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Notes and Comments: Strict Liability and Possession of Contraband: The Maryland Approach

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STRICT LIABILITY AND POSSESSION OF CONTRABAND: THE MARYLAND APPROACH

The author examines the purpose of and the limitations on imposing strict liability for conduct deemed injurious to the public. He considers the applicability of strict liability to the unlawful possession of contraband and the importance of knowledge as an element of possession. After comparing the positions of the majority of jurisdictions and that taken by Maryland, the author concludes that the Maryland position is neither consistent nor justified.

Until the nineteenth century it had been an established principle of law that the existence of a criminal mind was essential to imposing criminal responsibility.[1] The foundation of criminal justice was that an evil intent was the essence of an offense.[2] However, during the last century both the English and American courts began construing criminal statutes that failed to mention any mental element as imposing strict liability upon certain conduct.[3] Previously, where a penal statute was silent as to the mental element, the courts had construed it in favor of the accused by implying a requirement of mens rea.[4] This construction gradually gave way to a literal construction of such statutes.[5] The implication of a requirement of mens rea was abandoned and convictions came to be based merely upon forbidden conduct irrespective of intent.[6]

Most statutes which were subjected to a literal interpretation "resulted from the need for social regulation brought about by the industrial revolution"[7] and were generally of a purely regulatory or administrative nature. They were enacted to prevent an injury of a widespread and public character. These regulations have traditionally been given the name public welfare offenses.[8]

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1. *See* G. WILLIAMS, CRIMINAL LAW § 75, at 216 (2d ed. 1961) [hereinafter cited as WILLIAMS].
2. 1 J. BISHOP, CRIMINAL LAW § 287 (7th ed. 1882).
3. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56, 62 (1933) [hereinafter cited as Sayre].
4. "Mens Rea" is the awareness of all those facts which make conduct criminal. United States v. Crimmins, 123 F.2d 271, 272 (2d Cir. 1941). BLACK'S LAW DICTIONARY 1137(4th ed. 1968), defines "mens rea" as: "a guilty mind, a guilty or wrongful purpose; a criminal intent."
5. WILLIAMS at 217-18.
6. *Id.*
7. Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644, 670.
8. Sayre, *supra* note 3.

FOUNDATIONS OF STRICT LIABILITY

Early in the development of strict liability the desire to protect the public was recognized as a justification for dispensing with the mental element.

> Public policy sacrifices the individual to the general good . . . . It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.[9]

In public welfare offenses strict liability has been adopted "in order to simplify the investigation and prosecution of violations of statutes designed to control mass conduct."[10] An example of such offenses are those involving adulterated food and beverages. Such offenses typically carry only monetary penalties, rarely imprisonment.[11] In an early English case[12] the defendant was convicted of having in his possession adulterated tobacco and was fined £200. Baron Parke expressed a common justification for not requiring a mental element in such offenses when he said that "the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge."[13] The protection to be given society outweighed that customarily afforded to the individual in the requirement of scienter as a prerequisite to punishment.[14]

This desire to protect society has inspired the development of this "special type of regulatory offense involving a social injury so direct and widespread and a penalty so light that in such exceptional cases courts could safely override the interests of innocent individual defendants and punish without proof of any guilty intent."[15] When the penalty has consisted of a heavy fine or imprisonment, scienter has generally been required as an element of the offense.

In another early English case,[16] the defendant was convicted of bigamy for marrying within seven years after she had been deserted by her husband. The jury found that at the time of her second marriage she reasonably believed in good faith that her husband was dead. In support of the decision to quash the conviction, Justice Wills wrote:

> [T]he nature and extent of the penalty attached to the offense may reasonably be considered. There is nothing that need shock

9. O. W. HOLMES, THE COMMON LAW 48 (1881) [hereinafter cited as HOLMES].
10. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 423 (1958) [hereinafter cited as Hart].
11. *Id.* at 72.
12. Regina v. Woodrow, 153 Eng. Rep. 907 (Ex. 1846).
13. *Id.* at 913.
14. *Accord*, Commonwealth v. Farren, 91 Mass. (9 Allen) 489 (1864).
15. Sayre, *supra* note 3, at 68.
16. Regina v. Tolson, 23 Q.B.D. 168 (1889).

> any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels . . . to the loss of civil rights, to imprisonment with hard labour, or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed morally as well as unintentionally done something prohibited by law . . . .[17]

In a leading American case,[18] the imposition of strict liability was rejected, and the Court reversed the defendant's conviction for violating a federal statute making it a crime to embezzle, steal, purloin, or knowingly convert government property.[19] The defendant carried away and sold bomb casings which had accumulated on a government bombing range. The trial court rejected defendant's argument that he believed the casings to be abandoned. The jury was instructed that a lack of criminal intent was no defense. The Supreme Court reversed, holding that scienter was essential to this offense. In reviewing the nature of public welfare offenses the Court asserted that the accused was usually in a position to prevent the particular harm with no more care than society might reasonably expect of the individual. Furthermore, under such offenses the penalties usually are light and conviction causes no serious harm to an offender's reputation.

The principle that the interests of the public must outweigh the interests of the individual when strict liability is to be applied was expressed in another American decision.[20] A corporate officer was convicted of violating the Federal Food, Drug, and Cosmetic Act of 1938.[21] After purchasing drugs from a manufacturer, the defendant's company replaced the original labels with its own and shipped the drugs in interstate commerce. In upholding the conviction the Court classified the particular legislation as that type where penalties serve as effective means of regulation and thus dispensed with the requirement of mens rea. The Court spoke of putting the burden of acting at hazard upon an innocent person who stands in a responsible relation to a public danger. In the interest of the greater good, the intent of Congress was to place the burden upon those who have the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers. The balancing of relative hardships was in favor of the public who had no other protection against the evil to be avoided.

17. *Id.* at 177. *Contra*, Braun v. State, 230 Md. 82, 185 A.2d 905 (1962) (the court concluded that knowledge or mens rea was not necessary to a conviction for bigamy and equated bigamy with various police regulations where scienter is unnecessary); Commonwealth v. Mash, 48 Mass. (7 Met.) 472 (1844).
18. Morissette v. United States, 342 U.S. 246 (1952).
19. 18 U.S.C. § 641 (1966).
20. United States v. Dotterweich, 320 U.S. 277 (1943).
21. 21 U.S.C. § 331 (1972).

To summarize, the rationale for imposing strict liability upon conduct is that society needs protection from certain harmful acts which affect it in a direct and widespread manner. To effectively counter such conduct the public tolerates dispensing with a mental element so as to simplify the enforcement of statutes intended to control it. Yet, in dispensing with the traditional requirement of scienter in such statutes, it is considered desirable to impose only light penalties for such offenses.

UNCONSCIOUS POSSESSION AS A CRIME IN MARYLAND

Although strict liability is commonly applied to public welfare offenses, it should not be applied to criminal statutes that impose heavy penalties for acts which the accused could not reasonably have avoided or have known to be criminal.[22] Nevertheless, in certain types of offenses strict liability has been imposed when the prescribed penalties are not minimal and the statutes not merely regulatory. One such type of offense is the unlawful possession of contraband.[23] The question is whether possession should be *conscious*, i.e. should knowledge, either of the presence or the character of the article or both, be an element of the definition of possession and thus required to be proven by the prosecution.

The word possession has been given a variety of judicial definitions.[24] The majority of the state courts have asserted that knowledge is an element when the word possession is used in the context of a criminal statute. Under the majority rule,[25] possession of contraband is not criminal unless conscious. However, Maryland has apparently failed or refused to recognize a distinction between mere police regulations and more serious offenses of possession.

The leading Maryland case is *Ford v. State*,[26] where the defendant was convicted of violating the lottery laws[27] by possessing lottery slips.

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22. For a discussion of the role which strict liability plays in modern criminal justice, see Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).
23. The term *contraband* as used herein will refer to articles declared unlawful for possession except under authorized conditions.
24. Goodhart, *Possession of Drugs & Absolute Liability*, 84 L.Q. REV. 382 (1968).
25. *See, e.g.*, Frank v. State, 199 So. 2d 117 (Fla. Dist. Ct. App. 1967); Ritter v. Commonwealth, 210 Va. 732, 173 S.E.2d 799 (1970).
26. 85 Md. 465, 37 A. 172 (1897).
27. If any person shall bring into this State any lottery ticket, policy, certificate or anything by which the vendor or person promises or guarantees that any particular character, ticket or certificate shall in any event, or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property or evidence of debt, or if any person shall have in his possession in this state any book, list, slip or record of the numbers drawn in any lottery, whether in this State or elsewhere, or any book, list, slip or record of any lottery ticket, or anything in the nature thereof mentioned in this section, or of any money received or to be received from, or for the sale of any such lottery ticket or thing in the nature thereof as aforesaid he shall be liable to indictment, and upon conviction shall in

In the trial court the defendant offered evidence to show that he did not know he was in possession of the contraband. An exception was taken to a ruling prohibiting introduction of the evidence. In affirming the conviction the court held that lack of knowledge or the absence of mens rea was not a defense, and thus evidence tending to show lack of knowledge was not admissible. In noting the socially debilitating effect of lotteries upon the public[28] and the difficulty for the state to prove mens rea, the court reasoned that the legislature could, as a reasonable exercise of the police power of the state, legitimately impose criminal liability for the unconscious possession of items declared to be contraband.[29]

When the alleged criminal activity is unlawful possession of contraband, the state has no burden to prove a particular mental state, and the accused has no opportunity to prove an innocent intent. The only defenses available to the accused are "that the articles charged in the indictment were not found in his possession, or that those found were not such as the law prohibited him from having."[30] No matter how heavily the evidence would imply lack of knowledge, it will make no difference as to liability since knowledge is not an element of the offense.

Although the question of defendant's knowledge is not an issue, the prosecutor is permitted to weigh the evidence as to the defendant's mental state. The *Ford* court commented:

> If a reputable person satisfies the prosecuting officer that he came into possession of it [lottery slips] in an innocent way, it is not likely the prosecution would be continued, or if the court be informed of such facts it could take it into consideration in imposing the penalty, and could fine him fifteen cents or less, which would relieve him of the costs.[31]

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the discretion of the court be fined any sum not exceeding one thousand dollars, or shall be imprisoned for a period not exceeding one year, or shall be both fined and imprisoned; provided, however, that this section shall not apply to any person who may have possession of any of the articles herein mentioned, for the purpose of procuring or furnishing evidence of violations of any of the provisions of law relating to lotteries.

MD. ANN. CODE art. 27, § 362 (1971), *as amended*, Law of May 24, 1973, ch. 774, § __, [1973] Laws of Md. ____.

28. Maryland presently has a state operated lottery for the purpose of raising revenue. MD. ANN. CODE art. 88D, §§ 1-23 (Supp. 1972).
29. *Contra*, State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951). The defendant was accused of unlawfully and knowingly possessing certain papers pertaining to a lottery policy. In affirming a dismissal of the indictment the court stated:

    > The criminal mind is not essential where the Legislature has so willed. The doer of the act may be liable criminally even though he does not know the act is criminal and does not purpose to transgress the law. But it is quite another thing to assess with criminal or penal consequences the unknowing "possession" of contraband articles. That would constitute an abuse of the police power.

    Id. at 149, 80 A.2d at 623.
30. Ford v. State, 85 Md. 465, 480, 37 A. 172, 175 (1897).
31. *Id.* at 477, 37 A. at 174.

The result of permitting such a decision to be made by the prosecuting attorney is that, when the defendant stands before him, knowledge is an element of the offense; yet, when the defendant stands before the jury knowledge disappears as an element. The prosecutor holds what amounts to an informal trial of what he conceives to be the accused's culpability.[32] If he decides the accused is guilty, he prosecutes.

> This argument reasserts the traditional position that a criminal conviction imports moral condemnation. To this, it adds the arrogant assertion that it is proper to visit the moral condemnation of the community upon one of its members on the basis solely of the private judgment of his prosecutors. Such a circumvention of the safeguards with which the law surrounds other determinations of criminality seems not only irrational, but immoral as well.[33]

In addition to forbidding the introduction of evidence tending to prove knowledge or the lack thereof, the *Ford* court rejected the defendant's contention that such a statute merely shifted the burden of proof of lack of knowledge from the state to the defendant, since such an opportunity would make the statute practically useless and be a temptation to perjury.[34] The court was concerned that the accused would swear that he came into possession innocently and the state would be unable to prove otherwise.

The influence of *Ford* can be seen in such Maryland possession offenses as violations of the narcotics laws.[35] In *Jenkins v. State*[36] the court took the same position with respect to possession of narcotics as *Ford* did in regard to possession of lottery slips. The defendant had removed a package from under the sink of a gasoline station men's room. At his trial the defendant testified that he found the package containing the narcotics on the floor of the washroom, and that he took it because he thought it might contain money or some other valuable. He asserted that he did not know it contained marijuana. In affirming the conviction the court held that it was unnecessary for the state to prove mens rea. In *Jenkins*, the court adopted the rationale of the *Ford* court and deplored the deleterious effect narcotic drug addiction has upon the public health, morals, safety and welfare. The

32. WILLIAMS, *supra* note 1, at 256.
33. Hart, *supra* note 10, at 424.
34. Contrary to *Ford*, it would be sounder policy to retain the guilty mind element and to shift the burden of proof to the defendant to establish lack of guilty intent. With the possibility of heavy penalities, "the defendant should not be denied the right of bringing forward affirmative evidence to prove that the violation was the result of no fault on his part." Sayre, *supra* note 3, at 79. Under this policy the jury could find that the defendant's testimony was insufficent to meet the burden.
35. "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this subtitle. . . ." Law of March 29, 1935, ch. 59, § 1, [1935] Laws of Md. 91, *as amended*, MD. ANN. CODE art. 27, § 287 (1971).
36. 215 Md. 70, 137 A.2d 115 (1957).

Jenkins court also embraced the *Ford* court's declaration that a lack of guilty knowledge may only mitigate punishment.

POSSESSION AS DEFINED BY OTHER STATES

Maryland's position as expressed in *Ford* and *Jenkins*, compared with that of other states, is notable for its harshness. This characteristic was expressed in an Oregon case, *State v. Cox*,[37] in which a hotel porter was convicted of unlawfully possessing intoxicating liquors by carrying a suitcase containing the contraband from a train to the hotel. In reversing the lower court, the Supreme Court of Oregon stressed the evil inherent in imposing criminal responsibility for unconscious possession:

> In the discharge of his duties the defendant did not have the right of search, and did not have any choice or discretion in the taking or handling of the baggage of a guest. If the mere act of a porter in lifting a suitcase which contains intoxicating liquors is within itself a violation of the statute in question, then any minister, old lady, or the most radical Prohibitionist, through chance or design might be made the innocent victim of having intoxicating liquor in his or her possession, and . . . could be convicted of that offense.[38]

The thrust of *Cox* is that in construing the applicable criminal statute, the interests of due process outweigh the desire to protect the health, safety, welfare and morals of society.[39]

In a number of possession cases where knowledge was required as an element of the crime, a distinction has been made between knowledge of the article's presence and of its character. In *People v. Gory*,[40] the defendant was an inmate of a prison farm at the time of his arrest for the unlawful possession of marijuana. The contraband was found in a metal box issued to the defendant. The box could not be locked. When the prisoners were absent it was customary for one man to remain behind to watch the inmates' property. At the trial the defendant stated that he had never seen the marijuana before it was removed from

37. 91 Ore. 518, 179 P. 575 (1919).

38. *Id.* at 532, 179 P. at 579.

39. In State v. Neel, __ Ore. __, 493 P.2d 740 (1972), involving a prosecution for the possession of marijuana, the court said:

> [A]s a general rule of statutory construction, all criminal statutes should be interpreted as requiring proof of some culpable element. If the legislature desires to impose strict criminal liability on any conduct, it can expressly do so. Since the statutes in question do not expressly impose strict liability for the possession of narcotics and dangerous drugs, we interpret the statute as requiring proof of some mental element.

Id. at __, 493 P.2d at 742.

40. 28 Cal. 2d 450, 170 P.2d 433 (1946).

the box. On appeal, the defendant challenged the propriety of the trial court's action in twice reading certain instructions and then expressly withdrawing them. One of the withdrawn instructions directed that the jury must be convinced beyond a reasonable doubt that the defendant knew of the contraband's presence. In reversing the judgment and the order denying defendant's motion for a new trial, the court held that "the law makes the matter of knowledge in relation to *defendant's awareness of the presence* of the object a basic element of the offense of possession."[41]

Subsequent to *Gory* the California court specifically considered whether knowledge of the contraband's *character* was an element of possession. In *People v. Winston*[42] the defendant was convicted of furnishing marijuana to minors and of illegal possession of marijuana found in his apartment. The defendant had rented his apartment to a tenant while he was out of town. At the time of his arrest the defendant had occupied his apartment for approximately three weeks since his return. One of his contentions on appeal was that the lower court erroneously refused to give an instruction offered by him that knowledge of the narcotic character of the article possessed is an element of the offense of possession. In agreeing with the defendant, the court reviewed *Gory* and concluded that under that case knowledge of the contraband's character was an element.[43] Although the question presented by *Gory* was whether the accused had knowledge of the presence of the contraband, the court found that the character "concept of knowledge is implicit in the discussion of the basic principles involved."[44] Thus, when proof of a conscious possession is required, not only should it be established that the accused was conscious of the contraband's presence, but also that he knew that the article was contraband.[45]

The actual proof of the requisite knowledge is one of the more controversial points in a discussion of this area of the criminal law. Those states in which knowledge is not an element of possession usually rest their opposition to such a requirement partly upon the alleged impossibility of producing the necessary proof of the defendant's mental state.[46] This line of reasoning has not been followed by most states, yet the prosecution has been able to establish a conscious possession by means of circumstantial evidence from which a jury may *infer* knowledge.

In the North Dakota case of *State v. Schuck*,[47] the defendant was

41. *Id.* at 454, 170 P.2d at 436.
42. 46 Cal. 2d 151, 293 P.2d 40 (1956).
43. *Accord*, State v. Giddings, 67 N.M. 87, 352 P.2d 1003 (1960); State v. Neel, __ Ore. __, 493 P.2d 740 (1972).
44. 46 Cal. 2d at 159, 293 P.2d at 45.
45. In public welfare offenses, such as possessing adulterated foods and beverages, there is no requirement of knowledge of the article's character.
46. Ford v. State, 85 Md. 465, 37 A. 172 (1897).
47. 51 N.D. 875, 201 N.W. 342 (1924).

convicted of the unlawful possession of intoxicating liquors. The contraband was discovered on his premises, part of which were used as a store. The store was maintained downstairs in the front part of the premises. The testimony was conflicting as to where the liquor was discovered. The arresting officers stated that the contraband was found in a back storeroom, while the defendant's wife asserted that it was found in the kitchen in the back of the premises. According to the wife, prior to the arrival of the officers, a stranger had come to the back door requesting to be permitted to leave a box in the kitchen until it was to be called for later. The package was allegedly placed on the stove and remained there until found. Both the defendant and his wife denied any knowledge of the contents of the package. There was "no direct testimony tending to show that the defendant Schuck had any knowledge of the presence of" the liquor containers "or that their contents were intoxicating."[48] On appeal the contention was made that the trial court had misdirected the jury. Defendant's exception was to the following instruction: "In the absence of any proof that the defendant did not know there was intoxicating liquor on his premises, you may presume that a man knows the condition of his own place, his home, his store, and the property therein, if the circumstances shown warrant this."[49] In affirming the conviction the court rejected the argument that this instruction put upon the defendant the burden of proving his lack of knowledge. In another part of the instruction the lower court had clearly stated that the burden was upon the state to prove knowledge of the contraband's presence beyond a reasonable doubt. The instruction merely created an inference of fact which was rebuttable by facts and circumstances indicating the contrary. In other words, the defendant's ownership and control of the premises was a circumstance sufficient to raise an inference of knowledge, unless overcome by circumstances which would imply a lack of knowledge. If mere ownership and control would be enough to establish knowledge, the burden upon the state is hardly "impossible."

The prosecution is usually in a position to prove knowledge by direct evidence or by circumstantial evidence.[50] However, the evidence must so link the accused to the contraband that the inference of knowledge may be fairly drawn.[51] The existence of such a link was the issue before the Oklahoma court in *Brown v. State*,[52] where the defendant was convicted of possession of marijuana. Police officers were in the process of searching an apartment when appellant and a co-defendant entered. No clothing or personal property of the appellant was found on the premises, nor was any marijuana found on his person; however, a residue of marijuana was found in the apartment. The appellant had

48. *Id.* at 880, 201 N.W. at 344.
49. *Id.*
50. *But see* State v. Eberhardt, 176 Neb. 18, 125 N.W.2d 1 (1963).
51. Carrol v. State, 90 Ariz. 411, 368 P.2d 649 (1962).
52. 481 P.2d 475 (Okla. Crim. App. 1971).

stayed in the apartment only on the day of the search. The apartment was never locked and was frequented by several persons at various times. In reversing the conviction the court found that mere proximity[53] or presence[54] was insufficient to establish knowledge of the presence of contraband and dominion and control of it. Being in the presence of other persons having possession will not impart possession to an accused. The court stated: "There must be some link or circumstance in addition to the presence of the marijuana which indicates defendant Brown's knowledge of its presence and his control of it. Absent this additional independent factor the evidence is insufficient to support conviction."[55]

In spite of the qualification that the circumstances must establish a link and reasonably imply knowledge, the production of the necessary factors has not been difficult. In *People v. Mack*,[56] an Illinois case involving a conviction for the unlawful possession of heroin, the conduct of the defendant prior to a raid on his apartment, coupled with the presence of the contraband in the apartment, was sufficient to establish knowledge. Acting upon information provided by an informant, police officers executed a search warrant in an apartment rented by the defendant. In the morning on the day of the search, the defendant left the apartment by a rear door, descended to the ground by a fire escape, then walked to a car in which he drove away. The apartment was not used as a habitation and only the defendant, by his own admission, had access to the premises. In ruling that the defendant's activity prior to the search was sufficient to prove knowledge, the court reasoned that the "prosecution may meet its burden of proving the knowledge essential to a conviction for possession by evidence of acts, declarations or conduct of the accused from which the inference may be fairly drawn that he knew of existence of the narcotics at the place they were found."[57] Presenting to a jury the conduct of the accused prior to his arrest and eliciting his declarations do not seem to be so extremely difficult as to place an impossible burden upon the prosecution.

In addition to the actual circumstances of the offense committed, the prosecution has still another aid in proving the mental element in possession. Although it is an established common law rule that in a criminal prosecution proof of unrelated crimes is incompetent and inadmissible for the purpose of proving the crime charged,[58] it is a recognized exception to the rule that whenever knowledge is an essen-

53. *Accord*, Harvy v. State, 487 S.W.2d 75 (Tex. Crim. App. 1972).
54. *Accord*, People v. Gory, 28 Cal. 2d 450, 170 P.2d 443 (1946).
55. 481 P.2d at 478.
56. 12 Ill. 2d 151, 145 N.E.2d 609 (1957).
57. *Id.* at 159, 145 N.E.2d at 612.
58. Faust v. United States, 163 U.S. 452 (1896); Nesbit v. Cumberland Contracting Co., 196 Md. 36, 75 A.2d 239 (1950); People v. Thau, 219 N.Y. 39, 113 N.E. 556 (1916); State v. Reineke, 89 Ohio St. 390, 106 N.E. 52 (1914).

tial element of the crime charged, evidence is admissible which tends to establish the accused's knowledge.[59] For example, evidence showing a sale of narcotics may be introduced in a prosecution for possession when it tends to establish knowledge.[60] Such a rule makes the prosecution's task easier.

The various reasons set forth in *Ford* and *Jenkins* for not defining possession to include the element of knowledge lose their credibility in light of the decisions reviewed above. Yet, as much as these decisions may go to undermine the persuasiveness of *Ford* and *Jenkins*, subsequent Maryland cases may have weakened them even more.

MARYLAND LAW AFTER *FORD* AND *JENKINS*

Recent Maryland cases indicate that the reasoning of *Ford* and *Jenkins* is not accepted in cases involving joint possession of contraband. When the circumstances are such that more than one person is in a position to control the contraband, knowledge has been a required element of the offense. This consideration of the mental element is in sharp contrast to the consistent refusal of the Maryland courts to consider evidence relating to defendant's mental state in cases such as *Ford* and *Jenkins*, where only one defendant is involved.

In *Davis v. State*[61] the appellants leased an apartment. Davis had spent only two nights a week there for three months and was not present at the time marijuana was sold by the co-defendant, Green. Davis was present later when a search was made of the apartment by the police. At that time needle marks were found on his arms and armpits. During the search narcotics were found in a metal box on the coffee table. In reversing Davis' conviction for possession of the marijuana sold by Green, the court stated that his ownership of the premises and association with Green were insufficient to convict him. The court said: "We think this, without more, too thin a nexus upon which to predicate guilt . . . ."[62] On the other hand, the court affirmed his conviction of possession and control of the contraband found in the metal box while he was present. The court thought that the location of the box and the needle marks on Davis permitted "an inference that he knew of the presence of, and was directly connected with" the contraband.[63] The court implied that under the circumstances, knowledge can be inferred. But, in light of *Ford* and *Jenkins*, what need is there for such an inference?

The subject of inferred knowledge was again considered in *Wilkins v.*

59. Wallace v. State, 77 Nev. 123, 359 P.2d 739 (1961); State v. Salte, 54 S.D. 536, 223 N.W. 733 (1929).
60. State v. Hennings, 3 Wash. App. 483, 475 P.2d 926 (1970).
61. 9 Md. App. 48, 262 A.2d 578 (1970).
62. *Id.* at 55, 262 A.2d at 583.
63. *Id.*

State.[64] The appellants were common law spouses. The husband owned a three story dwelling and occupied a bedroom on the middle floor. The other floors were rented out and their occupants had free access, by use of internal stairways, to other parts of the house. Under a bed in a room identified as the husband's was found a piece of aluminum foil containing two capsules of heroin. The wife's daughter had at one time slept in the room and testified to having put the two capsules beside the bed. The jury decided that the appellants had exclusive control of the bedroom and attributed very little weight to the evidence and the credibility of the daughter. The court quoted *Davis*: "It has been held that where one has exclusive possession of a home or apartment in which prohibited narcotics are found, it may be inferred, even in the absence of other incriminating evidence, that such person *knew* of the presence of the narcotics and had control of them . . . ."[65] Again, such an inference would not even be considered under the standards announced in *Ford* and *Jenkins*.

Subsequent to *Wilkins* an analysis of cases dealing with the joint possession of narcotics was made in *Folk v. State*.[66] The appellant was a child adjudged to be a delinquent. Her delinquent conduct was the possession and control of marijuana. Appellant was arrested along with five others when she was in a parked automobile. The evidence with certainty showed that someone in the car was smoking marijuana. In affirming the lower court, the Court of Special Appeals stated:

> The common thread running through all of these cases affirming joint possession is 1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.[67]

On the other hand, in cases negating joint possession, lack of knowledge has been a common thread.[68]

In *Rettman v. State*[69] the appellant was convicted in a non-jury trial of various charges involving possession of cocaine. Appellant had gone with a co-defendant in appellant's car to the scene of a narcotics transaction. The transaction was an exchange of hashish for cocaine and a sum of cash. The seller of the hashish was an undercover narcotics agent. The appellant left the motel room to get a metal container out of

64. 11 Md. App. 113, 273 A.2d 236 (1971), *cert. denied*, 261 Md. 730 (1971).
65. *Id.* at 127, 273 A.2d at 243.
66. 11 Md. App. 508, 275 A.2d 184 (1971).
67. *Id.* at 518, 275 A.2d at 189.
68. *Id.* at 514, 275 A.2d at 187.
69. 15 Md. App. 666, 292 A.2d 107 (1972), *cert. denied*, 266 Md. 741 (1972).

his automobile and upon returning handed it to the co-defendant. The metal container held the cocaine. In the lower court both the co-defendant and the appellant denied that appellant knew that cocaine was in the can. They further denied that appellant knew that cocaine was connected with the transaction. The lower court did not believe them. In affirming the conviction the court said that the lower court "was under no obligation to believe the protestations of innocence on the part of the appellant, nor the exculpatory statements . . . . relative to appellant's alleged lack of knowledge of the presence of cocaine in the metal container or in appellant's automobile."[70] The credibility of the defendant's testimony is unimportant. What is notable is that the trial court considered evidence which tended to show a lack of knowledge. The admission of this evidence is inconsistent with the holdings of *Ford* and *Jenkins*.

The admission of evidence tending to show knowledge in the joint possession cases is inconsistent with the court's reasoning in *Ford* and *Jenkins*. The asserted social harm in possession of contraband is present in both sole and joint possession situations. The burden of proving scienter in joint possession is as difficult as it is in sole possession, if not more so. Finally, in both situations the court is construing the same statute. The inconsistency between the joint possession cases and *Ford* and *Jenkins* seriously undermines the foundation of the latter cases.

CONCLUSION

The Maryland court should, upon the next opportunity, attempt to explain these inconsistencies or join the ranks of the majority of jurisdictions by expressly overruling *Ford* and *Jenkins*. The absence of mens rea as an element of possession of contraband is not justified by the reasoning of these cases. The possibility of heavy penalties, the harshness of imposing these penalties upon an accused whose conduct may be faultless, and the demonstrated ability of the prosecution to establish a mental link between the accused and the contraband together would seem to indicate that the interests of the public are not sufficient to outweigh those of the accused and thus to deny to him an opportunity to establish that he is without fault. Failure by the court to make knowledge an element in contraband possession offenses carrying criminal penalties would mandate legislative response expressly requiring scienter in contraband possession statutes.

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70. *Id.* at 673, 292 A.2d at 111.