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Guilty Until Proven Innocent: Undermining the Criminal Intent Requirement

Paul Rosenzweig and Daniel J. Dew

Abstract

Developed over the course of hundreds of years, the Anglo–American legal system contains several key provisions that, when used properly, guard against wrongful criminal convictions. These provisions, however, are under attack by America's legislators and their desire to eliminate mens rea *("guilty mind") requirements from U.S. criminal law. The loss of this guilty mind requirement would destroy Americans' primary defense against false accusations and Kafka-esque legal proceedings. How the Supreme Court of the United States rules (if the Court does choose to rule) on* Shelton v. Sec'y, Dep't of Corrections *will have a tremendous impact on one of America's primary core liberties.*

Developed over the course of hundreds of years, the Anglo–American legal system contains several key provisions that, when used properly, guard against wrongful criminal convictions. These protections are critical: Not only do they defend Americans from false accusations and Kafka-esque legal proceedings, but they also demand that police and prosecutors proceed with discipline and care, proving every element of an accusation beyond a reasonable doubt—no matter the identity of the defendant.

Despite the advantages of this unique system, however, some of Americans' most cherished legal protections are under assault. This attack does not come from the courts. Rather—as demonstrated by a case now pending before the Supreme Court of the United States, *Shelton v. Sec'y, Dep't of Corrections*—it is America's legislators who pose the greatest threat to the Anglo–American legal system. Now is the time to remind our legislators that core liberties, once lost, are at best difficult, if not impossible, to restore.

Key Points

- The Anglo–American legal system contains several key provisions that, used properly, guard against wrongful criminal conviction.
- These provisions are under attack by America's legislators and their desire to eliminate *mens rea* ("guilty mind") requirements from U.S. criminal law.
- Currently before the Supreme Court, *Shelton* raises a critical question: Do Florida drug offenses, whose *mens rea* requirements were specifically eliminated by the legislature, violate due process protections under the Fourteenth Amendment to the U.S. Constitution?
- By eliminating the government's burden of proving every element of a crime beyond a reasonable doubt, the Florida legislature has jeopardized one of the American legal system's most important protections.
- It is imperative that legislatures draft laws that protect the innocent by requiring the government to prove a *mens rea* and an *actus reus* (bad act) beyond a reasonable doubt before branding somebody a criminal and depriving him of his liberty.

This paper, in its entirety, can be found at **http://report.heritage.org/bg2782**

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Modern Criminal Law

Modern criminal law is far different from the criminal law of 100 years ago. Common-law crimes like murder, rape, and robbery all were once morally blameworthy. Today, such moral clarity is in short supply: There are 4,500 federal criminal statutes and roughly 300,000 criminal regulations dealing with acts (like using the Smokey Bear emblem without authorization) that most Americans would not consider "criminal." Indeed, in order to secure a criminal conviction, a prosecutor traditionally would have to prove beyond a reasonable doubt that the defendant committed a bad act (*actus reus*) and that he did so with a guilty mind (*mens rea*).

This requirement is also changing, and not for the better. Today, there is a place where you are presumed to be guilty until you prove yourself innocent, a place where you can be imprisoned without any proof you intended to commit a crime. Where is that place? North Korea? China? No, Florida. And this seismic shift in the state's legal landscape is not an accident: The Florida legislature has deliberately cast aside centuries of Anglo–American legal tradition.

Florida Today: The *Shelton* Case

In a case currently pending before the Supreme Court, *Shelton v. Sec'y, Dep't of Corrections*, the Court will consider whether to hear an appeal of a criminal conviction that raises the following issue: Can Florida change the rules so that, instead of the government having to prove that a citizen intended to commit a crime, the citizen has to demonstrate that he had *no idea* that his acts violated the law. In other words, does the citizen have the burden of proving he did not intend to violate the law—a sharp contrast to the normal rule, under which the burden of proving intent is on the government?

The case arises in the unfortunate context of a drug charge, but that does not mean it is unimportant, and it certainly is no reason for conservatives to be unconcerned. The underlying principle is simple and of universal applicability: If the government cannot prove that an individual knew his acts were potentially criminal, then that individual should not be criminally liable.

In 1996 and again in 2002, the Florida Supreme Court held that knowledge of the illicit nature of a substance is an element that the state must prove in drug prosecutions.[1] Therefore, in order to convict someone of drug possession or drug trafficking, the government had to prove beyond a reasonable doubt that the defendant knew that what he had in his pocket was an illegal drug.

To be sure, many defendants would falsely claim, "I had no idea that was cocaine in my pocket," but those kinds of defenses usually do not pass the "laugh test" and are easily dismissed. Moreover, if an individual really did not know the nature of what he was holding, then he is not guilty of a crime. There is no value, the court said, in convicting someone who innocently believed he was carrying sand or talcum powder. This burden of proof was modest in nature and of little true concern to Florida prosecutors.

In response to those decisions, the Florida legislature amended Florida's drug law[2] to "make possession of a controlled substance a general intent crime, no longer requiring the state to prove that a violator [was] aware that the contraband is illegal...."[3] The defendant can attempt to offer an "affirmative defense" to prove that he did not know the substance was illegal, but the jury will be instructed that they can presume that the defendant knew that the substance in his possession was an illicit substance unless he can convince them otherwise. Because the burden of persuasion is on the defendant, the federal district court that recently reviewed the law concluded that, for all practical purposes, "delivery of cocaine it [*sic*] is a strict liability crime under Florida law."[4] Consequently, if an individual in Florida knowingly possesses something that turns out to be an illegal drug, that individual is guilty of a crime—even if he had absolutely no idea that it was an illegal drug, unless he can prove otherwise.

In October 2004, Mackle Shelton was arrested for, among other things, possession and delivery of cocaine. At trial, the judge instructed the jury that in order to convict Shelton, the state had to prove

1. *See* Chicone v. State, 684 So.2d 736, 744 (Fla. 1996), and Scott v. State, 808 So.2d 166, 170–72 (Fla. 2002).
2. Fla. Stat. § 893.101.
3. Wright v. State, 920 So.2d 21, 24 (Fla. 4th DCA 2005).
4 Shelton v. Sec'y, Dep't of Corrections, 802 F.Supp.2d 1289, 1308–15 (M.D.Fla.2011).

beyond a reasonable doubt (1) that Shelton delivered a certain substance and (2) that the substance was cocaine. Under those instructions, the jury found Shelton guilty and sentenced him to 18 years in prison.

Shelton appealed to the state appellate court and the Florida Supreme Court, arguing that imposing such a harsh penalty without a meaningful *mens rea* requirement (that is, without a requirement that he had acted with a guilty intent) violates due process protections under the Fourteenth Amendment of the U.S. Constitution. Neither the appellate court nor the Florida Supreme Court, however, addressed the constitutional issue raised by Shelton, and both upheld his conviction.

Shelton then filed a federal *habeas* petition in a federal district court in Florida, arguing that the Florida drug law was facially unconstitutional because it eliminated the *mens rea* requirement for a drug offense, under which he was sentenced to 18 years' imprisonment.

The district court granted Shelton's petition and found the Florida statute to be facially unconstitutional.[5] The district court also held that the Florida statute either is a strict liability offense requiring no proof of *mens rea* or, if proof of knowledge of the illicit nature of the substance is still required, unconstitutionally shifts—to the defendant—the burden of raising and proving a lack of such knowledge. If the *mens rea* requirement has been completely removed, the court reasoned, the statute must be analyzed under prior Supreme Court decisions about strict liability offenses. If the *mens rea* requirement is still an element of the offense, the presumption that the defendant had the requisite *mens rea* unless he proves otherwise would, in the district court's view, violate due process.[6]

The district court analyzed the case using the same line of reasoning followed by the Supreme Court in *Staples v. United States*.[7] According to the district court, a strict liability criminal offense would be constitutional only if the penalty is slight, a conviction does not result in substantial stigma, and the statute regulates inherently dangerous or deleterious conduct. In *Shelton*, the district court determined that the Florida drug law satisfied none of the three *Staples* elements. To the contrary, it concluded that:

- The penalties for violating Florida's drug laws are harsh;
- A conviction for violating those laws results in substantial stigma and damage to the defendant's reputation; and
- In contrast to possessing inherently dangerous articles such as hand grenades or hazardous waste (both of which are heavily regulated and both of which ordinary people would know are not innocently possessed), the possession of a pill or a powdery or leafy substance would not by itself put the defendant on notice that he was likely violating the law.

As a result of these findings, the court held the Florida drug law to be an unconstitutional violation of due process.

The U.S. Eleventh Circuit Court of Appeals overturned the district court, holding that the Supreme Court has yet to address the strict liability issue directly and that Florida's ruling was not an unreasonable application of current law.[8] In its decision, the Eleventh Circuit cited Supreme Court cases in which, with regard to criminal cases, the justices approved shifting the burden of proof to a defendant.

Meanwhile, in a different case, the Florida Supreme Court, by a thin majority, held last year that the same drug statute considered in *Shelton* was facially constitutional. The court emphasized that the primary responsibility for defining the elements of a criminal offense rests with the legislature and concluded that, because the law prohibits an affirmative act of possession and because there is no lawful purpose for an unauthorized person to handle a controlled substance, the legislative decision to eliminate intent as an element of the crime did not violate

5. *Id.*
6. *Id.*
7. 511 U.S. 600, 619–20 (1994).
8. Shelton v. Sec'y, Dep't of Corrections, 691 F.3d 1348 (11th Cir. 2012).

due process.[9] That the Florida Supreme Court, the U.S. District Court, and the Eleventh Circuit Court of Appeals each relied on Supreme Court precedent and came to diverging conclusions on the same issue demonstrates the lack of clarity in this area of the law.

Shelton has petitioned the Supreme Court of the United States to hear the case, and the Court's decision on whether to take the case is expected before the end of March.

Why Is *Shelton* So Important?

The *Shelton* case matters profoundly. Historically, the law has required that before an individual can be deemed a criminal, he must have acted with intent to do wrong. The burden of proving that he intended to do wrong was placed on the government. Accidents and mistakes are not considered crimes: "It is a fundamental principle of Anglo–Saxon jurisprudence that guilt...is not lightly to be imputed to a citizen who...has no evil intention or consciousness of wrongdoing."[10] This standard is different from tort law in which liability for damages resulting from negligence does not require proof that a defendant intended to cause harm, only that he was careless and did something that resulted in harm.

The requirement that a crime involve culpable purposeful intent has a solid historical grounding. As Justice Robert Jackson wrote:

> 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. Unqualified acceptance of this doctrine by English common law was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."[11]

The development of strict liability crimes has transformed the criminal law landscape. It means that guilty intent is no longer the hallmark of criminality. And even though the elimination of all *mens rea* requirements—so that purely unintentional conduct is punished criminally—ought to be deemed a violation the Constitution, the courts have often said that it is not.[12]

Today, although rare, there are a number of criminal offenses that impose serious criminal liability without fault.[13] As *Shelton* makes clear, that number is growing, and where this doctrine was originally limited to misdemeanor criminal liability, it is now often imposed as part of felony prosecutions. For example, one court held a company strictly liable for the death of certain migratory birds "even if the killing of the birds was accidental or unintentional."[14] Similarly, courts have held strictly liable those whose conduct contravenes laws relating to the sale of liquor and narcotics, foods, and possession of unregistered firearms, among others.[15] Likewise, some statutes have been passed that shift proof requirements to defendants, often requiring them to bear the burden of persuading a jury of their lack of criminal intent. The Florida statute, if read this way, is just the latest and most extreme example of this trend.

What *Shelton* portends is, in effect, a standard of near-absolute liability. One is entitled to wonder

9. *See* State v. Adkins, 96 So.3d 412, 420–21 (Fla. 2012).
10. United States v. Dotterweich, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting).
11. Morissette v. United States, 342 U.S. 246, 250–51 (1952).
12. The seminal case most frequently cited for the proposition is Shevlin-Carpenter Co. v. State of Minnesota, 218 U.S. 57 (1910) (State may "eliminate the question of intent" without violating the Due Process clause of the Fourteenth Amendment).
13. Lafave & Scott, Criminal Law § 3.8, at 242 n.1 (2d ed. 1986).
14. United States v. FMC Corporation, 572 F.2d 902, 904 (2d Cir. 1978).
15. *See* United States v. Freed, 401 U.S. 601 (1971) (possession of unregistered hand grenades); Dotterweich, 320 U.S. at 278 (sales under Food and Drug laws); United States v. Balint, 258 U.S. 250 (1922) (sale of narcotics).

whether contemporary legislators who have enacted vague criminal statutes and have empowered bureaucrats to implement regulations with onerous criminal penalties have lost sight of a fundamental truth: "If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary."[16] As the drafters of the Model Penal Code put it:

> It has been argued, and the argument undoubtedly will be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains.... Crime does and should mean condemnation, and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised.[17]

By eliminating the government's burden of proving each and every element of a crime beyond a reasonable doubt, the Florida legislature has jeopardized one of the American legal system's most important protections.

Criminal Law and the Guilty Mind

The Supreme Court may choose not to resolve the issues present in *Shelton*. If the Court does indeed decline to intervene—it hears only few dozen cases each year—then legislators across the country will have an even greater obligation to learn from Florida's mistakes.

It is imperative that legislatures draft laws that protect the innocent by requiring the government to prove a *mens rea* (guilty mind) and an *actus reus* (bad act) beyond a reasonable doubt before branding somebody a criminal and depriving him of his liberty, quite possibly for many, many years. If they do not, then we may all truly be criminals, and we will have lost sight of a profoundly important insight: that the criminal law ought to be reserved for truly culpable behavior.

*—**Paul Rosenzweig** is a Visiting Fellow and **Daniel J. Dew** is a Visiting Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*

16. United States v. Weitzenhoff, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of rehearing *en banc).*
17. American Law Institute, Model Penal Code § 2.05 and Comments at 282–83 (1985).