

# “KNOWINGLY” IGNORANT: MENS REA DISTRIBUTION IN FEDERAL CRIMINAL LAW AFTER *FLORES-FIGUEROA*

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*The Supreme Court has repeatedly and emphatically disfavored applying strict liability to ambiguous elements of federal criminal statutes. The presumption against strict liability has been most pronounced where the statute at issue contains a mens rea or culpability term and the dispute is over which elements of the statute this term applies/extends to. In Flores-Figueroa v. United States, the Court culminated this line of cases by expounding an interpretive approach which applies the mens rea term in a statute to every subsequent element of the offense. This new framework was based on text and grammar rather than any particular substantive criminal law principles. The opinion’s textual logic appears to encompass many other federal criminal statutes with potentially strict liability elements. Lower federal courts, however, have not extended Flores-Figueroa’s reasoning to such analogous criminal statutes and have instead maintained strict liability applications in the contexts of offenses involving minors, firearm offenses, and immigration offenses. The lower court resistance to Flores-Figueroa has relied on prior Court precedent that only bars strict liability applications if the defendant would somehow be fundamentally “innocent” but for the use of strict liability. This Note argues that the lower court resistance to extending Flores-Figueroa needs to be highlighted and addressed and that the Supreme Court’s new approach, which replaces an incoherent innocence-based distinction with a clear workable rule in the context of mens rea distribution, needs to be forcefully reaffirmed in other statutory contexts.*

## INTRODUCTION

For more than half a century since *Morissette v. United States*,<sup>1</sup> the Supreme Court has repeatedly disfavored applying strict liability<sup>2</sup> to ambiguous elements of federal criminal statutes, especially if a mens rea or culpability term is specified somewhere in the statutory scheme.<sup>3</sup> In *Flores-Figueroa v. United States*, the Court culminated this line of cases by expounding an interpretive approach which applies the mens rea term in a

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1. 342 U.S. 246 (1952).

2. A “strict-liability crime” is defined as “[a] crime that does not require a *mens rea* element.” Black’s Law Dictionary 429 (9th ed. 2009). Mens rea is in turn defined as “[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.” *Id.* at 1075. This Note uses “strict liability” in a broader sense to describe any element of a crime, proof of which does not require any mens rea.

3. See *infra* Part I.A (discussing disapproval of strict liability in line of cases beginning with *Morissette*).

statute to every subsequent element of the offense.<sup>4</sup> This rule parallels the distributive default of the Model Penal Code.<sup>5</sup>

While the ultimate result of *Flores-Figueroa* was unremarkable in light of precedent,<sup>6</sup> the Court's opinion marked a shift from an approach centered on protecting what the Court considered to be "innocent" actors to a new focus on text and grammar.<sup>7</sup> For the first time, the Court rejected a strict liability interpretation even though the defendant was already on notice that he was committing illegal conduct, a factor whose *absence* was traditionally the reason for rejecting strict liability.<sup>8</sup>

In the decision's aftermath, however, lower courts have not extended *Flores-Figueroa*'s reasoning to analogous federal statutes with traditional strict liability elements.<sup>9</sup> This lower court resistance has so far gone unidentified and unaddressed by both courts and commentators, despite its importance in a variety of federal criminal law contexts.<sup>10</sup>

This Note argues that the lower court resistance to extending *Flores-Figueroa* needs to be addressed and that the Supreme Court's new approach, which replaces an incoherent innocence-based distinction with a clear, workable rule in the context of mens rea distribution, should be forcefully reaffirmed in other statutory contexts.<sup>11</sup> Part I documents the line of Supreme Court cases that limited the use of strict liability elements in federal criminal statutes and discusses how *Flores-Figueroa* was both a culmination of and a departure from these decisions. It attempts to fully contrast *Flores-Figueroa*'s textual approach with the "innocence" focus of its predecessors to understand how *Flores-Figueroa* suggests courts should interpret ambiguous mens rea elements in federal criminal statutes. Part II examines how lower federal courts have *actually* dealt with strict liability elements since *Flores-Figueroa*, finding that these courts have not embraced the Supreme Court's new approach. In particular, three areas of criminal law that commonly involve strict liability application will be dis-

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4. 129 S. Ct. 1886 (2009); see *infra* Part I.B (analyzing *Flores-Figueroa* decision).

5. See *infra* notes 96–98 and accompanying text (drawing parallel between *Flores-Figueroa* and Model Penal Code distributive default).

6. See *infra* notes 83–84 and accompanying text (discussing how refusal in *Flores-Figueroa* to apply strict liability to statutory element at issue was, on its surface, not remarkable in light of precedent).

7. See *infra* Part I.C (discussing how *Flores-Figueroa* departed from precedent in both its rhetoric and legal reasoning).

8. See *infra* notes 92–95 and accompanying text (discussing defendant's notice of illegal conduct in *Flores-Figueroa*).

9. See *infra* Part II (exploring how lower courts have handled interpretation of possible strict liability applications in federal criminal law since *Flores-Figueroa*).

10. See *infra* notes 67, 124–125 and accompanying text (discussing how *Flores-Figueroa*'s lesson is not just academic, but has important consequences for defendants and prosecutors).

11. See *infra* Part III (discussing how lower court reaction to *Flores-Figueroa* might be addressed).

cussed: offenses involving minors,<sup>12</sup> felon-in-possession offenses,<sup>13</sup> and immigration offenses.<sup>14</sup> Finally, Part III suggests that the Court will have to reaffirm the new *Flores-Figueroa* approach in other statutory contexts to send a message that the new rule, grounded in greater clarity and fairness than its predecessor, applies more broadly.

I. FLORES-FIGUEROA'S DEPARTURE FROM PRECEDENT AND A NEW  
APPROACH TO MENS REA DISTRIBUTION IN  
FEDERAL CRIMINAL LAW

Part I situates *Flores-Figueroa* in the context of the Supreme Court's precedent on mens rea and strict liability, finding that the differences signal a new approach to interpretation in this context. Part I.A chronicles the precedent beginning with the foundational *Morrisette* case, which established the Court's general disapproval of strict liability elements. Part I.B dissects the Court's unanimous *Flores-Figueroa* decision and Justice Alito's cautionary concurrence. Part I.C discusses the ways in which *Flores-Figueroa* marks a departure from precedent and where it leaves the state of mens rea distribution.

A. *Disapproval of Strict Liability: Morrisette to X-Citement Video*

In *United States v. Behrman* and *United States v. Balint*, the Supreme Court for the first time recognized and allowed for the omission of mens rea requirements in federal criminal law statutes.<sup>15</sup> Responding to possible constitutional objections, *Balint* explicitly found that strict liability crimes did not violate due process.<sup>16</sup> Thirty years later in *Morrisette v. United States*, however, the Supreme Court pushed back against what had become an expansive reading of these two prior cases.<sup>17</sup> The Court noted that the requirement of some level of culpability "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."<sup>18</sup>

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12. See *infra* Part II.A.

13. See *infra* Part II.B.

14. See *infra* Part II.C.

15. *United States v. Behrman*, 258 U.S. 280, 288 (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."); *United States v. Balint*, 258 U.S. 250, 251 (1922) ("The statute does not make . . . knowledge an element of the offense.").

16. *Balint*, 258 U.S. at 252 (dismissing objection that "punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law," and noting that prior case law had already "considered and overruled" this argument). But see Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 398–99 (1989) (arguing that *Balint* was "mere pleading case" and that subsequent courts have misconstrued its dicta as holding).

17. 342 U.S. 246 (1952).

18. *Id.* at 250.

The statute at issue in *Morissette* punished with fine and imprisonment "whoever embezzles, steals, purloins, or knowingly converts" government property.<sup>19</sup> The defendant had taken used bomb casings owned by the United States government, mistakenly thinking that they were abandoned, and was subsequently prosecuted under the statute.<sup>20</sup> Though *Morissette* argued that the lack of any wrongful intent on his part precluded liability under the statute, he was convicted because the trial judge instructed the jury that it did not need to make any findings as to mental culpability; liability under the statute was to be found purely on the defendant's conduct.<sup>21</sup> The Supreme Court rejected this reading and held that, where no mens rea is specified in the text of the statute, strict liability should only be presumed if the statute defines a "public welfare offense."<sup>22</sup> Such offenses involve health and welfare regulations arising out of the industrial revolution and attach heightened duties to those in control of particular industries and trades.<sup>23</sup> These offenses are not like common law crimes in that penalties are relatively smaller, reputational losses from conviction are less significant, and they aim less to punish wrongful actors than to maintain public health and welfare.<sup>24</sup> In contrast, the statute in *Morissette* punished a variant of the common law offense of

19. *Id.* at 248 (quoting 18 U.S.C. § 641 (1946) (current version at 18 U.S.C. § 641 (2006))).

20. *Id.* at 247–48.

21. *Id.* at 248–50.

22. *Id.* at 255–56, 260–63.

23. See *id.* at 255–56, 261–63 (discussing "public welfare offenses" and why criminal statute at issue did not constitute such an offense). For a survey of early public welfare offenses and their development, see Francis Bowes Sayre, *Public Welfare Offenses*, 33 *Colum. L. Rev.* 55, 62–67 (1933). *Morissette* references Sayre's eight categories of public welfare offenses:

(1) illegal sales of intoxicating liquor, (2) sales of impure or adulterated food or drugs, (3) sales of misbranded articles, (4) violations of antinarcotic 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.

*Morissette*, 342 U.S. at 262 n.20 (citing Sayre, *supra*, at 73, 84).

24. See *Morissette*, 342 U.S. at 255–56 (defining and analyzing "public welfare offenses"). Singer notes the following traditional justifications for public welfare offenses: (1) deterring "profit-driven manufacturers . . . from ignoring the well-being of the consuming public" ("deterrence"); (2) "inquiry into mens rea would exhaust courts, which have to deal with thousands of 'minor' infractions every day" ("expedition"); (3) because penalties are small and social stigma is minimal or nonexistent, "the imposition of strict liability is not inconsistent with the moral underpinnings of . . . criminal law" ("triviality"); and (4) the legislature is constitutionally empowered to create strict liability crimes for public welfare offenses ("legislative intent"). Singer, *supra* note 16, at 389–403. Singer finds that most of these justifications were exaggerated and ultimately rejects them. See *id.* at 403–07 (discussing failures of strict liability).

larceny, which involved serious penalties and had traditionally required a mens rea.<sup>25</sup> Thus, the Court imputed a requirement of criminal intent.<sup>26</sup>

The Court affirmed this disapproval of strict liability in *Liparota v. United States*.<sup>27</sup> In *Liparota*, the statute subjected to fine and imprisonment “whoever knowingly uses, transfers, acquires, alters, or possesses [benefits] . . . in any manner contrary to [the statute] or the regulations.”<sup>28</sup> The defendant, prosecuted for unlawfully acquiring and possessing food stamps, argued that the statute required knowledge that his possession of the food stamps was contrary to law or regulation.<sup>29</sup> The Court found that the statute was ambiguous in its mens rea requirement as to the illegality element despite the use of the word “knowingly” at the beginning of the statute.<sup>30</sup> Though the Court did not read “knowingly” across the statute as a matter of textual interpretation, the Court did impute a knowledge requirement to the element based on substantive principles.<sup>31</sup> These principles were: (1) A different interpretation would criminalize a broad range of innocent, appropriate conduct since, if the defendant did not know his use or possession of food stamps was contrary to law, nothing else in his action would have alerted him to the illegality or wrongfulness of his conduct;<sup>32</sup> (2) the traditional rule of lenity requiring ambiguous

25. See *Morissette*, 342 U.S. at 260–61 (“State courts of last resort . . . have consistently retained the requirement of intent in larceny-type offenses.”).

26. See *id.* at 263 (“We hold that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.”). The Court also rejected the government’s contention that “knowingly converts,” 18 U.S.C. § 641 (1946) (current version at 18 U.S.C. § 641 (2006)), only referred to “knowledge that defendant was taking the property into his possession.” *Morissette*, 342 U.S. at 270–71. “Knowingly” here instead referred to “knowledge of the [broader] facts . . . that made the taking a conversion”—in this case, that the property was not abandoned but rightfully belonged to the government. *Id.*

27. 471 U.S. 419 (1985).

28. 7 U.S.C. § 2024(b)(1) (2006).

29. *Liparota*, 471 U.S. at 421–23.

30. *Id.* at 424 (“[T]he words themselves provide little guidance. Either interpretation would accord with ordinary usage.”).

31. *Id.* at 425 (“Absent indication of contrary purpose in the language or legislative history of the statute, we believe that § 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations.”). *Liparota* cited *Morissette* and *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436–46 (1978). *Liparota*, 471 U.S. at 424–27. In *U.S. Gypsum Co.*, the Court stated that “[w]hile strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status.” 438 U.S. at 436–46 (citations omitted).

32. See *Liparota*, 471 U.S. at 426–27 (“This [non-strict-liability] construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct.”). This disapproval of interpretations that would criminalize innocent conduct overrode the Court’s traditional doctrine that “it is no defense that the defendant mistakenly believed that the law did not prohibit his action,” and thus allowed ignorance of the food stamp law to be a defense. Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes: Cases and Materials* 264 (6th ed. 1995); see also Richard Singer & Douglas Husak, *Of Innocence and*

criminal statutes to be interpreted in favor of the accused;<sup>33</sup> and (3) the inapplicability of the public welfare offense doctrine to the conduct at issue.<sup>34</sup> Through this analysis, the Court found that knowledge of the illegality of food stamp possession was indeed required under the statute, and thus reversed the conviction.<sup>35</sup>

The line between public welfare offense and traditional common law offense can be difficult to draw, a difficulty that was clear in *Staples v. United States*.<sup>36</sup> The statute in *Staples* criminalized possession of an unregistered “firearm,”<sup>37</sup> and defined the term to include automatic, but not semiautomatic, guns.<sup>38</sup> The defendant had been convicted of possession of an unregistered automatic gun, but argued that he had thought it was semiautomatic and that his lack of knowledge about the automatic nature of the firearm precluded liability.<sup>39</sup> Despite the absence of any explicit requirement in the statute, the Court reversed the court of appeals and

Innocents: The Supreme Court and Mens Rea Since Herbert Packer, 2 Buff. Crim. L. Rev. 859, 878 n.55 (1999) (“The Court’s attempt to show that it was not creating a defense of ignorance of law is unconvincing.”); John Shepard Wiley Jr., Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation, 85 Va. L. Rev. 1021, 1037–39 & n.46 (1999) (discussing how Court’s disapproval of criminalizing otherwise innocent conduct led it to create narrow “ignorance of law” defense for food stamp statute).

33. See *Liparota*, 471 U.S. at 427–28 (“In addition, requiring *mens rea* is in keeping with our longstanding recognition of the principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971))). The rule of lenity is “the notion that ambiguities in criminal statutes should be construed to the benefit of the defendant.” William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* 375 (2d ed. 2006); see also *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.”). The canon “has led an erratic and unpredictable life in the federal cases.” Eskridge et al., *supra*, at 378. Some scholars have advocated jettisoning it, see, e.g., Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 510 (1996) [hereinafter Kahan, *Relevant*] (“Given the high cost and futility of complete legislative specification of criminal offenses, it’s a good thing that courts have traditionally ignored this rule.” (footnote omitted)), while other scholars have defended it, see, e.g., Lawrence M. Solan, Law, Language, and Lenity, 40 Wm. & Mary L. Rev. 57, 60 (1998) (“[T]he narrow rule of lenity embodies important values with which we are unwilling to dispense.”).

34. See *Liparota*, 471 U.S. at 432–33 (“[T]he offense at issue here differs substantially from those ‘public welfare offenses’ we have previously recognized.”).

35. *Id.* at 433–34. For an analysis of *Liparota* and how its holding is often used in the environmental law context, see Thomas Richard Uiselt, What a Criminal Needs to Know Under Section 309(c)(2) of the Clean Water Act: How Far Does “Knowingly” Travel?, 8 *Envtl. Law.* 303, 315–17 (2002) (concluding “[c]ourts have rejected defendants’ attempts to rely on *Liparota* . . . for the proposition that ignorance of the law may be an excuse in environmental cases” because such cases involve public welfare offenses).

36. 511 U.S. 600 (1994).

37. 26 U.S.C. § 5861(d) (2006).

38. *Id.* § 5845(a)(6) (including “machinegun” within term “firearm”); see also *id.* § 5845(b) (defining “machinegun”).

39. *Staples*, 511 U.S. at 602–04.

imputed a mens rea requirement of knowledge.<sup>40</sup> The Court then applied this imputed knowledge requirement to the characteristics that brought the weapon in question within the statutory definition of a machine gun.<sup>41</sup> According to the majority opinion by Justice Thomas, the statute did not create a public welfare offense because the long tradition of lawful private gun ownership in the United States meant that guns do not fall within the category of obviously dangerous devices that automatically put their owners on notice of potential regulations.<sup>42</sup> Moreover, the severity of the statutory penalty suggested incompatibility with the public welfare rubric.<sup>43</sup> The Court did not need to resort to the rule of lenity used in *Liparota* because “the background rule of the common law favoring *mens rea* and the substantial body of precedent [the Court] ha[d] developed construing statutes that do not specify a mental element” resolved the issue and eliminated any ambiguity.<sup>44</sup> *Staples* is in some ways a combination of *Morissette* and *Liparota*. First, as in *Morissette*, the Court imputed a mens rea requirement into a statute that did not define a public welfare offense and did impose a severe penalty.<sup>45</sup> Then, as in *Liparota*, the Court stretched that requirement to include knowledge of a legal def-

40. See *id.* at 619 (“Silence does not suggest that Congress dispensed with *mens rea* for the element of § 5861(d) at issue here.”).

41. See *id.* at 619–20 (“Thus, to obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his [gun] that brought it within the scope of the Act.”).

42. See *id.* at 610–16 (“[P]recisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential . . . cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify . . . not requiring proof of knowledge of a weapon’s characteristics.”). Interestingly, however, the Court did not overrule *United States v. Freed*, which held that the same statute did not require the government to prove that the defendant knew the weapon was unregistered. 401 U.S. 601, 607–10 (1971). The Court in *Freed* reasoned that defendants were on sufficient notice of potential regulation if they knew they had a dangerous firearm; it was appropriate for them to bear the burden of discovering whether their weapon was registered or not. See *id.* at 609–10 (presuming knowledge because of high likelihood of regulation of dangerous weapons); *id.* at 616 (Brennan, J., concurring) (“[T]he likelihood of government regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it.”). Thus, the combination of *Staples* and *Freed* meant that, to be found guilty under § 5861(d), firearm owners had to know that they owned a dangerous firearm, but not that the firearm was unregistered. For analysis of the contrast between *Freed* and *Staples* and an attempt at reconciliation, see Stephen F. Smith, Proportional Mens Rea, 46 Am. Crim. L. Rev. 127, 129 n.13 (2009); see also Sanford H. Kadish, Fifty Years of Criminal Law: An Opinionated Review, 87 Calif. L. Rev. 943, 955 n.45 (1999) (comparing *Staples* and *Freed*).

43. See 26 U.S.C. § 5871 (imposing \$10,000 fine or ten-year imprisonment for violation); *Staples*, 511 U.S. at 616–19 (“Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*.”).

44. *Staples*, 511 U.S. at 619 n.17.

45. See Note, Mens Rea in Federal Criminal Law, 111 Harv. L. Rev. 2402, 2409–10 (1998) (finding *Staples* consistent with prior decisions, including *Morissette*, because it imputed mens rea requirement into statute that did not define public welfare offense but did provide severe penalty).

inition or rule because such knowledge separated fundamentally innocent from fundamentally illegal conduct.<sup>46</sup>

The trend against strict liability continued in *United States v. X-Citement Video, Inc.*<sup>47</sup> The statute in *X-Citement Video* punishes "[a]ny person who . . . knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if . . . the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct."<sup>48</sup> The Ninth Circuit had held that the law violated relevant First Amendment precedent because the age element lacked a mens rea requirement.<sup>49</sup> Rejecting the "most natural grammatical reading"<sup>50</sup> (much to the consternation of Justice Scalia)<sup>51</sup>, the Court rescued the statute by extending the "knowingly" mens rea requirement to the provision containing the age element.<sup>52</sup>

Chief Justice Rehnquist, in the majority opinion, relied on several factors in rejecting the grammatical reading and finding a legislative intent to extend "knowingly" to the age element.<sup>53</sup> Drawing on key considerations and trends in its prior strict liability precedent, the Court identified three extratextual factors: (1) The involvement of a minor was the key element separating innocent from illegal conduct and thus was probably intended to require some level of culpability;<sup>54</sup> (2) the statute did

46. See Katherine R. Tromble, Note, Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation, 52 Vand. L. Rev. 521, 535–37 (1999) (describing *Staples* as "[i]mplied [m]ens [r]ea [c]ounterpart to *Liparota*").

47. 513 U.S. 64 (1994).

48. 18 U.S.C. § 2252(a).

49. *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1292 (9th Cir. 1992), rev'd, 513 U.S. 64 ("[T]he First Amendment . . . mandates that a statute prohibiting the distribution, shipping or receipt of child pornography require as an element knowledge of the minority of at least one of the performers . . . . As a result, section 2252 is unconstitutional on its face.").

50. *X-Citement Video*, 513 U.S. at 68 ("The most natural grammatical reading, adopted by the Ninth Circuit, suggests that the term 'knowingly' modifies only the surrounding verbs: transports, ships . . .").

51. See id. at 80 (Scalia, J., dissenting) ("Today's opinion is without antecedent. None of the decisions cited as authority support interpreting an explicit statutory scienter requirement in a manner that its language simply will not bear.").

52. Id. at 78 (majority opinion) ("[W]e conclude that the term 'knowingly' in § 2252 extends both to the sexually explicit nature of the material and to the age of the performers.").

53. See id. at 68–73 (explaining rejection of natural reading).

54. See id. at 69 ("If we were to conclude that 'knowingly' only modifies the relevant verbs in § 2252, we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material."); id. at 72 ("*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."); id. at 73 n.3 ("Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful."). Professor Alan Michaels argues that *X-Citement Video* and its predecessors imply a principle of "constitutional innocence," according to which "strict liability is constitutional when, but only when, the

not constitute a “public welfare offense”<sup>55</sup> and the punishment for violation was harsh;<sup>56</sup> and (3) consistent Supreme Court precedent had limited strict liability applications and interpreted criminal statutes to include “broadly applicable scienter requirements.”<sup>57</sup> *X-Citement Video*’s reliance on precedent and on *Liparota*’s and *Staples*’s protection of “innocence,” even at the expense of a clear contrary textual interpretation, was criticized by a number of commentators and judges.<sup>58</sup> Many commenta-

intentional conduct covered by the statute could be made criminal by the legislature” and “runs afoul of the Constitution if the other elements of the crime, with the strict liability element excluded, could not themselves be made a crime.” Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828, 834 (1999). Professor Michaels’s interpretation, by emphasizing that “when the involvement of children is the only reason why the First Amendment does not protect the material, ‘criminal responsibility may not be imposed without some element of scienter on the part of the defendant,’” *id.* at 871 (quoting *New York v. Ferber*, 458 U.S. 747, 765 (1982)), highlights *X-Citement Video*’s focus on protecting entirely “innocent” actors from strict liability.

55. *X-Citement Video*, 513 U.S. at 71 (“[Section] 2252 is not a public welfare offense. Persons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation.”).

56. *Id.* at 72 (“*Staples*’ concern with harsh penalties looms equally large respecting § 2252: Violations are punishable by up to 10 years in prison as well as substantial fines and forfeiture.”).

57. *Id.* at 70 (“Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.”); see also *id.* at 70–71 (discussing *Morissette*, *United States Gypsum Co.*, *Liparota*, and *Staples*). Justice Rehnquist pointed to three other reasons for stretching the mens rea term to reach a different subsection: (1) Applying “knowingly” just to the adjacent verbs would produce anomalous results, see *id.* at 69 (“It would seem odd . . . that Congress distinguished between someone who inadvertently dropped an item into the mail without realizing it, and someone who consciously placed the same item in the mail, but was nonetheless unconcerned about whether the person had any knowledge of the prohibited contents of the package.”); (2) the legislative history was ambiguous enough to avoid concluding that Congress specifically omitted a mens rea requirement, see *id.* at 73–78 (“The Committee Reports and legislative debate speak more opaquely as to the desire of Congress for a scienter requirement with respect to the age of minority.”); and (3) the canon of constitutional avoidance supported the Court’s reading, see *id.* at 73 (“[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.”); *id.* at 78 (“It is . . . incumbent upon us to read the statute to eliminate [constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress.”).

58. See *id.* at 81 (Scalia, J., dissenting) (“Today’s opinion converts the rule of interpretation into a rule of law, contradicting the plain import of what Congress has specifically prescribed regarding criminal intent.”); see also Robert Batey, *Judicial Exploitation of Mens Rea Confusion*, at Common Law and Under the Model Penal Code, 18 Ga. St. U. L. Rev. 341, 384 (2001) (criticizing *X-Citement Video* as attempt at judicial self-empowerment at expense of legislature); Peter J. Henning, *Foreword: Statutory Interpretation and the Federalization of Criminal Law*, 86 J. Crim. L. & Criminology 1167, 1170 (1996) (“The Court obfuscated the legislative history and resorted to linguistic subterfuge to rewrite the provision the way the Court believed it should have been written.”); Note, *supra* note 45, at 2410–12 (arguing Court’s reading of statute in *X-Citement Video* is inconsistent with both textualist and purposivist approaches); The Supreme Court, 1994 Term—Leading Cases, 109 Harv. L. Rev. 279, 286–87 (1995) (“Although the Court

tors saw the decision as the culmination of a new nontextualist approach focused less on adherence to Congress's words and wishes and more on ensuring that criminal statutes did not reach wholly "innocent" actors.<sup>59</sup>

Arriving at the same result as the majority, but with a more succinct and text-based analysis, Justice Stevens wrote separately in concurrence and noted that it was only natural to read "knowingly" to apply to subsequent elements, even those in separate subsections of the statute.<sup>60</sup> Justice Stevens's simpler position eventually gained adherents on the Court, culminating in the Court's unanimous decision in *Flores-Figueroa v. United States*.<sup>61</sup>

### B. Flores-Figueroa's *New Textual Focus and Distributive Default Rule*

The aggravated identity theft statute at issue in *Flores-Figueroa* imposed an additional mandatory two-year prison term upon an individual who, while committing certain enumerated felonies, "'knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.'"<sup>62</sup> The defendant was an illegal immigrant who gave his employer a false name, birth date, and Social Security number as well as counterfeit Social Security and alien registration cards.<sup>63</sup> After being discovered, he was prosecuted for entering the United States without inspection and for misusing immigration documents.<sup>64</sup> Because the numbers

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went through the motions of following the classic intentionalist model of statutory interpretation, its argument is somewhat disingenuous, as exemplified by its inconsistent use of grammatical rules." (footnote omitted)).

59. See Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 Utah L. Rev. 915, 935–42 (arguing *X-Citement Video* and its predecessors created new substantive canon of statutory construction that, "where a defendant engages in conduct that . . . would be innocent [if the statute did not exist], a court should presume that 'a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.'" (quoting *X-Citement Video*, 513 U.S. at 72)); Wiley, *supra* note 32, at 1022–44 (arguing *X-Citement Video* and its predecessors establish rule of moral culpability that statutes will be construed to shield what Court considers "blameless conduct from criminal condemnation"). Professor Eric Johnson has identified both *Staples* and *X-Citement Video* as reinforcing and giving dispositive weight to the distinction "between elements that make the conduct illegal and elements that make the crime worse," with the former counseling against strict liability application. Eric A. Johnson, *Does Criminal Law Matter? Thoughts on Dean v. United States and Flores-Figueroa v. United States*, 8 Ohio St. J. Crim. L. 123, 133 (2010).

60. See *X-Citement Video*, 513 U.S. at 79–80 (Stevens, J., concurring) ("[T]he normal, commonsense reading of a subsection of a criminal statute introduced by the word 'knowingly' is to treat that adverb as modifying each of the elements of the offense identified in the remainder of the subsection."); see also *id.* ("Surely reading this provision to require proof of scienter for each fact that must be proved is far more reasonable than adding such a requirement to a statutory offense that contains no scienter requirement whatsoever." (citing *Staples v. United States*, 511 U.S. 600, 624 (1994) (Stevens, J., dissenting))).

61. 129 S. Ct. 1886 (2009).

62. *Id.* at 1888 (quoting 18 U.S.C. § 1028A(a)(1) (2006)).

63. *Id.* at 1889.

64. *Id.*

on both of the cards were in fact assigned to other people, and because these two crimes were predicate offenses for the aggravated identity theft enhancement, the government sought the two-year mandatory additional sentence for the defendant.<sup>65</sup>

The defendant argued that the government had to “prove that [the defendant] *knew* that the numbers on the counterfeit documents were numbers assigned to other people.”<sup>66</sup> The government instead contended that “knowingly” applied only to the verbs—transfer, possession, or use—and/or to the lack of lawful authority, but that the mens rea did not extend to “means of identification of *another person*.”<sup>67</sup> Accepting the government’s argument, the district court found the defendant guilty after a bench trial, and the Eighth Circuit Court of Appeals affirmed.<sup>68</sup>

The Court, in a unanimous opinion by Justice Breyer, reversed, finding that “knowingly” also applied to the fact that the means of identification belonged to another person.<sup>69</sup> In doing so, the Court focused entirely on the text of the statute. Moreover, it suggested that its reading of the statute, which stretched the initial mens rea across every subsequent element, was an ordinary and natural way to interpret any statute with such a grammatical structure:

As a matter of ordinary English grammar, it seems natural to read the statute’s word “knowingly” as applying to all the subsequently listed elements of the crime. . . . In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.<sup>70</sup>

65. *Id.*

66. *Id.*

67. *Id.* (emphasis added). The debate was not academic: Flores-Figueroa had moved for a judgment of acquittal on the aggravated identity theft counts because he claimed that the government could not prove that he knew that the numbers on the documents were assigned to other people. *Id.* Since prosecutors would have a difficult time proving beyond a reasonable doubt that defendants prosecuted under the statute submitted the fraudulent personal information knowing that it belonged to another person rather than just making it up out of thin air, the resolution of this issue was important. See Nathaniel J. Stuhlmiller, Comment, *Flores-Figueroa* and the Search for Plain Meaning in Identity Theft Law, 58 *Buff. L. Rev.* 221, 221–22 (2010) (noting government’s interpretation would “use § 1028A(a)(1) as a weapon to combat illegal immigrants who misappropriated another’s identification” while “the petitioner’s interpretation . . . would affect only those who knowingly steal identification documents from a known person, and many illegal immigrants using forged identification documents for work purposes would be beyond its reach”).

68. *Flores-Figueroa*, 129 S. Ct. at 1889.

69. *Id.* at 1894 (“We conclude that § 1028A(a)(1) requires the Government to show that the defendant knew that the means of identification at issue belonged to another person.”).

70. *Id.* at 1890. The Court rejected the government’s intratextual argument that such an interpretation would render language in another subsection superfluous. *Id.* at 1892 (dismissing government’s intratextual argument based on language in § 1028A(a)(2)).

In other words, courts should “ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.”<sup>71</sup>

As if to drive home the point that reading the word “knowingly” across the statute was to be a default used across all of federal criminal law and not just a statute-specific interpretation, the Court went further. It noted that it had not been provided with and could think of absolutely no

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, 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.<sup>72</sup>

Thus, the Court could not even imagine a statute where, as a matter of textual analysis, the initial *mens rea* did not extend across the statute.

The Court summarily rejected the government’s argument that the statute was meant to provide “enhanced protection for individuals whose identifying information is used to facilitate the commission of crimes” by putting the information burden on potential offenders who would then “take great care to avoid wrongly using IDs that belong to others.”<sup>73</sup> Although the Court acknowledged the “difficulties of proof” that its interpretation would entail, it ultimately dismissed these concerns. According to the Court, “intent is generally not difficult to prove” and the “concerns about practical enforceability are insufficient to outweigh the clarity of the text.”<sup>74</sup>

Perhaps Justice Alito sensed the relative inflexibility of this position when he counseled against “adopting an overly rigid rule of statutory construction” in his concurring opinion.<sup>75</sup> Indeed, he “suspect[ed] that the Court’s opinion will be cited for the proposition that the *mens rea* of a federal criminal statute nearly always applies to every element of the offense.”<sup>76</sup> Although he agreed that it is “fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense,”<sup>77</sup> he argued that the ultimate interpretational inquiry is always

71. *Id.* at 1891.

72. *Id.*

73. *Id.* at 1892.

74. *Id.* at 1893. The Court concluded:

[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.

*Id.* at 1893–94.

75. *Id.* at 1895 (Alito, J., concurring in part and concurring in the judgment).

76. *Id.*

77. *Id.*

contextual.<sup>78</sup> Justice Alito then approvingly cited a number of circuit court decisions that sanctioned the use of strict liability elements in federal criminal statutes.<sup>79</sup> Ultimately, however, he agreed with the other Justices because the “Government’s interpretation leads to exceedingly odd results.”<sup>80</sup>

This sense of caution and appeal to context, however, appeared only in Justice Alito’s concurrence; as noted, Justice Breyer’s opinion for the Court spoke in terms suggesting that the specified mens rea of a criminal offense almost always applies to every subsequent element.<sup>81</sup> Indeed, this is what prompted Justice Alito’s concurrence in the first place, as he presumed the Court’s decision would lay down a rule that “the *mens rea* of a federal criminal statute nearly always applies to every element of the offense.”<sup>82</sup>

78. See *id.* (“I think that the Court’s point about ordinary English usage is overstated. Examples of sentences that do not conform to the Court’s rule are not hard to imagine. . . . [I]t must be recognized that there are instances in which context may well rebut that presumption.”).

79. See *id.* at 1895–96 (citing lower court opinions that, according to Justice Alito, correctly interpreted federal statutes to not stretch specified mens rea to all subsequent elements because of their context). In particular, Justice Alito cited *United States v. Griffith*, 284 F.3d 338, 350–51 (2d Cir. 2002), and *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001), both of which held that 18 U.S.C. § 2423(a) does not require knowledge of the victim’s age to be guilty of “knowingly transport[ing] an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense . . .” 18 U.S.C. § 2423(a) (2006); see also *infra* notes 110–111 (discussing *Griffith* and *Taylor* further). Justice Alito also approvingly cited to *United States v. Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992) (Ginsburg, J.) (finding that 21 U.S.C. § 861(a)(1), making it unlawful to “knowingly and intentionally . . . induce . . . a person under eighteen years of age to violate” drug laws, does not require knowledge of the minor’s age), and to *United States v. Flores-Garcia*, 198 F.3d 1119, 1121–23 (9th Cir. 2000) and *United States v. Figueroa*, 165 F.3d 111, 118–19 (2d Cir. 1998), which both held that 8 U.S.C. § 1327 does not require knowledge that the alien had been convicted of an aggravated felony to have “knowingly aid[ed] or assist[ed] any alien inadmissible under section 1182(a)(2) (insofar as an alien admissible under such section has been convicted of an aggravated felony) . . . to enter the United States.” 8 U.S.C. § 1327 (2006); see also *infra* Part II.C (discussing *Flores-Garcia*).

80. *Flores-Figueroa*, 129 S. Ct. at 1896 (Alito, J., concurring in part and concurring in the judgment). Under the government’s interpretation, “[i]f it turns out that the [made-up Social Security] 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.* Justice Alito could not ascribe such a purpose to Congress.

81. See *supra* notes 69–74 and accompanying text (discussing tone of Justice Breyer’s opinion in *Flores-Figueroa*).

82. *Flores-Figueroa*, 129 S. Ct. at 1895 (Alito, J., concurring in part and concurring in the judgment).

C. *Situating Flores-Figueroa Within the Precedent: A New Approach to Mens Rea Distribution*

In analyzing what impact *Flores-Figueroa* has had on federal criminal law interpretation and in weighing the merits of the decision, it is first useful to more thoroughly situate *Flores-Figueroa* within its body of precedent. Fleshing out how *Flores-Figueroa* departed from the prior decisions in Part I.A reveals that *Flores-Figueroa* signaled a new approach in this interpretive arena. Only by contrasting this new approach with the old one can the subsequent lower court decisions involving analogous statutes be sufficiently understood and evaluated.

Superficially, *Flores-Figueroa* is an unremarkable extension of the line of cases from *Morissette* to *X-Citement Video* scrutinizing and ultimately condemning strict liability applications in federal criminal law. Indeed, *Flores-Figueroa* cites briefly but approvingly to *Liparota* and *X-Citement Video*.<sup>83</sup> In fact, when one considers the great lengths the Court went through to stretch an initial mens rea to a different subsection in *X-Citement Video*, it becomes all the more ordinary to extend an initial mens rea within the same section as in *Flores-Figueroa*.<sup>84</sup>

But even if the words are the same, the music is radically different. Though all three cases ultimately applied an initial mens rea to a subsequent statutory element, *Flores-Figueroa* differed from *Liparota* and *X-Citement Video* in important respects. In *Liparota*, even though the word "knowingly" began the relevant statutory section, the Court found the text of the statute ambiguous and thus did not engage in simple grammatical extension.<sup>85</sup> The Court instead resorted to the rule of lenity, an analysis of what is and is not a public welfare offense, and the fact that a strict liability interpretation would criminalize innocent conduct to impute and then apply a mens rea of knowingly to the element at issue.<sup>86</sup>

In *X-Citement Video*, the Court actually and explicitly negated the "most natural grammatical reading" of the text and instead resorted to a multifactored analysis in applying a mens rea of "knowingly" to the age of the performer.<sup>87</sup> The Court emphasized that an alternate interpretation would punish "innocent" actors who were distributing films within their First Amendment rights with no notice of the illegality of their conduct, that the offense could not fit into the public welfare offense model, and

83. *Id.* at 1891 (majority opinion) (citing to *Liparota* and *X-Citement Video*, both of which extended mens rea requirements across their respective statutes).

84. See *id.* at 1894 (Scalia, J., concurring) ("Ordinary English usage supports [the Court's reading], as the Court's numerous sample sentences amply demonstrate. . . . I thought (and think) that [*X-Citement Video*] was wrongly decided.")

85. *Liparota v. United States*, 471 U.S. 419, 424 (1985); see *supra* note 30 and accompanying text (discussing how *Liparota* Court found ambiguity in text).

86. *Liparota*, 471 U.S. at 426–28, 432–33; see *supra* notes 31–35 and accompanying text (discussing factors considered in *Liparota* and ultimate result).

87. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994); see *supra* notes 50–53 and accompanying text (discussing how *X-Citement Video* ignored plain grammatical reading of statutory text).

that the Court's precedent had created an implicit presumption of some level of culpability.<sup>88</sup>

Thus, brief cites to *Liparota* and *X-Citement Video* in *Flores-Figueroa* mask the fact that those cases were not about text or grammar at all. Instead, they represented an extratextual or countertextual analysis of their respective statutes, drawing heavily on prior mens rea precedent and principle.<sup>89</sup>

Under the analyses of *Liparota* and *X-Citement Video*, a key consideration was whether a strict liability application would ensnare defendants whose mental state was, but for strict liability, *entirely* innocent (e.g., using food stamps in a normal way honestly believing they had the right to them; distributing films within their First Amendment rights honestly believing the performers were above the age of eighteen). Such intent to criminalize "innocent" conduct could simply not be ascribed to Congress under the Court's analysis in those cases.<sup>90</sup> Moreover, this particular protection of "innocence" is evident in strict liability cases that imputed mens rea terms even where there were none in the statute, such as *Staples*.<sup>91</sup>

The defendant in *Flores-Figueroa*, however, was not completely "innocent." Even if he had not known that the means of identification he was using belonged to another person, Flores-Figueroa was still knowingly using counterfeit documents in committing the predicate crimes and was thus on notice of the illegality and wrongfulness of his basic conduct.<sup>92</sup> This point was raised repeatedly by the government in its appellate brief and during oral arguments, urging the Court to use the absence of "innocence" to allow strict liability in Flores-Figueroa's case just as its presence had led to rejection of strict liability in *Liparota*, *Staples*, and *X-Citement*

88. *X-Citement Video*, 513 U.S. at 69–73; see supra notes 54–57 and accompanying text (discussing *X-Citement Video*'s use of precedent).

89. See Johnson, supra note 59, at 140 ("In neither [*Liparota* nor *X-Citement Video*], however, did the Court rely on grammar or usage.").

90. See supra note 32 and accompanying text (discussing this "innocence" aspect for *Liparota*); supra note 54 and accompanying text (discussing this "innocence" aspect for *X-Citement Video*).

91. See supra note 42 and accompanying text (noting *Staples* rejected strict liability in part because defendant was not otherwise on notice of illegality or wrongfulness of his conduct).

92. As noted, the statute at issue essentially provided a two-year sentence enhancement for those who had committed another enumerated felony. See 18 U.S.C. § 1028A(a)(1) (2006) ("Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years."). The facts in Flores-Figueroa's case demonstrate that he could not have been a wholly "innocent" actor as in *Liparota* or *X-Citement Video* since he was not contesting the underlying predicate convictions for entering the United States without inspection and for misusing immigration documents. See supra text accompanying notes 63–65 (discussing facts in Flores-Figueroa's case).

*Video*.<sup>93</sup> The government thus argued that the precedential force of the innocence distinction required the use of strict liability since this defendant was in fact on notice of the illegality of his conduct. Indeed, the government argued, Congress must have expected this type of interpretation at the time of passing the law and thus desired it as a matter of policy.<sup>94</sup>

However, despite the absence of a factor that had been critical in all of the mens rea precedent prior to *Flores-Figueroa*, the Court rejected the government’s argument and reached the same result as in prior cases, rejecting strict liability but based on an altogether different consideration: text.<sup>95</sup>

The Court’s interpretive choice and rhetoric evoked the language and spirit of the Model Penal Code’s approach, which is also more focused on text than on context. The Code offers a simple and strict “distributive default rule,” which would always extend an initial mens rea to every subsequent element in situations such as *Flores-Figueroa*.<sup>96</sup> Though the Court does not actually cite to this provision,<sup>97</sup> both the result and reasoning appear to be very much in sync with the Code’s approach.<sup>98</sup> By

93. Transcript of Oral Argument at 38–39, *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009) (No. 08-108) [hereinafter Transcript of Oral Argument, *Flores-Figueroa*] (“[A]ny conceivable argument that the other side can have about criminalizing innocent or inadvertent conduct disappears, because then at that point the defendant knows specifically that he is acting in manner that is contrary to law.”); Brief for the United States at 7–8, *Flores-Figueroa*, 129 S. Ct. 1886 (No. 08-108) [hereinafter Brief for United States, *Flores-Figueroa*], 2009 WL 191837, at \*7–\*8 (“And because ‘[t]he presumption in favor of scienter requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct,’ it provides no basis for construing . . . ‘knowingly’ . . . as extending all the way to the words ‘of another person.’” (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000))).

94. Transcript of Oral Argument, *Flores-Figueroa*, supra note 93, at 39 (“[The defendant] has the culpable state of mind to commit the underlying felony . . . [which] illustrates why Congress would have made the decision it did.”).

95. See supra Part I.B (discussing textual focus and result in *Flores-Figueroa*).

96. Section 2.02(4) of the Model Penal Code states:

Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

Model Penal Code § 2.02(4) (1985). This provision has come to be known as the “distributive default rule.” John Kaplan, Robert Weisberg & Guyora Binder, *Criminal Law* 223 (6th ed. 2008).

97. It is not clear why the Supreme Court did not cite to the Model Penal Code in *Flores-Figueroa*. The reluctance may be due to the fact that, unlike a number of state legislatures, “Congress has not . . . directed courts to follow the Model Penal Code’s approach in construing the reach of *mens rea* requirements in federal criminal statutes,” and so a direct cite to the Code’s rule rather than an indirect adoption might be seen as an improper usurpation of Congress’s role in setting federal criminal law. Brief for United States, *Flores-Figueroa*, supra note 93, at 44, 2009 WL 191837, at \*44.

98. See supra note 70 and accompanying text (presenting *Flores-Figueroa*’s holding as type of distributive default).

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.

Thus, in the context of initial mens rea terms that may or may not extend to subsequent factual elements, *Flores-Figueroa* signaled a shift toward a kind of distributive default. Though the result was by no means extraordinary, the rhetoric of the opinion and the mechanisms by which that result was reached suggested that initial mens rea terms would henceforth be extended to subsequent elements as an ordinary and routine matter. Because of the notorious carelessness with which Congress drafts statutes in general and mens rea terms in particular,<sup>99</sup> the decision promised to bring a significant change in approach to a significant area of the law.

## II. THE DOG THAT DIDN'T BARK: LOWER COURT RELUCTANCE TO FOLLOW *FLORES-FIGUEROA*'S NEW INTERPRETIVE APPROACH

Part II explores the lower court response to *Flores-Figueroa*. It finds that, even in the sphere of cases in which an initial mens rea is to be extended to a subsequent element—the exact situation in which *Flores-Figueroa* offered its rule—lower courts have been reluctant to follow the Court's logic. The Part proceeds by looking at three areas of federal criminal law where *Flores-Figueroa* could have made an impact and examines lower court cases interpreting statutes in each of these areas: offenses involving minors (Part II.A), firearm offenses (Part II.B), and immigration offenses (Part II.C).

### A. *Offenses Involving Minors: A Strict Liability Interpretation of 18 U.S.C. § 2423(a)*

Under 18 U.S.C. § 2423(a), “[a] person who *knowingly* transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution, . . . shall be fined . . . and imprisoned not less than 10 years or for life.”<sup>100</sup> The courts have grappled with how far this “knowingly” mens rea term extends and whether it reaches the transportee's minor status. If it does, knowledge of age is an element of the offense, preventing prosecutions for those defendants who could not be proven to have known that the victims were actually minors. The Seventh Circuit is the first and (so far) only circuit court to address this issue after *Flores-Figueroa*, doing so in *United States v. Cox*.<sup>101</sup>

99. See Kahan, Relevant, *supra* note 33, at 477 (“Congress is notoriously careless about defining the mental state element of criminal offenses.”).

100. 18 U.S.C. § 2423(a) (2006) (emphasis added).

101. 577 F.3d 833 (7th Cir. 2009).

In *Cox*, the defendant argued that the district court “erred when it did not require the Government to prove for purposes of the § 2423(a) charge that [he] knew that the person he transported was under the age of 18.”<sup>102</sup> In particular, he urged an interpretation whereby “the plain language of the statute makes knowledge of the transportee’s age an element of the offense, because the adverb ‘knowingly’ modifies not only the transitive verb ‘transports’ but also the verb’s direct object[,] . . . the phrase, ‘an individual who has not attained the age of 18 years.’”<sup>103</sup>

The *Cox* court admitted that:

Facing a grammatical construction similar to that which we consider here, the [*Flores-Figueroa*] Court concluded that “listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.”<sup>104</sup>

Yet the court ultimately concluded that under § 2423(a), “the Government need not prove that [the defendant] knew that [the transportee] was a minor.”<sup>105</sup>

How did *Cox* distinguish *Flores-Figueroa*? It noted that *Flores-Figueroa*’s introduction itself initially admits that “the inquiry into a sentence’s meaning is a contextual one,”<sup>106</sup> approvingly cited to Justice Alito’s concurrence,<sup>107</sup> and then summarily found such a special context present.<sup>108</sup> *Cox* did not, however, attempt to rebut the *Flores-Figueroa* Court’s observation that it could think of no 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, 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.<sup>109</sup>

*Cox* sided with four sister circuits that had, before *Flores-Figueroa*, found that knowledge of a victim’s minor status is not an element of § 2423(a).<sup>110</sup> Though these cases each at least briefly analyzed the text of

102. *Id.* at 834.

103. *Id.* at 836 (quoting 18 U.S.C. § 2423(a)).

104. *Id.* at 838 (quoting *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1890 (2009)).

105. *Id.*

106. *Id.* (citing *Flores-Figueroa*, 129 S. Ct. at 1891).

107. *Id.* (citing *Flores-Figueroa*, 129 S. Ct. at 1895–96 (Alito, J., concurring in part and concurring in the judgment)).

108. See *id.* (“We read the Court’s decision in *Flores-Figueroa* as consistent with, and perhaps calling for, the interpretation of § 2423(a) that we settle on here.”).

109. *Flores-Figueroa*, 129 S. Ct. at 1891.

110. See *Cox*, 577 F.3d at 836 (citing *United States v. Jones*, 471 F.3d 535, 538–39 (4th Cir. 2006); *United States v. Griffith*, 284 F.3d 338, 350–51 (2d Cir. 2002); *United States v. Taylor*, 239 F.3d 994, 996 (9th Cir. 2001); *United States v. Hamilton*, 456 F.2d 171, 173 (3d Cir. 1972)).

the statute,<sup>111</sup> *Cox* could not rely too heavily on this prior textual analysis in light of *Flores-Figueroa* and that case's similar "grammatical construction."<sup>112</sup> Instead, *Cox*, like the pre-*Flores-Figueroa* cases it cited approvingly, put heavy emphasis on the existence of another statute, 18 U.S.C. § 2421, that punished knowing transportation of *any* individual in interstate commerce for the purposes of prostitution.<sup>113</sup>

This other statute served two purposes in *Cox*'s analysis. First, "[g]iven that § 2421 already makes it unlawful to transport any individual in interstate commerce for the purpose of prostitution," the court held that as a matter of congressional intent, "the best reading of § 2423(a) is that the inclusion of age was intended to create an aggravating factor for penological purposes, in order to provide greater protection against the sexual exploitation of minors."<sup>114</sup>

Second, *Cox* emphasized that a defendant prosecuted under § 2423(a) could not claim full "innocence" based on not knowing the

111. See, e.g., *Jones*, 471 F.3d at 539 ("Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil."); *Taylor*, 239 F.3d at 997 ("A more natural reading of the statute, however, is that the requirement of knowledge applies to the defendant's conduct of transporting the person rather than to the age of the person transported.")

112. *Cox*, 577 F.3d at 838. The *Cox* court did briefly endorse the Fourth Circuit's conclusion in *Jones* that it would be a "grammatically absurd result" to "read the adverb 'knowingly' to modify not only the verb 'transports' but also the noun and the dependent clause." *Id.* at 836 (citing *Jones*, 471 F.3d at 539).

113. See 18 U.S.C. § 2421 (2006) ("Whoever knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution . . . shall be fined under this title or imprisoned not more than 10 years, or both."). Interestingly, § 2421 has itself been subject to interpretive dispute in the wake of *Flores-Figueroa*. In *United States v. Shim*, the Second Circuit had to decide whether "knowingly" extends to the interstate commerce element; the defendant argued that the jury had to "find not simply that she conspired to knowingly transport individuals with the intent that they engage in prostitution, but also that she knew they were transported in interstate commerce for that purpose." 584 F.3d 394, 395 (2d Cir. 2009) (per curiam). In a per curiam opinion, the court focused almost solely on *Flores-Figueroa*'s command that "[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Id.* (quoting *Flores-Figueroa*, 129 S. Ct. at 1890). In doing so, the court agreed with the defendant's interpretation and held that "knowingly" does in fact qualify "interstate commerce." *Id.* ("Applying this analysis, we 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."). This type of *Flores-Figueroa*-centered analysis contrasts starkly with the *Cox* court's reluctance to follow the *Flores-Figueroa* approach. See *infra* notes 120–125 and accompanying text (discussing *Cox*'s pre-*Flores-Figueroa* mindset). Moreover, other courts have disagreed with *Shim*'s analysis and have not applied "knowingly" to the interstate commerce element when interpreting similar statutes. See *United States v. Myers*, 430 F. App'x 812, 815–16 (11th Cir. 2011) (finding, without much discussion, "knowingly" in 18 U.S.C. § 1591(a)(1) does not extend to interstate commerce element).

114. *Cox*, 577 F.3d at 837 (citing *Taylor*, 239 F.3d at 997).

victim's age, as the defendant in *X-Citement Video* had, since the § 2423(a) defendant was already in violation of § 2421.<sup>115</sup> After all, "the conduct prohibited by § 2423(a) is already unlawful under § 2421, and a defendant is 'already on notice that he is committing a crime when he transports an individual of any age in interstate commerce for the purpose of prostitution.'" <sup>116</sup> Because the *X-Citement Video* decision was directed at "'awareness of the elements that define circumstances upon which criminality turns,'" <sup>117</sup> and because "age in § 2423(a) is not a factor that distinguishes criminal behavior from innocent conduct (as it was in the statute at issue in *X-Citement Video*)," <sup>118</sup> *Cox* found that "§ 2423(a) is best read as imposing a greater penalty on those persons who transport underage victims in interstate commerce for the purpose of prostitution."<sup>119</sup> *Cox*'s logic thus draws heavily on the pre-*Flores-Figueroa* circuit court cases interpreting § 2423(a) and on *X-Citement Video*'s line between conduct that is obviously illegal and conduct that is considered innocent but for a strict liability application.<sup>120</sup>

Thus, though *Flores-Figueroa* was decided only a couple of months before *Cox*<sup>121</sup> and though *Flores-Figueroa* signaled a shift in approach to interpreting an extremely similar grammatical structure,<sup>122</sup> *Cox* instead applied *X-Citement Video* and its predecessors' focus on whether the strict liability element ensnares "innocent" defendants.<sup>123</sup> The difference is not purely academic: In *Cox*'s case (and future cases in circuits that will follow the *Cox* approach),<sup>124</sup> the burden on the prosecutor in proving viola-

115. See *id.* ("In *X-Citement Video*, the Court held that 18 U.S.C. § 2252 . . . contains a scienter requirement for age given that 'the age of the performers is the crucial element separating legal innocence from wrongful conduct.'" (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72–73 (1994))).

116. *Id.* (quoting *United States v. Griffith*, 284 F.3d 338, 351 (2d Cir. 2002)).

117. *Jones*, 471 F.3d at 541 (quoting *United States v. Bostic*, 168 F.3d 718, 723 (4th Cir. 1999)).

118. *Cox*, 577 F.3d at 837.

119. *Id.*

120. See *supra* notes 54, 88, 90 and accompanying text (discussing how *X-Citement Video* put heavy emphasis on avoiding strict liability application that itself makes wholly innocent conduct illegal).

121. The Supreme Court decided *Flores-Figueroa* on May 4, 2009. The Seventh Circuit decided *Cox* on August 18, 2009.

122. See *supra* text accompanying note 95 (discussing analytical departure of *Flores-Figueroa*).

123. See *supra* notes 110–120 and accompanying text (discussing how *Cox* focuses on *X-Citement Video* and principles drawn from pre-*Flores-Figueroa* precedent).

124. Perhaps some courts are beginning, albeit slowly, to chip away at the consensus represented by *Cox*. In *United States v. Flint*, the Sixth Circuit reserved judgment on whether *Flores-Figueroa* had overruled earlier cases that found no knowledge-of-age requirement in § 2423(a) and found that even if it had, such knowledge was established in the case through direct evidence. 394 F. App'x 273, 279 (6th Cir. 2010) ("We need not decide the effect of *Flores-Figueroa* in the present case because, even if *Flint* is correct and the statute requires proof of his actual knowledge that Jane was a minor, the government has pointed to direct evidence of *Flint*'s knowledge . . ."). Such equivocation on this issue suggests that perhaps not all circuit courts will side with *Cox* in the wake of *Flores-Figueroa*.

tion of a statute that requires a minimum of ten years' imprisonment is significantly decreased.<sup>125</sup>

B. *Firearm Possession: How Lower Courts Have Not Extended "Knowingly" in 18 U.S.C. § 924(a)(2) to 18 U.S.C. § 922(g)(1)*

18 U.S.C. § 924(a)(2) provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."<sup>126</sup> Subsection (g) of § 922 punishes firearm possession by felons and reads, in relevant part:

It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.<sup>127</sup>

Courts have been forced to grapple with what exactly the "knowingly" in § 924(a)(2) means and how far it extends within § 922(g)(1).

Representative of such cases is the Fifth Circuit's decision in *United States v. Fulbright*.<sup>128</sup> In *Fulbright*, the defendant was convicted under § 924(a)(2) of knowingly violating § 922(g)(1), the felon-in-possession law.<sup>129</sup> He argued that his conviction "should be vacated because the word 'knowingly' in § 924(a)(2) applies not only to the possession of a firearm proscribed in § 922(g)(1) but also to the fact that such possession was 'in or affecting commerce.'"<sup>130</sup>

As the defendant acknowledged, "knowingly" appears in a different section of the statutory scheme (§ 924(a)(2)) than the substantive elements of the crime (§ 922(g)(1)). Though this complicates the *Flores-Figueroa* analysis, the verb that "knowingly" modifies in § 924(a)(2) is "violates" and the object of the sentence is "subsection . . . (g) . . . of section 922."<sup>131</sup> *Flores-Figueroa* notes that "where a transitive verb has an object,

125. See *United States v. Cox*, 577 F.3d 833, 834, 836 (7th Cir. 2009) (describing facts of *Cox*'s case and high stakes involved in prosecution under § 2423(a)). For a scathing and detailed critique of *Cox* and its departure from *Flores-Figueroa*, see generally Joseph Edmonds, Note, Replacing Context for Plain Meaning in *United States v. Cox*, 2010 BYU L. Rev. 1399. Though Edmonds focuses only on *Cox* and does not fully explicate the focus on innocence it borrows from pre-*Flores-Figueroa* Supreme Court decisions, his conclusion as to *Cox*'s correctness post-*Flores-Figueroa* is very much in line with that of this Note. See *id.* at 1423 ("The court in *Cox* had a chance to apply a rule of construction from *Flores-Figueroa* that would have simplified statutory interpretation, increased judicial predictability, and avoided numerous problems associated with judicial discretion. However, the court incorrectly followed its sister circuits . . .").

126. 18 U.S.C. § 924(a)(2) (2006) (emphasis added).

127. 18 U.S.C. § 922(g).

128. 348 F. App'x 949 (5th Cir. 2009) (per curiam).

129. *Id.* at 950.

130. *Id.* at 951 (quoting 18 U.S.C. §§ 922(g), 924(a)(2)).

131. 18 U.S.C. § 924(a)(2).

listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."<sup>132</sup> Thus, the defendant's argument went, the object of the statute is § 922(g) and "knowingly" must extend to that section. Indeed, "knowingly" would be a nullity if it did not extend to at least some aspect of § 922(g), since that is the only element for a § 924(a)(2) penalty.<sup>133</sup> As for how far "knowingly" extends within § 922(g)(1), *Flores-Figueroa* suggests that the adverb "knowingly" applies to the entire action. Thus, read somewhat broadly but logically by the defendant, *Flores-Figueroa*'s approach would find that "knowingly" extends to the entirety of the clause "possess *in or affecting commerce*, any firearm or ammunition,"<sup>134</sup> and knowledge of the interstate commerce nexus would be a required element of the crime.

The *Fulbright* court noted that it had previously rejected the extension of "knowingly" to the interstate commerce element in § 922(g), all in cases prior to *Flores-Figueroa*.<sup>135</sup> As to defendant's argument that *Flores-Figueroa* overruled this precedent, the court summarily dismissed such a claim by noting that "*Flores-Figueroa* involved a totally different statute, with different wording and structure."<sup>136</sup> The court noted that, "[i]n our view, whether *Flores-Figueroa* can be extended to overrule our section 924(a)(2) precedent is a matter for the Supreme Court, or our court *en banc*, and not this panel," thus leaving open the possibility of a different interpretation in the future.<sup>137</sup> In the meantime, the result was reaffirmed by the Fifth Circuit, in *United States v. Rose*<sup>138</sup> and *United States v.*

132. *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1890 (2009).

133. Reply Brief of Appellant at 12–13, *Fulbright*, 348 F. App'x 949 (No. 08-10985), 2009 WL 6445734, at \*12–\*13; see also 18 U.S.C. § 924(a)(2) (listing penalties for violating various subsections of § 922, including § 922(g)).

134. 18 U.S.C. § 922(g) (emphasis added).

135. *Fulbright*, 348 F. App'x at 951 ("We have rejected this contention many times."); see *United States v. Dancy*, 861 F.2d 77, 80–81 (5th Cir. 1988) (per curiam) (finding *Liparota* inapplicable and that pair of statutes did not require knowledge of interstate commerce nexus); see also *United States v. Cook*, 308 F. App'x 792, 793–94 (5th Cir. 2009) (per curiam) (summarily rejecting defendant's argument that knowledge of interstate commerce nexus was required based on precedent); *United States v. Schmidt*, 487 F.3d 253, 254–55 (5th Cir. 2007) (finding that *Staples* did not overrule *Dancy* and noting that "the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense" and that interstate commerce nexus did not constitute such fact (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998))).

136. *Fulbright*, 348 F. App'x at 951.

137. *Id.*

138. 587 F.3d 695, 705 (5th Cir. 2009) (per curiam) ("*Dancy* remains good law in this circuit."). The *Rose* court's analysis on this issue might be *dicta* since *Rose* was actually sentenced under § 924(e)(1), which provides no *mens rea* requirement, rather than § 924(a)(2), which has a "knowingly" requirement. *Id.* However, *Rose* reiterated that *Dancy* was still good law, *id.*, and noted in a footnote that, "[e]ven assuming *arguendo* that the 'knowingly' requirement in § 924(a)(2) applied throughout that section, there would be no corresponding impact on the elements of a crime listed in § 922(g)(1)." *Id.* at 706 n.9

*Peters*,<sup>139</sup> and the Eleventh Circuit has reached a similar result in a similar fashion.<sup>140</sup>

Thus, most of the post-*Flores-Figueroa* lower court cases dismissed a knowledge requirement for the interstate commerce element by citing to previous cases and noting briefly that *Flores-Figueroa* did not overrule them. The Eighth Circuit recently, however, did provide a substantive discussion for why it rejected a distributive default under *Flores-Figueroa*. In *United States v. Thompson*, the court held that “[t]he interstate commerce nexus in section 922(g) merely provides the basis for federal jurisdiction and knowledge of this element is [thus] not required.”<sup>141</sup>

This argument, that “jurisdictional” facts or elements do not require a mens rea and that an interstate commerce nexus is a jurisdictional element, has been implicit in many of the lower court cases that found no knowledge requirement for the interstate commerce nexus.<sup>142</sup> Because of its use in these cases, it is worth briefly fleshing out the argument.

The key Supreme Court case establishing a special rule for jurisdictional elements is *United States v. Feola*.<sup>143</sup> The Court addressed a statute that criminalizes the assault of a federal officer while in the performance of his official duties<sup>144</sup> and found “that scienter with regard to a factual element conferring federal jurisdiction is not necessary for a conviction”<sup>145</sup> as a matter of congressional intent.<sup>146</sup> Importantly, however, the

(citing *Fulbright*, 348 F. App’x at 951). Nonetheless, *Rose* included a cautionary note, similar to the one in *Dancy*, that its strict liability interpretation might not truly withstand *Flores-Figueroa* in the future. *Id.* at 706 (“We will overrule a prior panel opinion in response to an intervening decision of the Supreme Court only if ‘such overruling is unequivocally directed.’ . . . [W]e are bound to follow the prior panel opinion in *Dancy*.” (quoting *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295, 300 (5th Cir. 2008))).

139. 364 F. App’x 897, 898 (5th Cir. 2010) (finding *Rose*’s interpretation of *Dancy* was not dicta, but binding precedent establishing “‘knowingly’ requirement in Section 924(a)(2) did not extend to Section 922(g)(1)” (citing *United States v. Bueno*, 585 F.3d 847, 850 n.3 (5th Cir. 2009))). *Dancy* was also applied in a slightly different gun-possession context in *United States v. Butler*, 637 F.3d 519, 523–25 (5th Cir. 2011). In *Butler*, the defendant was a dishonorably discharged soldier who, like felons, was prohibited from possessing a weapon under § 922(g). *Id.* at 523. Though the defendant argued that his lack of knowledge about his prohibited status precluded liability, the court found no such knowledge requirement as to prohibited status in the statute. *Id.* at 524–25.

140. *United States v. Coney*, 349 F. App’x 497, 498 (11th Cir. 2009) (“[Defendant]’s suggestion that *Flores-Figueroa* effectively overrules this precedent misses the mark. That case did not analyze a conviction under § 922(g)(1); rather, a different statute was involved.”).

141. 365 F. App’x 42, 43 (8th Cir. 2010) (citations omitted).

142. See, e.g., *United States v. Castillo-Rivera*, 244 F.3d 1020, 1023 (9th Cir. 2001) (“We hold that the commerce nexus requirement of § 922(g) is merely a jurisdictional basis.” (internal quotation marks omitted)).

143. 420 U.S. 671 (1975).

144. 18 U.S.C. § 111 (2006).

145. *Uiselt*, supra note 35, at 347 (citing *Feola*, 420 U.S. at 676).

146. The enterprise in *Feola* was based almost entirely on finding the interpretation that best realized Congress’s purpose in passing the statute, rather than on the text of the statute itself. See *Feola*, 420 U.S. at 684 (“[I]n order to effectuate the congressional purpose of

statute "contained no express mens rea language relating to the 'federal officer' element of the crime."<sup>147</sup> Instead, the main issue was "whether an independent mens rea requirement should be read into the federal officer element of the crime."<sup>148</sup>

The other major Supreme Court case applying the jurisdictional element rule was *United States v. Yermian*.<sup>149</sup> In *Yermian*, the Supreme Court reiterated that "[j]urisdictional language need not contain the same culpability requirement as other elements of the offense."<sup>150</sup> However, the statute at issue, which punished false statements made within the jurisdiction of a federal agency, placed the mens rea term *after* the jurisdictional language.<sup>151</sup> Indeed, *Yermian* emphasized that, because of the order of the wording and the separate clause for the jurisdictional language, "[a]ny 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."<sup>152</sup>

Though both *Feola* and *Yermian* use language suggesting that jurisdictional elements categorically do not require a mens rea, the texts at issue in those cases themselves either strongly counseled against the application of any mens rea term as to the "jurisdictional" element or were silent on the issue and required an exploration of congressional intent. The current state of the jurisdictional fact rule is questionable: One circuit has already forcefully suggested "that the Government *must* prove jurisdictional elements in addition to non-jurisdictional ones."<sup>153</sup>

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*according maximum protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts, § 111 cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer.*" (emphasis added)).

147. Jorge C. Gonzalez, Note, Punishing the Causer as the Principal: Mens Rea and the Interstate Transportation Element of the National Stolen Property Act, 38 San Diego L. Rev. 629, 642 (2001) (citing 18 U.S.C. § 111).

148. *Id.*

149. 468 U.S. 63 (1984).

150. *Id.* at 68 (emphasis added). Like *Feola*, *Yermian* found that extending a mens rea to the "jurisdictional element" in the statute would be contrary to Congress's purpose in passing the statute. See *id.* ("The statutory language requiring that knowingly false statements be made 'in any matter within the jurisdiction of any department or agency of the United States' is a jurisdictional requirement. Its *primary purpose* is to identify the factor that makes the false statement an appropriate subject for federal concern." (emphasis added) (quoting 18 U.S.C. § 1001)).

151. See 18 U.S.C. § 1001 ("[W]hoever, in any matter within the jurisdiction of . . . [any department or agency] of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined . . . , imprisoned not more than 5 years . . . or both.").

152. *Yermian*, 468 U.S. at 69.

153. Uiselt, *supra* note 35, at 340 (emphasis added) (discussing *United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997), which held "that [the Government] must prove . . . that the defendant was aware of the facts establishing the required link between

Thus, though the lower courts make heavy use of the jurisdictional element rule to justify not applying the “knowingly” mens rea to the interstate commerce nexus in § 922(g)(1), the applicability of the rule to the situation here is questionable. *Feola* and *Yermian*, the foundational cases for the rule, involved statutes whose text either lacked a mens rea entirely or whose grammatical structure made clear that the mens rea did not apply at all to the jurisdictional element.<sup>154</sup> No such situation appears to be present in the felon-in-possession context.<sup>155</sup>

More importantly, the compatibility of the “jurisdictional” elements approach with the text-based distributive default suggested by *Flores-Figueroa* is uncertain, and this uncertainty significantly complicates the situation in a way that is not explicitly addressed in these cases. This tension is especially pronounced considering that *Flores-Figueroa* found no possible context where an initial mens rea would not extend to every subsequent element and applied this ordinary textual rule despite concerns about congressional intent and enforceability.<sup>156</sup>

C. *Immigration Offenses: Knowledge of Prior Felony Conviction Under 8 U.S.C. § 1327*

Title 8 U.S.C. § 1327 provides that:

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the wetland and waters of the United States” (footnote omitted)); see also id. at 349 (“The Fourth Circuit remains the only circuit that requires *mens rea* for jurisdictional elements.”).

154. See supra notes 143–153 and accompanying text (discussing how jurisdictional element rule in *Feola* and *Yermian* may just be dicta).

155. See supra notes 126–134 and accompanying text (discussing language of two statutes in conjunction). For another example of how lower courts have used the jurisdictional element rule to unconvincingly distinguish *Flores-Figueroa* from the statute at issue, see *United States v. Rehak*, 589 F.3d 965 (8th Cir. 2009). In *Rehak*, the theft-of-government-property statute at issue provided that “[w]hoever . . . steals . . . or knowingly converts to his use or the use of another . . . any . . . money . . . of the United States or of any department or agency thereof” shall be guilty of an offense against the United States. 18 U.S.C. § 641. The defendant contended that, as per *Flores-Figueroa*, “knowingly” extended to “money . . . of the United States” and thus required knowledge that “the United States owned the money at the time of the wrongful taking.” *Rehak*, 589 F.3d at 974. Citing only cases from the 1970s, see, e.g., *United States v. Denmon*, 483 F.2d 1093, 1095 (8th Cir. 1973), the court found that “[c]ourts 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.” *Rehak*, 589 F.3d at 974. Thus, “the government need not allege or prove that the defendants knew the property was the property of the United States.” Id.; accord *United States v. Jeffery*, 631 F.3d 669, 675–78 (4th Cir. 2011) (“Jeffery argues that knowledge that the property belonged to the United States is an element of § 641 . . . . We disagree.”). As in the felon-in-possession law examples, *Rehak* shows a willingness to minimize the scope of *Flores-Figueroa* based on continued use of the jurisdictional element rule. On the other hand, see *United States v. Shim*, 584 F.3d 394 (2d Cir. 2009), for an example of a rare case where the lower court did in fact focus on *Flores-Figueroa* and extended “knowingly” to the interstate commerce element. See supra note 113 (discussing *Shim*).

156. See supra notes 73–74 and accompanying text (noting *Flores-Figueroa* elevated distributive default over congressional concerns about enforceability).

Any person who knowingly aids or assists any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) . . . to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined . . . , or imprisoned not more than 10 years, or both.<sup>157</sup>

In turn, § 1182(a)(2) reads in relevant part: "any alien convicted of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , is inadmissible."<sup>158</sup>

In *United States v. Flores-Garcia*, the Ninth Circuit tackled the question of whether "a complete lack of knowledge concerning the alien's felony record" barred conviction under the statute.<sup>159</sup> The defendant in *Flores-Garcia* admitted aiding and assisting an undocumented alien to enter the United States.<sup>160</sup> The undocumented alien had previously been convicted of narcotics possession, but the defendant asserted, and the government did not dispute, that he had no knowledge concerning the alien's felony record.<sup>161</sup> The court, siding with the Second Circuit's position on the same issue, found that "the defendant's knowledge of an alien's prior felony conviction is not an element of section 1327."<sup>162</sup>

The court claimed to arrive at its result by ascertaining the statute's plain meaning, but it explicitly considered the statute's "object and policy" as integral indicia of that plain meaning.<sup>163</sup> The statutory history of § 1327 was, according to the court, ambiguous, and it dismissed statements by congressional sponsors suggesting that the statute was meant to target those "who actually recruit aliens in foreign countries for the purpose of dealing drugs in the United States."<sup>164</sup>

Instead of relying on text or legislative history, the court focused on three factors. First, as an inferential matter, the "variety of aliens covered under section 1327 suggest[ed] that Congress was concerned primarily with the threat posed by the alien illegally entering the United States" and thus cared little about the defendant's knowledge of the threat.<sup>165</sup> Second, because 8 U.S.C. § 1324 already represented a baseline statute

157. 8 U.S.C. § 1327.

158. 8 U.S.C. § 1182(a)(2).

159. 198 F.3d 1119, 1121 (9th Cir. 2000).

160. *Id.*

161. *Id.*

162. *Id.* (citing *United States v. Figueroa*, 165 F.3d 111 (2d Cir. 1998)).

163. *Id.*

164. *Id.* at 1123 (quoting 133 Cong. Rec. 8772 (1987) (statement of Sen. Lawton Chiles)).

165. *Id.* at 1122. The court noted difficulties that would arise in enforcement of § 1327 if the term "knowingly" applied to the basis of the alien's inadmissibility. See *id.* ("If the defendant's knowledge of the reason why an alien is inadmissible is an element of section 1327, the government would be required to prove that the defendant knew what was in the mind of a consular officer, the Attorney General, or the Secretary of State.").

governing the entry of illegal aliens and alien smuggling,<sup>166</sup> § 1327 should be understood “to provide enhanced penalties for those who aid and assist particular classes of aliens to enter illegally the United States” as a kind of “aggravated version[]” of § 1324.<sup>167</sup> Third, the court saw *X-Citement Video* as the key precedent for its position, reading that decision to only require “some mental state for each statutory circumstance that would make criminal ‘otherwise innocent conduct.’”<sup>168</sup> Expanding on this point, *Flores-Garcia* interpreted *X-Citement Video* to state the rule that, “[p]rovided the defendant recognizes he is doing something culpable, . . . he need not be aware of the particular circumstances that result in greater punishment”<sup>169</sup> and thus “[c]riminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful.”<sup>170</sup> Though *Flores-Garcia* was decided before *Flores-Figueroa*, it has been forcefully reaffirmed after *Flores-Figueroa* by the Eleventh Circuit.<sup>171</sup>

*Flores-Garcia* appears to be in some significant tension with the Court’s approach in *Flores-Figueroa*. Applying “‘knowingly’ . . . to all the subsequently listed elements of the crime,”<sup>172</sup> as *Flores-Figueroa* did in a very similar grammatical context, would extend the mens rea term past the verbs, “aids or assists,” and to the fact that the alien was inadmissible under § 1182(a)(2). Moreover, the analytical focus of *Flores-Garcia* and its progeny is very different from that of *Flores-Figueroa*. Whereas the former sees enforceability as important to realizing congressional intent,<sup>173</sup> the latter notes that “concerns about practical enforceability are insufficient to outweigh the clarity of the text.”<sup>174</sup> And whereas *Flores-Garcia* used *X-Citement Video* to emphasize that a defendant on notice of the underlying criminality of his action need not have any mens rea with regard to aggravating enhancements,<sup>175</sup> *Flores-Figueroa* focused solely on a text- and grammar-based distributive default and ignored the fact that the defendant there *was* on notice of the illegality of his underlying conduct.<sup>176</sup> The

166. See 8 U.S.C. § 1324 (2006) (providing penalties for entry of illegal aliens and alien smuggling).

167. *Flores-Garcia*, 198 F.3d at 1122.

168. *Id.* at 1121 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

169. *Id.* at 1121–22.

170. *Id.* at 1122 (quoting *X-Citement Video*, 513 U.S. at 73 n.3).

171. See *United States v. Lopez*, 590 F.3d 1238, 1254–55 (11th Cir. 2009) (citing to and reaffirming reasoning of *Flores-Garcia*).

172. *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1890 (2009).

173. See *supra* note 165 (discussing *Flores-Garcia*’s reference to enforceability as part of congressional intent).

174. *Flores-Figueroa*, 129 S. Ct. at 1893.

175. See *supra* notes 166–170 and accompanying text (discussing focus on innocence in *Flores-Garcia* and its reading of *X-Citement Video*).

176. See *supra* notes 90–92 and accompanying text (discussing notable absence of *X-Citement Video*’s notice-of-illegality element from *Flores-Figueroa*).

textual similarity of the statutes makes these differences in approach only starker.<sup>177</sup>

Thus, if *Flores-Figueroa* signaled a possible new approach to mens rea distribution in federal criminal law, a close examination of lower court mens rea distributive decisions shows a reluctance to apply this approach to analogous statutes. This reluctance appears in a variety of contexts, including statutes targeting sex trafficking of minors, firearm possession by felons, and alien smuggling. The tension between *Flores-Figueroa* and its lower court reception leaves the mens rea distribution arena in federal criminal law in an uncertain state.

### III. TO BE CONTINUED (AND REAFFIRMED?): THE FUTURE OF MENS REA DISTRIBUTION

Part III reflects on the lower court resistance to *Flores-Figueroa* and explores solutions to the situation. Part III.A explores reasons *why* the lower courts may have been reluctant to extend the *Flores-Figueroa* approach to other contexts and suggests that concerns with enforceability are central to the lower court reaction. Part III.B suggests that *Flores-Figueroa* might have to be reaffirmed in other federal criminal law contexts if it is truly meant to signal a new approach to mens rea interpretation and distribution. Part III.C considers whether the lower court reaction itself suggests that *Flores-Figueroa* and the distributive default should be narrowed by the Court to that case’s essential holding and facts rather than applied to other contexts but ultimately concludes that the *Flores-Figueroa* approach is one that deserves to prevail.

#### A. *Strict Liability Lives: Why the Lower Courts Have Not Extended the Flores-Figueroa Approach*

As discussed in Part II, lower courts have been reluctant to apply *Flores-Figueroa* in analogous contexts. In the sex-trafficking-of-minors and alien-smuggling contexts, lower courts have instead endorsed the *X-Citement Video* line between wholly innocent actors and those already on notice of the underlying illegality of their actions to allow strict liability applications.<sup>178</sup> One might infer that these courts strongly believe that the *X-Citement Video* rule, which seeks to protect the wholly innocent from being ensnared by strict liability elements, is a rule of fundamental fairness, perhaps of constitutional dimensions.<sup>179</sup> This reading misses the

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177. Compare 8 U.S.C. § 1327 (2006) (applying criminal liability to “[a]ny person who knowingly aids or assists any alien inadmissible . . . to enter the United States”), with 18 U.S.C. § 1028A(a)(1) (2006) (applying criminal liability to whomever “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person”).

178. See *supra* Part II.A, C (analyzing lower court decisions interpreting sex-trafficking-of-minors and alien-smuggling statutes).

179. See *supra* note 54 (discussing *X-Citement Video* and principle of “constitutional innocence”); *supra* note 59 and accompanying text (suggesting *X-Citement Video* created

mark, however, since these lower courts have used the “innocence” rule not as a shield to protect the potentially “innocent” as *X-Citement Video* and *Liparota* did, but instead as a sword to ease the burden on prosecutors in adding punishment to those wrongdoers who had already violated an underlying or predicate criminal law.<sup>180</sup> The use of the jurisdictional element rule to endorse strict liability applications in the felon-in-possession context also represents such a move, easing the evidentiary burden on prosecutors rather than protecting any notion of “innocence.”<sup>181</sup>

To some degree, the lower court reaction might reflect a desire to shift the informational burden to those already knowingly committing underlying illegal conduct. This shift might encourage such wrongdoers to make greater efforts to ensure certain facts do not exist that would trigger an enhancement, since simple ignorance will not protect them from additional liability.<sup>182</sup> Such reasoning is also a traditional justification for the felony murder rule,<sup>183</sup> though this justification has been criticized heavily in the felony murder context and in criminal law more generally.<sup>184</sup>

The reluctance of the lower courts to apply *Flores-Figueroa* in analogous contexts and their use of the “innocence” rule and jurisdictional element rule to endorse strict liability might also evidence a tangible concern with enforceability and with avoiding interpretations that overly burden prosecutors.<sup>185</sup> Though *Flores-Figueroa* found that “concerns about practical enforceability are insufficient to outweigh the clarity of the text,”<sup>186</sup> this bold statement perhaps underestimates judicial reluctance to make conviction significantly more difficult for a variety of serious offenses. Indeed, the fact that Justice Alito, considered one of the more

new substantive canon of construction that, for sake of fairness, allowed only strict liability interpretations that protected “innocence”).

180. Defendants prosecuted under § 2423(a) for sex trafficking of a minor are already liable under § 2421 for sex trafficking of anyone. See *supra* notes 113–119 and accompanying text (discussing underlying liability in § 2423(a) context). Defendants prosecuted under § 1327 are already liable under § 1324, which punishes alien smuggling regardless of the alien’s prior criminal record. See *supra* notes 166–167 and accompanying text (discussing underlying liability in § 1327 context).

181. See *supra* Part II.B (analyzing lower court decisions interpreting felon-in-possession statute and their endorsement of strict liability).

182. See Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 Va. L. Rev. 415, 451–57 (2007) (arguing strict liability elements may be partially justified for their information- and cost-shifting functions).

183. See *infra* note 207 (discussing felony murder rule).

184. See *infra* notes 208–209 (chronicling criticism of strict liability); see also Hamdani, *supra* note 182, at 451–57 (concluding that better alternatives, such as less demanding mens rea requirement, would serve same informational goals as strict liability without high fairness costs).

185. Indeed, this concern with enforceability was implicit in *Flores-Garcia*. See *supra* notes 165, 173 and accompanying text (discussing *Flores-Garcia*’s concern with enforceability).

186. *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1893 (2009).

prosecution-friendly Justices on the Court,<sup>187</sup> wrote the cautionary concurrence trying to limit the opinion's language is indicative of how crucial this implicit aspect of the decision is.

Concern with whether prosecutors will be able to successfully enforce the laws is thus at least one significant implicit concern in the lower court resistance to *Flores-Figueroa*. Considering the relative novelty of *Flores-Figueroa* and its distributive default, lower courts might be unwilling to extend *Flores-Figueroa* to analogous contexts without further reaffirmation of the rule when such extension entails a significantly more difficult burden of proof for prosecutors in proving the commission of evils that Congress has sought to prohibit.<sup>188</sup>

### B. Reaffirming *Flores-Figueroa* in Other Federal Criminal Law Contexts

*Flores-Figueroa* was a unanimous decision, despite Justice Alito's cautionary concurrence, suggesting that the distributive default is no passing fad to be swept away by a future Court.<sup>189</sup> On the other hand, though it is not mentioned in the opinion, the particular immigration context of *Flores-Figueroa* may have been at least somewhat special. The Justices could implicitly have been responding to what many in the community saw as widespread prosecutorial abuse under the identity theft enhancement, as "[p]rosecutors used the threat of the two-year mandatory sentence provisions of § 1028A(a)(1) to secure rapid pre-trial settlements and the expeditious removal of defendants from the territory of the United States."<sup>190</sup>

187. See Adam Liptak, Sotomayor Guides Court's Liberal Wing, *N.Y. Times*, Dec. 28, 2010, at A10 (stating Justice Alito consistently sides with prosecutors against defendants and suggesting he has become ideological "enforcer[]" for prosecutorial side).

188. Indeed, this wait-and-see attitude is evident in some of the lower court decisions that did not apply *Flores-Figueroa* in other criminal law contexts. See *supra* notes 137–138 and accompanying text (discussing how lower courts have considered application of *Flores-Figueroa* to other federal criminal law contexts a question for Supreme Court).

189. The Court's opinion, finding a distributive default based on textual and grammatical considerations, was written by Justice Breyer, hardly a firm textualist in the Justice Scalia camp. See Julia K. Stronks, *Breyer v. Scalia: Will Alito Be an Activist or a Textualist?*, *Seattle Times* (Jan. 15, 2006, 12:00 AM), [http://seattletimes.nwsourc.com/html/opinion/2002738527\\_sundaystronks15.html](http://seattletimes.nwsourc.com/html/opinion/2002738527_sundaystronks15.html) (on file with the *Columbia Law Review*) ("Breyer lays out an argument that many say stands in opposition to the 'textualist' perspective of Justice Antonin Scalia."). Thus, the text-based distributive default seems to have surpassed any typical ideological divide on the Court and garnered unanimous support from the Justices.

190. Raymond J. Toney, *Flores-Figueroa v. United States: US Supreme Court Attempts to Clarify Mens Rea*, 13 *Int'l J. Evidence & Proof* 330, 335 (2009) (citing P.R. Moyers, *Butchering Statutes: The Postville Raid and the Misrepresentation of Federal Criminal Law*, 32 *Seattle U. L. Rev.* 651 (2009)). Indeed, the practices of prosecutors, including mass raids on private facilities where suspected illegal immigrants were working, may have been an implicit source of concern for at least some of the Justices. See Adam Liptak & Julia Preston, *Justices Limit Use of Identity Theft Law in Immigration Cases*, *N.Y. Times*, May 5, 2009, at A17 (noting connection between decision and outrage over prosecutorial tactics and immigration raids). A number of the amicus briefs submitted to the court on behalf of the petitioner raised the issue of the raids and of prosecutorial abuse. See, e.g.,

Because of this somewhat special context of *Flores-Figueroa*, the decision might need to be reaffirmed forcefully in other more mundane contexts for lower courts to take notice of the new textualist approach. Indeed, a Supreme Court decision recognizing the distributive default in one of the statutes discussed in Part II would send a strong message that enforceability and doctrine take a back seat to textual clarity in the initial mens rea extension context and that *Flores-Figueroa* did in fact signal a new approach.<sup>191</sup>

Such a follow-up opinion, perhaps even a summary reversal of one of the lower court cases allowing for strict liability in a mens rea distribution context, would be extremely difficult to ignore and would provide the guidance hesitant lower courts might require to extend *Flores-Figueroa*.<sup>192</sup> Such a decision in the felon-in-possession context would particularly send a message that the distributive default is something the Court is serious about, since the extension of a mens rea term in § 924(a)(2) to the elements of § 922(g)(1) is arguably a slight, yet logical, extension of *Flores-Figueroa*'s distributive default approach rather than just a simple application.<sup>193</sup>

### C. Narrowing the "Default" in "Distributive Default": Reconciling *Flores-Figueroa* with the Lower Court Reaction?

Of course, the Court does not have to summarily reaffirm *Flores-Figueroa* in other statutory contexts. Like any adjudicatory body whose language gets ahead of the immediate controversy, the Court may in the future narrow the *Flores-Figueroa* holding to that particular statutory context and may simply discount the broadly stated distributive default approach as dicta.<sup>194</sup> Indeed, if the Court was implicitly concerned with prosecutorial abuse in the § 1028A(a)(1) immigration enforcement con-

Brief of Amici Curiae Advocates for Human Rights, et al. in Support of Petitioner at 21–22, *Flores-Figueroa*, 129 S. Ct. 1886 (No. 08-108) (arguing prosecution under aggravated identity theft statute can be means for prosecution to bypass established immigration procedures for false identification convictions); Brief for the Mexican American Legal Defense and Educational Fund and the United States Hispanic Chamber of Commerce as Amici Curiae on Behalf of Petitioner at 3, *Flores-Figueroa*, 129 S. Ct. 1886 (No. 08-108) (arguing that raids under statute were predominately harming Hispanic businesses and had dampening effect on overall U.S. economy).

191. See *supra* Part III.A (discussing how and why lower courts have resisted *Flores-Figueroa*'s mandate).

192. See *supra* notes 137–140, 188 and accompanying text (discussing wait-and-see approach by some lower courts).

193. See *supra* notes 129–134 and accompanying text (discussing application and/or extension of *Flores-Figueroa* to felon-in-possession context).

194. For an excellent discussion on this process of retroactively deciding what was the holding and what was the dictum in a case whose language might constrain a later court in an analogous factual situation, see Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. Legal Educ. 431, 432 (1989) ("The distinction between holding and dictum concerns what the first case *establishes*, as opposed to what its opinion may say that is not established.").

text under a strict liability interpretation,<sup>195</sup> this concern might be less salient in contexts such as sex trafficking of minors, felon-in-possession offenses, and alien smuggling. The lower court reluctance to extend the distributive default to these analogous statutes suggests that a very different problem is present there: A non-strict-liability application would make the evidentiary burden of prosecutors *too difficult* rather than too easy.<sup>196</sup>

In light of this resistance, it might be worth narrowing the *Flores-Figueroa* distributive default so that it does not automatically apply to other contexts, as Justice Alito proposed in his concurrence (i.e., making the distributive "default" only a default in the situations where the Court has found it to be so and letting other statutes be decided based on their particular context).<sup>197</sup>

Though this solution might be a tempting response to the lower court resistance, it is one that does not adequately take into account *Flores-Figueroa's* explicit and implicit justifications. The *Flores-Figueroa* Court was free to again reaffirm its predecessors' line between wholly innocent actors and those aware of their underlying illegal conduct and to use it to endorse strict liability.<sup>198</sup> It was also free to adopt the context-specific caution discussed in Justice Alito's concurrence.<sup>199</sup> Ultimately, however, the Court chose neither of these two paths and instead found that courts should read an initial mens rea term as "applying . . . to each [subsequent] element"<sup>200</sup> and noted that it could think of absolutely no "example of a sentence that . . . would lead the hearer to believe that the word 'knowingly' modifies only a transitive verb without the full object."<sup>201</sup> This statement was no simple rhetoric or dicta; the Court seemed to forcefully endorse a distributive default.<sup>202</sup>

Some have criticized the decision for its abrupt shift in approach. One commentator lamented that the textual focus of *Flores-Figueroa* reduces the flexibility prior courts had to go beyond the text of the statute and to import developed criminal law principles.<sup>203</sup>

195. See *supra* Part III.B (discussing concerns with prosecutorial abuse in immigration and aggravated-identity-theft context).

196. See *supra* Part III.A (discussing lower court concern with imposing burden on prosecutors that would make enforceability too difficult in these federal criminal law contexts).

197. See *supra* notes 75–81 and accompanying text (discussing Justice Alito's cautionary concurrence in *Flores-Figueroa*).

198. See *supra* notes 90–91 and accompanying text (discussing this "innocence" line in cases such as *X-Citement Video*).

199. See *supra* notes 75–81 and accompanying text (discussing Justice Alito's concurrence).

200. *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1891 (2009).

201. *Id.*

202. See *supra* notes 96–98 and accompanying text (noting *Flores-Figueroa* establishes distributive default).

203. In particular, Professor Eric Johnson sees the decision as a small but significant part of a much broader Supreme Court shift from (1) an approach centered on "doctrinal

The Court, however, had good reasons for choosing such a default, as the *Flores-Figueroa* approach has a number of significant advantages as a matter of both doctrine and policy, including: (1) greater clarity in criminal law interpretation; (2) avoidance of the incoherent focus on entire innocence; (3) empowerment of jury fact-finding in a manner that connects with the Court's recent Sixth Amendment jurisprudence; (4) compliance with the spirit of the long-standing rule of lenity; and (5) maintenance of the traditional distaste for strict liability criminal law applications that dates back to *Morissette*.

The distributive default promulgated in *Flores-Figueroa* paralleled the interpretive choice of the Model Penal Code, which was an attempt to rationalize and eliminate "pervasive ambiguity" in criminal law.<sup>204</sup> The decision thus added clarity to the interpretive enterprise in what had been a notoriously muddled area of the criminal law and provided much-needed guidance to courts, citizens, and Congress in future drafting decisions.

Indeed, within its sphere (i.e., statutes with an initial mens rea term that may or may not extend to a subsequent factual element), *Flores-Figueroa* brings a high degree of clarity to the interpretive enterprise rather than simply representing an ad hoc focus on "the text of the latest piece of legislation."<sup>205</sup> In finding "clear guidance in a grammatical structure that until then had been thought . . . to be ambiguous," the Court established a clear rule where previously there had been a somewhat context-specific weighing of doctrine that left courts free to pick and choose which "substantive, criminal law background principles" they wanted to use in deciding how far to extend an initial mens rea.<sup>206</sup>

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systematicity" and "substantive, criminal law background principles" to (2) an approach entirely focused on "the text of the latest piece of legislation." Johnson, *supra* note 59, at 126–27. The new text-based approach is marked by "a readiness to find clear answers to interpretive questions in the statute's text" and "a preference for resolving unanswered questions without the help of criminal law doctrine." *Id.* at 138. Johnson criticizes this shift on general grounds because there might be situations in which doctrine is needed to clarify a truly ambiguous text. See *id.* at 143 (presenting critique). Johnson's critique, based on hypothetical interpretational issues that simply could not be answered by text, is outside the scope of this Note. In the narrow arena of initial mens rea terms and distribution throughout subsequent statutory elements, the Court *has* clearly found a textual approach feasible. See *supra* Part I.B (discussing *Flores-Figueroa's* analytical departure from prior cases and its new textual approach). In this arena, Johnson's critique, which conceives of the new approach as *less* clear and stable than its predecessor because it only focuses on the individual text at issue rather than a built-up body of criminal law principles, largely misses the mark.

204. Model Penal Code § 2.02(4) explanatory note (1985) ("Subsection (4) is addressed to a pervasive ambiguity in definitions of offenses that include a culpability requirement, namely, that it is often difficult to determine how many of the elements of the offense the requirement is meant to modify.").

205. Johnson, *supra* note 59, at 126–27.

206. *Id.* at 126–27, 140.

The distributive default in *Flores-Figueroa* also avoided using the often incoherent precedential focus on whether the actor was wholly "innocent" to endorse strict liability applications.<sup>207</sup> After all, a comparable degree of inequity exists in (1) punishing a person who, but for the strict liability application to the element, would have received zero punishment (the "innocent" case protected by *X-Citement Video*) and (2) punishing with more years of imprisonment a person who, but for the strict liability application to the element, would still have received substantial punishment.<sup>208</sup> By using a distributive default grounded in text rather than the precedential "innocence" principle, the Court avoided turning a ques-

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207. *X-Citement Video*, *Staples*, and *Liparota* all used the line between wholly innocent and obviously noninnocent underlying conduct to avoid strict liability and prevent the respective defendants from being ensnared by the purported lack of a mens rea for the element in question. See supra notes 27–59 and accompanying text (discussing results and reasoning in those cases). The controversy in *Flores-Figueroa* risked turning this shield for "wholly" innocent defendants into a sword directed against defendants who were already on notice of their underlying illegal conduct. See supra note 92 and accompanying text (discussing how Flores-Figueroa's underlying conduct was obviously noninnocent). A particularly dramatic example of using such a "sword" to condemn for further crimes defendants who are already culpable for others appears in state felony murder statutes, which hold a defendant who is already guilty of certain felonies liable for murder if a killing occurs during commission of the felony, even if he did not have intent to kill. See Aya Gruber, A Distributive Theory of Criminal Law, 52 Wm. & Mary L. Rev. 1, 24–34 (2010) (defining and discussing felony murder rule). The offensive use of the *X-Citement Video* "innocence" line against a defendant, whereby an already guilty and on-notice defendant can be strictly liable for any further crimes or enhancements, has been heavily criticized in the literature, as has any strict liability application more generally. See, e.g., Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 Am. U. L. Rev. 313, 316 (2003) ("The notion of strict liability [elements] has generally been considered an anathema in the criminal law . . ."); see also, e.g., Guyora Binder, The Culpability of Felony Murder, 83 Notre Dame L. Rev. 965, 981 (2008) ("[C]riminal law theorists have almost unanimously condemned felony murder as a form of strict liability, imposing undeserved punishment for causing death without culpability."). Although the *Flores-Figueroa* Court did not explicitly address this problem with the *X-Citement Video* precedent and did not explicitly use it to arrive at its textual conclusion, its implicit adoption of the Model Penal Code approach to the issue suggests a dissatisfaction with the formerly dispositive "innocence" line the precedent had adopted.

208. In their hornbook on criminal law, Richard G. Singer and John Q. La Fond state the point succinctly, criticizing what they call the "greater crime" approach whereby a defendant who possessed the requisite mens rea as to committing a crime in general can be held for the greater offense even if he lacked any mens rea as to the enhancement:

[T]here are serious problems with the "greater crime" approach. First, suppose that D is not reckless or even criminally negligent with regard to a specific element. For example, suppose that D purposely punches V in the nose, but that V is a hemophiliac and dies. If D is charged for the death, D is actually being held "strictly liable" for the element of death. Or suppose that D, having been given a vial of cocaine, learns upon arrest that there is crack at the bottom of the vial, for which the penalty is much higher. If D is held to "knowingly possess" crack, even though he has attempted to learn the true facts, he may be punished too severely for his mens rea.

Richard G. Singer & John Q. La Fond, *Criminal Law* 137–38 (5th ed. 2010) (citation omitted).

tionable distinction into a wholesale endorsement of strict liability for any enhancement piled on top of a defendant found guilty of some other underlying offense. Indeed, a distinguished group of criminal law professors submitted a brief to the Court in *Flores-Figueroa* urging it to reverse the Eighth Circuit's ruling because it conflicted with the notion that crimes of "increased culpability warrant[] more severe punishment."<sup>209</sup>

The Court's interpretive choice also went some length toward harmonizing its mens rea jurisprudence with its major sentencing decisions by giving more fact-finding power to the jury.<sup>210</sup> The effort by the Court to set a clear textual rule that eliminates strict liability in statutes with initial mens rea terms helps reduce the power of district courts to label elements as not requiring any culpability, thus allowing the jury to consider whether the defendant was actually subjectively culpable. In at least some subset of cases then, *Flores-Figueroa* may empower juries to engage in more fact-finding at the expense of district judges. This aspect of the decision ties it together with the Court's line of sentencing cases that find the Sixth Amendment to be violated by district court fact-finding that raises the sentence beyond that authorized by the jury's verdict or defendant's admissions.<sup>211</sup> Commentators have noted the link between strict liability and potential Sixth Amendment jury right violations<sup>212</sup> and the danger that strict liability might be used to take elements out of the jury's fact-

209. Brief of Amici Curiae Professors of Criminal Law in Support of Petitioner at 6, 22, *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009) (No. 08-108).

210. A number of strict liability controversies involve sentencing enhancements rather than separate offenses; *Flores-Figueroa* itself dealt with a mandatory sentencing enhancement for the predicate crimes listed. *Flores-Figueroa*, 129 S. Ct. at 1888–89.

211. See *United States v. Booker*, 543 U.S. 220, 244 (2005) ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); *Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours' . . . ." (quoting 4 William Blackstone, *Commentaries* \*343)); *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000) ("The New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.").

212. See Ann Hopkins, Comment, *Mens Rea and the Right to Trial by Jury*, 76 *Calif. L. Rev.* 391, 397 (1988) ("[W]hen the Constitution was ratified and the sixth amendment adopted, part of what was guaranteed to criminal defendants was the right to have a jury decide whether they were morally blameworthy."). When the Sixth Amendment was drafted,

mens rea meant the moral blameworthiness necessary to a finding of criminal guilt. The presence or absence of mens rea was a jury question. It was a prerequisite for any finding of criminal guilt, and a finding of criminal guilt without moral blame was universally recognized as unjust. Furthermore, while the right to jury trial in criminal cases probably allowed the jury to decide the law as well as the facts, it at least guaranteed a decision by the jury about whether the application of a law to the accused was just or unjust.

*Id.* (footnotes omitted).

finding power contrary to the spirit of recent Sixth Amendment jurisprudence.<sup>213</sup>

*Flores-Figueroa*'s interpretive choice is also in sync with the long-standing rule of lenity giving the benefit of interpretational doubts to defendants as a matter of fairness and policy. Even if the rule currently leads an uncertain life in the courts, the rule's long pedigree and fairness-based roots demand some consideration. *Flores-Figueroa* better matches the spirit of the rule than does the lower court reaction allowing strict liability.<sup>214</sup>

Finally, the decision maintained the traditional distaste for strict liability applications in nonpublic welfare offenses, a jurisprudential pedigree stretching back to *Morissette*.<sup>215</sup> Though one could argue that the penalty enhancements at issue here, unlike their underlying crimes, are public welfare offenses with no mens rea requirement under *Balint*, the harsh penalties and nonindustrial nature of the enhancements in all of these cases put them outside the public welfare offense model.<sup>216</sup>

Of course, on the other hand, the logic of *Flores-Figueroa* raises issues of practical enforceability and threatens to make the job of prosecutors significantly more difficult in convicting defendants under various federal criminal statutes and enhancements with formerly strict liability applications. These concerns cannot be dismissed out of hand, but Congress is of course free to redraft its statutes in a way that clearly endorses application of strict liability to certain elements if that is its chief concern; the distributive default is just that, a default, and *Flores-Figueroa* or the Model Penal Code do not suggest otherwise.<sup>217</sup> The Court's unanimous statement in *Flores-Figueroa* that "concerns about practical enforceability are insufficient to outweigh the clarity of the text"<sup>218</sup> is thus sound in this context and should not be ignored.

The benefits of *Flores-Figueroa* as a matter of doctrine and policy<sup>219</sup> are thus salient and worthy of consideration. At the very least, they sug-

213. Nancy J. King & Susan R. Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1540 (2001) (arguing courts should closely scrutinize efforts by legislatures to avoid dictate of *Apprendi* by taking mens rea element entirely out of jury's hands through strict liability).

214. See *supra* note 33 (discussing rule of lenity).

215. See *supra* notes 17–26 and accompanying text (discussing *Morissette*'s distaste for strict liability); see also *Morissette v. United States*, 342 U.S. 246, 250 (1952) (noting requirement of some level of culpability "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

216. See *supra* notes 23–24 and accompanying text (discussing public welfare offense model).

217. See Model Penal Code § 2.02(4) explanatory note (1985) ("Subsection (4) provides that if the definition is not explicit on the point, as by prescribing different kinds of culpability for different elements, the culpability statement will apply to all the elements, *unless a contrary purpose plainly appears.*" (emphasis added)).

218. *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1893 (2009).

219. See *supra* notes 204–215 and accompanying text (discussing benefits *Flores-Figueroa* approach brought to interpretive context of mens rea distribution).

gest that the decision by lower courts to elevate practical enforceability over *Flores-Figueroa*'s reasoning is a development the Court should take seriously. Though the Court is free to narrow the reach of *Flores-Figueroa* in light of its lower court reception, the logic of *Flores-Figueroa* is compelling and suggests that, if anything, the Court should forcefully apply and extend its distributive default to other contexts.

#### CONCLUSION

Sloppy drafting of criminal laws by Congress is a scourge that likely will persist in the future,<sup>220</sup> and how courts respond to such ambiguity has a tremendous impact on the burden of proof prosecutors carry and whether a defendant will or will not be exposed to serious punishment. *Flores-Figueroa* brought a shift in approach to this arena and added clarity to what had been a muddled area of interpretation. Lower courts have responded by resisting the *Flores-Figueroa* distributive default, maintaining strict liability in a variety of criminal laws and thus easing what would be a high evidentiary burden for prosecutors in achieving convictions for different statutory enhancements. This lower court reluctance suggests that *Flores-Figueroa* will have to be reaffirmed in another statutory context. Though narrowing the decision is also an option, the benefits *Flores-Figueroa* brings to the mens rea distribution doctrine in federal criminal law are significant and counsel instead for the decision's expansion, regardless of the lower courts' initial reluctance.

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220. Dan M. Kahan, Ignorance of Law Is an Excuse—But Only for the Virtuous, 96 Mich. L. Rev. 127, 153 (1997) (“[T]he truth . . . is that criminal statutes typically emerge from the legislature only half-formed . . .”).