledge requirement apply to the element concerning the age of the victim. Thus, to accept the conclusion [that "knowingly" modifies the interstate element] requires the word "knowingly" to jump over the age element to reach the interstate commerce element. Accordingly, this instruction should be treated with caution.

3 MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 64.04 (Matthew Bender 2015). Despite the consensus among courts of appeals that "knowingly" in section 2423 of the Mann Act does not apply to the victim's age, this reading of the statute is contrary to the Model Penal Code's presumption that a stated mens rea applies to all elements of the offense. MODEL PENAL CODE § 2.02(4) (AM. LAW INST. 1962); *see also* Brown, *supra* note 69, at 116.

standards of proof regarding the element conferring federal jurisdiction.[183]

A second issue with the *Shim* opinion is that the Second Circuit concluded that if "knowingly" does not modify the interstate element as the government had argued, the word becomes superfluous.[184] The opinion made an effort to give meaning to every word of the statute,[185] but the court failed to consider that a defendant can be ignorant of the geographical boundaries that make a journey interstate, even while fully intending to transport an individual to another location for the purposes of prostitution.[186]

While the Second Circuit avoided the problem of oversimplifying the jurisdictional element approach as the Seventh Circuit had,[187] the holding in *Shim* is the exception to the rule—no other court has concluded that *Flores-Figueroa* is applicable to an interstate element of a federal statute. There is no indication in *Flores-Figueroa* that the approach was applicable to jurisdictional elements, and in fact, the Supreme Court cited approvingly to *X-Citement Video*, which recognized a distinction between jurisdictional and substantive elements.[188]

The Second Circuit's approach benefits potential defendants by placing an additional burden on the prosecution to prove the defendant's knowledge of a state's geographical boundaries. There is

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183 "There is a very close relationship between sections 2421 and 2423(a). The language of the latter provision is virtually identical to that of the former, with the exception that section 2423(a) applies only when the individual transported 'has not attained the age of 18 years.'" MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 64.01. For example, the Fifth Circuit in United States v. Bennett was faced with interpreting section 2423 of the Mann Act, but the opinion appeared to interpret the mens rea of the jurisdictional elements of the Mann Act generally, rather than with specific regard to that individual statutory provision. 258 F. App'x 671, 682–83 (5th Cir. 2007).

184 *Shim*, 584 F.3d at 396. To be guilty under section 2421, a defendant must both "knowingly transpor[t] [an] individual in interstate or foreign commerce," and the defendant must have "intent that such individual engage in prostitution." 18 U.S.C. § 2421(a) (2012). The Second Circuit reasoned that "[o]ne could not unknowingly transport an individual while simultaneously intending that the individual engage in prostitution; if, as the Government argues, 'knowingly' modifies only the word 'transport,' rather than 'interstate commerce,' then 'knowingly' is superfluous." *Shim*, 584 F.3d at 396.

185 *Shim*, 584 F.3d at 396 ("We are not inclined to accept an interpretation of the statute that would nullify one of its key terms." (citing Cty. of Nassau v. Leavitt, 524 F.3d 408, 416 (2d Cir. 2008))).

186 This fear of making ignorance of geography an excuse to the Mann Act was precisely what the Seventh Circuit feared. *See* United States v. Hattaway, 740 F.2d 1419, 1428 (7th Cir. 1984) ("The defendant's knowledge of whether a state line has been crossed thus is irrelevant to whether he has violated the Mann Act; otherwise, a defendant could argue ignorance of geography as a valid Mann Act defense.").

187 *See supra* Section II.B.

188 Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009) (citing United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)).

concern that applying mens rea to an "in or affecting interstate commerce" element would severely limit the government's ability to prosecute otherwise culpable defendants, because it takes so little to accomplish and, therefore, may be done without any intentionality.[189] However, when a statute requires travel "in interstate commerce," it would likely be of little consequence in most cases even if the government had to prove actual knowledge of the interstate travel, given that individuals are usually aware of when they travel between states.[190] Requiring actual knowledge would, therefore, protect only those defendants who did not intend to cross a state line and were not attempting to remain ignorant of geographical boundaries, as well as coconspirators who were unaware that a conspiracy became interstate.

While strict adherence to the *Feola* approach is problematic, adherence to the *Flores-Figueroa* approach does not necessarily produce a better outcome. The Second Circuit appears to have fallen into the very trap that Justice Alito warned against in his concurrence—reading *Flores-Figueroa* as establishing a rigid rule of interpretation.[191] The Supreme Court recognizes a distinction between jurisdictional and substantive elements. The element at issue in *Flores-Figueroa* was not jurisdictional, and therefore, inapplicable to the interstate element of the Mann Act.[192]

IV. AN ALTERNATE APPROACH

The opinions from the Second and Seventh Circuit deal with two extremes: the Second Circuit follows the *Flores-Figueroa* approach and

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189 For example, when examining the mens rea of the interstate element of the TVPA, the Seventh Circuit wrote,

> [W]e can think of no reason Congress would have gutted the law by limiting prosecutions to the surely trifling number of sex traffickers who know, for example, that using a hotel room or out-of-state condoms affects interstate commerce as that term is understood in constitutional law. Nothing in the statute's legislative history suggests such an intent, and the wrongfulness of a sex trafficker's conduct is not mitigated because he is unfamiliar with the boundaries of Congress's constitutional powers.

United States v. Sawyer, 733 F.3d 228, 230 (7th Cir. 2013).

190 If a defendant has lived in the same locale for several years, he would probably be aware of geographical boundaries between neighboring states; if the defendant is from out of town, he may be unaware of state boundaries.

191 *Flores-Figueroa*, 556 U.S. at 659 (Alito, J., concurring in part and concurring in the judgment) ("I am concerned that the Court's opinion may be read by some as adopting an overly rigid rule of statutory construction.").

192 The element of the aggravated identity theft statute at issue was whether the identification was "of another person." *See supra* notes 89–98 and accompanying text.

applies one of the highest levels of mens rea, actual knowledge,[193] while the Seventh Circuit follows *Feola* and requires no mens rea at all.[194] Neither court considered whether there was an appropriate middle ground based on the specific statute at issue.

Recall the *Yermian* opinion,[195] where the Supreme Court reserved the question of whether a lesser "knew or should have known" instruction should be used for the jurisdictional element of the statute criminalizing false statements.[196] In the context of the Mann Act, applying a "knew or should have known" standard to the jurisdictional element would solve the problems created by the Second Circuit's approach, which allows for an ignorance of the law defense, as well as curing the inequities created by the Seventh Circuit, by only subjecting to federal jurisdiction those individuals who were at least somewhat culpable in terms of acting within the federal sphere.

A brief inquiry into the progression of the federal kidnapping statute supports the application of such a reasonably foreseeable standard. The Federal Kidnapping Act, as it was originally enacted, punished "[w]hoever knowingly transports in interstate or foreign commerce, [a kidnapping victim]."[197] Subsequent amendments to the Act significantly broadened federal jurisdiction over kidnapping cases, and the current statute no longer requires that a defendant "knowingly

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193 *See* United States v. Shim, 584 F.3d 394, 395 (2d Cir. 2009) (per curiam).

194 *See* United States v. Hattaway, 740 F.2d 1419, 1428 (7th Cir. 1984).

195 United States v. Yermian, 468 U.S. 63 (1984); *see also supra* notes 77–85 and accompanying text.

196 The only question before the Court in *Yermian* was whether the statute required the government to prove actual knowledge. *Yermian*, 468 U.S. at 75 n.14. The facts of the case suggest that Yermian likely "should have known" that he was within federal agency jurisdiction; he typed his security questionnaire responses onto a form entitled "Department of Defense Personnel Security Questionnaire," and he signed a certification stating that any misrepresentations or false statements could subject him to prosecution under the United States Criminal Code. *Id.* at 65–67.

197 Kidnapping Act (Lindbergh Kidnapping Act), ch. 645, § 1201, 62 Stat. 760 (1948). "It was to assist the states in stamping out this growing and sinister menace of kidnapping that the Federal Kidnapping Act was designed. Its proponents recognized that where victims were transported across state lines only the federal government had the power to disregard such barriers in pursuing the captors." Chatwin v. United States, 326 U.S. 455, 463 (1946).

> Law enforcement authorities, lacking coordination, with no uniform system of intercommunication and restricted in authority to activities in their own jurisdiction, found themselves laughed at by criminals bound by no such inhibitions or restrictions . . . . The procedure was simple—a man would be kidnapped in one State and whisked into another, and still another, his captors knowing full well that the police in the jurisdiction where the crime was committed had no authority as far as the State of confinement and concealment was concerned.

Hugh A. Fisher & Matthew F. McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L.Q. REV. 646, 653 (1935).

transport[]" his victim in interstate commerce.[198] Courts have recognized that the change in language was meant to ensure that the defendant's knowledge of crossing state lines would no longer be an element of the offense.[199]

Unlike the Federal Kidnapping Act, the Mann Act still employs this "knowingly transports" language—suggesting that it still requires some degree of mens rea as to the interstate element. However, after determining that the *Flores-Figueroa* approach is inapplicable to the jurisdictional element of the Mann Act statute, the next step of the inquiry requires a determination of whether a reasonably foreseeable standard is proper.[200]

If the Seventh Circuit had applied this "knew or should have known" standard to the interstate element in *Hattaway*, it is possible that the court would have reached the same outcome. The defendant in that case was involved with a group of individuals who brought their victim from out of state,[201] making it reasonable to assume that he should have known the victim would be taken across state lines again. However, in *Shim*, the Second Circuit reversed the defendant's conviction because the jury had not been instructed that the defendant

198 The 1972 amendment changed the language to read: "(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when: (1) the person is willfully transported in interstate or foreign commerce . . . ." Kidnapping Act, Pub. L. No. 92-539, Title II, § 1201, 86 Stat. 1072 (1972). A Senate Report for the 1972 Amendment stated, "the law is amended to make the thrust of the offense the kidnapping itself rather than the interstate transporting of the kidnapped person. This effort to clearly differentiate the question of what is criminal from the question of what criminal behavior falls within Federal jurisdiction." S. REP. NO. 92-1105, at 4317–18 (1972). As the Fourth Circuit opined, "[t]he legislative history of this amendment indicates that the purpose of the change was to expand the jurisdictional base of the statute." United States v. Hughes, 716 F.2d 234, 238 (4th Cir. 1983). The current language of the Act is even broader, now allowing for prosecution when "the [victim] is willfully transported in interstate or foreign commerce . . . or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense." 18 U.S.C. § 1201 (2012).

199 In rejecting a "reasonably foreseeable" instruction for the interstate element of the offense, the Sixth Circuit wrote, "[s]ince the 1972 amendment, knowledge of interstate transportation is not an element of the offense: interstate transportation now serves merely as a jurisdictional basis for the federal prosecution of kidnapping." United States v. Burnette, 170 F.3d 567, 571 (6th Cir. 1999). "[T]here is no scienter requirement with respect to the interstate travel element. That is, the defendant must intentionally transport the victim, but there is no requirement that the defendant intentionally cross a state line during that transportation." 2 MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 42.01 (Matthew Bender 2015).

200 Although in the wire fraud context most courts have rejected a "knew or should have known" standard for the interstate element, the relevant inquiry was whether a reasonably foreseeable instruction was appropriate, rather than questioning whether actual knowledge of the interstate nature was required. *See supra* notes 87–88 and accompanying text.

201 United States v. Hattaway, 740 F.2d 1419, 1422–24 (7th Cir. 1984).

had to have actual knowledge of the interstate transportation.[202] If the Second Circuit applied a "knew or should have known" standard instead, the defendant likely would have been convicted for her part in the conspiracy.

Using a reasonably foreseeable standard would resolve one of the difficulties created by the Second Circuit's opinion, allowing for a uniform approach to the jurisdictional elements of sections 2421 and 2423 of the Mann Act.[203] Application of a lesser "knew or should have known" standard to the interstate element in section 2423 would achieve a similar result in most cases without requiring that "knowingly" reactivate after being dormant for the intervening element, the age of minority.[204] This "knew or should have known" standard also resolves the issue of the Seventh Circuit approach, which makes no distinction in mens rea requirements between different types of jurisdictional language.[205] Rather than interpreting any one Supreme Court opinion as the applicable "rule" to resolve this question,[206] a consideration of all the relevant factors leads to the application of this "knew or should have known" standard.

CONCLUSION

Some lower federal courts have examined whether a Mann Act conviction requires the government to prove mens rea of interstate transportation. The Seventh Circuit concluded that the interstate transportation is a jurisdictional element that does not require any mens rea, while the Second Circuit concluded that the element requires a full showing of actual knowledge. This conflict illuminates the need for an individualized consideration when interpreting a statute. Rather than merely considering these two ends of the intent spectrum, courts should consider applying a middle ground, a "knew or should have known" standard, as was suggested in a footnote of the Supreme Court's opinion

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202 United States v. Shim, 584 F.3d 394, 395–96 (2d Cir. 2009) (per curiam).

203 The two sections use almost identical language, but 2423 includes an additional element to protect individuals under the age of eighteen. *See* discussion *supra* Section III.B.

204 *See supra* notes 182–83 and accompanying text.

205 This way, the "in or affecting" jurisdictional element would remain free of any mens rea requirement, and the more demanding jurisdictional element would require some additional proof of mens rea. *See supra* notes 167–69 and accompanying text.

206 This approach is partially guided by the footnote in *Yermian* that suggests that there may be some leeway in approaching mens rea requirements for jurisdictional elements. United States v. Yermian, 468 U.S. 63, 75 n.14 (1984). However, there are certainly those who would argue against this proposal by saying that unless and until the Supreme Court determines that *Feola* is no longer applicable, it is not up to the lower courts to stray from that approach. *See supra* note 85.

in *United States v. Yermian*. Using this reasonably foreseeable standard solves many of the difficulties created by applying either of the two extremes, protects potential defendants from federal prosecution when they unintentionally cross over to the federal sphere, and protects the public by eliminating an ignorance of geography defense.