



# Staying Moored: Why a Meaningful Mens Rea Requirement Should Matter to You

By Shana O'Toole **DIRECTOR, NACDL**

Mario Meeks **COUNSEL FOR WHITE COLLAR CRIME POLICY, NACDL**

**A**s the recent Presidential election attested, Florida regularly commands the national spotlight. This is evident in the world of criminal justice.

An adequate mens rea (which is legalese for a “guilty mind”) requirement in all criminal laws protects anyone that did not intend to commit a crime from unjustly

being exposed to criminal prosecution and the unfortunate consequences that result. The collateral consequences of even an arrest, in itself, regardless of whether the charges are dismissed or an individual is ultimately prosecuted, convicted or sentenced can dramatically impact an individual’s future job prospects or higher

education admissions. The erosion of this protection should be unsettling, especially to Floridians.

Mens rea is a foundational anchor of the American criminal justice system and even predates the days of the founding fathers. At its core, this concept requires an individual to have intended to commit a crime before he can be subjected to the criminal punishment associated with that crime. It is the moral justification for bringing to bear on a single individual the incredible might of the government. Ensuring that every law has an adequate criminal intent requirement preserves society's faith in the criminal justice system.

Because the greatest power that any civilized government routinely uses against its own citizens is the power to prosecute and punish under criminal law, this power must be vigilantly scrutinized and checked. More than any other area of law, criminal law must be firmly grounded in fundamental principles of justice, for its abuse (intended or not) by elected and unelected public servants alike can rob well-intentioned citizens of their most sacred, unalienable right: Liberty.

This criminal law anchor is based on a stalwart constitutional principle: fair notice. The Due Process clause of the Constitution requires that before a person

can be criminally punished, that person must be given adequate notice that the conduct in question was prohibited. Only when the government has made its edicts clear, should a person be subjected to condemnation and prolonged deprivation of liberty, and all the serious, life-altering collateral consequences that follow.

Over the last several decades, however, the protections that an adequate criminal intent requirement provide have been systematically eroded away by hastily enacted and overly broad legislation. This legislation has often then been implemented, administered, and enforced by a plethora of additional criminal regulations drafted by unelected government agencies with no direct accountability to the public. The end result is that there are now hundreds of thousands of federal criminal laws and regulations on

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the books that are so broadly defined that most anyone can be deemed a "criminal." Of course, this is not what James Madison intended when he drafted what would become the framework for the Constitution of the United States.

The erosion of criminal intent requirements has not been limited to only federal law. Many states have also enacted legislation undermining this important legal anchor. Sadly, Florida is no exception. In Florida, there are a number of foolish

criminal laws, lacking sufficient criminal intent requirements, that many Floridians would be shocked to learn are crimes, including the individuals who have been arrested for committing them.

For example, in September 2016, a 34-year-old man from Auburndale was arrested and jailed after a deputy spotted him with a red, plastic milk crate that was stamped “Sunshine State Dairy Farms” attached to his bicycle. When asked by the deputy, the man said he found the crate on the side of the road and attached it to his bike. He was arrested and charged with unlawful possession of a dairy crate—a crime that could land him up to one year in prison.

In August 2016, a 74-year-old Bushnell man was arrested after trying to protect his horses and stepson from a 10-foot alligator. He shot at the alligator four times with his pistol, but it still attacked and latched on to his son’s leg. Authorities eventually arrived at the scene and killed the predator, but then arrested the man for unlawfully attempting to kill it without a permit. Another man in Naples was arrested in April 2015 for attempting to nurse a baby alligator back to health after he and his son rescued it from being attacked. In Florida, both crimes are felonies punishable with up to five years in prison.

Other recent examples of Floridians being arrested or prosecuted for crimes that they probably did not even know existed,

let alone intended to purposefully commit, include: a University of Florida student-athlete who was arrested in July 2013 for barking at a police dog, a misdemeanor punishable with up to 60 days in jail; and a man who was arrested in February 2013 when he released a dozen heart-shaped balloons on Dania Beach as a romantic Valentine’s Day gesture for his girlfriend—a gesture that could have cost him up to five years in prison under the Florida Air and Water Pollution Control Act.



Florida’s lack of adequate criminal intent requirements, however, is not limited to mere “regulatory” laws. With its strict liability drug law, Florida is actually at the forefront of the erosion of the criminal intent anchor in the criminal justice system. In fact, Florida is only one of two states that have implemented such a law.

Under § 893.13 of the Florida Statutes, the mere possession of a controlled substance constitutes a felony regardless of whether you knew you were in possession of the drug or whether you knew that the

specific controlled substance that was in your possession was illegal to possess. Depending on the controlled substance at issue and other facts, a violation of this statute is punishable by anywhere from one to thirty years in prison.

In 2012, in *State v. Adkins*, this troubling law was deemed constitutional by the Supreme Court of Florida. Thus, any Floridian (or person physically present in Florida) can be guilty of and sentenced for possessing a controlled substance without requiring the government to prove any intentional conduct whatsoever. As noted by Justice James Perry in his scathing dissent in *Adkins*, this drug law unjustly exposes an “endless” list of innocent people to criminal punishment and imprisonment, including, but not limited to:

- The student in whose book bag a classmate stashes his drugs to avoid detection;
- A roommate unaware that the person who shares his apartment has hidden illegal drugs in the common areas of the home;
- A driver who rents a car in which a previous passenger has dropped marijuana under the seat;
- A traveler who mistakenly retrieves from a luggage carousel a bag identical to her own containing Oxycodone; and
- An ex-wife who is framed by an ex-husband in an effort to get the upper hand in a bitter custody dispute.

Justice Perry’s non-exhaustive list of possible scenarios demonstrates just how easily unsuspecting citizens could be

ensnared by Florida’s broad strict liability drug law. The statute currently excludes common carriers, like postal workers, but this law would apply still to a neighbor who innocently agreed to accept delivery for a package that, unbeknownst to them, contained unlawfully prescribed medication for an out-of-town neighbor.

So what can Floridians do to prevent the further erosion of criminal intent requirements in their state laws?

For starters, Floridians can demand their legislators engage in common sense lawmaking before proposing additional unnecessary or overly broad criminal statutes or regulations. Second, Florida should follow the example of a couple of its sister states, like Michigan and Ohio, and demand their state representatives pass a default mens rea criminal law. Legislation should include a provision that if a statute is silent on the “state of mind” or criminal intent to commit the crime, the state of mind the government must prove is something meaningful, like “purposefully” or “willfully” in order to avoid unfairly prosecuting innocent people. It should also include a provision that makes clear that any criminal intent requirement applies to every element of the crime. Lastly, it should state that if the offense consists of conduct that a reasonable person would not know was unlawful, the government must prove the accused person knew or had reason to believe that the conduct was unlawful, i.e., the person had adequate notice that the conduct was criminal. Laws of this type are a meaningful step in mooring the criminal justice system back to the Founding Father’s original goal of fundamental fairness.