Punishing the Causer as the Principal: Mens Rea and the Interstate Transportation Element of the National Stolen Property Act*

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I. INTRODUCTION

Transporting goods worth over five thousand dollars, which are known to be stolen, in interstate commerce is a violation of the Federal National Stolen Property Act (NSPA).[1] The congressional intent behind the NSPA is to aid the states in punishing those who commit theft, fraud, or counterfeiting in violation of state law, but elude punishment by utilizing the channels of interstate commerce.[2] Congress included an interstate transportation element in this statute, which is otherwise parallel to a typical state stolen property statute, merely to supply a constitutional basis for the exertion of federal power.[3] Thus, Congress enacted the NSPA as a means through which federal authority could be invoked to fill gaps in state prosecutorial authority caused by crimes that are interstate in nature.[4] For example, under this law a thief who steals in New Mexico and transports the stolen goods to California is not beyond the reach of the law if the prosecutorial efforts of either state prove futile. Instead, through the NSPA, the thief may be brought to justice under the umbrella of federal power.

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1. 18 U.S.C. § 2314 (1994). For an annotated discussion of the types of activities considered by the federal courts as within the range of "interstate transportation," see Jean F. Rydstrom, Annotation, *Necessity in Prosecution Under 18 U.S.C.S. § 2314 for Interstate Transportation of Securities Obtained by Fraud That Specific Securities Have Moved in Interstate Commerce*, 48 A.L.R. FED. 570 (1980); 66 AM. JUR. 2D *Receiving and Transporting Stolen Property* § 42 (1973).

2. McElroy v. United States, 455 U.S. 642, 659 (1982) ("Through § 2314, Congress has sought to aid the States in their detection and punishment of criminals who evade state authorities by using the channels of interstate commerce."); United States v. Sheridan, 329 U.S. 379, 384 (1946) (holding that the NSPA "contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent").

3. United States v. Scarborough, 813 F.2d 1244, 1245–46 (D.C. Cir. 1987) (holding that Congress did not intend to "relate interstate movement to the culpability of the underlying criminal acts"); United States v. Newson, 531 F.2d 979, 981 (10th Cir. 1976) ("The essence of the offense is the fraudulent scheme itself and the interstate element is only included to provide a constitutional basis for the exercise of federal jurisdiction."); United States v. Ludwig, 523 F.2d 705, 707–08 (8th Cir. 1975) ("The sole reason for conditioning the statutes' prohibitions upon use of interstate commerce is to provide a constitutional basis for the exercise of federal power." (quoting United States v. Roselli, 432 F.2d 879, 891 (9th Cir. 1970))); *Roselli*, 432 F.2d at 891 ("[S]ection 2314 is aimed at the evils of theft, fraud, and counterfeiting and not at the regulation of interstate transportation.").

4. In most instances the criminal causes the unlawfully obtained good to travel in interstate commerce in order to dispose of it or to conceal the fraud. It is likely that it will be difficult for the states to prosecute this type of crime because they will not be able to investigate fully and may not be able to compel witnesses to testify. *See McElroy*, 455 U.S. at 655 n.19 (discussing interstate transportation of stolen checks). Thus, federal jurisdiction power is used to bridge the gaps in state power and ensure that a full prosecution is possible. For an illustrative look at the increasing federalization of crime, see Note, *Mens Rea in Federal Criminal Law*, 111 HARV. L. REV. 2402 (1998).

Beyond punishing people who actually transport stolen goods in interstate commerce, Congress chose to punish people who *cause* interstate transportation of such goods. Criminal liability for causing federal crimes is created by 18 U.S.C. § 2(b), also known as the "causing alternative."[5] Thus, under federal law a person who causes a crime can be charged as if he committed the crime himself.[6] In addition, for purposes of the causing alternative, it does not matter whether the person who carries out the crime happens to be an innocent intermediary.[7] For example, if while in California Fast Eddie sells a fraudulently acquired ring to Joe who is unaware of the fraud, and Joe brings the ring home to New York, then Fast Eddie is criminally liable for a violation of the NSPA. By selling the ring, Fast Eddie caused it to move in interstate commerce in violation of the NSPA.[8] It makes no difference in the outcome—even if Joe had no idea that the ring was in fact stolen.[9]

Conceptually, these laws reflect a rather straightforward principle: transporting stolen goods in interstate commerce is a crime; therefore causing this crime to happen is equivalent to committing the crime itself. Congress, via the causing alternative, sought to ensure that those individuals who orchestrate, but refrain from actually performing, criminal activity would not go unpunished.[10]

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5. 18 U.S.C. § 2(b) (1994). Criminal causation liability existed prior to the passage of the causing alternative in 1948, but it specifically had to be provided for in the individual statute creating the offense. *See id.* revision notes.

6. By definition, a causer is charged as a principal; thus, a charge for causing a crime is in no way different than a charge for committing the crime itself. *See id.*

7. *Id.*

> [The causing alternative] removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

Id.

8. In distancing himself from the "hot" ring, Fast Eddie has set the crime in motion. He is liable for the crime, despite the fact that he did not actually do any transporting.

9. It is interesting to note that if, instead of being unaware, Joe knew the ring was stolen, then Fast Eddie and Joe could be charged with the same offense. Joe would be charged with a violation of the NSPA and Fast Eddie's charge, via causation liability, would be identical.

10. *See* 18 U.S.C. § 2(b) revision notes. *See generally* G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1410–15 (1996) (discussing criminal accomplice liability under 18 U.S.C. § 2(b)).

Despite the relatively simple character of the overall statutory scheme enacted by Congress, the federal appellate courts are in disagreement as to how to apply the law in any given case. Namely, these courts disagree as to whether the prosecution must prove that a defendant charged with *causing* a violation of the NSPA acted with a culpable mental state, commonly referred to as mens rea, in relation to the interstate transportation element of the crime.[11] Mens rea rules traditionally require the prosecution to prove that the defendant acted with the requisite level of mental knowledge or culpability[12] in regard to each material element of the crime to which the mental requirement attaches.[13]

In the NSPA context, a judicially constructed mens rea constraint, if enforced, would require a showing that the defendant actually knew or

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11. Generally a crime is made up of an "actus reus," a physical act that produces the deed, and a "mens rea," a guilty mind that produces the act. 21 AM. JUR. 2D *Criminal Law* § 126 (1998) (annotated discussion of mens rea); *see also* United States v. Apfelbaum, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur."). The common law rule that mens rea was a necessary element of every crime was modified by the Supreme Court in *United States v. Balint*, 258 U.S. 250, 251–52 (1922), with respect to prosecutions under statutes. Whether mens rea is an element of a statutory offense is a question of legislative intent to be construed by the courts. *Id.* A mens rea requirement is usually created in a statute through the insertion of such words as "intentional," "willful," "knowing," "fraudulent," or "malicious." Morissette v. United States, 342 U.S. 246, 264 (1952). Additionally, punishing a person for an act in violation of law when the person is ignorant of the facts making it so does not deny due process of law. *Balint*, 258 U.S. at 252. For articles discussing criminal mens rea requirements, see Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997) (exploring mens rea requirements as they pertain to inchoate crimes, i.e., conspiracy and attempt); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635 (detailing the evolution of mens rea requirements in criminal law); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859 (1999) (analyzing the constitutional status of mens rea requirements); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999) (discussing the interpretation of federal criminal statutes and evaluating the rule of mandatory culpability enforced by the Supreme Court); Matthew T. Fricker & Kelly Gilchrist, Comment, United States v. Nofziger *and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803 (1990) (advocating the need for reform of mens rea in federal criminal statutes).

12. For a commonly accepted overview and categorization of mental states, see MODEL PENAL CODE § 2.02 (1985). Generally, there are four increasing levels of mens rea: negligence, recklessness, knowledge, and purpose. *Id.* The mens rea levels implicated by the issues in this Comment are generally limited to knowledge and purpose.

13. The relevant portion of the NSPA contains only one explicit word signifying a mens rea requirement. That word is "knowing," which attaches a mens rea requirement to knowing that the goods are in fact stolen. *See* 18 U.S.C. § 2314 (1994). For a complete discussion, see *infra* Part III.A.

intended that the goods would travel across state lines.[14] As it turns out, most circuit courts have held that there is no mens rea requirement attached to the interstate transportation element of the crime.[15] In cases where the mens rea element of the crime is rejected, mere proof that the defendant caused interstate transportation of the stolen good is enough to convict.[16] There is no inquiry into what the defendant actually knew. Other courts hold that, at a minimum, the prosecution must show that the defendant could have reasonably foreseen that the goods would travel interstate.[17] Only a small number of courts actually enforce the mens rea requirement.[18]

The resolution of this issue is of critical importance to those charged with causing violations of the NSPA. If there is no mens rea requirement attached to the interstate transportation element, it will be considerably easier to convict potential defendants of causing these crimes.[19] The Supreme Court has consistently warned that it is not the province of the judiciary to enlarge the scope of criminal laws as enacted

14. The inquiry would focus on the subjective mental state of the actor. In other words, the state must show that the defendant knew the goods would travel interstate or that he intended to cause them to travel interstate. *See* United States v. Leppo, 177 F.3d 93, 96–97 (1st Cir. 1999) (discussing the potential level of mental culpability a mens rea requirement would create if attached to the interstate transportation element of the crime). For example, in the hypothetical involving Fast Eddie, a mens rea requirement of knowledge would require the prosecution to show that Fast Eddie knew Joe would take the ring to New York. If the mens rea level is purpose, it would require a showing that Fast Eddie directed Joe to take the ring across state lines to New York.

15. *E.g.*, United States v. Powers, 437 F.2d 1160, 1161 (9th Cir. 1971) ("There is no requirement under 18 U.S.C. § 2314 that the accused know, foresee, or intend that instrumentalities of interstate commerce will be used."). For a complete listing of all the circuits which reject the mens rea requirement, see *infra* note 49. *See also* 66 AM JUR. 2D *Receiving and Transporting Stolen Property* § 41 (1973) (discussing the transportation element of 18 U.S.C. § 2314).

16. *See, e.g.*, *infra* note 48 and accompanying text.

17. *E.g.*, United States v. Masters, 456 F.2d 1060, 1061–62 (9th Cir. 1972) ("The actor is at least responsible under the statute for the reasonably foreseeable consequences of his acts.").

18. *See, e.g.*, *Leppo*, 177 F.3d at 96–97 (holding that interstate transportation must be "willful").

19. Morissette v. United States, 342 U.S. 246, 264 (1952) ("Congress has been alert to what often is a decisive function of some mental element in crime."). If there is no mental state attached to the interstate transportation of the crime, the simple fact that the stolen good crossed a state boundary will be sufficient proof. This lessened burden of proof might dictate the outcome of the case. The only other elements that the prosecution would have to prove is that the stolen goods were worth over five thousand dollars and that the defendant knew the goods were in fact stolen. For a complete discussion breaking down the statutory elements of the crime, see *infra* Part III.A.

by Congress.[20] Thus, in the present context it is imperative that the federal courts forego the mental state requirement, as it applies to interstate transportation, *only* if they find clear evidence that Congress affirmatively intended to do away with it altogether,[21] or if they find that interstate transportation is not a material element of the substantive crime.[22] Otherwise, the courts must presume that Congress intended to require a showing of mens rea for all material elements of the statutory crime.[23]

This Comment advocates for a uniform rule of prosecution in accord with the underlying goals of the statutory scheme created by Congress.[24] Given the interstate nature of the crime, potential defendants should be tried in the same manner as those tried in various federal jurisdictions.[25]

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20. In *Morissette*, the Supreme Court held that the federal courts should not enlarge the reach of federal statutory crimes. *Morissette*, 342 U.S. at 263. The Court stated this duty in the following terms: "The spirit of the doctrine which denies the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Id.* (internal citation omitted).

21. *See* United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978) ("[F]ar more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."); *Morissette*, 342 U.S. at 263 ("We hold that mere omission from [the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced."). Thus, in order to defeat the traditional presumption in favor of a mental state it must be shown that Congress affirmatively wished to dispense with the mental state requirement. *See United States Gypsum*, 438 U.S. at 438. For more on the presumption in favor of mens rea requirements used by the Supreme Court, see Wiley, *supra* note 11, at 1021–25 (characterizing the Supreme Court's rationale as the rule of mandatory culpability).

22. Mental states are not applicable to elements of federal statutory crimes, which are jurisdictional only in nature. *See, e.g.*, United States v. Feola, 420 U.S. 671, 676–77 n.9 (1975). In *Feola*, the Supreme Court held that a charge of violating the federal officer assault statute did not require proof that the defendant knew his victim was a federal officer. *Id.* at 684. This element of the crime was held to be jurisdictional only in nature. *See id.* at 676–86. For a complete discussion of the *Feola* case, see *infra* Part II.B.

23. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) ("Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable [mens rea] requirements, even where the statute by its terms does not contain them."); Staples v. United States, 511 U.S. 600, 619 (1994); *Morissette*, 342 U.S. at 263; United States v. Balint, 258 U.S. 250, 251–52 (1922).

24. *See supra* note 20 and accompanying text.

25. The mens rea requirement may have a decisive effect on the outcome of the case. *See supra* note 18 and accompanying text. Given that the courts disagree as to whether they will impose the mens rea requirements, the probability of inconsistent prosecutions is high. For example, in the Fast Eddie hypothetical (Joe is knowledgeable of the fraud variation), assume that Fast Eddie is tried in a California federal court and Joe in a New York federal court. If the Ninth Circuit enforces the mens rea rule and the Second Circuit does not, then there is a high probability that Joe may escape liability, while Fast Eddie will be convicted, even though both are equally culpable for the crime.

The verdicts in these cases should not depend upon such an arbitrary variable as the court in which the charges are brought.

The central issue this Comment addresses is whether the prosecution is required to prove a culpable mental state in relation to the transportation element when charging defendants with causing violations of the NSPA. This Comment concludes that Congress did not intend a mens rea requirement to attach to the interstate transportation element of the crime. The ongoing confusion surrounding the mens rea requirement must be resolved so that the individual circuits will apply a consistent and coherent rule in each and every case,[26] thereby eliminating the possibility of inconsistent verdicts.

Part II begins by highlighting the points of divergence among the federal circuit courts. This serves as a valuable overview to the different modes of analysis employed by the various courts. These conflicting analyses in turn lead to inconsistent outcomes on the mens rea issue. This confusion among the courts will, in addition to outlining the basic problem, serve to underscore the need for an authoritative resolution by the Supreme Court or Congress on the matter.[27]

Part III further analyzes the problem by breaking down the penal code,[28] discussing the differing statutory constructions offered by individual courts,[29] and analyzing the practical consequences of those statutory interpretations.[30] In particular, how a court interprets the language and each of the individual elements of the statutes at issue will determine the ultimate result a court will reach, that is, whether there is a mens rea requirement.

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26. For an illustrative example of the confusion the mens rea issue has created, see *United States v. Roselli*, 432 F.2d 879, 891 (9th Cir. 1970). The Ninth Circuit held that no mental state applied to the transportation element because it was not a material element of the offense. *Id.* Two years later, the same court decided *United States v. Masters*, 456 F.2d 1060 (9th Cir. 1972). After citing to *Roselli* as precedent, the *Masters* court went on to hold that the actor was only responsible for interstate transportation that was reasonably foreseeable. *Id.* at 1061. The court confused the issue: if an element is not material then no mens rea is applicable and there is no need to venture into an inquiry as to whether the interstate transportation was reasonably foreseeable.

27. The Supreme Court can easily solve the problem by ruling that the transportation element is not a material element of the crime and only jurisdictional in nature. Alternatively, Congress can solve the problem by modifying the statutory language. For a complete discussion of possible solutions, see *infra* Part VII.

28. The relevant portions of 18 U.S.C. §§ 2314, 2(b) (1994) will be addressed.

29. For a concise summary of the three primary interpretations of the statutory scheme created by Congress, see *infra* Part VI.

30. In this case, the potential outcomes are polar opposites: either a mens rea is required or it is not; there is no in-between position.

Part IV follows this analysis by evaluating *Pereira v. United States*,[31] the most recent Supreme Court decision directly addressing mens rea as it relates to the transportation element under the NSPA.[32] Part V continues the analysis by illustrating the present inadequacies of the Court's narrow holding in *Pereira*. This narrow decision has added to the confusion among the federal courts of appeal; the lack of clear guidance by the Supreme Court lends itself to differing interpretations of what the law requires. In short, Parts IV and V further underscore the need for the Supreme Court to revisit and reevaluate its decision in *Pereira* so that the problem of inconsistent verdicts in the federal courts may be avoided.

Part VI evaluates the competing views on the mens rea issue and concludes that the mens rea required argument is not tenable. This Comment argues that Congress intended the interstate transportation element of the crime to be a source for federal jurisdiction only and that it is not a material element of the crime.[33] Therefore, since it is not a material element of the crime, judicially constructed mens rea requirements are not applicable to it.

Part VII concludes by addressing the need for an authoritative decision on the matter.[34] The Supreme Court could easily lay the statutory construction issue to rest by adopting a specific rule of statutory interpretation. A better alternative would be for Congress to step in to clarify the statutory language. After all, Congress is supposed to be in charge of making the rules. Future code revisers should take notice of the inconsistencies among the courts and make the necessary clarifications. If Congress intended a mens rea requirement to apply to the interstate transportation element of the crime, it should clarify its position by inserting the relevant statutory language.[35] If no mens rea requirement was intended, Congress should strike the language

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31. 347 U.S. 1 (1954).

32. Subsequent Supreme Court decisions involving the NSPA have not addressed this particular issue but rather have dealt with other issues involving construction of the NSPA. *E.g.*, Moskal v. United States, 498 U.S. 103, 105 (1990) (holding that a defendant who received genuine vehicle titles, knowing that they incorporated fraudulently tendered odometer readings, violated the NSPA if he knew they were "falsely made"); McElroy v. United States, 455 U.S. 642, 653–54 (1982) (holding that the NSPA is effective at any and all times during the movement of the good in interstate commerce); Schaffer v. United States, 362 U.S. 511, 517 (1960) (holding that shipments may be aggregated to satisfy the monetary limit when they have enough relationship that they may be charged as a single offense).

33. *See, e.g.*, United States v. Ludwig, 523 F.2d 705, 707 (8th Cir. 1975) (holding that state transportation is "merely the linchpin for federal jurisdiction").

34. *See infra* Part VII.

35. Inserting the word "knowingly" to modify the clause, "transports, transmits, or transfers in interstate or foreign commerce" in 18 U.S.C. § 2314 (1994) would support this position.

suggestive of a mental state from the causing alternative provision altogether.[36] In effect this measure would end any plausible claim that there is a mens rea requirement attached to the interstate transportation element of the crime.[37]

II. THE ALL BUT BURIED MENS REA QUESTION RESURFACES

In *United States v. Leppo*,[38] the First Circuit Court of Appeals revived an issue that had been inconsistently decided for over forty-five years.[39] In a straightforward manner, the *Leppo* court admirably tried to reconcile ambiguous congressional language,[40] inadequate Supreme Court precedent,[41] and wildly inconsistent circuit court standards.[42] Specifically, the *Leppo* court attempted to decide whether or not there was a mens rea requirement for causing violations of the NSPA.[43] Unfortunately, the *Leppo* court fell short, and reached a mistaken conclusion, because it was lured into the same pitfalls that claimed its predecessors. Those pitfalls, as the following paragraphs suggest, are

36. In particular the word "willfully" must be stricken from 18 U.S.C. § 2(b) (1994). For a complete discussion elaborating on the significance of the word "willfully" in 18 U.S.C. § 2(b), see *infra* Part III.A. *See generally* Blakey & Roddy, *supra* note 10, at 1410–15 (discussing "willfully" as applied under 18 U.S.C. § 2(b)).

37. It is important that Congress revise the statutory language instead of merely offering opinions on it, because the views of a present Congress as to the meaning of an act passed by an earlier Congress are not ordinarily of great weight in statutory construction. United States v. X-Citement Video, Inc., 513 U.S. 64, 77 n.6 (1994).

38. 177 F.3d 93 (1st Cir. 1999).

39. The First Circuit began its analysis by pointing out the "wide national disagreement on this important subject." *Id.* at 95. After describing the leading circuit court cases, which had enforced the no mens rea rule, the First Circuit boldly stated that it had "cited these cases to indicate the mistreatment of this subject and not to influence [its] own decision." *Id.* at 95–96.

40. The question was whether the language in the causing alternative, particularly the word "willfully," created a mens rea requirement attached to the interstate transportation element of the crime. For a detailed discussion addressing the significance of the word "willfully" in the causing alternative, see *infra* Part III.B.

41. In *Pereira v. United States*, 347 U.S. 1, 9 (1954), the Supreme Court, in its only applicable decision to date, rendered a decision limited only to the facts of the case. Thus, it did not answer the mens rea issue. For a complete discussion of the *Pereira* case, see *infra* Part IV.

42. The federal appellate courts are not in agreement as to whether there is a mens rea requirement attached to the interstate transportation element of the crime. *See Leppo*, 177 F.3d at 95–97 (describing the leading cases of several circuits which are not consistent in reasoning or outcome).

43. The First Circuit came to the conclusion that the word "willfully" in 18 U.S.C. § 2(b) created a mens rea requirement of intent attached to the transportation element of 18 U.S.C § 2314. *See id.* at 96–97.

embodied by the judicial preoccupation with the specific statutory language that Congress chose and the failure to look at the overall purposes Congress had in passing the law.

In *Leppo*, the defendants were charged with causing violations of the NSPA, after the stolen polyester commercial film they sold to an unsuspecting buyer traveled across state lines.[44] The defendant admitted he knew the goods were stolen and accepted the factual allegations in the indictment. His sole defense was that there was not a proper showing of mens rea as to the interstate transportation of the film.[45] In other words, the defendant claimed that the government was required to prove that he had intended to cause the film to travel from Massachusetts to Connecticut when he sold it to the innocent buyer. The defendant was convicted because there was evidence that he knew the buyer was from out of state and he sold film to him on four previous occasions.[46] Thus, the defendant would have been guilty with or without a mens rea requirement because the facts warranted an inference that he manifested the subjective intent to cause the interstate transportation.[47]

The greater importance of the *Leppo* case is that the First Circuit interpreted the statutory scheme created by Congress as creating a mens rea requirement attaching to the interstate transportation element of the statutory crime,[48] a conclusion traditionally rejected by a majority of the circuit courts.[49] In reaching this conclusion, the *Leppo* court argued that

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44. In *Leppo*, the defendant purchased quantities of commercial polyester film that he did not intend to pay for, had them delivered to his Massachusetts place of business, and then sold the film to a Connecticut buyer who was ignorant of the fraud. *Id.* at 95. The buyer picked up the film and took it back to Connecticut. *Id.* The defendant claimed he did not intend to cause the film to cross state lines. *Id.*

45. *Id.*

46. *Id.* at 97.

47. *Id.* ("The agreed facts warranted an inference that, in picking an out-of-state buyer on four occasions, defendant, with hot goods, affirmatively intended to distance them from himself.").

48. *Id.* at 96–97.

49. The circuit courts that conclusively reject the attachment of a mens rea requirement to the transportation element of the crime are: the Fifth Circuit, *see* United States v. Lennon, 751 F.2d 737, 741 (5th Cir. 1985); the Sixth Circuit, *see* United States v. White, 451 F.2d 559, 559–60 (6th Cir. 1971); the Seventh Circuit, *see* United States v. Lack, 129 F.3d 403, 409–10 (7th Cir. 1997); the Eighth Circuit, *see* United States v. Ludwig, 523 F.2d 705, 707 (8th Cir. 1975); the Tenth Circuit, *see* United States v. Newson, 531 F.2d 979, 980–81 (10th Cir. 1976); and the D.C. Circuit, *see* United States v. Scarborough, 813 F.2d 1244, 1245–46 (D.C. Cir. 1987). The Second Circuit purports to reject a mens rea requirement, *see* United States v. Mingoia, 424 F.2d 710, 713 (2d Cir. 1970). For subsequent authority to the contrary, see United States v. DeKunchak, 467 F.2d 432, 436–37 (2d Cir. 1972). The same is also true for the Ninth Circuit. *Compare* United States v. Roselli, 432 F.2d 879, 891 (9th Cir. 1970) (holding that "knowing interstate transportation is not an essential element of a violation of section 2314"), *with* United States v. Masters, 456 F.2d 1060, 1061–62 (9th Cir. 1972) (holding that an "actor is at least responsible under the statute for the reasonably foreseeable

the causing alternative was the sole source for criminal causation liability.[50] The court further argued that the language in the causing alternative created a mental state requirement that attached to the interstate transportation element of the crime.[51]

As the title of this section suggests, the *Leppo* court revived an old issue, which a large majority of the circuit courts thought was settled.[52] The majority of the circuit courts have held that no mens rea attached to the interstate transportation element of the crime.[53] As previously noted, the only express mens rea requirement on the face of the statute applies to the knowledge that the goods were in fact stolen.[54] In the absence of any language that clearly establishes a mens rea requirement for the transportation element, the majority of circuit courts reasons that evidence that the good traveled in interstate commerce is enough proof to satisfy that element of the crime.[55]

A. The Minority Lures the Majority into the Pitfall

The majority of federal circuit courts, as this Comment argues, reach the appropriate ultimate conclusion. There is no mens rea requirement attached to *causing* interstate transportation of stolen goods. However, the paths these courts have traveled in reaching their final decisions have, at times, served to further confuse the issue.[56] This section explains how some courts reaching the no mens rea rule are lured into faulty analysis when they attempt to engage in a tit-for-tat argument against the minority position.[57] This faulty analysis leads to wildly

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consequences of his acts").

50. *See Leppo*, 177 F.3d at 94–95. For a fully considered treatment of this argument, see *infra* Part III.B.

51. *Leppo*, 177 F.3d at 96–97.

52. Prior to *Leppo*, there was only one major case ruling on the interstate transportation mens rea issue since the late 1980s. *See Lack*, 129 F.3d at 409–10.

53. *See supra* note 49.

54. *See infra* Part III.A.

55. For this proposition the majority of courts cite to the Supreme Court decision in *Pereira v. United States*, 347 U.S. 1 (1954), which held that "[t]o constitute a violation of these provisions [18 U.S.C. §§ 2314, 2(b)], it is not necessary to show that petitioners actually mailed or transported anything themselves; it is sufficient if they caused it to be done." *Id.* at 8.

56. For a brief summary outlining the three major methods used to arrive at the no mens rea required rule, see *infra* Part VI.

57. This back and forth debate takes the form of arguing whether the exact language in the causing alternative creates a mens rea requirement attached to the transportation element of the crime.

varying justifications for enforcing the no mens rea rule. The confusion seems to snowball, as the mens rea rule is seemingly given credence even by the courts that ultimately reject the rule.

In more concrete terms, the debate centered originally on whether the courts should read a mens rea requirement into the interstate transportation element of the crime. In the early case of *Pereira v. United States*,[58] the Supreme Court seemed to take the position that intent, or at the very least reasonable foreseeability, was required in connection with the interstate transportation element of the crime.[59] This focused early attention as to whether the language on the face of the NSPA created a mental state. The majority of the circuit courts held that it did not.[60] The courts in favor of mens rea later shifted the inquiry and argued that the language in the causing alternative, as applied to the NSPA, created a mens rea requirement.[61]

The language in the causing alternative arguably creates a mens rea requirement.[62] Focused primarily on the question of whether the language in the causing alternative created a mental state, courts attacking the mental state position were lured into addressing the wrong question. The point here is that in preoccupying themselves with the mens rea statutory language construction question, many courts, on both sides of the issue, addressed the wrong issue. The correct issue, as the following section illustrates, was whether it was proper to attach a mens rea requirement to the interstate transportation element in the first

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58. 347 U.S. 1 (1954).

59. *Id.* at 9. The court upheld the defendants' convictions based upon the following logical assumption:

> When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collection, he "caused" it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira *intended* the El Paso bank to send this check across state lines.

Id. (emphasis added).

60. *See supra* note 49.

61. *See, e.g.*, United States v. Scandifia, 390 F.2d 244, 249–50 (2d Cir. 1968), *vacated on other grounds sub nom.* Giordano v. United States, 394 U.S. 310 (1969) ("[T]he causer as a principal has been eliminated from 18 U.S.C. § 2314, and since the 1951 amendment, 18 U.S.C. § 2(b) has required that the defendant *wilfully* cause the forbidden act to be done.").

62. The debate surrounds the significance of the word "willfully" in 18 U.S.C. § 2(b) (1994). Traditionally, the word "willfully" creates a mental state requirement. *See* Ratzlaf v. United States, 510 U.S. 135, 141 (1994). Willfully is a "word of many meanings" and the construction given to it many times is "influenced by its context." *Id.* (quoting Spies v. United States, 317 U.S. 492, 497 (1943)); *see also* 1 WORKING PAPERS OF NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 148–51 (1970) (providing an annotated discussion of Supreme Court treatment of willfully in federal statutes) [hereinafter WORKING PAPERS]. For an extended discussion of "willfully" in the causing alternative context, see Blakey & Roddy, *supra* note 10, at 1410–15.

place.[63] Stated differently, is interstate transportation a material element of the offense?

B. Jurisdictional v. Jurisdictional Only

Many of the circuit courts, regardless of the merits of their arguments, simply were addressing the wrong question in their analysis of the problem. In the mid 1970s, some of the circuits eventually caught on to the real issue at play in these cases, which is the jurisdictional nature of the transportation element of the NSPA.[64] The real issue is not the interpretation of the language contained in the statute; instead the true inquiry concerns the purpose Congress had in enacting the law.[65]

It is not coincidental that some circuit courts changed their analysis contemporaneously with the landmark Supreme Court decision regarding the construction of mens rea requirements in federal statutes.[66] In *United States v Feola*,[67] the Supreme Court addressed the mens rea issue as it relates to 18 U.S.C. § 111,[68] which criminalizes the assault of a federal officer while in the performance of his official duties.[69] The

63. Some elements of the crime are not considered material elements; they do not relate to the underlying culpability of the act. Rather, they are "jurisdictional only" in nature. *See* United States v. Feola, 420 U.S. 671, 676–77 n.9 (1975). If the element is jurisdictional only in nature, in the absence of explicit statutory language, the courts cannot read in a mens rea requirement. *See id.* at 676–86.

64. The Ninth Circuit was the first federal appellate court to recognize that the transportation element of the NSPA was jurisdictional only and thus no mental state applied. United States v. Roselli, 432 F.2d 879, 891 (9th Cir. 1970). *But see* United States v. Masters, 456 F.2d 1060, 1061–62 (9th Cir. 1972) (holding that at the very least a mens rea of reasonable foreseeability attaches to the transportation element of the crime). The Eighth Circuit was the first to conclude authoritatively that the transportation element was jurisdictional only in nature. *See* United States v. Ludwig, 523 F.2d 705, 706–08 (8th Cir. 1975). The Tenth Circuit followed the Eighth Circuit one year later. *See* United States v. Newson, 531 F.2d 979, 981 (10th Cir. 1976).

65. In the absence of clear congressional language attaching a mens rea requirement to a particular element of the crime, it becomes a question of legislative intent for the courts to decide. *See* United States v. Balint, 258 U.S. 250, 251–52 (1922); *see also Ludwig*, 523 F.2d at 706 ("Whether [18 U.S.C. § 2314] requires, at a minimum, that such interstate transportation be reasonably foreseeable is, of course, a question of congressional intent.").

66. *Ludwig*, 523 F.2d 705, was decided about seven months after the Supreme Court's landmark decision in *Feola*, 420 U.S. 671. Although the *Ludwig* court did not specifically cite to *Feola*, the principles espoused by the Eighth Circuit were likely influenced by the Supreme Court's decision. *See Ludwig*, 523 F.2d at 707–08.

67. 420 U.S. 671 (1975).

68. 18 U.S.C. § 111 (1994 & Supp. IV 1999).

69. *See id.* In *Feola*, the defendants were convicted of assaulting, and conspiring

statute contained no express mens rea language relating to the "federal officer" element of the crime.[70] The main issue in the case was whether an independent mens rea requirement should be read into the federal officer element of the crime.[71] Stated differently, was the prosecution required to show that the defendants knew that their victims were federal officers?

In *Feola*, the Supreme Court held that Congress inserted the federal officer element into 18 U.S.C. § 111, which otherwise was a general assault statute, in order to ensure that assaults against specified federal officers did not go unpunished.[72] Given the congressional purpose behind the law, the jurisdictional nature of the element, and the absence of language stating otherwise, the federal officer element of the crime was defined as being jurisdictional only, and thus a mens rea requirement was not applicable.[73] In a key footnote, the court elaborated on this view:

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

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to assault, undercover narcotics officers while in the performance of their official duties. 420 U.S. at 671.

70. The statute reads: "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both." 18 U.S.C § 111 (1948) (stating the statute as it read in 1975, prior to its 1988 amendment). Note the absence of "knowingly," or any analogous words, in the statute.

71. The precise issue raised by the defendants was whether the mental state should be read into the conspiracy charge only, but the court addressed the application of a mens rea requirement to the substantive charge as well. *Feola*, 420 U.S. at 676–77.

72. *Id.* at 681 ("Congress clearly was concerned with the safety of federal officers insofar as it was tied to the efficacy of law enforcement activities.").

73. *Id.* at 684.

> We conclude, from all this, that in order to effectuate the congressional purpose of 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.

Id.

74. *Id.* at 676–77 n.9 (emphasis added).

According to the *Feola* principle, in order to determine whether a requirement that is jurisdictional in nature is jurisdictional only, the adjudicating court must look at the congressional purposes behind the statute and determine whether a mens rea requirement would frustrate those purposes. In *Feola*, the court determined that a strict mens rea requirement would have frustrated the policy of protecting federal law enforcement officers because it would have made it tougher to convict defendants committing these offenses.[75] Therefore, the Court decided to treat the federal officer element as jurisdictional only. No showing of mens rea was necessary.

The *Feola* jurisdictional only principle applies with equal, if not greater, force to the issue under consideration in this Comment. The congressional purpose in passing the NSPA was first authoritatively interpreted by the Supreme Court in *United States v. Sheridan*.[76] In *Sheridan*, the Court stated that the purpose behind the NSPA was to come to the aid of the states in punishing those who use the channels of interstate commerce to escape the reach of state law.[77] The interstate transportation element of the NSPA has been characterized subsequently by some circuits as being merely the "linchpin" for federal jurisdiction,[78] and not a material element of the offense.[79]

The transportation element of the NSPA may actually be an even stronger case for jurisdictional only status than the federal officer provision of 18 U.S.C. § 111, which was at issue in *Feola* itself. In *Feola*, the dissent raised legitimate doubts that the federal officer assault statute had other possible purposes behind it not consistent with the

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75. *Id.* at 684 ("All the statute requires is an intent to assault, not an intent to assault a federal officer. A contrary conclusion would give insufficient protection to the agent enforcing an unpopular law, and none to the agent acting under cover.").

76. 329 U.S. 379 (1946). The decision was rendered two years before the code was revised in 1948. Although stylistic changes were made, no changes in the overall substance of the law have been made since. *See* discussion *infra* Part III.A.

77. *Sheridan*, 329 U.S. at 384. The Supreme Court summed up the congressional purpose behind the NSPA as follows:

> Congress had in mind preventing further frauds or the completion of frauds partially executed. But it also contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent.

Id.

78. United States v. Ludwig, 523 F.2d 705, 707 (8th Cir. 1975); *accord* United States v. Scarborough, 813 F.2d 1244, 1245–46 (D.C Cir. 1987) (quoting *Ludwig*, 523 F.2d at 707).

79. *See* cases cited *supra* note 3 and accompanying text.

federal officer element being jurisdictional only.[80] In the NSPA context there are no potentially inconsistent purposes.[81] The transportation element was provided in the NSPA for the single purpose of making sure that criminals are not able to evade the reach of the law entirely by taking advantage of the gaps in state power.[82] The transportation element is not meant to be a device that aggravates punishment or creates a new crime which punishes otherwise innocent conduct.[83] Instead, it strictly provides a basis to subject these criminals to federal jurisdiction. Imposing a strict mens rea requirement on this element of the crime would be contrary to Congress's objectives in passing the law because it would make it harder to punish those who elude state law.

To recapitulate, the sole purpose of the NSPA is to fill gaps in state criminal authority. The NSPA parallels a state law, but it includes an interstate component to provide a jurisdictional basis for the exercise of federal power.[84] There is no explicit statutory language creating a mens rea requirement that attaches to the transportation element of the crime.[85] The judicial construction of a strict mens rea requirement would be contrary to the goals of Congress in passing the law itself. Therefore, the transportation element is jurisdictional only. Since the transportation element is jurisdictional only, no mental state can be attached to it.

III. STATUTORY INTERPRETATION: THE COURTS ARE NOT CONSISTENT IN THEIR APPROACH TO THE PROBLEM POSED BY THE TRANSPORTATION ELEMENT

Up to this point the discussion has made reference, in general terms, to

80. *See Feola*, 420 U.S. at 696–713 (Stewart, J., dissenting). The dissent argued that the statute was not merely a parallel to a state law punishing the assault of law enforcement officers. *Id.* at 697–700. Instead, the dissent argued, the law was written as a federal aggravated assault law. *Id.* at 697–99. According to the dissent, Congress was specifically trying to deter criminals from assaulting federal officers by aggravating punishment. *Id.* A key element of an aggravated assault statute is the knowledge of the accused, otherwise "[w]here an assailant [has] no such knowledge, he could not of course be deterred by the statutory threat of enhanced punishment." *Id.* at 698.

81. The Ninth Circuit summed it up best when it stated that "section 2314 is aimed at the evils of theft, fraud, and counterfeiting and not at the regulation of interstate transportation." United States v. Roselli, 432 F.2d 879, 891 (9th Cir. 1970).

82. *See supra* note 4 (describing possible gaps in state authority).

83. In this case, because the thief knows that the goods are stolen, he is not acting innocently when he transports or causes the goods to flow in the stream of interstate commerce. Thus, the transportation element is not covered by the judicial presumption in favor of mens rea for elements that criminalize otherwise innocent conduct. For more on this presumption, see United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994).

84. *See supra* note 3.

85. For an in depth look at the relevant statutory language, see discussion *infra* Part III.A.

the broad purposes behind the NSPA and the causing alternative. This section will begin by taking a more detailed look at the significant language contained within the NSPA[86] and the causing alternative.[87] In connection to the language, this section also analyzes the structure within which both of these statutes operate. The second part of this section explores the different modes of analysis various courts use to interpret these statutes. These divergent interpretations help to explain the inconsistent decisions that the courts reach.

In sum, this section serves to illustrate the need for an authoritative interpretation regarding the interrelation of both these provisions of the law. Since these laws were enacted over fifty years ago, the courts have not agreed on a consistent interpretation as to what the law requires. The Supreme Court or Congress must step in to lay the matter to rest in order to avoid potentially inconsistent and unfair outcomes.[88]

A. Revisions, Insertions, and Deletions

A detailed look at the specific laws that Congress enacted must be undertaken in order to understand the confusion that has prevailed among the circuit courts. The NSPA and the causing alternative are both characterized by statutory revision and insertions or deletions of key statutory language.[89] Different courts attach varying degrees of significance to these alterations. As the ensuing discussion suggests, this is a major source of confusion among the courts.

The logical starting point in the analysis is the NSPA itself. The current version of 18 U.S.C. § 2314 provides, in relevant part:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.[90]

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86. 18 U.S.C. § 2314 (1994).
87. 18 U.S.C. § 2(b) (1994).
88. For more on this assertion, see *infra* Part VII.
89. *See infra* notes 98–104, 107–08 and accompanying text. For an extremely detailed analysis of the congressional record and purposes underlying 18 U.S.C. § 2314, see McElroy v. United States, 455 U.S. 642, 649–59 (1982).
90. 18 U.S.C. § 2314 (1994). The second paragraph is omitted because it pertains to transporting *persons* in interstate commerce, a topic beyond the scope of this Comment. *See id.* The third paragraph deals primarily in securities, which are covered in the treatment of the first paragraph. *See id.* The fourth paragraph relates to stolen traveler's checks, which are covered implicitly in the treatment of other kinds of checks.

In order to analyze this statutory crime enacted by Congress, it must be broken down into three primary elements, which can be stated in general terms: (1) transporting goods in interstate commerce, (2) goods must have the value of five thousand dollars or more, and (3) defendant must "know" the goods are stolen.[91] The meanings of the second and third elements of the crime are clear and well settled. The second element is a simple value threshold and for the purposes of this Comment it will be assumed to be satisfied.[92] The third element is the only one that expressly contains a mens rea requirement. The word "knowing" in a criminal statutory provision traditionally requires a showing that the defendant acted with knowledge of the relevant element of the crime.[93] In this case, "knowing" means that the defendant must have known that the goods he was transporting were in fact stolen.[94]

See id. The fifth paragraph deals with transporting counterfeit tax stamps and is also beyond the scope of this Comment. *See id.*

91. *See, e.g.*, Pereira v. United States, 347 U.S. 1, 9 (1954) (delineating the statutory elements of the NSPA, but implicitly assuming the five thousand dollar element); *see also* United States v. Freeman, 619 F.2d 1112, 1118 (5th Cir. 1980) (delineating an alternative breakdown of the same general statutory elements).

92. The purpose of the five thousand dollar value threshold is to limit the use of federal resources to matters involving substantial value. "There is no legitimate interest of [defendants] . . . which Congress the sought to protect by this requirement." United States v. Bottone, 365 F.2d 389, 394 (2d Cir. 1966) (quoting United States v. Schaffer, 266 F.2d 435, 440 (2d Cir. 1959)) (alteration in original). The purpose of the monetary requirement is to avoid overtaxing the federal government. *Id.* Market value is the standard in determining the value of the transported stolen goods. *See, e.g.*, Anderson v. United States, 406 F.2d 529, 534 (8th Cir. 1969). Individual shipments as to an individual defendant may be aggregated to meet the monetary limit if they are so related that they may be properly charged as a single offense. *See* Schaffer v. United States, 362 U.S. 511, 512, 512 n.2, 517 (1960). For an in-depth look at the practical and legal aspects of the value requirement, see generally Margaret Shulenberger, Annotation, *Determination of Value of Stolen Property Within Meaning of Provision of 18 U.S.C.S. § 2314 Proscribing Interstate or Foreign Transportation of Stolen Goods, Wares, Merchandise, Securities, or Money, of Value of $5,000 or More*, 15 A.L.R. FED. 336 (1973). *See also* 66 AM. JUR. 2D *Receiving and Transporting Stolen Property* § 43 (1973) (examining the value requirement of the NSPA); Randy Gidseg et al., *Intellectual Property Crimes*, 36 AM. CRIM. L. REV. 835, 843–44 (1999) (evaluating the monetary value requirement of the NSPA in the trade secret context).

93. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 68–70 (1994) (interpreting whether the mens rea requirement created by the word "knowingly," attached to the transportation element of 18 U.S.C. § 2252 (child pornography statute), applies to the age of performer requirement); *see also* MODEL PENAL CODE § 2.02(2)(b) (1985).

94. It does not matter whether the defendant is guilty of any crime with respect to the wrongful taking of the goods. *See* Johnson v. United States, 207 F.2d 314, 319 (5th Cir. 1953). The method through which the defendant acquired the goods is only relevant when used to prove actual knowledge that the goods were in fact stolen. *Id.*; *see also* Caroll J. Miller, Annotation, *What Constitutes "Constructive" Possession of Stolen Property to Establish Requisite Element of Possession Supporting Offense of Receiving Stolen Property*, 30 A.L.R.4TH 488 (1984) (analyzing instances where constructive possession satisfies the stolen goods element of the NSPA); Annotation, *What*

As is readily apparent, on the face of the NSPA there is no language creating mens rea attached to the first element of the crime. The provision seems to be clear: "Whoever transports, transmits, or transfers in interstate or foreign commerce . . . ."[95] Ordinarily the absence of mens rea language with respect to a jurisdictional element of the crime would be the end of the inquiry.[96] Unfortunately, contemporaneous acts taken by Congress may be interpreted by the courts as impliedly creating a mental state requirement for this element of the crime.[97] This Comment now turns to these changes in the statutory scheme.

The version of the NSPA currently on the books was enacted by Congress in 1948, consolidating five predecessor sections of the code.[98] The relevant predecessor section to the current NSPA provided for causation in element one.[99] It read: "[w]hoever shall transport or *cause to be transported* in interstate or foreign commerce . . . ."[100] Prior to 1948, criminal liability for those who caused interstate transportation was contained entirely within the NSPA. Given the absence of any mens rea language, there was no plausible claim that a mental state requirement attached to the transportation element; the transportation element merely conferred federal jurisdiction.

Ironically, matters became more complicated in 1948 when Congress attempted to simplify federal criminal law. In the 1948 revision of the federal code, the NSPA was stripped of its causation language.[101] This was due to the fact that Congress had created 18 U.S.C. § 2(b) in the same revision of the law.[102] The causing alternative was added by Congress to the United States Code in order "to permit the deletion from

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Constitutes "Recently" Stolen Property Within Rule Inferring Guilt from Unexplained Possession of Such Property, 89 A.L.R.3D 1202 (1979) (analyzing the temporal aspect of the theft element of the NSPA); 66 AM. JUR. 2D *Receiving and Transporting Stolen Property* § 41 (1973) (analyzing the theft element of the NSPA).

95. 18 U.S.C. § 2314.

96. *See* discussion *supra* Part II.B.

97. Specifically, the acts taken by Congress were the creation of 18 U.S.C. § 2(b) and the subsequent insertion of the word "willfully." *See* 18 U.S.C. § 2(b) (1994) (change noted in amendments).

98. The congressional act of 1948 consolidated former §§ 413, 415, 417, 418, 418a, and 419 of title 18 of the 1940 edition of the United States Code. *See* 18 U.S.C. § 2314 historical & revision notes.

99. Act of Aug. 3, 1939, ch. 413, § 415, 53 Stat. 1178 (current version at 18 U.S.C. § 2314 (1994)).

100. *Id.* (emphasis added).

101. *See* 18 U.S.C. § 2314 historical & revision notes.

102. *See* 18 U.S.C. § 2(b).

many sections throughout the revision of such phrases as 'causes or procures.'"[103] The causing alternative was a stylistic reform of the code, but it also served to reaffirm the congressional purpose that those who cause crimes to be committed will be punished.[104] In practical effect, the causing alternative:

> removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[105]

The specific language within the causing alternative has engendered the majority of the mens rea controversy. The original causing alternative read as follows: "Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."[106] Consistent with 18 U.S.C. § 2314, there was no mens rea requirement expressed on the face of 18 U.S.C § 2(b). This changed, however, in 1951 when Congress further revised the causing alternative by inserting the word "willfully."[107] Thus, the statute now reads: "Whoever willfully causes an act to be done . . . ."[108] Because Congress did not elaborate on the purposes behind the insertion of "willfully,"[109] it is not clear whether Congress intended to create a mens rea requirement for all causation crimes.[110]

Traditionally, the word "willfully" in criminal statutes refers to the higher levels of mens rea culpability.[111] In many instances, "willfully" is

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103. *Id.* historical & revision notes.

104. *Id.*

105. *Id.* For more on the purposes behind the causing alternative, see Blakey & Roddy, *supra* note 10, at 1410–19 (discussing the causing alternative).

106. Act of June 25, 1948, ch. 645, 62 Stat. 683, 684.

107. 18 U.S.C. § 2(b).

108. *Id.*

109. The relevant Senate Report clarified a contemporaneous change in the law but did not even bother to mention the addition of the word "willfully." *See* S. REP. NO. 82-1020, § 17b (1951), *reprinted in* 1951 U.S.C.C.A.N. 2578, 2583.

110. For an argument that Congress inserted the word "willfully" in response to Judge Learned Hand's criticism that 18 U.S.C. § 2(b) had no express mens rea requirement, see Blakey & Roddy, *supra* note 10, at 1411 ("Ironically, Congress added 'willfully' to § 2(b) after criticism from Judge Learned Hand that no state of mind was expressed on the face of the statute."). Judge Hand openly criticized 18 U.S.C § 2(b) in *United States v. Chiarella*, 184 F.2d 903, 909–10 (2d Cir. 1950) (holding that 18 U.S.C. § 2(b) contains an implicit mens rea requirement because Congress could not have "intended so drastically to enlarge criminal liability" when it enacted the law).

111. The Supreme Court has held that "willfully" is "a 'word of many meanings,' and 'its construction [is] often . . . influenced by its context.'" Ratzlaf v. United States, 510 U.S. 135, 141 (1994) (quoting Spies v. United States, 317 U.S. 492, 497 (1943)). In general, "willfully" imposes a mens rea requirement of intent. *See Ratzlaf*, 510 U.S. at 141; *see also* WORKING PAPERS, *supra* note 62 (discussing the Supreme Court's treatment of "willfully" in federal criminal statutes); 21 AM. JUR. 2D *Criminal Law* § 142

interpreted as requiring a showing of the defendant's intent. In the present context, "willfully" has created a dilemma for courts attempting to establish the proper relationship between the causing alternative and the NSPA. First, the court must decide whether Congress intended to create a mental state requirement for causation liability. Second, the court must decide to which element of the crime this mens rea requirement attaches.[112] The second inquiry has proven to be the most difficult.

As the next section will explore, the courts are inconsistent in answering these questions. In fact, the circuits vary wildly in their outcomes.[113] Some courts argue that the causing alternative applies exclusively to those who cause interstate transportation and the language contained therein creates a mens rea requirement.[114] Other courts argue that there is no distinction between those who transport and those who cause such transportation.[115] The purpose of this section will be to illustrate that this general confusion is in part created by the statutory scheme set up by Congress. In addition, the difficulty in trying to prove the exact nature of the statutory scheme intended by Congress will serve to reinforce the validity of the jurisdictional only argument in this context.

(1998) (discussing "willfulness" in federal criminal statutes).

112. The problem is that if "willfully" does create a mental state requirement, it will apply differently under different substantive provisions of the federal code. For example, in *United States v. Curran*, 20 F.3d 560, 568-69 (3d Cir. 1994), the Third Circuit held that "willfully" creates a mens rea of intent to cause election treasurers to submit false reports to the Federal Election Commission in violation of 18 U.S.C § 1001. "'Willfulness' in this context is an important component of section 2(b), and it is necessary that the term be understood." *Id.*

113. For instance, consider the following line of cases issued by the Second Circuit Court of Appeals, which illustrates the confusion in this area of the law. In *United States v. Scandifia*, 390 F.2d 244 (2d Cir. 1968), *vacated on other grounds sub nom.* Giordano v. United States, 394 U.S. 310 (1969), the court held that § 2(b) created a mens rea requirement attached to the transportation element of the crime. *Id.* at 249. Two years later, in *United States v. Mingoia*, 424 F.2d 710 (2d Cir. 1970), the Second Circuit held that no mens rea was required. *Id.* at 713. Finally, in *United States v. DeKunchak*, 467 F.2d 432 (2d Cir. 1972), the court contradicted itself again and held that reasonable foreseeability was required by § 2(b). *See id.* at 436–37. The problem is that all three cases are still considered good law. In fact, *Scandifia* was recently cited by the First Circuit as persuasive authority. *See* United States v. Leppo, 177 F.3d 93, 96–97 (1st Cir. 1999).

114. *See, e.g., Leppo*, 177 F.3d at 95–97.

115. *See supra* note 49.

B. Will the Courts Ever Agree?

Since the 1948 statutory revision,[116] which established the causing alternative, courts have been unable to agree conclusively upon the proper construction of the statutory scheme set up by Congress. This section discusses the two primary modes of analysis undertaken by courts in addressing this problem. The first mode of analysis comes to the conclusion that there is a mens rea requirement for interstate transportation, while the second reaches the opposite conclusion that no mens rea showing is required. The purpose of this section is to illustrate that much of the analysis surrounding this particular issue is flawed due to the ambiguous nature of the statutory scheme.

The first mode of analysis employed by the courts embarks on a quest to prove that the causing alternative creates a mens rea requirement in relation to the interstate transportation element of the NSPA.[117] These courts make a bright line distinction between transporters and those who cause others to act.[118] These courts argue that, by definition, the NSPA applies only to a person who transports. For example, if Fast Eddie obtains checks he knows are stolen in New York and takes them with him to Montana, then he would be charged as a transporter under the NSPA. In addition, courts who subscribe to this analysis further argue that the causing alternative automatically kicks in when the charge is for causing one to transport.[119] Thus, in the previous example if Fast Eddie had cashed the checks in New York instead, and then they traveled to a drawee bank in Florida as part of a routine cashing practice, he would be charged as causing the crime to happen under the sole authority of the causing alternative.

Once under the authority of the causing alternative, these courts argue that the "willfully" language creates a mens rea requirement that applies to the interstate transportation element of the crime.[120] Implicitly these courts make the connection by arguing that what specifically is being caused is interstate transportation. Since the statute requires a person willfully to cause, these courts conclude that there is a mens rea requirement attached to causing interstate transportation.

While this argument makes sense in logical terms, it fails to take into account the jurisdictional nature of the transportation element and the

116. *See supra* notes 97–105 and accompanying text.
117. The First Circuit employs this statutory interpretation. *See Leppo*, 177 F.3d at 94–97.
118. *See id.* at 95 ("Section 2314 applies to transporters; § 2(b) to one who willfully causes one to act.").
119. *See id.*; United States v. Sabatino, 943 F.2d 94, 99–100 (1st Cir. 1991).
120. *See Leppo*, 177 F.3d at 96–97.

congressional purpose behind the law.[121] The jurisdictional only nature of the transportation element trumps any subsequent mens rea requirements judicially read into that part of the crime.[122] It is contradictory for courts to read a mens rea requirement into an element that was created for jurisdictional purposes only.[123] In short, even if these courts are correct in interpreting the relationship of the causing alternative to any particular statute, this analysis is not relevant to transportation under the NSPA because mens rea requirements are not applicable to that element in the first place.

Similarly, in many of the court decisions that hold that there is no mens rea requirement, courts found themselves preoccupied by the statutory interpretation question.[124] These courts find no distinction in application between those who transport and those who cause others to transport.[125] They reason that causation liability is still implicitly provided for in the NSPA itself and that the causing alternative is meant solely as a reassurance that causation liability exists.[126] Some courts go as far as to proclaim that the causing alternative is "mere surplusage to be ignored."[127] This type of statement reflects the mistaken assumption made by courts that cause is implicitly provided for by the National Stolen Property Act itself.

Other courts simply sidestep the statutory construction question altogether.[128] These courts reason that it is unnecessary to figure out whether mens rea is actually required by the statute because any requisite level of mens rea can be inferred from the character of the defendant's scheme.[129] This analysis effectively sidesteps the

121. *See* discussion *supra* Part II.B.
122. *See* United States v. Feola, 420 U.S. 671, 684 (1975).
123. *Id.*
124. *See, e.g.*, United States v. Lack, 129 F.3d 403, 409–10 (7th Cir. 1997).
125. *See, e.g.*, United States v. Lennon, 751 F.2d 737, 741 (5th Cir. 1985).
126. For example, in *Lennon*, the Fifth Circuit held that the National Stolen Property Act *expressly* contained provision for those who cause. *Id.* at 741. This conclusion is clearly mistaken since there is no causation liability language in the current 18 U.S.C. § 2314 for those who cause interstate transportation of stolen goods. *See supra* notes 90–96 and accompanying text. The only instance where cause appears is in the second paragraph of the statute, which specifically refers to the interstate transportation of *persons* in furtherance of a scheme to defraud. 18 U.S.C. § 2314 (1994).
127. *Lennon*, 751 F.2d at 741 (citing United States v. Lyons, 706 F.2d 321, 324 n.1 (D.C. Cir. 1983)).
128. This form of analysis stems from the Supreme Court's decision in *Pereira v. United States*, 347 U.S. 1, 9 (1954).
129. *See id.*

disagreement at issue, but works only in the limited number of actual cases where mens rea as to interstate transportation can be inferred automatically from the circumstances.[130]

The following section takes up this inferential mode of analysis in greater detail. This was the approach utilized by the Supreme Court in its only decision directly relevant to the issue at hand.[131] As the section discusses, this analysis is limited in application and lends itself to overextension by the courts. This in turn further adds to the inconsistency among the already confused courts. The Supreme Court must revisit this decision in order to put to rest any and all sources for conflicting rules of prosecution.

IV. SIDESTEPPING THE ISSUE: *PEREIRA V. UNITED STATES*

As previously noted, the Supreme Court is in part responsible for the confusion among the federal circuit courts. This is due to the fact that in *Pereira v. United States*,[132] the Court effectively sidestepped the mens rea issue in connection to causing violations of the interstate transportation element of the crime.[133] The Court relied on the assumption that any level of mens rea was automatically inferable from the defendant's activities.[134] While undoubtedly a proper decision given the facts of the case,[135] it failed to decide the mens rea issue in cases

130. In *Pereira*, the Supreme Court held that the defendant's intent to cause interstate transportation was inferable from the fact that he cashed a check drawn on an out-of-state bank. *Id.*; *see also supra* note 59. Obviously, this reasoning is not applicable when both banks are in the same state, but for some reason completely unknown to the defendant the check travels across state lines. This was the situation the Eighth Circuit faced in *United States v. Ludwig*, 523 F.2d 705, 706, 708 (8th Cir. 1975), and the D.C. Circuit faced in *United States v. Scarborough*, 813 F.2d 1244, 1245–46 (D.C. Cir. 1987) (check deposited and drawn on District of Columbia banks, but unknown to the defendants the check traveled to the Federal Reserve bank in Maryland "in the normal course of the check clearing process").

131. *See Pereira*, 347 U.S. at 9.

132. 347 U.S. 1.

133. The Court did not discuss whether Congress intended to attach a mens rea requirement to the interstate transportation element of the crime. *See id.* at 8–10. Also, the Court did not address whether 18 U.S.C. § 2(b), as applied in the 18 U.S.C. § 2314 context, externally created a mens rea requirement attached to the interstate element of the crime. *See id.*

134. As applied to the particular defendants in the case, the Court reasoned that:

> When Pereira delivered the check, drawn on an out-of-state bank, to the [cashing] bank for collection, he "caused" it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira *intended* the [cashing] bank to send this check across state lines.

Id. at 9 (emphasis added).

135. It is certainly reasonable to assume that people know that cashing a check, drawn on an out-of-state bank, will cause it to travel across state lines. Therefore, it

where the Court's inference did not apply.[136] In particular, what would happen when mens rea was not automatically inferable from the defendant's conduct?

The particular facts in *Pereira* are a useful tool to help in understanding the mens rea problem at issue in this Comment. In *Pereira,* the defendants, Pereira and Brading, were charged with violating the NSPA by causing checks, which were obtained through a fraudulent scheme, to travel in interstate commerce.[137] Pereira and Brading had set up a scheme to defraud a wealthy widow of her money.[138] Pereira set himself out to be a wealthy entrepreneur involved primarily in motel development deals.[139] Brading's role in the scheme was to provide credibility for Pereira's assertions.[140] In furtherance of his scheme Pereira went so far as to marry his victim, in order to gain her confidence, so that he could swindle her of her money.[141]

The facts leading to the criminal charges occurred when Pereira obtained a $35,000 check from his spouse for the purposes of a fictional motel deal, which he immediately cashed in the course of his subsequent flight.[142] The check, as it turned out, was drawn on an out-of-state bank.[143] Consequently, when Pereira cashed the check, he violated the NSPA because he caused it to travel across state lines.

The defendants challenged their convictions on the grounds that there was no evidence that they mailed or transported anything in interstate commerce themselves.[144] This defense was quickly shot down, and

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would not have been logically plausible for the defendant to argue that he did not intend to cause interstate transportation because when he cashed the check he knew that interstate transportation was practically certain to occur. *Id.*

136. *See supra* note 130.

137. 347 U.S. at 3. The defendants were also charged with committing a violation of the mail fraud statute, 18 U.S.C. § 1341, and with conspiracy to commit both crimes. *Id.*

138. *Id.* at 3–6.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 5.

143. *Id.*

144. *Id.* at 7 (applying this defense to the substantive counts only). The defendants challenged the conspiracy counts on the further ground that punishing for both the substantive crime and conspiracy constituted double jeopardy. *Id.* at 11. The Supreme Court held that a substantive crime and the conspiracy to commit it are separate and distinct offenses. *Id.* (citing Pinkerton v. United States, 328 U.S. 640, 643–44 (1946)). Thus, a defense of double jeopardy is futile. For articles offering a complete treatment of the principle of allowing defendants to be charged with both conspiracy and

rightfully so. In reaching its decision, the Court held that to support a conviction "it is not necessary to show that petitioners actually mailed or transported anything themselves; it is sufficient if they caused it to be done."[145] The conclusion drawn by the Court was in no way surprising, because it went to the heart of the causing alternative, which is geared toward punishing those who cause the criminal acts to be done. Needless to say, their defense was ill advised, because causation had been clearly established. Instead of challenging on causation grounds, the best available defense would have been to challenge on the basis of the lack of an arguably required mens rea showing attached to the transportation element of the crime.[146]

The significance of *Pereira* was not the actual outcome of the case; instead, it was the method of analysis the Supreme Court laid down concerning the mens rea issue. The Court did not engage in the statutory construction issues discussed in the previous section and, alternatively, did not address the congressional purpose in passing the NSPA in regard to the transportation element.[147] As a substitute for this analysis, the Court relied on a logical, common sense assumption. The Court held, "It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira *intended* the [cashing] bank to send this check across state lines."[148] In other words, the Court inferred from the facts of the case that when Pereira cashed the check he knew it would travel interstate because it was drawn on an out-of-state bank. As a corollary to this inference, there could have been no plausible claim that he did not act with the requisite mental culpability of any proposed level of mens rea because he intentionally cashed the check knowing it would travel. Therefore, under this analysis it is unnecessary to discuss the mens rea requirement issue because the defendant is guilty regardless.

The problem with this analysis is that it is limited in application to those circumstances in which a guilty mind is automatically inferable.

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substantive offenses in the federal system, see Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying* Pinkerton *Liability to RICO Actions*, 56 MO. L. REV. 931 (1991) (discussing the application of *Pinkerton* liability in the federal criminal justice system); Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239 (1993) (describing compound liability in the federal criminal justice system).

145. *Pereira*, 347 U.S. at 8.

146. It is not clear from the facts of the case whether the defendants would have actually benefited from a strict mens rea requirement. Given the facts of the case, to satisfy a mens rea requirement, the government would have had to prove that Pereira knew the check was drawn from an out-of-state bank. *Id.* at 5.

147. It is important to note that, although this was a causation case, the Court does not discuss 18 U.S.C. § 2(b) anywhere in its relevant analysis. *See id.* at 9–10.

148. *Id.* at 9 (emphasis added).

There are a multitude of cases in which this inference will not be applicable; thus, the courts will be forced to address the statutory interpretation issue. For example, what if the cashing bank and the drawee bank were in the same state, but for reasons completely unknown to the defendant the check traveled interstate?[149] The *Pereira* inference is no longer applicable in these instances because the actor has not conclusively manifested his intent to cause interstate transportation. Lacking any manifestation of intent, the most that can be said is that the actor was a cause-in-fact of interstate transportation. Thus, in these types of cases the courts are not allowed the luxury of being able to sidestep the mens rea issue with simple logical assumptions.

The next section explores the erratic course of federal appellate court decisions after *Pereira*. This confusion is due in large part to the Supreme Court's narrow holding in *Pereira*. The courts of appeals have been left to their own devices when it comes to cases to which the *Pereira* inference does not apply.[150] As was previously discussed, courts have not been able to agree on a consistent method of interpreting the statutory scheme set up by Congress.[151] Thus, the void left by the lack of clear Supreme Court or congressional guidance is filled by varying and inconsistent circuit court decisions. This inconsistency does not bode well for a fair criminal process. Given the often decisive nature of mens rea requirements,[152] the likelihood of conviction may well turn on the federal circuit in which the defendant is prosecuted.

V. DISAGREEMENT AMONG THE COURTS AFTER *PEREIRA*

Soon after the Supreme Court's decision in *Pereira*, a growing majority of the circuit courts began to adopt the "no mens rea required"

149. For instances in which the court faced this predicament, see *supra* note 130. In both of those cases the adjudicating court relied on the jurisdictional element argument discussed *supra* Part II.B.

150. The circuit courts do not cite to *Pereira* as authority for their holdings on the mens rea issue. In fact the circuit courts cite to *Pereira* only for the proposition that the defendants need not transport anything themselves in order to violate the statute. *See* United States v. Lack, 129 F.3d 403, 410 (7th Cir. 1997); United States v. Sparrow, 614 F.2d 229, 232 (10th Cir. 1980); United States v. Newson, 531 F.2d 979, 981 (10th Cir. 1976); United States v. Ludwig, 523 F.2d 705, 706 (8th Cir. 1975); United States v. Masters, 456 F.2d 1060, 1062 (9th Cir. 1972); United States v. Mingoia, 424 F.2d 710, 711 (2d Cir. 1970).

151. *Compare, e.g.*, United States v. Leppo, 177 F.3d 93, 96–97 (1st Cir. 1999) (mens rea required), *with Ludwig*, 523 F.2d at 706–08 (no mens rea required).

152. *See supra* note 19.

rule.[153] Although there was some general continuity in outcome, there was no continuity in terms of the reasoning behind the rule. The disagreement as to the proper way to approach the issue opened the door to new and divergent interpretations as to what the law requires.[154]

As was discussed in the previous section, the disagreement is most acute when the *Pereira* inference is not applicable. For example, what if the cashing and drawee banks were in the same state? Some courts would attack the problem by disregarding the causing alternative and holding that cause is provided for by the NSPA itself.[155] In the absence of any explicit mens rea language attaching to the transportation element, these courts would hold that mere evidence that the stolen check crossed state lines is enough.[156] If this line of analysis is indeed proper, it opens the door to potentially conflicting outcomes. Other courts have interpreted the NSPA as being dependent upon the causing alternative entirely and hold that "willfully" creates a mens rea requirement for the transportation element.[157] This argument is plausible due to the fact that there has been no authoritative decision regarding the true source of causation liability in the National Stolen Property Act context.[158]

Another distinct line of cases has uncovered the true nature of the inquiry.[159] These cases apply the *Feola* jurisdictional element principle to causing transportation under the NSPA.[160] For example, in *United States v. Ludwig*,[161] the Eighth Circuit Court of Appeals was faced with a situation in which the cashing bank and the drawee bank were in the same state.[162] Hence, the *Pereira* inference was not directly applicable. Instead of jumping into the statutory construction issue directly, the Eighth Circuit decided to take a broader look at the issue. The court

153. *See supra* note 49.

154. Amid the confusion, the First Circuit recently revived the mens rea requirement for the transportation element of the NSPA. *See Leppo*, 177 F.3d at 96–97.

155. *See, e.g.*, United States v. Lennon, 751 F.2d 737, 741 (5th Cir. 1985).

156. *See supra* note 42 (citing cases within text of *Leppo*, 177 F.3d 93).

157. *See, e.g.*, *Leppo*, 177 F.3d at 97.

158. As was previously discussed, the Supreme Court in *Pereira v. United States*, 347 U.S. 1 (1954), did not address the interrelationship of 18 U.S.C. §§ 2(b), 2314, and whether a mens rea requirement should be read into the transportation element of the crime. *Id.* at 9–10.

159. *See supra* note 3.

160. *See supra* note 3.

161. 523 F.2d 705 (8th Cir. 1975).

162. *Id.* at 706. The defendants cashed fraudulently obtained checks, from a Missouri bank and later drawn on a Missouri bank. *Id.* The check happened to travel in interstate commerce because of circumstances beyond the knowledge of the defendants. *Id.* at 708 ("We have found no previous case in which the drawee bank and the depository bank were located in the same state, and thus we have found no case in which the issue of [mens rea] has been so sharply presented as here.").

correctly identified the issue when it framed the inquiry as follows: "Whether the [NSPA] requires, at a minimum, that such interstate transportation be reasonably foreseeable is, of course, a question of congressional intent."[163] The Eighth Circuit went on to hold, as was also concluded by the Supreme Court in *United States v. Feola*,[164] that when mens rea is not clearly provided for, the congressional purpose behind the statute determines whether it should be read in by the courts.[165]

In *Ludwig*, the court held that the purpose behind the transportation element of the NSPA is to "provide a constitutional basis for the exercise of federal power."[166] Since the interstate transportation element of the crime was merely jurisdictional, a mens rea requirement would frustrate the purposes of the rule. Therefore, it would be improper to read any mental requirement into the rule.

Although the *Ludwig* "jurisdictional only" line of cases rests soundly upon Supreme Court precedent,[167] responds to the purposes Congress had in making the law,[168] and deals with the specific language contained in the statute,[169] it has not ended the disagreement between the courts.[170] Despite the fact that these courts purport to have solved the problem in accordance with established Supreme Court principles, other courts continue to disagree. This conflict is due in large part to the continuing preoccupation by certain courts with the distinction between transporting and causing one to transport, which leads to inconsistent outcomes because different courts offer their own answer to the statutory construction question.

The following section briefly summarizes and evaluates the competing views on the mental state issue and states this Comment's conclusions. At the bare minimum it is self evident that a *Pereira* type analysis is sufficient when the rule clearly applies. When a *Pereira* type analysis does not apply, the best alternative analysis focuses on the purposes

163. *Id.* at 706.
164. *See supra* Part II.B.
165. *See Ludwig*, 523 F.2d at 706–07.
166. *Id.* at 707 (quoting United States v. Roselli, 432 F.2d 879, 891 (9th Cir. 1970)); *accord* United States v. Scarborough, 813 F.2d 1244, 1245–46 (D.C. Cir. 1987); United States v. Newson, 531 F.2d 979, 981 (10th Cir. 1976).
167. This reasoning is parallel to the *Feola* principle. *See* United States v. Feola, 420 U.S. 671, 676–85 (1975).
168. *See* McElroy v. United States, 455 U.S. 642, 649–59 (1982).
169. *See Ludwig*, 523 F.2d at 707.
170. *See* United States v. Leppo, 177 F.3d 93, 95–97 (1st Cir. 1999) (providing a concise overview of "wide national disagreement" on the subject).

behind the NSPA and concludes that mens rea is not applicable to the transportation element of the crime because it is jurisdictional only. Analyses that attempt to distinguish between transporting and those who cause transporting are faulty and ultimately will render inconsistent results.

VI. MAKING SENSE OF IT ALL: UNDERSTANDING THE DRIVING FORCES BEHIND THE COMPETING RULES

The circuit courts of appeals generally conclude that no mens rea requirement attaches to the element of causing interstate transportation.[171] These courts have fostered conflicting rules because they have not been able to come to agreement as to the proper way to interpret the relevant law.

There are three general forms of analysis which courts utilize in reaching the no mens rea rule. The first method involves focusing on the statutory language of the NSPA and concluding that there is no explicit mens rea requirement attached to transportation. This method declines to distinguish between transporting and causing one to transport and argues that the NSPA is the sole determinant of mens rea.[172]

As pointed out in the previous discussion, there are two faults in this mode of analysis. First, it does not take into account the jurisdictional nature of the transportation element. While the conclusion reached is ultimately correct, the lack of jurisdictional only analysis leaves it open to attack as the second problem illustrates. The second problem is that focusing on the statutory language leaves open the possibility that the causing alternative may in fact be the true source of causation liability. This is true because the issue has not been decided authoritatively. Thus, in the end, courts that focus on the statutory language are led down an empty path that offers more questions than answers.

The second form of analysis utilizes the type of guilty mind inference employed by the Supreme Court in *Pereira v. United States.*[173] These courts infer from the circumstances that the defendant must have intended to cause interstate transportation of stolen goods. Such reasoning is applicable only when the facts of the case warrant an automatic inference that the defendant acted with a guilty mind. Since there is no opportunity to rebut the presumption of mens rea in this type of case, there is no need to determine whether mens rea is actually required.

171. *See supra* note 49.
172. *See, e.g.*, United States v. Newson, 531 F.2d 979, 980–81 (10th Cir. 1976).
173. 347 U.S. 1, 9–10 (1954); *see also supra* Part IV.

The problem with the *Pereira* approach is that it is limited by its very terms and the analysis breaks down when mens rea is not inferable from the facts of the case. In effect, the *Pereira* approach merely sidesteps the issue and does not end the confusion between the courts.[174]

The final mode of analysis, if accepted across the board by all the circuit courts, would offer the greatest level of consistency and understanding of the statutory scheme created by Congress.[175] This mode of analysis focuses on the jurisdictional nature of the transportation element of the crime. This interpretation of the scheme comes to terms with the congressional purpose behind the NSPA which is to punish fraudulent activity that eludes the power of the states.[176] In addition, this position is in accord with the rule of federal statutory interpretation laid down by the Supreme Court in *United States v. Feola*.[177] Requiring mens rea might frustrate the purposes behind the insertion of the transportation element.[178] Thus, by concluding that no mens rea requirement is applicable to the interstate transportation element of the crime, courts avoid determining the exact purposes of the statutory language contained in the rules.

Since the circuit courts continue to disagree, and no end appears in sight,[179] it is necessary to explore other avenues to settle this disagreement. The final section concludes by proposing simple reformatory measures for use by the Supreme Court or Congress. These measures would resolve the inconsistencies among courts and result in a single rule for prosecution.

VII. RECOMMENDATIONS TO THE SUPREME COURT AND FUTURE CODE REVISERS

The Supreme Court could end the confusion among the circuit courts by specifically extending the holding in *United States v. Feola*[180] to prosecutions for causing violations of the NSPA. This extension would lay to rest any plausible assertion that the transportation element of the

174. *See* discussion *supra* Part IV.
175. *See* discussion *supra* Part II.B; *see also supra* note 4.
176. *See supra* note 2 and accompanying text.
177. 420 U.S. 671, 676–77 n.9 (1975); *see also* discussion *supra* Part II.B.
178. *See supra* notes 76–85 and accompanying text.
179. Just when the issue seemed to be settled, the First Circuit vigorously revived the mens rea issue. *See* United States v. Leppo, 177 F.3d 93, 96–97 (1st Cir. 1999). Because the case is so new, it remains to be seen whether other circuits will follow suit.
180. 420 U.S. at 686.

crime carries with it a mens rea requirement.[181]

Alternatively, future congressional code revisers could step in to resolve the matter in two ways. First, if Congress wants no mens rea requirement, it should strike the word "willfully" from the causing alternative. This revision would address any confusion surrounding mens rea. Second, if Congress accepts a mens rea requirement for the interstate transportation element of the crime, it should insert relevant statutory language to indicate such.[182] These simple textual alterations would end the debate surrounding mens rea as it relates to causing interstate transportation of stolen goods.[183]

These changes in the federal system must be implemented in order to promote a fairer system of criminal justice. It is somewhat arbitrary for a criminal defendant's fate to rest on the federal jurisdiction in which he will be charged. Until some authoritative changes are made, the circuit courts will continue to disagree, and thus will apply conflicting rules for prosecution.

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181. The Supreme Court turned down a golden opportunity to lay this matter to rest when it denied certiorari in *United States v. Leppo*, 177 F.3d 93, *cert. denied*, 120 S. Ct. 501 (1999).

182. For example, the word "knowingly" could be inserted to modify "transports" in 18 U.S.C. § 2314. For an example of a statute that expressly uses the mens rea of knowledge to attach to the transportation element of the crime, see 18 U.S.C. § 2252 (1994). For a case evaluating the mens rea elements created by this statute, see *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 67–78 (1994).

183. It is important that the statutory language be revised. A simple congressional interpretation at this point in time will not suffice as the views of the current Congress regarding the meaning of an act passed by an earlier Congress are not ordinarily of great weight under the rules of statutory construction. *See X-Citement Video*, 513 U.S. at 77 n.6. Thus, inserting a word traditionally used to create a mens rea requirement, for example "knowingly," into the statute would constitute irrefutable proof of Congress's intent to include a mental state as an element of the crime. In *Morissette v. United States*, 342 U.S. 246 (1952), the Supreme Court summed up this principle as follows:

> And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Id. at 263.