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Joseph S. Hamrick

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FLORIDA'S DRUG STATUTE, MENS REA, AND DUE PROCESS

Joseph S. Hamrick†

I. INTRODUCTION

Florida's drug statute presents an important constitutional query. As amended by the Florida legislature in 2002, the law now explicitly allows a person to be convicted of any drug offense—which in some cases is punishable by up to life in prison—without requiring that the prosecution put forth evidence that the defendant had knowledge that the substance in question was unlawful.[1] This feature of Florida's drug law, which is unique in all of the United States,[2] raises the question of whether the circumscription of the mental element in this drug statute allows for a person without wrongful intent to be convicted and thus violates that individual's federal constitutional rights.

This article will address the following question: Is the legal doctrine of mens rea, i.e., that the prosecution must prove a malevolent intention on the part of a defendant in committing some prohibited act before that person may be convicted of a crime, protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution? If it is determined that these amendments do afford some protection for the doctrine of mens rea, this article will further consider how courts should analyze challenges to existing statutes on this basis.

II. U.S. SUPREME COURT AND MENS REA

The pertinent sections of the Fifth and Fourteenth Amendments state that no person shall be deprived of "life, liberty, or property, without due process of

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† The author was a member of the inaugural class of Liberty University School of Law and sat on the first editorial board of this law review. The author spent his first several years in the practice of law as a prosecutor in the 4th Judicial Circuit in Florida and is currently with the Jacksonville law firm of Arnold & Sichta, primarily practicing in criminal appeals and post-conviction cases.

1. FLA. STAT. § 893.101 (2002).

2. Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1295 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012) ("Not surprisingly, Florida stands alone in its express elimination of mens rea as an element of a drug offense.").

law."[3] The early U.S. Supreme Court case law addressing whether the due process clauses speak to the doctrine of mens rea seem to suggest that legislatures had authority to restrict or eliminate mens rea at their discretion;[4] however, since *Morissette v. United States*[5] in 1952, the trend has shifted to disfavor the elimination of mens rea and to make great efforts to interpret whether it was the intent of Congress or a state legislature in enacting a challenged statute to include a mental element in the crime. For instance, in *United States v. Staples*,[6] the Court interpreted a statute criminalizing the possession of a machine gun to require knowledge of the automatic nature of the weapon, even though the statute nowhere explicitly set forth that element.[7] Other cases in which laws were found to pass constitutional muster by similar statutory interpretation involved unauthorized possession of food stamps,[8] child pornography,[9] and identity theft.[10]

Several cases in which the Court found that the statutes did restrict the mens rea requirement but were nonetheless constitutional dealt with the sale of prescription medication[11] and unregistered grenades.[12] The statutes addressed in these cases were similar to statutes passed during the Industrial Revolution that criminalized public welfare offenses—laws that regulated involvement with inherently dangerous substances or activities—in which strict liability, i.e., no mens rea, was permitted.[13]

In only one case has the U.S. Supreme Court found that a statute was unconstitutional on the basis of strict liability; this occurred in the 1957 case

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3. U.S. CONST. amend. XIV; U.S. CONST. amend. V.

4. United States v. Bayaud, 16 F. 376, 384 (C.C.S.D.N.Y. 1883) ("Statutory crimes where knowledge or intent are not ingredients of the offense are common."); *see, e.g.*, United States v. Behrman, 258 U.S. 280, 287 (1922); United States v. Balint, 258 U.S. 250, 251 (1922).

5. Morissette v. United States, 342 U.S. 246, 273 (1952).

6. Staples v. United States, 511 U.S. 600 (1994).

7. *Id.* at 619.

8. Liparota v. United States, 471 U.S. 419, 433 (1985).

9. United States v. X-Citement Video, Inc., 513 U.S. 64, 71-72 (1994).

10. Flores-Figueroa v. United States, 556 U.S. 646, 647 (2009).

11. United States v. Balint, 258 U.S. 250, 251 (1922).

12. United States v. Freed, 401 U.S. 601, 607 (1971).

13. *See* Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73 (1933). These statutes seem to have been considered not to offend mens rea because any reasonable person should be on notice that dealing in certain industries that created a danger to the general public would be regulated by laws. Thus, one could not claim to have innocently violated a law that he did not know existed, where one should have known that there would be applicable laws in his chosen industry and should have investigated to find out the requirements of those laws.

Lambert v. California.[14] The statute involved in that case made it a crime for a convicted felon to spend more than five consecutive days inside the city of Los Angeles, or to enter the city five or more separate times within any thirty-day period, without registering with the authorities.[15] There was no requirement, however, that it be shown that the defendant was aware of this law.[16] Given that the law punished purely passive behavior and had no notice requirement, the Court found that its elimination of mens rea violated the Due Process Clause of the Fourteenth Amendment.[17]

III. THE *SHELTON* CASE IN FLORIDA

While the general approach taken by the Supreme Court has been to avoid any potential constitutional issues by engaging in creative statutory interpretation to find mens rea within a given law, the Florida drug statute allows for no such approach.[18] After the Florida Supreme Court in 1996 and 2002 issued opinions interpreting Florida's drug statute to require that the prosecution prove that the defendant knew of the illicit nature of the controlled substance that he possessed, delivered, or sold,[19] the Florida legislature in May of 2002 passed an additional section to chapter 893.[20] The new section referenced those two cases, stated that they misinterpreted the legislature's intent, and explicitly eliminated this knowledge requirement from the state's burden of proof.[21] The amendment to the statute allows the

14. Lambert v. California, 355 U.S. 225, 227 (1957).

15. *Id.* at 226.

16. *Id.*

17. *Id.* at 227–28.

18. *See* FLA. STAT. § 893.13 (2012).

19. Scott v. State, 808 So. 2d 166, 170 (Fla. 2002); Chicone v. State, 684 So. 2d 736, 738 (Fla. 1996).

20. FLA. STAT. § 893.101 (2002).

21. *Id.* The text of that section is as follows:

> (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 of this chapter.

defendant to raise lack of knowledge that the substance was illegal as an affirmative defense,[22] but in such cases the state remains entitled to a presumption that possession alone indicates guilty knowledge.[23] In July of 2011, although all five of the Florida district courts of appeal had already found the statute constitutional,[24] and the Florida Supreme Court would later do so in *Adkins v. State*[25] in 2012, a federal district court sitting in Orlando granted a habeas corpus petition and ruled that the Florida statute violated the U.S. Constitution.[26] In August of 2012, the Eleventh Circuit Court of Appeals reversed the district court's ruling; however, the appellate court did because the district court had chosen to address the constitutional question de novo, rather than adopting the appropriate standard of deferential review of the Florida courts' finding that the law was constitutional.[27] The Eleventh Circuit explicitly noted that it was refraining from making a finding on the actual constitutionality of the statute.[28] As of the date of this article's publication,

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> (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 permissive presumption provided in this subsection.

Id.

22. *Id.* § 893.101(2).

23. *Id.* § 893.101(3). For this affirmative defense, the defendant bears a minimal burden to put forth some evidence on that issue in order to be entitled to the jury instruction regarding knowledge of the illicit nature of the substance, at which point the burden shifts to the prosecution to prove the defendant's knowledge of the illicit nature of the substance beyond a reasonable doubt. *See id.*; *cf.* Andrews v. State, 577 So. 2d 650, 652 (Fla. Dist. Ct. App. 1991) (describing, in the context of the defense of self-defense, the burden shifting that takes place in criminal cases with regard to affirmative defenses).

24. Lanier v. State, 74 So. 3d 1130, 1131 (Fla. Dist. Ct. App. 2011); Harris v. State, 932 So. 2d 551, 552 (Fla. Dist. Ct. App. 2006); Taylor v. State, 929 So. 2d 665, 665 (Fla. Dist. Ct. App. 2006); Wright v. State, 920 So. 2d 21, 25 (Fla. Dist. Ct. App. 2005); Burnette v. State, 901 So. 2d 925, 927–28 (Fla. Dist. Ct. App. 2005).

25. State v. Adkins, 96 So. 3d 412, 423 (Fla. 2012).

26. Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1315–16 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012).

27. Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1353–54 (11th Cir. 2012).

28. *Id.* at 1355.

Shelton's petition for writ of certiorari for review of the Eleventh Circuit's decision was pending before the U.S. Supreme Court.[29]

IV. JUDICIAL OPINIONS DEALING WITH THE FLORIDA DRUG STATUTE

At this point, a more in-depth review of the constitutional analysis conducted by the Florida Supreme Court in *Chicone v. State*,[30] *Scott v. State*,[31] and *Adkins*,[32] and the federal district court in *Shelton v. Secretary, Department of Corrections*,[33] should prove helpful. These cases will be taken in chronological order.

In *Chicone* in 1996, the Florida Supreme Court relied heavily on the strong presumption in the common law that a crime should consist of a mental element when it concluded that the Florida legislature must have intended to require the state to prove knowledge of the illicit nature of the substance.[34] In that case, the defendant requested an instruction that an element of the crime was knowledge that the substance he possessed was cocaine, but the trial court refused to give that instruction.[35] The Florida Supreme Court held that

> [w]hile the existing jury instructions are adequate in requiring "knowledge of the presence of the substance," we agree that, if specifically requested by a defendant, the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed. We hold that the defendant was entitled to a more specific instruction as requested here.[36]

In *Scott* in 2002, the Florida Supreme Court affirmed *Chicone* and extended it to apply in situations where the defendant had not specifically requested an instruction challenging knowledge of the nature of the substance.[37] In that case, where the defendant had been convicted for introduction of contraband into a jail after cocaine was found in an eyeglass case inside the defendant's locker, the court reiterated its holding in *Chicone* "that knowledge of the illicit

29. *2012 Term Court Orders*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/orders/ordersofthecourt.aspx (last visited Apr. 7, 2013).

30. Chicone v. State, 684 So. 2d 736 (Fla. 1996).

31. Scott v. State, 808 So. 2d 166 (Fla. 2002).

32. State v. Adkins, 96 So. 3d 412 (Fla. 2012).

33. Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289 (M.D. Fla. 2011).

34. *Chicone*, 684 So. 2d at 742–43.

35. *Id.* at 738.

36. *Id.* at 745–46 (footnote omitted).

37. Scott v. State, 808 So. 2d 166, 172 (Fla. 2002).

nature of the contraband is an element of the crime of possession of a controlled substance.... It is error to fail to give an instruction even if the defendant did not explicitly say he did not have knowledge of the illicit nature of the substance."[38]

In response to these two cases, the Florida legislature amended the drug statute to explicitly eliminate knowledge of the illicit nature of the substance as an element of any drug crime; subsequently, five district courts of appeal in Florida found the amended statute to be constitutional.[39] Nevertheless, before the Florida Supreme Court addressed the issue, the federal district court in Orlando took the Florida statute to task in 2011 in *Shelton*, finding that it violated the Due Process Clause of the U.S. Constitution.[40] Assuming that due process generally requires that the state prove the existence of a guilty mind prior to subjecting a person to criminal punishment, the major part of the court's analysis focused on whether Florida's drug statute fit into a narrow exception to the mens rea requirement dealing with public welfare offenses.[41] After addressing three factors put forth in *Staples* that help the court determine the constitutionality of a strict liability offense—the penalty that could be potentially imposed, the stigma associated with conviction, and the potential punishment of truly innocent conduct[42]—the court concluded that the Florida statute did not fit this exception and thus violated due process.[43]

Subsequent to the district court's ruling in *Shelton* in 2011 and prior to the Eleventh Circuit's reversal of that decision in August of 2012, the Florida Supreme Court conducted its own analysis of this statute in *Adkins*.[44] Overturning a trial court's order granting motions to dismiss forty-six drug prosecutions in the Twelfth Judicial Circuit, the Florida Supreme Court concluded that legislatures have strikingly broad authority to define the

38. *Id.* (footnote omitted).

39. Lanier v. State, 74 So. 3d 1130, 1131 (Fla. Dist. Ct. App. 2011); Harris v. State, 932 So. 2d 551, 552 (Fla. Dist. Ct. App. 2006); Taylor v. State, 929 So. 2d 665, 665 (Fla. Dist. Ct. App. 2006); Wright v. State, 920 So. 2d 21, 25 (Fla. Dist. Ct. App. 2005); Burnette v. State, 901 So. 2d 925, 927–28 (Fla. Dist. Ct. App. 2005).

40. Shelton v. Sec'y, Dept. of Corr., 802 F. Supp. 2d 1289, 1302–03 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012).

41. *Id.* at 1305.

42. Staples v. United States, 511 U.S. 600, 616 (1994).

43. *Shelton*, 802 F. Supp. 2d at 1308.

44. State v. Adkins, 96 So. 3d 412 (Fla. 2012).

elements of a crime and that nothing about this particular statute offended any constitutionally protected right.[45]

The federal district court in *Shelton* and the Florida Supreme Court in *Adkins* launch into their opinions from radically different starting points. On the one hand, the *Shelton* court begins with the assumption that the general rule is that the Due Process Clause prohibits any statute that does not require mens rea, unless it fits within the narrow exception of regulating conduct as a public welfare offense.[46] On the other hand, the Florida Supreme Court in *Adkins* begins from the proposition that the general rule is that legislatures have broad authority to require or to eliminate mens rea and that a statute should only be found unconstitutional if it falls into one of the narrow exceptions that would cause it to be constitutionally defective,[47] e.g., violating the First Amendment,[48] punishing passive conduct without notice,[49] or bearing no rational relation to its intent and thereby punishing innocuous conduct.[50] It is important to consider which of these approaches is more appropriate before proceeding further into an analysis of this statute.

As noted by the concurring opinion of Justice Pariente in *Adkins*, the requirement of mens rea is the general rule in the common law.[51] The fact that it is the general rule in the common law, however, does not necessarily mean that the Due Process Clause requires that it forever be preserved in our laws, as evidenced by statutory changes to common law rules.[52] In fact, at least one court has determined that state legislatures have broad authority to deviate in many aspects from the traditions implanted in the common law at the time of

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45. *Id.* at 417, 422, 423. Given that the Eleventh Circuit's decision overturning the district court's ruling in *Shelton* was on procedural rather than substantive grounds, i.e., the improper standard of review, that opinion is not particularly helpful in examining the proper constitutional analysis. *See* Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1355 (11th Cir. 2012).

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

47. *Adkins*, 96 So. 3d at 417.

48. *E.g.*, *id.* at 419; *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 71–72 (1994) (holding that a presumption in favor of a scienter requirement was appropriate).

49. *E.g.*, *Adkins*, 96 So. 3d at 419; *see also* Lambert v. California, 355 U.S. 225, 227 (1957); State v. Giorgetti, 868 So. 2d 512, 517 (Fla. 2004).

50. *E.g.*, *Adkins*, 96 So. 3d at 420; *see also* Schmitt v. State, 590 So. 2d 404, 413 (Fla. 1991).

51. *Adkins*, 96 So. 3d at 425 (Pariente, J., concurring) (citing United States v. Morissette, 342 U.S. 246, 250–51 (1952)).

52. *See, e.g.*, FLA. STAT. § 2.01 (1829) (adopting the English common law as it was in effect in 1776, except when inconsistent with acts enacted by the Florida or federal legislatures).

the enactment of the Fifth or Fourteenth Amendments.[53] Thus, the legal framework appears to have been more accurately set forth by the Florida Supreme Court, requiring that the principle asserted must be more fundamentally anchored in our basic legal notions of fairness to trigger due process concerns.[54] This article will generally proceed from that perspective. Nevertheless, the analysis of the Florida Supreme Court, as well as that of the federal district court, was too rigid and stilted to thoroughly consider the nuanced right protected in the due process clauses, as interpreted by U.S. Supreme Court case law, in relation to the doctrine of mens rea.[55] Before moving directly to a discussion of the appropriate analysis that should be conducted in a mens rea constitutional challenge, a more thorough review of the due process clauses is required.

V. DUE PROCESS AND MENS REA IN LIGHT OF LEGAL HISTORY

A. *American Constitutional Law*

Two separate amendments to the U.S. Constitution provide that one may not be deprived of life, liberty, or property, unless afforded "due process"—first, in the Fifth Amendment of the Constitution and, second, in the post-Civil War Fourteenth Amendment.[56] The U.S. Supreme Court has generally interpreted these clauses to mean the same thing[57] and to fall into one of three major procedural categories: notice to the person of the charges against her, the opportunity to be heard at the proceedings, and that a neutral judge sit as arbiter.[58] At its core, due process has been understood to be grounded in the notion of fundamental fairness, such that it is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[59] Thus, the first step in examining whether due process can be violated by the elimination of mens rea in a given

53. *See, e.g.*, Somer v. Johnson, 704 F.2d 1473, 1477 (11th Cir. 1983) (observing that in Florida the legislature had broad authority to abrogate the common law).

54. *Adkins*, 96 So. 3d at 416.

55. *See supra* Part II.

56. U.S. CONST. amend XIV; U.S. CONST. amend. V.

57. *See* Andrew Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1, 4, 10–23 (2005). *But see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (arguing that the two clauses meant separate things to those who enacted them in 1791 and 1868, respectively).

58. *See* Goldberg v. Kelly, 397 U.S. 254, 267, 271 (1970).

59. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); *see also* Marshall v. Lonberger, 459 U.S. 422, 436 n.4 (1983).

statute is to conduct a historical analysis of whether the doctrine of mens rea is in fact "rooted in the traditions and conscience of our people."[60] A thorough examination of this question must begin by addressing the entrance of the notion of mens rea into Anglo-Saxon jurisprudence.

B. *Anglo-Saxon Law*

At the time of the Norman Conquest in 1066, the Anglo-Saxon legal tradition—which was not very formalized or centralized—was an amalgamation of the customs of the Ancient Britons, the Romans who ruled the Britons until the early fifth century A.D., and the later invading races known as the Angles, Saxons, and Danes.[61] Prior to Norman rule, it appears that persons were punished on the basis of near absolute liability, e.g., execution for causing the death of another by a blameless accident, for the purpose of deterring vigilantism and curing a blood feud.[62] Nevertheless, the English legal customs began to shift towards moral culpability in criminal law

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60. *Snyder*, 291 U.S. at 105. For a critique of this approach of determining the content of the due process clauses, consider the convictions of the recently deceased eminent legal scholar Ronald Dworkin. *See* Adam Liptak, *Ronald Dworkin, Scholar of the Law, Is Dead at 81*, N.Y. TIMES, Feb. 14, 2013, http://www.nytimes.com/2013/02/15/us/ronald-dworkin-legal-philosopher-dies-at-81.html?hp&_r=0. Dworkin argued that the Due Process Clause was a vague standard, drafted to bring "moral rights" into the law. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1977). Dworkin remarked,

> The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.

Id. at 147. Some critics of Dworkin's position, such as Judge Richard Posner, have described Dworkin's work as to "polemicize in favor of a standard menu of left-liberal policies" that would promote judicial activism and the furtherance of political positions. RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE 374 (2003). While finding Dworkin's arguments formidable, this author is more persuaded by an originalist approach, i.e., believing the courts to be bound by the mutual understanding reached by those who drafted and ratified these amendments, as best as that can be ascertained.

61. *See generally* Daniel R. Coquillette, *The Lessons of Anglo-Saxon "Justice,"* 2 GREEN BAG 2d 251 (1999); *see* EDWARD P. CHEYNEY, A SHORT HISTORY OF ENGLAND 2, 33 (1904).

62. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 975–82 (1932); *see also* Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Appellee at 28–29, Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348 (11th Cir. 2012) (No. 11-13515-G) (noting Sayre's tracing of the origins of mens rea, as well as outlining the progression of the doctrine itself).

in the century following the Norman invasion,[63] and towards a more organized system of laws in general.[64] For the following 150 years after the Norman conquest, the English kings' powerful judges solidified the legal importance of their prior rulings as precedent and served to entrench the principles of the common law.[65] During this period, King Henry II (1154–89) was of particular importance because he played an essential role in the endeavor of unifying a common system of laws throughout England.[66] By 1250, Henry Bracton, an eminent jurist, attempted to summarize English law and procedure in an extensive treatise.[67]

During this formative period of English legal history, two other foreign sources dramatically influenced its basic legal notions, including the idea that one should not be punished unless one was morally responsible for an intentional act. The first source was a revival of the study of Roman law in the European universities, which occurred after the Justinian Code—compiled in the sixth century[68]—was rediscovered in the twelfth century.[69] The second

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63. Sayre, *supra* note 62, at 982–83.

64. William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 38 (2011).

65. *See* Albert M. Rosenblatt, *The Fifty-Fifth Annual Cardozo Memorial Lecture: The Law's Evolution: Long Night's Journey into Day*, 24 CARDOZO L. REV. 2119, 2137–38 (2003).

> In terms of our own legal history, we must mark the Norman conquest as an unequaled, defining chapter. It gave us what would become the common law. Under Henry I and Henry II, a centralized system of law, administered by the Crown, replaced a jumble of competing courts and conflicting jurisdictions that had their roots in a host of sources, including the king, the church, the feudal lords, and tribal practice. From these origins—traced back to 1066—we developed the common law, a vehicle Blackstone described as the "perfection of reason."

Id. (footnotes omitted).

66. *See* Bader, *supra* note 64.

67. *Id.*

68. Timothy G. Kearley, *Justice Fred Blume and the Translation of Justinian's Code*, 99 LAW LIBR. J. 525, 527 (2007).

> Justinian, who ruled the Roman Empire from Constantinople in the years 527 to 565, had as one of his early concerns the number of contradictory laws that had arisen through the centuries of Roman legislation and had added to confusion and delay in the courts. He ordered that a commission organize into one collection the existing compilations of imperial legislation (covering the years from 117 to 438), add to it all subsequent imperial enactments, and harmonize the resulting material to eliminate the contradictions. This first compilation, known as the Codex Justinianus or Code of Justinian, was issued in 529.

source was the influence the canon law, the law and edicts of the Catholic Church,[70] had on the development of notions of culpability and punishment.

C. *Roman Law*

While the early Roman law looked only to the "material and objective violation of the law" without regard to the state of mind, it did require moral imputability, which was captured in the term *dolus*, which is a violation of the law done intentionally.[71] As the legal system developed further, a distinction was made between *dolus* and *culpa*, which is a violation of the law done in negligence.[72] In Roman law, the concept of ignorance was a factor that might destroy *dolus*, "or, if there is culpability in the ignorance itself, it may render a crime imputable *ex culpa*."[73]

The most important distinction made was between the object of the ignorance—of law or of fact.[74] In general, ignorance of fact excused the crime while ignorance of law did not; however, there were exceptions depending on the degree of negligence that resulted in the ignorance.[75] "[T]he law cannot tolerate . . . a man to enjoy the excessive security of being free from the effects of crass negligence. Hence, the ignorance must not be *crassa* or *supina*, *dissoluta* or *captiosa*."[76] On the other hand, ignorance of the law did not excuse

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Id. (footnote omitted).

69. *See* Sayre, *supra* note 62, at 982–83; *see also* Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into A Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 864 (1999).

70. *See* Sayre, *supra* note 62, at 982–83; *see also* HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 199 (1983). According to Berman, the Papal Revolution of the twelfth century (investiture and simony struggles of Gregory VII), resulting in greater independence of the church and leading to the formation of the canon Law, was the foundation not only of the Western legal tradition but also of Western civilization in general. *Id.* at 86.

71. INNOCENT ROBERT SWOBODA, IGNORANCE IN RELATION TO THE IMPUTABILITY OF DELICTS 2 (1941). The Roman law used a number of terms as substitutes for *dolus*, e.g., "*animus occidendi, data opera . . . incendium fecerit*, [and] *voluntas nocendi* . . . ." *Id.* at 4.

72. *Id.* at 5. Not all crimes could be punished on the basis of *culpa*, e.g., theft and injury. *Id.* Other crimes specifically allow *culpa* as sufficient to punish, e.g., homicide, arson, and allowing a prisoner to escape. *Id.* at 5–6.

73. *Id.* at 6.

74. *Id.* "Ignorance of law can be described as a lack of knowledge concerning the law itself: its content, meaning and extension. Ignorance of fact is a failure to apprehend the factual circumstances which constitute the violation of the law." *Id.* at 6–7.

75. *Id.*

76. *Id.* at 9 (footnote omitted).

the conduct in most cases.[77] The chief reason was that all men were presumed to know the natural law, *ius gentium*, and penal laws generally prohibit actions that would be offensive to the natural law.[78]

D. Canon Law

Turning to the canon law, the Church's earliest development of its theory of moral culpability included this notion of a mental element to wrongdoing. The church fathers taught that "knowledge and the will to transgress" were essential elements of moral culpability—there must be a "deliberate consent of free will."[79] St. Augustine's doctrine of sin and the relation of ignorance had an important influence on Gratian,[80] who in 1140 promulgated the collection of papal decrees made throughout the Middle Ages.[81] In his work, the *Decretum Gratiani*, Gratian explicitly addressed the doctrine of ignorance—quoting Augustine, canons produced by church councils, and decrees issued by popes.[82] This analysis of culpability in relation to intent and ignorance was carried on by the Scholastic Theologians, whose famous method of critical thought in defending and articulating dogma led to minute distinctions between different types of culpable ignorance.[83] Such was the dogma solidified in the canon law around the time its influence began to be extended into the English legal tradition.

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77. *Id.*

78. *Id.* at 11.

79. *Id.* at 14.

80. *Id.* at 31.

81. JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 229 (1987).

82. SWOBODA, *supra* note 71, at 31.

83. *See id.* at 30–35. For instance, Abelard made a significant distinction in addressing the issue of the guilt of the Jews in crucifying Christ—that between *ignorantia invincibilis* (ignorance because of infirmity) and *negligentia*. *Id.* at 31–32. The Scholastic Theologians later replaced *negligentia* for *ignorantia invincibilis* (ignorance resulting from decision of the will), and this distinction was embraced by the Decretists. *Id.* at 33–34. A more complex distinction was made by Peter Lombard, dividing ignorance into three categories: *invincibilis* (can by no means be overcome and completely excuses), *simplex* (neither desired nor avoided and mitigates imputability), and *affectata* (caused by neglect or contempt and never excuses from penalty). *Id.* at 35. One further distinction offered by the Scholastic Theologians during this period was made by Roland: *culpa*, i.e. ignorance by "neglect, contempt, or positive desire to remain ignorant" and never excuses, versus *poena*, i.e. ignorance by passion or defect of mind which hinders from acquiring knowledge does excuse. *Id.* at 31–34.

E. *The Influence of Roman Law and Canon Law on Anglo-Saxon Law*

Early evidence of these two foreign influences on Anglo-Saxon law is found in the mid-thirteenth century treatise of the English jurist Bracton; the treatise would later have a profound influence on the development of the common law.[84] In attempting to summarize English law regarding felonies, Bracton, "writing under strong Roman and canonist influence, emphasized, often beyond the actual law of his day, the mental requisites of criminality."[85] Professor Francis Sayre drew the following conclusions:

> It is, in the last analysis, underlying ethical concepts which shape and give direction to the growth of criminal law. It was almost inevitable, therefore, that the emphasis placed by Bracton upon the mental element in criminality should take permanent root and become part of the established law. 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. Henceforth, the criminal law of England, developing in the general direction of moral blameworthiness, begins to insist upon a *mens rea* as an essential of criminality. Scholars, newly inspired with Roman texts and maxims, searched the books afresh in their efforts to formulate and systematize these developing ideas.[86]

By the latter half of the seventeenth century, the requirement that a crime contain evil intent was universally accepted in England,[87] and it was famously summarized by Sir Edward Coke that "[*a*]*ctus non facit reum, nisi mens sit rea*," meaning the act does not make a person guilty unless the mind be also guilty.[88] In addition to Coke, notable jurists such as Lord Francis Bacon,[89] Lord

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84. Sayre, *supra* note 62, at 984.

85. *Id.* at 987.

86. *Id.* at 988. Sayre wrote several thorough articles in the early twentieth century related to the concept of mens rea that continue to be cited as authoritative today. *See, e.g.*, Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Appellee at 1–2, Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348 (11th Cir. 2012) (No. 11-13515-G) (listing endorsements by multiple criminal defense associations, libertarian organizations, and thirty-eight law professors).

87. Sayre, *supra* note 62, at 993 (citing 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 38 (1847)).

88. 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 107 (1797).

Matthew Hale,[90] and Sir William Blackstone[91] discussed and defended this doctrine at length. Thus, Justice Robert Jackson could accurately state in his majority opinion in *Morissette v. United States* that

> [t]he 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.[92]

Given the centuries over which the doctrine of mens rea was articulated, embraced, and developed in the common law prior to the adoption of the U.S. Constitution in 1789, this doctrine can be safely concluded to be "rooted in the traditions and conscience of our people";[93] consequently, this raises concerns as to whether restriction or limitation of the mens rea requirement deprives a defendant of his due process of law, as guaranteed by the U.S. Constitution.

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89. 1 FRANCIS BACON, THE ELEMENTS OF THE COMMON LAWES OF ENGLAND 65 (1630) ("All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact....").

90. *See* HALE, *supra* note 87, at 38.

> As to criminal proceedings, if the act that is committed be simply casual, and *per infortunium*, regularly that act, which, were it done *ex animi intentione*, were punishable with death, is not by the laws of *England* to undergo that punishment; for it is the will and intention, that regularly is required, as well as the act and event, to make the offence capital.

Id.

91. 4 WILLIAM BLACKSTONE, COMMENTARIES *21 (1769).

> Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act.... And, as a [vicious] will without a [vicious] act is no civil crime, so, on the other hand, an unwarrantable act without a [vicious] will is no crime at all. So that to constitute a crime against human laws, there must be, first, a [vicious] will; and, secondly, an unlawful act consequent upon such [vicious] will.

Id.

92. Morissette v. United States, 342 U.S. 246, 250 (1952). As previously stated, *Morissette* signaled a shift in the United States Supreme Court's constitutional treatment of mens rea. *See supra* Part II.

93. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

VI. CONDUCTING AN APPROPRIATE ANALYSIS OF THE FLORIDA DRUG STATUTE IN LIGHT OF ITS DUE PROCESS IMPLICATIONS

Is this the end of the question? If it is accepted that the importance of mens rea is historically grounded in our American notion of fundamental fairness, does this conclusively establish that any restriction on the requirement of mens rea is per se a violation of the Due Process Clause? Clearly, U.S. Supreme Court jurisprudence has not held that any infringement on mens rea violates the Constitution.[94] As stated by the Supreme Court in *Mathews v. Eldridge*, "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.' Accordingly, resolution of the issue whether the . . . procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected."[95]

Rather, upon finding the right at stake to be fundamental, a court should proceed to weigh the competing interests at stake by analyzing the three factors set forth in *Mathews v. Eldridge*:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[96]

Only at the conclusion of this analysis can a court properly draw a decision as to whether a restriction of a procedural right, such as mens rea, in fact violates the Constitution.

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94. *See supra* Part II.

95. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citation omitted) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

96. *Id.* at 334–35.

A. *Analyzing Florida's Drug Statute Under the* Mathews v. Eldridge *Three-Prong Test*

Mathews v. Eldridge sets forth three factors that should be weighed and then balanced against each other.[97] The first factor deals with the private interest at stake.[98] With respect to Florida's drug statute, the private interest could hardly be more important. In certain cases, a person charged under the statute could face a lifetime of imprisonment, in addition to the stigma and shame associated with a felony conviction.[99]

The second factor deals with the degree of risk that the private interest would be unfairly deprived under the procedure at issue.[100] At the outset of analyzing this factor, it is important to outline the specific aspect of mens rea that was restricted by the 2002 amendment: the knowledge of the illicit nature of the substance.[101] The text of the amendment[102] and the Florida jury instructions[103] make clear the elements of drug crimes that remain untouched.

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97. *Id.* at 321.

98. *Id.*

99. Shelton v. Sec'y, Dept. of Corr., 802 F. Supp. 2d 1289, 1302 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012); *see* FLA. STAT. § 893.13 (outlining prohibited acts and penalties).

100. *Mathews*, 424 U.S. at 321.

101. FLA. STAT. § 893.101 (2002).

102. *Id.*

103. FLA. STAT. STANDARD CRIMINAL JURY INSTRUCTION § 25.2 (2013). Concerning drug abuse, Florida Jury Instruction 25.2 states in part:

> Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) is a controlled substance.
>
> To prove the crime of (crime charged), the State must prove the following (applicable number) elements beyond a reasonable doubt:
>
> 1. (Defendant) [possessed . . .] a certain substance.
>
> 2. The substance was (specific substance alleged).
>
> . . . .
>
> 3. (Defendant) had knowledge of the presence of the substance.
>
> . . . .
>
> Possession.
>
> To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.
>
> Possession may be actual or constructive.

Contrary to the apparent assumption of the federal district court in *Shelton*, as evidenced by the court's hypothetical of a school child who was handed a backpack that later was found to contain marijuana,[104] the amendment served in no way to diminish the necessity of the government proving that the defendant knew that the substance was in his possession.[105] Further, the amendment does nothing to diminish the government's burden to prove that the defendant knew what the substance was, e.g., that the white powder was cocaine.[106] The text of the amendment speaks for itself, as do the Florida jury instructions.

> Actual possession means:
>
> a. the controlled substance is in the hand of or on the person, or
> b. the controlled substance is in a container in the hand of or on the person, or
> c. the controlled substance is so close as to be within ready reach and is under the control of the person.
>
> ....
>
> Mere proximity to a controlled substance is not sufficient to establish control over that controlled substance when it is not in a place over which the person has control.
>
> Constructive possession means the controlled substance is in a place over which the (defendant) has control, or in which the (defendant) has concealed it.
>
> In order to establish constructive possession of a controlled substance if the controlled substance is in a place over which the (defendant) does not have control, the State must prove the (defendant's) (1) control over the controlled substance and (2) knowledge that the controlled substance was within the (defendant's) presence.

Id.

104. Shelton v. Sec'y, Dept. of Corr., 802 F. Supp. 2d 1289, 1308 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012).

> Consider the student in whose book bag a classmate hastily stashes his drugs to avoid imminent detection. The bag is then given to another for safekeeping. Caught in the act, the hapless victim is guilty based upon the only two elements of the statute: delivery (actual, constructive, or attempted) and the illicit nature of the substance.

Id.

105. FLA. STAT. § 893.101 (2012); FLA. STAT. STANDARD CRIMINAL JURY INSTRUCTION 25.2 (2013).

106. FLA. STAT. § 893.101.

Thus, the only scenario in which a risk exists that an innocent person, without malevolent intent, could be convicted or punished under this statute would be one in which a person knowingly possessed, delivered, or sold a substance that the person did not know was illegal. Two factors mitigate the significance of this minor, and slightly far-fetched, risk. First, the Supreme Court has found that the nature of certain substances, such as prescription drugs[107] and grenades,[108] put the possessor on notice that the substance is likely to be regulated by the government.[109] Second, the hypothetical circumstance in which a person is innocently naïve of the illicit nature of the drug he possesses, delivers, or sells is addressed by the option of putting forward the affirmative defense of lack of knowledge. For instance, a plausible scenario of innocent possession could be found if someone was given a prescription pill for personal consumption, and the person did not know that the pill was controlled by section 893.03.[110] In such a case, the defendant would bear the burden of production by putting forward some evidence of her ignorance, such as her own testimony, or that of the person who gave her the pill.[111] At that point, the burden would shift back to the government to prove beyond a reasonable doubt the defendant's knowledge of the pill's illegality (without a prescription), as evidenced by the relevant Florida jury instruction.[112] If the

107. United States v. Balint, 258 U.S. 250, 253–54 (1922).

108. United States v. Freed, 401 U.S. 601, 609–10 (1971).

109. *Id.*; *Balint*, 258 U.S. at 253–54. Thus, an evil mind is impliedly shown by the fact that the person knew or should have known that he should examine whether there were laws that he might be violating. This assumption appears to be similar to the doctrine of willful blindness. *See, e.g.*, United States v. Heredia, 483 F.3d 913, 917 (9th Cir. 2007).

110. FLA. STAT. § 893.03 (2012) (enumerating schedules of what are controlled substances under the statutory chapter).

111. FLA. STAT. § 893.101 (2002).

112. FLA. STAT. STANDARD CRIMINAL JURY INSTRUCTION 25.2 (2013). Concerning drug abuse, Florida Jury Instruction 25.2 states in part:

> Knowledge of the illicit nature of the controlled substance is not an element of the offense of [insert name of offense charged]. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense. (Defendant) has raised this affirmative defense. However, you are permitted to presume that (defendant) was aware of the illicit nature of the controlled substance if you find that (defendant) was in actual or constructive possession of the controlled substance.
>
> If from the evidence you are convinced that (defendant) knew of the illicit nature of the controlled substance, and all of the elements of the charge have been proved, you should find (defendant) guilty.

jury found the testimony of the defendant and her friend credible, this would dissipate the presumption in favor of knowledge and thereby authorize the jury to acquit her, particularly if it was plausible in the general community that one might not know that a particular pill was a controlled substance.[113]

Finally, the third prong of *Mathews v. Eldridge* addresses the government interest involved, including the financial and administrative burden of adopting an alternative procedure, which in this statute would be to make knowledge of the illicit nature of the substance an element of the crime.[114] The difficulties of proving a defendant's knowledge of the law in relation to every controlled substance are obvious. For instance, putting on evidence that an undercover agent purchased Oxycodone from a man on the street would not be enough to prove the crime of sale of a controlled substance, or even to survive a motion for a judgment of acquittal at the close of the government's case, if additional evidence is not presented regarding the defendant's subjective awareness of the illegality of the drug. No matter how obviously illegal the drug—such as cocaine, heroin, or methamphetamine—additional, independent proof of the defendant's knowledge of the illegality of the drug would be technically necessary to put forth a prima facie case. The challenges of calling family members or friends of each defendant to testify as to this element illustrate the rational basis that existed for the Florida legislature's amendment. Given the important state interest in prosecuting crimes related to controlled substances, avoiding a procedural requirement that, if strictly enforced by courts and juries, would inevitably result in the acquittal on arbitrary grounds of patently guilty individuals is a significant concern.

In balancing the three factors described above, the limited intrusion on the due process interest in the mens rea requirement is clearly justified on the basis of the important government interest involved and the low degree of risk that an innocent person would be convicted as a result,[115] particularly in light of the availability of the affirmative defense of true ignorance.[116]

> If you have a reasonable doubt on the question of whether (defendant) knew of the illicit nature of the controlled substance, you should find (defendant) not guilty.

Id.

113. *See id.*

114. Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

115. Of the three Florida Supreme Court cases discussed above that address the constitutionality of the statute—*Chicone* (cocaine), *Scott* (marijuana), and *Adkins* (46 different cases, explicitly stated to be a facial constitutional challenge)—none of these cases presented factual scenarios in which a person put forth evidence that he was actually

B. *Importance of the Three-Prong Analysis*

While this article concludes that the Florida statute was properly upheld by the Florida Supreme Court in *Adkins*, that court should have first conducted a weighing of the *Mathews v. Eldridge* factors. In 2005, the U.S. Supreme Court in *Wilkinson v. Austin*[117] reiterated the importance of these factors in conducting any procedural due process analysis.[118] Nevertheless, there are no U.S. Supreme Court cases thoroughly addressing this analysis as it relates to mens rea. If the U.S. Supreme Court does grant the defendant's writ of certiorari in *Shelton*, the Court could fill this void. The limited analysis conducted by the court in *Adkins*, essentially finding that mens rea is irrelevant to due process unless its restriction violates some other constitutional provision, fails to allow for a robust weighing of the various interests involved in determining whether one's constitutional right—a right touching on fundamental fairness and developed over centuries through the common law—has been restricted or stripped in an unconstitutional manner by a state or federal legislature.

VII. CONCLUSION

A court, whether state or federal, must be hesitant to strike down a statute passed by a democratically elected legislature on the basis of undefined rights under the Due Process Clauses of the Federal Constitution. Nevertheless, the

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unaware of the illicit nature of the substance involved in his case. The court in *Scott* acknowledged the absence of specific evidence, but stated that

> [b]ecause knowledge of the illicit nature is an element of the crime and the jury must be instructed on each element of the crime, an instruction must be given even when the defendant simply requires the State to prove its case and offers nothing by way of an affirmative defense.

Scott v. State, 808 So. 2d 166, 171 (Fla. 2002).

116. FLA. STAT. § 893.101 (2002).

117. Wilkinson v. Austin, 545 U.S. 209 (2005).

118. *Id.* at 224.

> A liberty interest having been established, we turn to the question of what process is due an inmate whom Ohio seeks to place in OSP. Because the requirements of due process are "flexible and cal[l] for such procedural protections as the particular situation demands," we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures.

Id. at 224 (citation omitted) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). The Court then cited to *Mathews v. Eldridge* for the articulation of the factors to consider in evaluating a particular situation. *Id.*

doctrine of mens rea is so firmly rooted in the common law tradition, influenced by the Roman and canon law notions of moral culpability that America inherited from her Anglo-Saxon roots, that a weighing of the factors set forth in *Mathews v. Eldridge* must be conducted to determine whether that well-established right has been restricted in a manner that violates the Constitution. Although it conducted a less-than-thorough analysis, the Florida Supreme Court correctly ruled that the Florida drug statute does not violate the U.S. Constitution. If the U.S. Supreme Court does decide to hear the *Shelton* case, it should reach the same conclusion, but it should only do so after conducting the balancing test that *Mathews v. Eldridge* requires.