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## Florida's Disregard of Due Process Rights for Nearly a Decade: Treating Drug Possession as a Strict Liability Crime

Rachel A. Lyons

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# FLORIDA'S DISREGARD OF DUE PROCESS RIGHTS FOR NEARLY A DECADE: TREATING DRUG POSSESSION AS A STRICT LIABILITY CRIME

*Rachel A. Lyons<sup>1</sup>*

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## INTRODUCTION

From its jurisprudential inception, the application of strict liability principles to criminal law has always punished the innocent.<sup>2</sup> Today, the government is increasingly utilizing its most astounding power—prosecution and imprisonment—in enacting and enforcing a significant amount of crimes as punishable without *any* proof of criminal intent.<sup>3</sup> Strict liability crimes that have been improperly and unjustifiably enacted into law have eroded the constitutional principle of fair notice and punished many individuals who may or may not have had the intent to commit a criminal act.<sup>4</sup> Allowing strict liability crimes to continue to punish individuals runs counter to fundamental constitutional principles. The severe injustice of strict liability crimes has been demonstrated and voiced since the Athenian tragedy of Oedipus the King.<sup>5</sup>

When Oedipus was an infant, his parents abandoned him.<sup>6</sup> Polybus and Merope of Corinth took him as their own and raised him; hence, Oedipus grew up believing they were his parents.<sup>7</sup> When Oedipus grew older, an oracle told him he was destined to murder his father and sleep with his mother.<sup>8</sup> Oedipus indefatigably spends his life avoiding the commission of these two heinous crimes.<sup>9</sup> One night, Oedipus kills some men on the road as a result of an argument over a right of way.<sup>10</sup> Unbeknownst to Oedipus, one of the men was Laius the King of Thebes.<sup>11</sup> Subsequently, Oedipus is summoned to take the throne of Thebes and marry Jacosta, the former wife of Laius.<sup>12</sup> As King, Oedipus inquires about who murdered Laius was and

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2. See *infra* text accompanying notes 6–20, for a discussion about how Oedipus did not have the requisite *mens rea* to be held strictly liable for his crimes.

3. Edwin Meese III & Normal L. Reimer, *Foreword* of BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW, at vi (2010), available at [http://s3.amazonaws.com/thf\\_media/2010/pdf/WithoutIntent\\_lo-res.pdf](http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf) (stating that by the end of 2007 there were over 4,450 federal crimes in the United States Code and an estimated tens of thousands of more crimes located in the federal regulatory code that are considered to be strict liability crimes).

4. *Id.* (demonstrating that the trend of eliminating *mens rea* from crimes risks pervasive injustice and is a current issue of significant depth and breadth).

5. See *infra* text accompanying notes 6–20. See also SOPHOCLES, OEDIPUS THE KING (Bernard M.W. Knox trans., Simon & Schuster 2009) (430 B.C.).

6. See SOPHOCLES, *supra* note 5, at 56–60.

7. See *id.* at 56–57.

8. See *id.* at 54–55.

9. See *id.* at 55–56.

10. See *id.* at 45–46.

11. See *id.* at 42–44.

12. See SOPHOCLES, *supra* note 5, at 5–8, 33.

is informed by a prophet that it was he.<sup>13</sup> Disturbed by this information, Oedipus tells his wife and she confesses to him that an oracle once told Laius he would be killed by his own son.<sup>14</sup> She explains how Laius's death occurred and Oedipus realizes that he murdered Laius.<sup>15</sup> Unsettled by the thought he could be Laius's son, Oedipus seeks out the Shepard who gave him away as a baby to discover the true identity of his parents.<sup>16</sup> The Shepard states that Oedipus is the son of Laius and Jacosta, abandoned by them as an infant.<sup>17</sup> Oedipus is horrified that in fact he did kill his father and slept with his mother.<sup>18</sup> Oedipus is held strictly liable for the murder of his father and incestuous relations with his mother without any inquiry into his *mens rea*.<sup>19</sup> Although he unwittingly engaged in conduct he did not know was criminal, Oedipus is exiled and suffers a stigma so severe he gouges his own eyes out and never returns to Thebes.<sup>20</sup>

Oedipus lived in an archaic and doctrinal world without justice. The world today is not so different. Just as Oedipus was engaged in unintended criminal conduct before he discovered the truth of his actions, individuals in Florida who are engaged in the innocent behavior of general possession of objects, substances, personal items, etc., are subject to an identical strict liability standard.<sup>21</sup> For example, the same concern of injustice would arise when a friend, bringing a package to the post office for a roommate, is stopped on the way and searched by an officer. The officer uses a canine to sniff the car and discovers the contents of the package arouse suspicion. Unbeknownst to the friend, the roommate's package contains cocaine. The friend will be convicted of drug possession without the State being required to prove the friend had knowledge of the illicit nature of the contents of the package. Florida's Drug Abuse Prevention and Control Law expressly dispenses with the well-settled, common law requirement of *mens rea*.<sup>22</sup> Such a comparison against Oedipus may seem fanciful, yet it is not.<sup>23</sup> Citizens of Florida live in a state that provides a mere shadow of justice in its crimi-

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13. *See id.* at 21–22.

14. *See id.* at 41.

15. *See id.* at 41–43.

16. *See id.* at 59–61.

17. *See id.* at 68–69.

18. *See* SOPHOCLES, *supra* note 5, at 69.

19. *See id.* at 70–71.

20. *See id.* at 73, 79–83.

21. *See* FLA. STAT. § 893.101 (2002).

22. *See id.*

23. *See generally* MILTON HIRSCH, *THE SHADOW OF JUSTICE* (2004), for a fictional story written by a prominent attorney in the field of criminal law discussing the inner workings of the Miami court system.

nal laws due to a legislature that has decided to regulate the wholly passive and innocent conduct of general possession in attempt to regulate drug possession.<sup>24</sup> The current state of the law is so unjust that it violates the Due Process Clause of the Fourteenth Amendment by subjecting millions of people to potential criminalization.<sup>25</sup>

This Article examines the United States Supreme Court's jurisprudence that constitutionally compels an analysis under the Due Process Clause for strict liability crimes, and how the Florida Legislature overstepped its due process limitations when it amended Florida's Drug Abuse Prevention and Control Law in 2002. Part I traces the evolution of *mens rea* in the criminal justice system. Part II provides a history of Florida's Drug Abuse Prevention and Control Law. Part III discusses the recent constitutional challenges to Florida's Drug Abuse Prevention and Control Law. Part IV explains why the United States Supreme Court cases addressing strict liability crimes compel a constitutional analysis under the Due Process Clause of the Fourteenth Amendment. Part V focuses on how Florida's Drug Abuse Prevention and Control Laws violate the Due Process Clause of the Fourteenth Amendment. Finally, part VI provides both a pragmatic solution for the Florida Legislature to remedy Florida's Drug Abuse Prevention and Control Law and an overwhelming suggestion to the United States Supreme Court to require legislatures to engage in a delineated due process analysis when enacting strict liability crimes.

## THE HISTORY OF *MENS REA* AND STRICT LIABILITY CRIMES: FROM THE COMMON LAW TO MODERN AMERICAN CRIMINAL JURISPRUDENCE

### THE EARLY BEGINNINGS OF *MENS REA*

A fundamental lynchpin within the field of American criminal law and a term deeply rooted in United States Supreme Court's jurisprudence and American culture is the Latin phrase *mens rea*,<sup>26</sup> or otherwise known as "guilty mind".<sup>27</sup> The term *mens rea* is often used in a broad sense to refer

24. See *infra* Part II.b.

25. See U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); *infra* text accompanying notes 203–06.

26. BLACK'S LAW DICTIONARY, 1075 (9th ed. 2009) [hereinafter BLACK'S LAW]. The Latin term *mens rea* is defined as, "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness . . . [t]he second of two essential elements of every crime at common law, the other being the *actus reus*." *Id.*

27. *Shelton v. Sec'y, Dept. of Corr.*, 802 F. Supp. 2d 1289, 1297–98 (M.D. Fla. 2011) (ex-

to a person's general culpability.<sup>28</sup> Specifically, in American criminal law, *mens rea* is, "the particular mental state provided for the definition of the offense."<sup>29</sup> Yet, the precise definition of the word is elusive at best because each jurisdiction within the United States has the police power to decide what the requisite *mens rea* shall be for each individual crime in its criminal statutes.<sup>30</sup> Even a glance into the historical development of *mens rea* does not bring clarity to a singularly accepted definition of the term.<sup>31</sup>

The material element of mental culpability dates back to the earliest known legal systems of ancient Hebrew law, Roman law, Anglo-Saxon law, and Christian theology.<sup>32</sup> In the early thirteenth century, the Anglo-Saxon Church had a great deal of influence on the development of criminal law in England.<sup>33</sup> In the Church, the intent of a man was the most persuasive factor in penance since it was thought that willful intent echoed in the

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plaining that the law recognizes that governments have the authority to create laws that do not require proof of *mens rea* but such power is subject to firm constitutional and historical safeguards).

28. CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW CASES AND MATERIALS* 189 (Louis H. Higgins ed., 2d ed. 2005).

29. *Id.* (quoting JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 119 (5th ed. 2009)).

30. See, e.g., COLO. REV. STAT. § 18-3-102 (2011); FLA. STAT. § 782.04 (2011); see also NEV. REV. STAT. § 200.010 (2010). The requisite *mens rea* for first-degree murder in Colorado is: "[a]fter deliberation and with the intent to cause the death of a person other than himself." § 18-3-102. The requisite *mens rea* for murder in Florida is: "perpetrated from a premeditated design to effect [sic] the death of the person killed or any human being." § 782.04. The requisite *mens rea* for murder in Nevada is: "[w]ith malice aforethought, either express or implied." § 200.010.

31. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1016 (1932) [hereinafter Sayre, *Mens Rea*]. In analyzing the ambiguity surrounding *mens rea*, Sayre wrote,

[A] study of the historical development of the mental requisites of crime leads to certain inescapable conclusions. In the first place, it seems clear that *mens rea*, the mental factor necessary to prove criminality, has no fixed continuing meaning. The conception of *mens rea* has varied with the changing underlying conceptions and objectives of criminal justice.

*Id.*

32. 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, 642 (1993); see Albert Levitt, *Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117, 117 (1923); Sayre, *Mens Rea*, *supra* note 31, at 978. English and Hebrew law drew a distinction between the man who willfully kills another and the man who kills by having God deliver the victim. Gardner, *supra*, at 642. Roman law drew a distinction between the man who consciously burns down a building or stack of grain and the man who commits the same deed by accident or negligence. *Id.* The Old Roman Law notions of *dolus* (fraud or deceit) and *culpa* (fault, neglect, or negligence) required meticulous consideration of an individual's mental state. Sayre, *Mens Rea*, *supra* note 31, at 983.

33. See PAUL H. ROBINSON, *ENCYCLOPEDIA OF CRIME & JUSTICE* 996 (Joshua Dressler et al. eds., 2d ed. 2002); Sayre, *Mens Rea*, *supra* note 31, at 983 ("[The] earliest reference to *mens rea* in an English law book is a scrap copied in from the teachings of the church.").

mind of a blameworthy “sinner.”<sup>34</sup> These teachings of the Anglo-Saxon Church soon transformed into Anglo-Saxon law and thus the idea that criminal liability should only be found where there is some degree of culpability accompanying harmful conduct, began to emerge.<sup>35</sup> The actual term *mens rea* was coined by Saint Augustine in A.D. 597 during one of his sermons, where he wrote of evil motive and discussed the correlation between a guilty man and perjury.<sup>36</sup>

By the middle of the thirteenth century, St. Augustine’s principle that punishment must be premised on, and proportional to, moral guilt was widely accepted and substantially influenced English jurist, Henry de Bracton.<sup>37</sup> As a result, Bracton authored a treatise on what criminal law should be and how it should be applied.<sup>38</sup> In his treatise, Bracton discussed the non-culpability of children and the insane and suggested, “*mens rea* required that offenders function as moral agents rationally choosing their evil designs.”<sup>39</sup> This view strengthened the essential component of moral blameworthiness as a defense to criminal liability and persuaded other legal scholars that criminal liability could not exist without the intent to injure or

34. Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455, 463 (2008); Sayre, *Mens Rea*, *supra* note 31, at 988 (“Under the pervasive influence of the Church, the teaching of the penitential books that punishment should be dependent upon moral guilt gave powerful impetus to this growth, for the very essence of moral guilt is a mental element.”).

35. See Gardner, *supra* note 32, at 642. Despite this emergence of *mens rea*, “commentators generally agree that no systematic *mens rea* requirements existed until at least the early thirteenth century.” *Id.*

36. Phillips & Woodman, *supra* note 34, at 463; see ROBINSON, *supra* note 33, at 996. The term *mens rea* first appeared in a sermon written by St. Augustine in which he wrote “*reum non facit nisi mens rea*,” as a description of perjury. Phillips & Woodman, *supra* note 34, at 463. Lord Coke’s maxim, “*actus non facit reum nisi mens sit rea*,” (the act is not guilty unless the mind is guilty) found in his *Third Institute* is thought to have come from the writings of St. Augustine. *Id.*; Sayre, *Mens Rea*, *supra* note 31, at 988. The *Leges Henrici Primi*, compiled around the year 1118, made assertions supporting the requirement of a guilty mind. *Id.* at 978. Henry’s treatise stated, “[i]f some one [sic] in the sport of archery or other form of exercise kill another with a missile or by some such accident, let him repay; for the law is that he who commits evil unknowingly must pay for it knowingly.” *Id.* (alteration in original).

37. See Phillips & Woodman, *supra* note 34, at 464; Harry Keyishian, *Henry de Bracton, Renaissance Punishment Theory, and Shakespearean Closure*, 20 L. & LITERATURE 444, 445 (2008). Bracton was a thirteenth-century jurist who served as a judge in the reign of King Henry III in England. *Id.*

38. Gardner, *supra* note 32, at 655 n.90. See generally HENRY D. BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel E. Thorne trans., 1968) (writing on and analyzing how the laws of England should be designed and implemented).

39. Gardner, *supra* note 32, at 661–62 (emphasis added). *Mens rea*, “constituted a normative judgment of subjective wickedness, requiring not simply that the actor intend to commit the offense, but also that the offense be committed by a responsible moral agent for wicked purposes.” *Id.* at 663.

cause societal harm.<sup>40</sup>

Since the element of *mens rea* was still unclear in its developmental phase, courts began to shape early criminal law by defining how the state of mind relates to a voluntary act.<sup>41</sup> However, *mens rea* took on a more concrete meaning when courts began to recognize certain defenses to criminal liability ascertaining that offenders could engage in a voluntary act without *mens rea*.<sup>42</sup> In the early seventeenth century, Lord Edward Coke<sup>43</sup> wrote his *Third Institute*, which was a repertoire of materials on criminal law.<sup>44</sup> In this compilation, Lord Coke established the American criminal law maxim, "*actus not facit reum nisi mens sit rea*."<sup>45</sup> As a result of his influence, English criminal law required *mens rea* for the conviction of serious offenses and this principle carried over to the American colonies, although it was limited in its application.<sup>46</sup> The English common law courts believed it was necessary to provide a clear understanding of the element of *mens rea*, since offenses began to require particular states of mind rather

40. See Phillips & Woodman, *supra* note 34, at 465. "Moral blameworthiness required that the offender make a free, voluntary, and rational choice to do evil." Gardner, *supra* note 32, at 665.

41. See Gardner, *supra* note 32, at 665. The early English courts addressed a retributive issue of whether the accused man acted with *mens rea* coupled with an *actus reus* sufficient to deserve blame and punishment. *Id.*

42. Gardner, *supra* note 32, at 665–66; see Sayre, *Mens Rea*, *supra* note 31, at 1004–05; *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 490 (E.D.N.Y. 1993) (explaining that Plato constructed a criminal code that permitted defenses such as infancy, insanity, and other forms of incapacity). Plato also, "punishe[d] premeditated murder more severely than homicide committed in the heat of passion and that absolves those who act unintentionally." *Id.* (alteration in original). This look into history as far back as Plato shows the significance of *mens rea* in the law. See *id.*

43. See Roland G. Usher, *Sir Edward Coke*, 15 ST. LOUIS L. REV. 325, 325–28 (1930). Lord Edward Coke, born in 1552 in England, has been heralded as one of the greatest English lawyers of his time and of English history. *Id.* at 325, 328. He was also one of the chief figures of the political and constitutional history of the early seventeenth century and is one of the greatest influences on modern legal teaching. *Id.* at 325.

44. ENCYCLOPEDIA OF CRIME AND JUSTICE 1031 (Sanford H. Kadish et al. eds., 1983). In his treatise, Lord Coke also wrote that ignorance of fact is a defense and that murder by accident, *per infortunatam*, is not murder, thus emphasizing the necessity of guilty mind. *Id.*

45. See ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 44, at 1031; Kelly A. Swanson, *Criminal Law: Mens Rea Alive and Well: Limiting Public Welfare Offenses—In RE C.R.M.*, 28 WM. MITCHELL L. REV. 1265, 1266 (2002). In *Duncan v. State*, the court stated,

It is a sacred principle of criminal jurisprudence that the intention to commit the crime is of the essence of the crime and to hold, that a man shall be held criminally responsible for an offense of the commission of which he was ignorant at the time would be intolerable tyranny.

*Duncan v. State*, 26 Tenn. 148, 150 (Tenn. 1846). "*Actus not facit reum nisi mens sit rea*" means, "an act does not make one guilty unless his mind is guilty." Swanson, *supra*, at 1266.

46. ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 44. In the seventeenth century, *mens rea* guided the outcomes in primarily three areas: murder, rape, and larceny. *Id.*



than solely rely upon pure evil motive.<sup>47</sup> In 1874, the concept of *mens rea* was more narrowly tailored in the decision of *Regina v. Pembliton*.<sup>48</sup> In *Pembliton*, a defendant's conviction for maliciously damaging the property of another was quashed because the defendant's intent to harm was directed at a person and not the property that the defendant damaged.<sup>49</sup> Furthermore, in *Regina v. Faulkner*, *mens rea* became a more distinct material element when the court rejected the notion that malicious intent for one's *actus reus*<sup>50</sup> cannot satisfy the requisite *mens rea* for a different offense.<sup>51</sup> At this point in time, England began to categorize criminal offenses within the common law in order to draw a distinction between the requisite *mens rea* of various offenses such as felony arson and theft.<sup>52</sup>

The common law notion of *mens rea* was first adopted in American jurisprudence while American legal scholars were in the process of drafting a criminal code.<sup>53</sup> Early consideration of adopting substantive criminal law

47. Gardner, *supra* note 32, at 672–73.

48. *Regina v. Pembliton*, (1874) 12 Cox C. C. 607, 607 (Eng.).

49. *Id.* at 607, 611. While Pembliton was drunk, he fought with a group of people in a street that was lined with houses. *Id.* at 608. Pembliton picked up a large stone and hurled it at the group but it flew over their heads and shattered a glass window on a house. *Id.* The court found Pembliton's malicious intent to be directed toward the people and not the house, therefore the requisite *mens rea* was lacking. *Id.* at 611.

50. BLACK'S LAW, *supra* at 41 ("The wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability . . ."). *Actus reus* is translated to "guilty act." *Id.* "Also termed *deed of crime*; *overt act*." *Id.*

51. *Regina v. Faulkner*, (1877) 13 Cox C. C. 550, 552 (App. Cas.) (Eng.). The Court found that Faulkner's malicious intent to steal rum from his ship's cargo by boring a hole in a cask, did not satisfy the requisite *mens rea* for the fire of the ship that ensued. *Id.* Faulkner's intent to light a match was to provide light so he could plug the hole in the cask after he finished stealing the rum. *Id.* at 551. The court opined that in order to commit arson, Faulkner must have intended to burn the ship or act with the knowledge of the risk that the ship could catch fire. *Id.* at 553.

52. See ROBINSON, *supra* note 33, at 996; John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 299–300 (1986). "At common law, [arson was defined as] the malicious burning of someone else's dwelling house or outhouse that is either appurtenant to the dwelling house or within the curtilage." BLACK'S LAW, *supra* note at 126 (alteration in original). Theft is defined as, "[t]he felonious taking and removing of another's personal property with the intent of depriving the true owner of it . . ." *Id.* at 1615. "At common law, arson was a crime punished by death because it was seen as an offense of since it violated "the security of the habitation [and] protect[ion] of dwellers within the building from injury or death by fire." Poulos, *supra*, at 299–300 (alteration in original).

53. See Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 947 (1999). Thomas Jefferson attempted to draft a criminal code, followed by Edward Livingston, American jurist and statesman, from Louisiana. *Id.* Livingston drafted the first criminal code for Louisiana; however, it was never enacted. *Id.* Louisiana did not adopt a criminal code until 1942, making it the first state to do so before World War II. *Id.* Later in the nineteenth century, David Dudley Field, lawyer and law reformer joined a movement to codify the entire law of the United States. *Id.* The movement resulted in the production of a criminal code that many Western states, including New York and California adopted. *Id.*

was an arduous process that often resulted in, "archaic, inconsistent, unfair, and unprincipled," results.<sup>54</sup> However, once prosecutors and judges began to develop the law in the courtroom, the black letter criminal law started to become better defined.<sup>55</sup> Nonetheless, states began to adopt their own criminal laws that reflected the English common law requirement of *mens rea*.<sup>56</sup>

### THE COMMON WELFARE OFFENSE DOCTRINE

Despite the common law's investigation into the realm of intent, most scholars would agree that primitive criminal law in England emerged from a public welfare offense foundation.<sup>57</sup> English jurists tended to focus on the perspective and outrage of the victim, rather than on the intent of the offender, setting aside a culpability requirement.<sup>58</sup> American states began to adopt a similar perspective and consequently enacted public welfare offenses that were considered to be common law exceptions to the requirement of *mens rea*.<sup>59</sup> American and English courts began to further develop the public welfare offense doctrine ignoring the well-established legal notion that, "blameworthiness was relevant to criminal stigma and punishment."<sup>60</sup> Juries were instructed to determine a defendant's liability solely on whether the defendant engaged in the forbidden act proscribed by a par-

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54. Kadish, *supra* note 53, at 947 (citing Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1100-01 (1952)). The major challenge with model penal codes is that they include major common law doctrines that rarely get reflected in state statutory law resulting in inconsistent and unfair results. See Wechsler, *supra*, at 1100-01.

55. See Kadish, *supra* note 53, at 947-48. In the thirties, on the suggestion of President Roosevelt, the American Law Institute approved the preparation of a model criminal code. *Id.* This eventually resulted in the development of the Model Penal Code in 1962. *Id.* at 948.

56. See LEE & HARRIS, *supra* note 28, at 189. Generally, terms used to describe a person's mental state under the common law included: "willfully," "maliciously," "corruptly," "intentionally," "knowingly," "recklessly," and "negligently." *Id.* Jurisdictions that have primarily incorporated the common law into their criminal laws still use those terms today to reference particular mental states. *Id.* However, each term may have its own meaning from statute to statute in each jurisdiction. *Id.*

57. See Gardner, *supra* note 32, at 649-50.

58. See *id.* at 652 ("To the extent that the law was aimed at compensating and buying off the feud, it hardly mattered that the offender acted inadvertently or otherwise nonculpably.").

59. See Matthew T. Fricker & Kelly Gilchrist, *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, 812-13 (1990). The English courts developed a rule, the doctrine of *ignorantia juris non excusat* (ignorance of the law is no excuse), which held that state of mind does not need to be proven as a material legal element of an offense. *Id.* at 813.

60. Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 322 (2003); see Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 338 (1989).

ticular statute regardless of the defendant's intent.<sup>61</sup> No mental elements were taken into consideration in these offenses because the legislature wanted to promote the public good and deter impermissible behavior by sanctioning criminals for minor crimes.<sup>62</sup>

Historically, the public welfare offense doctrine was drafted out of necessity and was intended to consist of a "narrow class of regulation[s]" during the industrial revolution to "impose more stringent duties on those connected with particular industries, trades, properties, or activities that affect public health, safety, or welfare."<sup>63</sup> Two other factors contributed to the notion that strict liability was necessary to the increasing implementation of regulatory offenses.<sup>64</sup> First, the concern was that, "requiring indi-

61. Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 733 (1959–60). As long as a jury can find that the defendant committed the forbidden act, then it is obliged to deliver a guilty verdict. *Id.*

62. *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 496 (E.D.N.Y. 1993); *Morissette v. United States*, 342 U.S. 246, 256 (1952); Singer, *supra* note 60, at 338; see Fricker & Gilchrist, *supra* note 59, at 817. In discussing public welfare offenses, Justice Jackson stated,

The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does not [sic] grave damage to an offender's reputation.

*Morissette*, 342 U.S. at 256. England applied a clear utilitarianism standard to an area where moral concerns should dominate. Singer, *supra* note 60, at 338. There was a strong push for certain crimes to call for the, "total abolition of moral blame as a predicate for criminal liability." *Id.* English legal scholars also interpreted the imposition of strict liability as representative of an emerging tendency towards applying an objective standard to criminal law. *Id.*

63. Carpenter, *supra* note 60, at 323; see *Morissette*, 342 U.S. at 255–56. The development of public welfare offenses and administrative regulation was a response to an, "increasing need for order in the burgeoning urban society and marked the growing shift from the protection of the individual's rights to the protection of the community." Carpenter, *supra* note 60, at 324. In *Morissette*, the Court stated that public welfare offenses do not fit neatly into the classification of common law offenses because the nature of these offenses is neglect or inaction where a legal duty is imposed, whereas common law offenses are aggressive and willful against, "the state, the person, property, or public morals." *Morissette*, 342 U.S. at 255–56. When legislation is created that classifies a crime as a public welfare offense, it is generally because the accused did not will the violation but rather was in a position to prevent the violation without using more care than society would reasonably expect him or her to use in a position of responsibility. *Id.* at 256.

64. Carpenter, *supra* note 60, at 324; see Francis Bowes Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55, 67 (1933) [hereinafter Sayre, *Public Welfare Offenses*]. In analyzing the history of public welfare offenses, Sayre wrote,

The development [of strict liability crimes] is the not unnatural result of two pronounced movements which mark twentieth century criminal administration, i.e., (1) the shift of emphasis from the protection of individual interests which marked nineteenth century criminal administration to the protection of public and social interests, and (2) the growing utilization of the criminal law machinery to enforce, not only the true crimes of the classic law, but also a new type of twentieth century regulatory measure involving no moral delinquency.

Sayre, *Public Welfare Offenses*, *supra*, at 67 (alteration in original).

vidua[lized] proof of *mens rea* would overtax an already burdened docket.”<sup>65</sup> The second issue raised was that, “in many of the regulatory infractions, a criminal *mens rea* was very difficult to prove.”<sup>66</sup> Since there was a new use for crimes that did not require intent, cities began enacting such regulations in limited areas of the law.<sup>67</sup>

In 1846, before an English court, the first seminal strict liability case, *Regina v. Woodrow*, charged a defendant with a public welfare offense.<sup>68</sup> The court affirmed the conviction of a tobacco dealer for possessing “unadulterated” tobacco even though the dealer had no knowledge of its illicit character.<sup>69</sup> Furthermore, two of the earliest public welfare offense cases that came before American courts involved a defendant selling liquor to a drunkard where he did not know the man was a drunkard,<sup>70</sup> and a defendant selling intoxicating liquor without knowing the liquor was intoxicating.<sup>71</sup> In time, courts were criticized for how expansive public welfare offenses had become; because no longer was the public welfare offense doctrine

65. Carpenter, *supra* note 60, at 324 (alteration in original) (emphasis added).

66. *Id.* (emphasis added).

67. *Morissette*, 342 U.S. at 257. New York enacted regulations of tenement houses in which a violation was a public welfare offense resulting in money penalties. *Id.* (citing Tenement House Dep’t of N.Y. v. McDevitt, 215 N.Y. 160, 168 (1915)). Justice Cardozo, in his opinion, stated that intent is not a requirement for such a crime because the penalty is petty. *Id.* After discussing *McDevitt* and other cases, the Supreme Court, in *Morissette*, explained “[t]hus, for diverse but reconcilable reasons, state courts converged on the same result, discontinuing inquiry into intent in a limited class of offenses against such statutory regulations.” *Id.* at 258.

68. *Regina v. Woodward*, (1846) 153 Eng. Rep. 907, 909; 15 M. & W. 404 (Eng.) (charging the defendant for buying tobacco that was altered with other substances); *Morissette*, 342 U.S. at 254 n.12 (1952); Sayre, *Public Welfare Offenses*, *supra* note 64, at 58; Singer, *supra* note 60, at 342. An information was charged against the defendant, a tobacco dealer, to enforce a fine of 200 pounds for having unadulterated tobacco in his possession which was a violation of the Act of 5 & 6 VICT. C. 93, § 3 enacted in 1842. Sayre, *Public Welfare Offenses*, *supra* note 64, at 58–59. Even in the case of *Regina v. Woodrow*, the court found a way “to avoid placing the full brunt of strict liability on the defendant” because the defendant made a wholly innocent mistake of fact. Singer, *supra* note 60, at 342. In *Woodrow*, the tobacco that was seized from the defendant was “adulterated” because it contained “sugar, molasses, and other saccharine matter, which [made up] one-seventh of the total weight.” *Id.* at 341 (alteration in original). When the defendant purchased the tobacco, he believed it to be pure and could not reasonably have known that it had been “adulterated” because the adulteration occurred before he purchased it. *Id.* Regardless of the defendant’s lack of knowledge, he was found guilty because the governing statute called for strict liability. *Id.* at 342.

69. See Singer, *supra* note 60, at 342. Within the statute, there was no requirement that the State prove the defendant had knowledge of the adulteration for the purpose of diluting the purity of the tobacco. *Id.*

70. See *Barnes v. State*, 19 Conn. 398, \*5 (Conn. 1849) (“[K]nowledge of one’s character, as a common drunkard, is not essential, to subject the offender to the penalty of the law.”).

71. See *Commonwealth v. Boynton*, 84 Mass. 160, 160 (2 Allen 1861) (holding that the case was not one in which it was necessary to prove that the person charged with the offense knew the illegal character of his act).

regulating acts of industry, it was bleeding into common law offenses.<sup>72</sup> As public welfare offenses gained momentum, courts became progressively confused as to when a public welfare offense is permissible and not overreaching and when *mens rea* should be a fundamental requirement for federal crimes adopted from the common law.<sup>73</sup>

#### SUPREME COURT JURISPRUDENCE ON STRICT LIABILITY AND THE DISPOSAL OF MENS REA

The United States Supreme Court has refused to establish a rule constitutionally requiring States to include the element of *mens rea* in each legislated criminal statute.<sup>74</sup> However, it has explained through case law that there are constitutional constraints on statutes that disregard the element of *mens rea*.<sup>75</sup> In 1952, *Morissette v. United States*<sup>76</sup> came before the Supreme Court and steered federal criminal law back toward the consideration that *mens rea* should be a constitutional requirement for a crime.<sup>77</sup>

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72. Fricker & Gilchrist, *supra* note 59, at 819; see *United States v. Behrman*, 258 U.S. 280, 288–89 (1922). In *Behrman*, the Court determined that if the accused commits an offense under the Narcotic Drug Act, the element of intent is not requisite, saying, “[i]f the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.” *Behrman*, 258 U.S. at 288.

73. See *United States v. Dotterweich*, 20 U.S. 277, 284 (1943); *United States v. Balint*, 258 U.S. 250, 254 (1922); Fricker & Gilchrist, *supra* note 59, at 819. In *United States v. Balint*, the Court held that if a statute is silent as to the requisite *mens rea* for an element, the prosecution does not need to prove state of mind. *Id.* Additionally, in *United States v. Dotterweich*, the Court held that state of mind does not need to be proven where the defendant shipped mislabeled drugs even though the defendant had no intent to misbrand the drugs. *Dotterweich*, 320 U.S. at 284–85.

74. *Patterson v. New York*, 432 U.S. 197, 210 (1977) (“We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.”).

75. *Lambert v. California* 355 U.S. 225, 228–30 (1957); see *Staples v. United States*, 511 U.S. 600, 605–06 (1994); *Morissette v. United States*, 342 U.S. 246, 275 (1952).

76. *Morissette*, 342 U.S. at 246; Carpenter, *supra* note 60, at 328. In *Morissette*, the defendant was hunting on uninhabited land in Michigan that was a government practice bombing range. *Morissette*, 342 U.S. at 247. The area was closed to the public yet was a popular site for deer hunting. *Id.* *Morissette* came across rusted bomb casings piled in heaps. *Id.* *Morissette* was a scrap iron collector so he took some casings, got them flattened, and sold them on the market for a profit. *Id.* An investigation was prompted and *Morissette* was indicted on the charge that he unlawfully, willfully and knowingly stole and converted property of the United States in violation of a federal conversion statute. *Id.* at 248. *Morissette* claimed he lacked intent to steal because he thought the casings were abandoned. *Id.* *Morissette* was convicted and sentenced to imprisonment. *Id.* The federal conversion statute *Morissette* was charged under purportedly disposed with criminal *mens rea* for conviction. Carpenter, *supra* note 60, at 328.

77. See *Morissette*, 342 U.S. at 256; see also Kadish, *supra* note 53, at 965. “Strict liability was an unwelcome departure from the principles of the common law.” Kadish, *supra* note 53, at 954. By the time the issue of strict liability crimes came before the Supreme Court in *Morissette*, strict liability likely had become too widespread to reverse completely. *Id.* at 965. Therefore, the

Yet, in *Morrisette*, the Supreme Court refused to make *mens rea* a constitutional requirement or draw a bright line on what exactly constitutes a public welfare offense.<sup>78</sup> However, it did narrow the doctrine such that where a statute was taken over from the common law, *mens rea* would be presumptively implied.<sup>79</sup> The holding in *Morrisette* emphasized the constitutional necessity that traditional common law crimes require a state of mind; it also highlighted the problematic rationale behind public welfare offenses.<sup>80</sup> The Court stated:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. . . . [T]o constitute any crime there must first be a vicious will.<sup>81</sup>

Five years after *Morrisette*, in *Lambert v. California*,<sup>82</sup> crimes without a *mens rea* requirement became further disfavored.<sup>83</sup> In *Lambert*, the Supreme Court concluded that where the violation of a regulation is a strict liability offense, the constitutional minimum standard of due process of law demands that all persons be on sufficient notice that their conduct is subject to punishment where the conduct is characteristically innocent.<sup>84</sup> In this

Supreme Court merely articulated its concern about strict liability crimes and narrowly interpreted the statute in question to retain some element of fault as a condition of *mens rea*. *Id.*

78. *Morrisette*, 342 U.S. at 260 ("We attempt no closed definition, for the law on the subject is neither settled nor static.").

79. *Id.* at 252.

80. *Id.* at 260–62. In reaching its holding, the Supreme Court looked to common law theft and decided that the federal conversion statute in fact required the element of *mens rea*. *Id.* The Court also exemplified that the public welfare offense doctrine rationale is troubling because had the statute dispensed with *mens rea*, "it would have made crimes of all unwitting, inadvertent and unintended conversions." *Id.* at 270. The Supreme Court reversed the appellate court's ruling and in its opinion established important principles of American criminal law when it stated,

81. *Id.* at 250–51 (footnotes omitted).

82. *Lambert v. California*, 355 U.S. 225 (1957).

83. *Id.* at 229. ("A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.").

84. *Id.* at 228. In *Lambert*, the defendant was arrested on suspicion of an offense and was charged with a violation of California's felon registration law. *Id.* at 226. The law provided that it is unlawful for any felon to be or remain in Los Angeles for more than five days without registering. *Id.* At the time of the defendant's arrest, she had been a resident of Los Angeles for over seven years and was a convicted felon for a crime she was previously charged with. *Id.* After

case, the statute was held unconstitutional because the type of regulation, that the defendant purportedly failed to comply with, did not extend the kind of notice that would, "shift the burden to the defendant to discern the facts and discover the potential regulation."<sup>85</sup> Thus, a constitutional problem emerged since this specific strict liability crime failed to put the reasonable person on notice of the illegality of wholly passive conduct that is subject to statutory regulation.<sup>86</sup>

Over the next three decades, the Supreme Court held in other cases that *mens rea* should only be eliminated under certain limitations since *mens rea* as a material element of a crime is the rule, and not the exception.<sup>87</sup> The most recent and seminal case addressing the dissonance between the necessity of proving *mens rea* and strict liability crimes is that of *Staples v. United States*.<sup>88</sup> The Court explained that dispensing with *mens*

defendant was convicted, she did not register under the municipal code as per the felon registration law. *Id.* The Court held that that the registration provisions of the Los Angeles Municipal Code that applied in the defendant's case violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 227.

85. *Id.* at 227; see Carpenter, *supra* note 60, at 329–30. The Court reiterated the widely accepted principal that state legislatures have the police power to declare what is and is not a crime, the requisite elements of a crime, and whether to dispense of the element of *mens rea* from a crime's definition. Carpenter, *supra* note 60, at 329–30.

86. See Carpenter, *supra* note 60, at 330. The concept of notice is an important one because public welfare statutes render criminal a type of behavior that people should know is subject to public regulation by law. *Id.* Notice shifts the burden to the defendant because he or she should have had heightened awareness that the conduct was subject to regulation. *Id.*

87. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (holding that the statute should be interpreted as to require that the government prove the defendant had knowledge of not only the sexually explicit nature of the material but also of the age of the performers in the material); *Liparota v. United States*, 471 U.S. 419, 426, 433–34 (1985) (opining that the government must prove beyond a reasonable doubt that the defendant knew that his possession of food stamps was unlawful by reference to facts and circumstances surrounding the case because to not do so would criminalize a broad range of apparently innocent conduct); *United States v. Gypsum Co.*, 438 U.S. 422, 443 (1978) (stating that because *mens rea* is the rule and not the exception to the principles of Anglo-American criminal jurisprudence, the criminal offenses defined by the Sherman Act must be interpreted as including *mens rea* as an element); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564 (1971) (holding that *mens rea* need not be proven by the government because the defendant was dealing with obnoxious waste materials such that the probability of regulation is so high that any person that is aware that he or she is dealing with or possessing such materials should be presumed to be on notice of the regulation).

88. 511 U.S. 600, 600 (1994). The defendant in *Staples* was indicted with unlawful possession of an unregistered machine gun in violation of a §5861(d) under the National Firearms Act ("NFA"). *Id.* When officers searched the defendant's home, they seized a semiautomatic AR-15 rifle that had been modified to engage in fully automatic fire. *Id.* Possessing an automatic weapon as such, if not registered, was a criminal offense under the NFA. *Id.* The defendant said he lacked knowledge that the firearm had been modified and was capable of automatic firing. *Id.* The District Court refused to allow a jury instruction under which the government would have had to prove beyond a reasonable doubt that the defendant had knowledge that the gun could fire

*rea* in the statute would require a defendant to have knowledge of criminal conduct that is traditionally lawful,<sup>89</sup> and has the potential to impose severe penalties on the innocent.<sup>90</sup> As a result, the Court concluded that Congress could not have intended to eliminate a *mens rea* requirement in such a situation.<sup>91</sup> More importantly, *Staples* proffered a tripartite analysis for evaluating whether a strict liability offense is permissible under the parameters of the Constitution.<sup>92</sup> The tripartite analysis allows for a strict liability offense only if: (1) the penalty imposed is slight; (2) a conviction does not result in a substantial stigma; and (3) the statute regulates inherently dangerous or deleterious conduct.<sup>93</sup> Despite the Court's lengthy analysis into the constitutionality of strict liability crimes, it refused to delineate precise criteria to distinguish between crimes that require *mens rea* and crimes that do not, just as it refused to do forty years earlier.<sup>94</sup>

### FLORIDA'S DRUG ABUSE PREVENTION AND CONTROL LAW

Since the issue of *mens rea* and strict liability crimes has yet to be resolved by the United States Supreme Court, it comes as no surprise that state criminal statutes lacking the element of *mens rea* are constantly challenged as unconstitutional.<sup>95</sup> One such constitutional challenge to a Florida

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automatically because the defendant should have known such a dangerous device would be subject to regulation. *Id.* at 604. The court of appeals affirmed concluding knowledge is not a material element of the crime. *Id.*

89. *Id.* at 601.

90. *Id.* at 618.

91. See *id.*; Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea since Herbert Packer*, 2 BUFF. CRIM. L. REV. 861, 899 (1999). In finding that the statute requires all persons to have knowledge of criminal conduct that could impose criminal sanctions, Justice Thomas in his opinion stated,

In contrast to the selling of dangerous drugs at issue in *Balint* or the possession of hand grenades considered in *Freed*, private ownership of guns in this country has enjoyed a long tradition of being entirely lawful conduct. Thus, the destructive potential of guns in general cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting § 5861(d) as dispensing with proof of knowledge of the characteristics that make a weapon a "firearm" under the statute. The Government's interpretation potentially would impose criminal sanctions on a class of persons whose mental state-ignorance of the characteristics of weapons in their possession-makes their actions entirely innocent.

*Staples*, 511 U.S. at 601. In his opinion, Justice Thomas also cited the well-repeated case law emphasizing the historical and constitutional importance of *mens rea* in criminal law. Singer & Husak, *supra*, at 899. However, he distinguished the argument in *Staples* from previous Supreme Court arguments by insisting that dispensing with *mens rea* would capture far too many innocent actors who rightfully believed they were merely engaging in lawful conduct. *Id.* at 898–99.

92. *Staples*, 511 U.S. at 619–20; see *Shelton*, 802 F. Supp. 2d. at 1300 (M.D. Fla. 2011).

93. *Shelton*, 802 F. Supp. 2d. at 1300 (citing *Staples*, 511 U.S. at 619–20).

94. See *Staples*, 511 U.S. at 619–20; *United States v. Morissette*, 342 U.S. 246, 260 (1952).

95. See, e.g., *State v. Giorgetti*, 868 So. 2d 512, 514 (Fla. 2004) (challenging the constitu-



drug possession statute, specifically section 893.13, has received widespread attention not only in the legal profession, but also in the news nationwide.<sup>96</sup>

#### THE ELEMENT OF MENS REA IN SECTION 893.13

Florida's Drug Abuse Prevention and Control Law, Florida Statutes, section 893.13 provides, *inter alia*:

(6) (a) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription. . . . Any person who violates this provision commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.<sup>97</sup>

In 1996, the Supreme Court of Florida confronted a challenge of first impression to section 893.13 in *Chicone v. State*.<sup>98</sup> The Court stated at the outset, "[w]e hold that guilty knowledge is part of the statutory offenses charged."<sup>99</sup> *Chicone* put into perspective how Florida is inundated with confusion on the issue of knowledge in simple drug possession crimes and how that confusion has spanned over decades of Florida's legislative and judicial history.<sup>100</sup> In its holding, the Florida Supreme Court stated that the

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tionality of Florida's statute that requires a sex offender to register a change in his or her home address where the statute does not require the State to prove knowledge of the statute's registration requirement); *Cashatt v. State*, 873 So. 2d 430, 436 (Fla. Dist. Ct. App. 1st 2004) (challenging the constitutionality of Florida's statute prohibiting child pornography where the statute failed to include a *mens rea* element as to the age of the child).

96. E.g., Norman L. Reimer, *Focus on Florida: A Report and a Case Expose a Flawed Justice System*, CHAMPION MAG. (Sept. 2011), <http://www.nacdl.org/Champion.aspx?id=21925>; Todd Ruger, *Drug Ruling Could Unravel Cases Across State*, HERALD TRIB. (Sept. 15, 2011), <http://www.heraldtribune.com/article/20110915/ARTICLE/110919738>; Diana Moskovitz, *Calling Law Flawed, Miami-Dade Judge Dismisses Dozens of Drug Charges*, MIAMI HERALD (Aug. 17, 2011), [http://www.miamiherald.com/2011/08/17/2363128\\_part-of-florida-drug-law-illegal.html](http://www.miamiherald.com/2011/08/17/2363128_part-of-florida-drug-law-illegal.html); *Federal Court In Orlando Overturns Florida Drug Law As Unconstitutional*, FLA. NEWS J. (Jul. 29, 2011), <http://www.thefloridanewsjournal.com/2011/07/29/federal-court-in-orlando-overturns-florida-drug-law-as-unconstitutional>.

97. FLA. STAT. § 893.13(6)(a) (2011).

98. 684 So. 2d 736, 738 (Fla. 1996). The defendant was convicted of possession of cocaine and possession of drug paraphernalia. *Id.* at 737. On appeal, the defendant argued that the trial court erred because it should have dismissed the information since neither count alleged knowledge, which is a material element of the crimes. *Id.* at 738. The defendant also argued that the trial court erred by refusing to instruct the jury that the State had the burden of proving that the defendant knew that the substance he possessed was cocaine and that the object he possessed was drug paraphernalia. *Id.*

99. *Id.* at 738.

100. 684 So. 2d at 738; see *Green v. State*, 602 So. 2d 1306, 1310 (Fla. Dist. Ct. App. 4th 1992) (holding that a person is charged with knowledge of what one is carrying on one's person,

State was required to prove the defendant had knowledge of the illicit nature of the items in his possession.<sup>101</sup> The court noted that the Florida Legislature's silence on scienter<sup>102</sup> in the statute did not suggest that the statute dispensed with a historically essential element in criminal law.<sup>103</sup> Furthermore, the court stated that it could not believe the legislature would impose criminal penalties on persons who innocently possess illegal drugs.<sup>104</sup>

After *Chicone*, *Scott v. State* further strengthened the Florida Supreme Court's view that scienter is and must be a material element of section 893.13.<sup>105</sup> The court reiterated its position in *Chicone*—that guilty knowl-

and that this kind of constructive knowledge may be sufficient to establish the general intent to do the act and thus allow a prima facie case of simple possession to go to the jury); *State v. Oxx*, 417 So. 2d 287, 291 (Fla. Dist. Ct. App. 5th 1982) (footnote omitted) ("[P]roof of nonexclusive constructive possession alone is insufficient to justify an implication of knowledge . . . [T]he State must present some corroborating evidence of knowledge to establish a prima facie case."); *State v. Medlin*, 273 So. 2d 394, 397 (Fla. 1973) ("[T]he State was not required to prove knowledge or intent since both were presumed from the doing of the prohibited act."); *Rutskin v. State*, 260 So. 2d 525, 527 (Fla. Dist. Ct. App. 1st 1972) (agreeing with the court's holding in *Frank* that scienter is an essential element); *Frank v. State*, 199 So. 2d 117, 121 (Fla. Dist. Ct. App. 1st 1967) (holding that scienter is an essential element of the crime of possession of marijuana). In describing scienter, the court stated,

Scienter . . . is not a mere technicality in the law but, a legal principle which must be observed in order to safeguard innocent persons from being made victim of unlawful acts perpetrated by others, and of which they have no knowledge. It is a safeguard which must be preserved in the interest of justice so that the constitutional rights of our citizens may be preserved.

*Frank*, 199 So. 2d at 121.

101. *Chicone*, 684 So. 2d at 744. In conclusion, the court stated,

We quash [the trial court's ruling], because it held that the State did not have to prove that Chicone knew of the illicit nature of the items he possessed under . . . 893.13(6)(a) . . . and find that it was error for the trial court to deny Chicone's request for a special jury instruction on knowledge.

*Id.* at 746 (alteration in original).

102. BLACK'S LAW, *supra* note at 1463. Scienter means "knowingly" in Latin and is defined as, "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly, esp. as a ground for civil damages or criminal punishment." *Id.*

103. *Chicone*, 684 So. 2d at 744 (emphasis added) ("[I]f the statute did *not* require guilty knowledge, then obviously a person who possessed an illicit object even without knowledge of its illicit nature would be as guilty of violating the statute (that had no scienter requirement) as one who did have knowledge.").

104. *Id.* ("As all agree, including the State, the legislature would not ordinarily criminalize the 'innocent' possession of illegal drugs.").

105. See *Scott v. State*, 808 So. 2d 166, 168–172 (Fla. 2002). In *Scott*, the defendant was charged with possession of contraband in a correctional facility. *Id.* at 168. The contraband was found in an eyeglass case in the defendant's locker, which was bent in such a manner that other persons may have had access to it. *Id.* at 172. The District Court did not instruct the jury that the element of knowledge meant that the defendant had knowledge of the illicit nature of the substance he allegedly possessed and the defendant was convicted. *Id.* at 168. The defendant appealed to the Fifth District Court of Appeal and the court affirmed stating that while *Chicone*

edge of the illicit nature of the illegally possessed substance is a material element of section 893.13 and the State has the burden of proving this element—along with the others, beyond a reasonable doubt.<sup>106</sup> Thus, the Florida Supreme Court made clear in both *Chicone* and *Scott* that proof of the requisite *mens rea* is pertinent for a successful conviction under section 893.13.<sup>107</sup>

#### THE LEGISLATURE CLARIFIES ITS INTENT FOR THE DRUG POSSESSION LAW

In May 2002, the Florida Legislature codified its legislative intent for the drug possession statute in response to the Florida Supreme Court's holdings in *Chicone* and *Scott*.<sup>108</sup> Section 893.101 sets out the legislative intent and states:

(1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.

(2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses in this chapter.

(3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the

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placed the burden to prove knowledge on the State, the mere possession of the controlled substance raised a rebuttable presumption that the possessor was aware of the illicit nature. *Id.* As such, the failure to give the instruction was harmless error. *Id.*

106. See *Scott*, 808 So. 2d at 172; see also BLACK'S LAW, *supra* note at 1380. "'Beyond a reasonable doubt' is the standard used by a jury to determine whether a criminal defendant is guilty." *Id.* A reasonable doubt is, "[t]he doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty." *Id.*

107. See *supra* text accompanying notes 96–106.

108. *Scott*, 808 So. 2d at 173 (Wells, C.J. dissenting); see FLA. STAT. § 893.101(1)–(3) (2002). Justice Wells' dissent in *Scott v. State* supports the action taken by the legislature to amend § 893.13. *Id.* In his dissent, Justice Wells stated,

I conclude that what the State proposed in *Chicone* and which the *Chicone* [c]ourt rejected would be a more logical and less problematic approach. Lack of knowledge should be an affirmative defense. The State carries its burden by proving the possession of the contraband . . . and the defendant should then proceed to prove lack of knowledge and overcome the presumption through an affirmative defense.

*Scott*, 808 So. 2d at 173 (footnote omitted).

permissive presumption provided in this subsection.<sup>109</sup>

Section 893.101 principally changed the crime of drug possession because it no longer requires the State to prove beyond a reasonable doubt whether a defendant was aware that the contraband in his or her possession was illegal, thus making drug possession a strict liability crime.<sup>110</sup> Removal of the knowledge element allows the defendant to assert lack of knowledge as to the contraband's illicit nature as an affirmative defense by which the defendant carries the burden of proving.<sup>111</sup> When a defendant raises this defense, the judge instructs the jury that it is permissible to infer a presumption that the defendant knew of the contraband's illicit nature requiring the defendant to rebut this presumption to prevail on the defense.<sup>112</sup> Since its enactment, Florida courts have overturned constitutional challenges to section 893.13 as amended by section 893.101 ("893.13 as amended").<sup>113</sup> However, in July of 2011, one Federal District Court judge diverted from the popular decision to uphold the constitutionality of section 893.13 as amended, and held the criminal statute facially unconstitutional

109. FLA. STAT. § 893.101(1)–(3).

110. *See id.*; *see also* Wright v. State, 920 So. 2d 21, 24 (Fla. Dist. Ct. App. 4th 2005) (finding that §893.101(1)–(3) made possession of contraband a general intent crime, thereby no longer requiring the State to prove that the defendant knew the contraband was illegal).

111. *See* § 893.101(2); Wright, 920 So. 2d at 24.

112. *See* § 893.101(3); Wright, 920 So. 2d at 24.

113. *See* Johnson v. State, 37 So. 3d 975, 975 (Fla. Dist. Ct. App. 1st 2010) (holding that Florida's legislature clearly expressed its intent in section 893.101 and the provision has been upheld in other cases facing due process challenges); Miller v. State, 35 So. 3d 162, 163 (Fla. Dist. Ct. App. 4th 2010) (stating that the State must prove that the defendant knew he possessed a substance, which was in fact cocaine, but the State does not have to prove defendant had knowledge the substance he possessed was cocaine); Williams v. State, 45 So. 3d 14, 15–16 (Fla. Dist. Ct. App. 1st 2010) (holding that knowledge of the illicit nature of a controlled substance is not an element of any offense under the chapter and that it does not render defendant's convictions and sentences unconstitutional under the Due Process Clause); Harris v. State, 932 So. 2d 551, 552 (Fla. Dist. Ct. App. 1st 2006) ("[T]he Florida Legislature clearly stated its express intent to eliminate the guilty knowledge requirement for chapter 893 offenses."); Taylor v. State, 929 So. 2d 665, 665 (Fla. Dist. Ct. App. 3d 2006) (rejecting defendant's argument that section 891.101 is unconstitutional since it has been correctly upheld in other cases); Tolbert v. State, 925 So. 2d 1148, 1149 (Fla. Dist. Ct. App. 4th 2006) (holding that the statute eliminating guilty knowledge as an element of the crime of possession was not unconstitutional); Burnette v. State, 901 So. 2d 925, 927–28 (Fla. Dist. Ct. App. 2d 2005) (stating that the defendant's constitutional challenge must fail because knowledge of the illicit nature can be raised as an affirmative defense, and that defense does not violate due process); Smith v. State, 901 So. 2d 1000, 1001 (Fla. Dist. Ct. App. 4th 2005) (holding that section 893.101 is constitutional as it does not shift the burden of proving an element of the offense on to the defendant under the guise of an affirmative defense); Wright v. State, 920 So. 2d 21, 25 (Fla. Dist. Ct. App. 4th 2005) (rejecting appellant's argument that section 893.101 is facially unconstitutional because if the defendant wants the jury to be instructed on knowledge he or she can raise it as an affirmative defense).

in *Shelton v. Secretary, Department of Corrections*.<sup>114</sup>

### SECTION 893.13 AS AMENDED HELD FACIALLY UNCONSTITUTIONAL

In *Shelton v. Secretary, Department of Corrections*, Judge Mary Scriven of the Federal District Court for the Middle District of Florida addressed a case of first impression, challenging the constitutionality of section 893.13 as amended.<sup>115</sup> In *Shelton*, the defendant challenged the constitutionality of the state court's decision to deny his petition for writ of habeas corpus by claiming a facial challenge to section 893.13 as amended.<sup>116</sup> Addressing the merits of the defendant's constitutional argument, Judge Scriven engaged in an in-depth analysis of U.S. Supreme Court jurisprudence.<sup>117</sup> The court concluded that *Staples* and its progeny mandate a tripartite analysis<sup>118</sup> in evaluating whether a strict liability crime is proper under the parameters of the United States Constitution.<sup>119</sup> Ultimately, Judge Scriven held that under this tripartite analysis, section 893.13 as amended violates the Due Process Clause of the Fourteenth Amendment because the statute imposes a severe penalty for a strict liability offense,<sup>120</sup> creates a substantial social stigma,<sup>121</sup> and regulates inherently innocent

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114. *Shelton v. Sec'y, Dept. of Corr.*, 802 F. Supp. 2d 1289, 1293 (M.D. Fla. 2011).

115. *Id.* The case came before Judge Scriven on an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Id.* at 1293. Prior to the writ's application, the defendant was convicted of delivering cocaine without a jury instruction as to any requisite level of *mens rea*. *Id.* at 1295. After being declared a habitual offender, the defendant was sentenced to eighteen years in prison. *Id.* at 1296. Subsequently, the defendant appealed his conviction and sentence, but the Fifth District Court of Appeals affirmed in a mere *per curiam* opinion. *Id.* Later, the defendant's application for post-conviction relief was denied on appeal in the Fifth District Court of Appeals by the court's affirmance of the lower court's ruling without a merit-based analysis of defendant's constitutional claim. *Id.* As such, Judge Scriven reviewed the case *de novo* and, according to state-law procedural principles articulated by the Florida Supreme Court, was not required to give deference to the state court's decision. *Id.* at 1297. In the habeas proceedings, the defendant argued that the legislature's express and affirmative elimination of *mens rea* from the statute violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and, therefore, § 893.13 was facially unconstitutional. *Id.*

116. *Id.* at 1297.

117. *See supra* Part I.c.

118. *See supra* text accompanying note 91.

119. *Shelton*, 802 F. Supp. 2d at 1300.

120. *Id.* at 1300, 1302. A violation of section 893.13(1)(a)(1) for delivery of a controlled substance as defined as a schedule I drug such as cocaine, is a second-degree felony, ordinarily punishable by imprisonment for up to fifteen years. *Id.* at 1300. Since defendant was a habitual, violent felony offender, he was sentenced to eighteen years imprisonment. *Id.* at 1297, 1300. The court agreed with the defendant that any such sentence is not "relatively small" and therefore the penalties are too severe to pass constitutional muster for a strict liability crime. *Id.* at 1300, 1302.

121. *Id.* at 1301–02. The Court opined that, "a second degree felony coupled with a sentence

conduct.<sup>122</sup> Following the *Shelton* Order, the State<sup>123</sup> immediately filed its Notice of Appeal.<sup>124</sup> Judge Scriven's compelling decision heavily influenced two other judges. For example, since *Shelton*, Judge Milton Hirsch, from the Eleventh Judicial Circuit of Florida, dismissed forty-two drug possession cases<sup>125</sup> and Judge Scott Brownell, from the Twelfth Judicial Circuit, dismissed forty-two drug possession cases.<sup>126</sup> The dismissal of these drug possession cases was based on the notion that section 893.13 as amended is facially unconstitutional.<sup>127</sup> Other state trial judges presiding in Florida have refused to follow Judge Hirsch and Judge Brownell's decisions,<sup>128</sup> on the grounds that the Circuit Courts of Florida are bound by Florida's District Courts of Appeal that uphold the constitutionality of section 893.13 as amended.<sup>129</sup> Most recently, the Second District Court of

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of fifteen to thirty years tends to 'gravely besmirch' a person's reputation." *Id.* at 1302. It further stated a laundry list of activities convicted felons cannot engage in due to a criminal conviction under section 893.13. *Id.*

122. *Id.* at 1302, 1305. The court explained that section 893.13 regulates the lawful delivery of any substance or transfer of containers, which may contain any substance, a criminal infraction irrespective of the carrier's level of *mens rea*. *Id.* at 1305.

123. Respondent's Supplemental Memorandum on Ground 1 *Shelton v. Sec'y, Dept. of Corr.*, 802 F. Supp. 2d 1289 (M.D. Fla. 2011) (No. 6:07-cv-839-Orl-35-KRS), 2011 WL 3500831. The State argued in its supplemental memorandum on the constitutionality of section 893.13 that the district court owed due deference to the state court's summary ruling, that section 893.13 is not a true strict liability offense because of the affirmative defense outlined in the statute, and that the state court ruling is not inconsistent with U.S. Supreme Court precedent. *Id.*

124. Kameel Stanley, et al., *Attorneys Seek Dismissal of Hundreds of Local Drug Cases*, ST. PETERSBURG TIMES (Aug. 5, 2011), <http://www.tampabay.com/news/courts/criminal/attorneys-seek-dismissal-of-hundreds-of-local-drug-cases/1184328>.

125. *E.g.*, *State v. Washington*, No. F11-11019, slip op. at 23 (Fla. 11th Cir. Ct. Aug. 17, 2011) ("Like the court in *Shelton*, I find that Florida Statute § 893.13 is facially violative of the Due Process Clause of the 14th Amendment to the United States Constitution . . .").

126. *E.g.*, *State v. Adkins*, No. 2011 CF 002001, slip op. at 16 (Fla. 12th Cir. Ct. Sept. 16, 2011) ("Simply put, a constitutional requirement cannot be overcome by legislative pronouncement that the legislature intended to define the elements of a crime in such a way as to violate due process. . . . The effect of this order is that all charges must be dismissed.").

127. *E.g.*, *id.*

128. See *State v. Houston*, No. F10-24318, slip op. at 2 (Fla. 11th Cir. Ct. Sept. 21, 2011) (Judge Sarah I. Zabel); *State v. Carey*, No. F11-13640B, slip op. at 11 (Fla. 11th Cir. Ct. Sept. 16, 2011) (Judge Migna Sanchez-Llorens); *State v. Scott*, No. F10-32326, slip op. at 1 (Fla. 11th Cir. Ct. Aug. 24, 2011) (Judge Antonio Arzola); *State v. Coney*, Case No. F11-017129A, slip op. at 6 (Fla. 11th Cir. Ct. Aug. 23, 2011) (Judge Jorge Rodriguez-Chomat); *State v. Wiley*, No. F11-012497, slip op. at 5 (Fla. 11th Cir. Ct. Aug. 23, 2011) (Judge Bronwyn Miller); *State v. Anderson*, No. F99-12435A, 2011 WL 3904082, at \*1-2 (Fla. 11th Cir. Ct. Aug. 11, 2011), for circuit court cases upholding the constitutionality of section 893.101 as of October 28, 2011.

129. See *Johnson v. State*, 37 So. 3d 975, 975 (Fla. Dist. Ct. App. 1st 2010); *Miller v. State*, 35 So. 3d 162, 163 (Fla. Dist. Ct. App. 4th 2010); *Williams v. State*, 45 So. 3d 14, 15-16 (Fla. Dist. Ct. App. 1st 2010) (per curiam); *Harris v. State*, 932 So. 2d 551, 552 (Fla. Dist. Ct. App. 1st 2006) (per curiam); *Taylor v. State*, 929 So. 2d 665, 665 (Fla. Dist. Ct. App. 3d 2006); *Tolbert v. State*, 925 So. 2d 1148, 1149 (Fla. Dist. Ct. App. 4th 2006) (per curiam); *Burnette v. State*, 901

Appeal reviewed Judge Brownell's order<sup>130</sup> and decided this issue is one of extreme public importance that has the potential to have a profound effect on the proper administration of justice in the State of Florida.<sup>131</sup> Accordingly, the Second District Court of Appeal certified the order for immediate resolution by the Florida Supreme Court.<sup>132</sup>

*MORISSETTE AND STAPLES COMPEL AN ANALYSIS OF THE  
CONSTITUTIONALITY OF STRICT LIABILITY CRIMES UNDER  
THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT*

At the heart of the Due Process Clause of the Fourteenth Amendment is the right to notice and fair procedure.<sup>133</sup> The Due Process Clause places limitations on states' police power to impose criminal punishment for conduct where *mens rea* need not be pleaded or proven.<sup>134</sup> The State in *Shelton* argued that *Morrisette* and *Staples* did not apply the Due Process Clause of the United States Constitution, in relation to strict liability offenses.<sup>135</sup> The State further contended that the phrase "due process" is not mentioned once in *Morrisette* and is mentioned only once in a Justice's dissenting opinion in *Staples*.<sup>136</sup> Lastly, the State asserted in its brief that sec-

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So. 2d 925, 927–28 (Fla. Dist. Ct. App. 2d 2005); *Smith v. State*, 901 So. 2d 1000, 1002 (Fla. Dist. Ct. App. 4th 2005); *Wright v. State*, 920 So. 2d 21, 25 (Fla. Dist. Ct. App. 4th 2005), for appellate court cases upholding the constitutionality of section 893.101 as of October 28, 2011.

130. *E.g.*, *Adkins*, No. 2011 CF 002001.

131. *State v. Adkins*, 71 So. 3d 184, 185 (Fla. Dist. Ct. App. 2d 2011) (per curiam) ("If the court were to review the order and make a decision, it would become binding statewide and could affect thousands of past and present prosecutions throughout the state."). *Contra* *Maestas v. State*, No. 4D09–5349, 2011 WL 5964337, at \*3 (Fla. Dist. Ct. App. 4th 2011) ("We . . . uphold the constitutionality of section 893.13 and conclude that section 893.101 does not create a strict liability crime. We find the reasoning of *Shelton* unpersuasive and decline to adopt its holding."). *Accord* *Flagg v. State*, 74 So. 3d 138, 141 (Fla. Dist. Ct. App. 1st 2011) ("Although we agree that the uncertainty caused by *Shelton* is affecting the administration of justice around the state and that an expeditious decision from the supreme court . . . is needed, we do not see any reason not to reaffirm our view that the statute is constitutional.").

132. *Adkins*, 71 So. 3d at 186.

133. See U.S. CONST. amend. XIV, § 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." *Id.*

134. See *Patterson v. New York*, 432 U.S. 197, 210 (1977). "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Id.* The reasonable doubt requirement is, "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 208 (citation omitted).

135. Respondent's Supplemental Memorandum on Ground I, *supra* note 123, at \*11.

136. *Id.* at \*4. The State contended that Judge Scriven incorrectly interpreted *Morrisette* and *Staples* as setting forth factors to analyze when deciding whether a strict liability crime is constitutional. *Id.* at 5. The State argued that those factors were not established as a matter of constitutional law but rather as a way to decide whether the element of intent should be read into a statute where a statute leaves it out. *Id.*

tion 893.13 as amended does not overreach any of the few limitations due process imposes on the state's power to define criminal statutes.<sup>137</sup> The State's argument is fundamentally flawed not only because *Morissette* and *Staples* compel an analysis under the Due Process Clause of the Fourteenth Amendment,<sup>138</sup> but also because section 893.13 as amended punishes entirely passive and innocent conduct.<sup>139</sup> In its decision, the Supreme Court in *Lambert* found that this type of regulation is a violation of due process and utterly unconstitutional.<sup>140</sup>

#### MORISSETTE

The Supreme Court in *Morissette* stated, "[t]his would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried . . . as to raise questions both fundamental and far-reaching in federal criminal law . . . ."<sup>141</sup> *Morissette* reaffirmed the historical and fundamental importance of preserving culpability as a cornerstone in the American philosophy of criminal law.<sup>142</sup> Contrary to the State's argument in *Shelton*,<sup>143</sup> it was not necessary for the Supreme Court in *Morissette* to expressly articulate the phrase, "due process," because the Court provoked

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137. See *id.* at 4 (citing *Chicago, B. & Q. Ry. v. United States*, 220 U.S. 559, 578 (1911)). In outlining the limitations imposed by the Due Process Clause the State argued that:

Due process prohibits such statutes from shifting burdens of proof onto the defendant, prohibits punishment of wholly passive conduct, protects against vague or overbroad statutes, and requires that statutes must give fair warning of prohibited conduct. The due process clause imposes little other restraint on the state's power to define criminal statutes.

*Id.* at 5.

138. See *infra* Part V.

139. See *Shelton v. Sec'y, Dept. of Corr.*, 802 F. Supp. 2d 1289, 1302–03 (M.D. Fla. 2011) (arguing Florida's strict liability drug statute runs afoul of due process limits because the U.S. Supreme Court has consistently invalidated laws that proscribe conduct that is not inherently dangerous to avoid criminalizing innocent conduct); see also *State v. Adkins*, No. 2011 CF 002001, slip op. at 14 (Fla. 12th Jud. Cir. Ct. Sept. 14, 2011) ("[E]ven people who are normally diligent in inspecting and organizing their possessions may find themselves unexpectedly in violation of this law . . . ."); *State v. Washington*, No. F11-11019, slip op. at 22 (Fla. 11th Jud. Cir. Ct. Aug. 17, 2011) ("Section 893.13 . . . punishes anyone who possesses or delivers controlled substances—however inadvertently, however accidentally, however unintentionally. It reaches beyond those who willfully do wrong . . . and includes within its wingspan those who meant no wrong.").

140. See *Lambert v. California*, 355 U.S. 225, 228 (1957).

141. *Morissette v. United States*, 342 U.S. 246, 247 (1952).

142. See generally *id.* at 250–63 (explaining the common law development of *mens rea*). In reference to the appellate and trial court rulings the Supreme Court stated, "[i]ndeed, such adoption of the literal reasoning announced in those cases would do this and more—it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind." *Id.* at 250.

143. See *supra* notes 138–142 and accompanying text.



a compelling discussion into how an individual can be criminalized for engaging in utterly innocent behavior.<sup>144</sup> In *Morissette*, the issue turned on whether the defendant had notice that his behavior was subject to criminalization.<sup>145</sup> In analyzing the facts of the case, the Court made a large distinction between the lawful conversion of piles of abandoned, rusting scrap metal and the unlawful conversion of bomb casings stored on government property.<sup>146</sup> The taking of the former in one's mind could not possibly be a conversion because no one has a property interest in abandoned property.<sup>147</sup> Yet, the taking of the latter arguably puts an individual on notice to inquire whether his or her behavior is subject to criminal laws.<sup>148</sup>

The defendant in *Morissette* was engaged in the permissible and innocent conduct of taking abandoned property and yet he was convicted under a federal conversion statute and sentenced for two months imprisonment or a fine of \$200.<sup>149</sup> That is precisely why the Supreme Court reversed the case and in doing so stated, "wrongdoing must be conscious to be criminal," and that jurisdictions have developed working formulae in drafting requisite intent for crimes to, "protect those who were not blameworthy in mind from conviction of infamous common-law crimes."<sup>150</sup> In its opinion, the Court demonstrates that if it were to uphold the Government's contention that knowledge was not necessary for the crime of conversion, innocent persons, free from knowledge that the converted item is subject to conversion, would be punished without even a thought as to *mens rea*.<sup>151</sup> Such punishment infringes upon the right to liberty and due process of law particularly for a crime that the Court says is traditionally one of intentment.<sup>152</sup>

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144. Cf. *Morissette*, 342 U.S. at 270 (explaining why proof of *mens rea* was not required for restitution for common law conversion).

145. See *id.* at 271.

146. See *id.* at 247–48.

147. See 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property to Adjoining Landowners* § 3, at 8–9 (2d ed. 2005). American Jurisprudence explaining that "[a]bandoned property" is that to which the owner has voluntarily relinquished all right, title, claim, and possession, with the intention of terminating his or her ownership. *Id.* Abandonment is a virtual throwing away without regard as to who may take over or carry on. *Id.*

148. See *Staples v. United States*, 511 U.S. 600, 611–14 (1994). The conduct must involve something inherently dangerous rather than merely involve perfectly innocent conduct to put a person on notice that his or her conduct is subject to statutory regulation. *Id.* at 611.

149. See *Morissette*, 342 U.S. at 248.

150. *Id.* at 252.

151. See *id.* at 271–73 ("Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions.").

152. See *id.* at 271–74.

## STAPLES

In *Staples*,<sup>153</sup> the Supreme Court clearly delineated how public welfare offenses regulating innocent conduct infringe upon due process.<sup>154</sup> The Court held that the Government was required to prove that the defendant had knowledge of the characteristics of his firearm that brought it within the statutory definition of a machine gun.<sup>155</sup> The Court reasoned that a commonplace and generally available item such as a firearm, although dangerous, cannot be considered to place individuals on notice of the likelihood of strict regulation and criminal punishment.<sup>156</sup> The Court further explained that if the Government were not required to prove knowledge, the statute would potentially impose criminal sanctions, amounting up to ten years imprisonment, on a class of innocent persons, "whose mental state-ignorance of the characteristics of weapons in their possession-makes their actions entirely innocent."<sup>157</sup> The Court stressed that imposing severe punishments for offenses that do not require *mens rea* is incongruous with the American criminal justice system because offenses punishable by imprisonment traditionally require *mens rea*.<sup>158</sup>

The Supreme Court reiterated its recognition of public welfare offenses in very limited circumstances.<sup>159</sup> Those limited circumstances in-

153. See facts of case *supra* note 8890.

154. See *Staples v. United States*, 511 U.S. 600, 619 (1994).

155. *Id.* at 602.

156. *Id.* at 611. In his opinion, Justice Thomas stated,

[D]espite their potential for harm, guns generally can be owned in perfect innocence. . . . [P]recisely because guns fall[] outside those categories [sic] traditionally have been widely accepted as lawful possessions, their destructive potential . . . cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting [the statute] as not requiring proof of knowledge of a weapon's characteristics.

*Id.* at 611–12 (alteration in original) (footnote omitted).

157. *Id.* at 614–15. The Court illustrates the importance of not allowing Congress to impose such criminal sanctions on innocent persons by simply arguing that the dangerousness of an item alone should put an individual on notice that his or her possession of that item is subject to criminalization. *Id.* at 614. The Court explains that if automobiles were termed dangerous devices, Congress could see fit to criminalize violations of certain automobile regulations. *Staples*, 511 U.S. at 614 (1994). The Court speculates that if Congress made it a crime to operate a vehicle without a properly functioning emission system, a car owner whose vehicle's emission levels, wholly unknown to him or her, begin to exceed legal limits between regular inspection dates, could be subject to criminalization. *Id.* The Court argues that empowering the Government's suggestion would reach untoward results. *Id.*

158. *Id.* at 617–18. The Supreme Court emphasizes that offenses punishable by imprisonment cannot be public welfare offenses and that public welfare offenses commonly have relatively small penalties and cause no grave damage to a defendant's reputation. *Id.* It further states that punishing a violation of a public welfare offense as a felony is, "simply incompatible with the theory of the public welfare offense." *Id.* at 618.

159. *Id.* at 607 (stating that the typical situations where public welfare offenses have been up-

volved statutes that regulated conduct where a defendant knew that he or she was dealing with a dangerous device or instrumentality and possession of it alone put the defendant on notice that he or she would be subject to the probability of strict regulation.<sup>160</sup> The Court held that the innocent and protected conduct of owning a firearm that the owner believes to have limited capabilities is not sufficient to put the owner on notice that the same firearm is subject to registration as a machine gun if tampered with in such a way that it can engage in automatic fire.<sup>161</sup> Thus, *Morrisette* and *Staples* compel an inquiry into due process when a public welfare offense is constitutionally challenged.<sup>162</sup>

### SECTION 893.13 AS AMENDED VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Section 893.13 as amended regulates the act of possession<sup>163</sup> in its most simplistic terms.<sup>164</sup> While lawmakers may argue that section 893.13 as amended regulates the guilty conduct of possession of controlled substances,<sup>165</sup> the statute is cast so broadly that it captures simple everyday activities involving possession.<sup>166</sup> Consequently, such an expanded scope overreaches the constitutional limitations in place for criminal laws.<sup>167</sup>

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held in the Supreme Court involve statutes that regulate potentially harmful or injurious items).

160. See *Staples*, 511 U.S. at 607. The Court said that only in these situations can the Court assume that Congress intended to place the burden on a defendant to, "ascertain at his peril whether [his conduct] comes within the inhibition of the statute." *Id.*

161. *Id.* at 615.

162. See *Morrisette v. United States*, 342 U.S. 246, 274 (1952); *Staples*, 511 U.S. at 636–639.

163. BLACK'S LAW, *supra* note, at 1281; MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 968 (Frederick C. Mish, et al. eds., 11th ed. 2007) [hereinafter WEBSTER'S]. To possess means, "[t]he fact of having or holding property in one's power . . . the exercise of dominion over property." BLACK'S LAW, *supra* note at 1281. Possession means, "the act of having or taking into control . . . control or occupancy of property without regard to ownership." WEBSTER'S, *supra*, at 968.

164. See Brief for National Association of Criminal Defense Lawyers et al., as Amici Curiae Supporting Petitioners at 12 *State v. Adkins*, 71 So. 3d 117 (Fla. 2011) (No. SC11-1878) ("Wholly passive, innocent, or no conduct whatsoever, though, is precisely what the state of Florida has permitted to be targeted by the stripping of any *mens rea* requirement at all from its controlled substance law.").

165. FLA. STAT. § 893.13(6)(a) (2011) ("It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription . . .").

166. See Brief for National Association of Criminal Defense Lawyers et al., as Amici Curiae Supporting Petitioners, *supra* note 164, at 12.

167. See *United States v. Garrett*, 984 F.2d 1402, 1411 (5th Cir. 1993) (stating that punishment of the possession of a weapon on an airplane arouses serious due process violations if courts interpreted the statute to cover a person who neither knew nor had reason to know he or she was carrying a weapon); *People v. Small*, 598 N.Y.S.2d 431, 436 (N.Y. App. Div. 1993) (holding that

It is not unlawful to possess or deliver everyday items such as containers, packages, envelopes, bottles, zip lock bags, back packs, hand bags, suitcases . . . the list could go on *ad infinitum*.<sup>168</sup> It is further not unlawful to drive a car, wear a backpack, or order consumer products and have them delivered to one's home.<sup>169</sup> Yet an innocent person possessing or engaging in any one of these activities while going about his or her lawful and unremarkable business, could find him or herself in an unfortunate situation where by way of another individual (maybe a child, family member, stranger, or friend), controlled substances are transferred into that innocent person's possession without his or her knowledge.<sup>170</sup> In their opinions, Judge Scriven, Judge Hirsch, and Judge Brownell list multiple examples of the types of innocent persons who are subject to conviction of unlawful drug possession absent a *mens rea* requirement.<sup>171</sup> There is no logical way that such innocent persons are on notice or have "fair warning" that their inherently innocent conduct is subject to criminalization.<sup>172</sup> A mistake of

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a statute that imposes criminal liability for the possession of a weapon would be unconstitutional if interpreted to require knowledge of possession of an "object" without regard to the true nature of the object).

168. See FREDERICK POLLOCK, AN ESSAY ON POSSESSION IN THE COMMON LAW 3 (1888) ("Possession is a term of common occurrence and no mean significance in the law."); Interview with Judge Milton Hirsch, 11th Judicial Circuit Court, Criminal Division, in Miami, Fla. (Oct. 13, 2011) [hereinafter Judge Hirsch Interview].

169. See POLLOCK, *supra* note 168, at 3; Judge Hirsch Interview, *supra* note 168.

170. See Judge Hirsch Interview, *supra* note 168.

171. Shelton v. Sec'y, Dept. of Corr., No. 6:07-cv-839-Orl-35-KRS, at 28 (M.D. Fla. Jul. 27, 2011) (demonstrating the student in whose book bag a classmate stashes drugs to avoid detection who then passes the book bag to his brother for safe keeping thus making the brother guilty of possession); State v. Adkins, No. 2011 CF 002001, slip op. at 14 (Fla. 12th Jud. Cir. Ct. September 14, 2011) (explaining that a letter carrier who delivers a package containing un-prescribed Adderall, a person who is unaware that her roommate has hidden controlled substances in the common areas of the home, a mother who carries a prescription pill bottle in her purse who is unaware that her teenage daughter has substituted the pill bottle with illegal drugs, are all guilty under section 893.13); State v. Washington, No. F11-11019, slip op. at 8-9 n.6 (Fla. 11th Jud. Cir. Ct. August 17, 2011). Judge Hirsch stated,

Thus a Florida prosecutor who seeks the conviction of an international drug kingpin must prove beyond all reasonable doubt that the defendant's drug-dealing was done knowingly and intentionally. If the same prosecutor seeks the conviction of a student in whose shared room at the frat house a nickel bag of marijuana is found; or of a car-pool commuter in whose SUV a single Valium pill for which he or she has no prescription is found; no such proof need be offered.

*Washington*, No. F11-11019 at 8-9 n.6.

172. See FLA. STAT. § 775.012 (2011). Section 893.13 as amended is so sweeping in nature that goes against the "General Purposes" behind Florida's Criminal Code as stated in section 775.012., as several of the purposes of Florida's Criminal Code include:

[G]iv[ing] fair warning to the people of the state in understandable language of the nature of the conduct proscribed and of the sentences authorized upon conviction[;] . . . defin[ing] clearly the material elements constituting an offense and the accompanying state of mind or criminal intent required for that offense[;] . . . [and] safeguard[ing]

legal fact of this nature cannot be subject to a guilty conviction without proof of knowledge, and therefore, under no set of facts can section 893.13 as amended ever be constitutional.<sup>173</sup> The duty to investigate legally relevant facts that section 893.13 as amended places upon ordinary law abiding citizens, is a burden and responsibility far too great for anyone to bear.<sup>174</sup> If the statute in *Lambert* was found to be unconstitutional for lack of *mens rea* due to its regulation of wholly passive conduct, clearly the Florida statute, which regulates the act of possession, must fall within the same line of reasoning.<sup>175</sup>

As the law stands now, the penalty that could be imposed onto potential innocent offenders is far too severe.<sup>176</sup> In *Morissette*, the Supreme Court held that in general, crimes that do not require proof of *mens rea* carry relatively small penalties and the imposition of such penalties does not cause substantial damage to a defendant's reputation.<sup>177</sup> The Court further held in *Staples* that for a defendant to be convicted of a felony offense, such as the one in that case, the Government must be required to prove *mens rea*.<sup>178</sup> Comparably, the term of imprisonment an individual can be sentenced to for mere possession of any one of Florida's enumerated controlled substances in chapter 893 is equally severe.<sup>179</sup> Such a felony conviction of drug possession results in substantial damage to one's reputation and a social stigma that greatly impairs an individual's ability to participate in society.<sup>180</sup> There is no authority, "that would justify such a far-ranging

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conduct that is without fault or legitimate state interest from being condemned as criminal.

*Id.* § 775.012(2)–(3), (5) (alteration in original).

173. See *Washington*, No. F11-11019 at 18 ("[A] movant who invokes *Shelton* necessarily claims that there exists no set of facts pursuant to which § 893.13 can be constitutional.").

174. See Brief for National Association of Criminal Defense Lawyers et al., as Amici Curiae Supporting Petitioner, *supra* note 164, at \*12.

175. See *supra* text accompanying notes 85–87.

176. See FLA. STAT. § 775.082(3)(d) (2011) (stating that someone convicted of a felony of the third degree can be sentenced to a term of imprisonment up to five years); FLA. STAT. § 775.084(4)(a) (2011) (stating that a habitual offender convicted of a felony of the third degree can be sentenced to a term of imprisonment up to ten years).

177. *Morissette v. United States*, 342 U.S. 246, 256 (1952).

178. *Staples v. United States*, 511 U.S. 600, 618–20 (1994). The penalty the defendant faced was ten years imprisonment where he simply did not know of the nature of his firearm and that it had to be registered by law. *Id.*

179. See FLA. STAT. § 893.13(6)(a)–(b) (2011). The statute provides that the lowest punishment an offender can receive is a misdemeanor of the first degree, which is punishable by up to a year imprisonment as provided in section 775.082. *Id.* The highest punishment is for a felony of the first degree, which is punishable up to life imprisonment depending on whether the offender is habitual or not as provided in section 774.082. *Id.*

180. See *Shelton v. Sec'y, Dept. of Corr.*, No. 6:07-cv-839-Orl-35-KRS, 2011 WL 3236040, at \*9 (M.D. Fla. Jul. 27, 2011); *Morissette*, 342 U.S. at 260. In *Shelton*, Judge Scriven stated,

departure from traditional understandings of due process . . . ." as to allow the innocent possessor to be subject to severe punishment and grave damage to his or her reputation.<sup>181</sup>

### FLORIDA'S LEGISLATURE MUST CHANGE THE LAW TO PROHIBIT THE CAPTURING OF INNOCENT BEHAVIOR IN THE REALM OF CRIMINAL LAW AND TO COMPLY WITH DUE PROCESS

At this point in time, Florida and Washington are the only states that do not require proof of *mens rea* for felony possession of controlled substances.<sup>182</sup> However, less than a decade ago, North Dakota had a similar statute to Florida's, which made possession of a controlled substance a strict liability crime requiring no proof of guilty knowledge.<sup>183</sup> In 1989, prior to the statute's amendment, the North Dakota Supreme Court in *State v. Michlitsch*,<sup>184</sup> reaffirmed its holdings in *Rippley*<sup>185</sup> and in *Morris*<sup>186</sup> making it clear that the accused has the opportunity for a jury instruction to include an affirmative defense for lack of knowledge of possession and nature of the controlled substance.<sup>187</sup> In its opinion, the court labeled the offense as one of strict liability despite recognizing a defendant's ability to raise an affirmative defense.<sup>188</sup> The punishments that followed a convic-

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Convicted felons cannot vote, sit on a jury, serve in public office, possess a firearm, obtain certain professional licenses, or obtain federal student loan assistance. The label of "convicted felon" combined with a proclamation that the defendant is so vile that he must be separated from society for fifteen to thirty years, creates irreparable damage to the defendant's reputation and standing in the community. This social stigma precludes, for example, the ability of a convicted felon to reside in any neighborhood of his choosing or to obtain certain employment.

*Shelton*, 2011 WL 3236040, at \*9. A felony is, "as bad a word as you can give to a man or thing." *Morissette*, 342 U.S. at 260.

181. See *State v. Washington*, No. F11-11019, slip op. at 22 (Fla. 11th Jud. Cir. Ct. August 17, 2011).

182. See Brief for National Association of Criminal Defense Lawyers et al., as Amici Curiae Supporting Petitioner, *supra* note 164, at \*9; see also *Shelton*, 2011 WL 3236040, at \*2.

183. See N.D. CENT. CODE § 19-03.1-23(1) (1971); *State v. Morris*, 331 N.W.2d 48, 57 (N.D. 1983); *State v. Rippley*, 319 N.W.2d 129, 134 (N.D. 1982).

184. 438 N.W.2d 175 (N.D. 1989).

185. 319 N.W. at 134 (holding that section 19-03.1-23(1) does not require the State to prove guilty knowledge of the nature of the substance in possession).

186. 331 N.W. at 57 (reaffirming that 19-03.1-23(1) is a strict liability offense and that a jury need not consider whether the accused had the intent to possess or knew the material he or she possessed was a controlled substance).

187. See *Michlitsch*, 438 N.W.2d at 177-78.

188. See *id.* at 177 (alteration in original) ("[T]he defendant is entitled to an affirmative defense instruction . . . in prosecutions for the strict liability offense[] of simple possession of controlled substances . . .").

tion under North Dakota's drug possession laws were severe.<sup>189</sup> That same year, the North Dakota Legislative Assembly amended section 19-03.1-23(1) to include the culpability requirement of "willfully" as an element of the offense.<sup>190</sup> In 2002, *State v. Bell* emphasized and clarified that the 1989 amendment to section 19-03.1-23(1) eliminated drug possession as a strict liability crime and imposed the requirement that the State must prove the essential elements of the crime as outlined in the statute.<sup>191</sup> The statute currently reads, "[e]xcept as authorized by this chapter, it is unlawful for any person to *willfully*, as defined in section 12.1-02-02 . . . possess . . . a controlled substance . . . ." <sup>192</sup>

In Florida, the Second District Court of Appeal sent Judge Brownell's order, rendered in *State v. Adkins*, to the Supreme Court of Florida to be decided as a matter of tremendous public importance.<sup>193</sup> The Supreme Court of Florida scheduled oral arguments for December 8, 2011.<sup>194</sup> The Court will have full discretion to resolve the disputed issue and declare section 893.13 as amended unconstitutional as violative of the Fourteenth Amendment. It is probable that relying on *Chicone* and *Scott*, the Supreme Court of Florida will declare the statute unconstitutional;<sup>195</sup> if it does, the Florida Legislature will be left with two options. The first option is to repeal section 893.101 and leave section 893.13 as it stands, silent on the element of *mens rea*.<sup>196</sup> If that be the case, courts will be able to read into the statute an implied *mens rea* requirement based on the nature of the in-

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189. See N.D. CENT. CODE § 19-03.1-23(1) (2011) (indicating that a person guilty of possession of a narcotic drug or methamphetamine must be sentenced to at least five years for a second offense and twenty years for any subsequent offense).

190. See 1989 N.D. Laws 267; *State v. Brown*, 389 So. 2d 48, 49 (La. 1980). In 1980, the Louisiana Supreme Court addressed drug possession as a strict liability crime where the statute expressly provided that the State could prosecute drug possession crimes even if the accused unknowingly possessed the controlled substance. See *id.* The court applied the holding in *Morissette* and held that drug possession cannot be a strict liability crime when it said, "[t]he 'unknowing' possession of a dangerous drug cannot be made criminal." *Id.* at 50-51. The court further stated, "[i]t requires little imagination to visualize a situation in which a third party hands the controlled substance to an unknowing individual who then can be charged with and subsequently convicted for violation of [this law] without ever being aware of the nature of the substance he was given." *Id.* at 51 (alteration in original).

191. See *State v. Bell*, 649 N.W.2d 243, 252 (N.D. 2002). The court stated, "[b]efore the legislative amendment, this Court held possession with intent to deliver was a strict liability offense, and a defendant could be entitled to an affirmative defense instruction. . . . [T]he offense . . . is no longer a strict liability offense . . . ." *Id.*

192. N.D. CENT. CODE § 19-03.1-23(1) (2011) (emphasis added).

193. See *State v. Adkins*, 71 So. 3d 184, 185-86 (Fla. Dist. Ct. App. 2d 2011) (per curiam).

194. *State v. Adkins*, 71 So. 3d 117, \*1 (Fla. 2011).

195. See *supra* Part II.a.

196. See FLA. STAT. § 893.13(6)(a) (2011); FLA. STAT. § 893.101 (2002).

nocent conduct of possession and how it is not an inherently dangerous crime, as the United States Supreme Court did in *Staples* and the rest of its jurisprudence on the issue.<sup>197</sup> The second option for the Florida Legislature is to follow North Dakota's actions.<sup>198</sup> The legislature can simply amend section 893.13 to include the phrase "knowingly," or "willfully," so that *mens rea* becomes a material element of drug possession as it currently is in forty-eight other states.<sup>199</sup>

*Shelton v. Secretary, Department of Corrections*, is set to go up on appeal in front of the United States Court of Appeals for the Eleventh Circuit.<sup>200</sup> The Eleventh Circuit, or given the opportunity, the Supreme Court of the United States, should compel the tripartite analysis as set forth in *Staples* so that Congress and state legislatures will be stripped of the discretion to allow strict liability to encroach upon due process rights.<sup>201</sup> If *Shelton* makes its way to the United States Supreme Court, the Court will have a ripe opportunity to eliminate the confusion and controversy that surrounds strict liability in criminal law and establish a bright line, constitutionally compelled rule that all jurisdictions shall be obligated to follow when drafting strict liability crimes.<sup>202</sup>

## CONCLUSION

When it amended section 893.13, Florida's Legislature casted a broad net over innocent conduct, subjecting it to criminal liability and making it an open target for the invasion of law enforcement.<sup>203</sup> It is unthinkable and impermissible to allow such circumvention of notice and fair procedure as it encroaches upon and metastasizes the constitutionally protected rule.<sup>204</sup> Such extreme margins cannot be allowed to creep into the center of due process and chip away at its sound structure, which has been in place since its implementation.<sup>205</sup> Strict liability implies no trust in the individual's good faith. While state prosecutors may claim they would not charge such

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197. See *supra* Part II.c.

198. See *supra* text accompanying notes 189–192.

199. E.g., TEX. CODE ANN. § 481.115(a) (2009) (stating that a person commits an offense if the person knowingly or intentionally possesses a controlled substance); VA. CODE ANN. § 18.2-250(A) (2011) (stating that it is unlawful for any person knowingly or intentionally to possess a controlled substance).

200. See *supra* note 123 and accompanying text.

201. See *supra* text accompanying note 92–93.

202. See *id.*

203. See *supra* Part VI.

204. See *supra* Part VI.

205. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 248 (Erwin Chemerinsky et al. eds., 3d ed. 2009). The Fourteenth Amendment was adopted in 1846 after the Civil War. *Id.*



an innocent person, prosecutorial discretion does not remedy a facially unconstitutional statute.

The United States cannot subsist as a Draconian<sup>206</sup> society in which an individual is forced to police his or her loved ones and colleagues so as to ensure controlled substances are not inadvertently transferred to the individual's possession. The mere act of possession is innocent. There must be a *mens rea* requirement, not the guise of an affirmative defense, to make Florida's Drug Abuse Prevention and Control Law comport with due process.

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206. WEBSTER'S, *supra* note 163, at 377. Draconian is defined as, "of, relating to, or characteristic of Draco or the severe code of laws held to have been framed by him; cruel; also severe." *Id.*

