

# **PROSECUTING COUNTERFEIT LICENSE PLATES:**

**A Law Clerk's Constitutional Argument**

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# **Prosecuting Counterfeit License Plates: *A Law Clerk's Constitutional Argument***

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## **I. INTRODUCTION**

As every one who has completed the first year of law school knows, a student's "1L" year is filled with long reading assignments, strange Latin terms, and professors who could probably teach Socrates a thing or two about his "method." From August until May, a first year student's time in and out of the classroom is a whirlwind educational experience with little free time to eat or sleep and never enough time to brief cases for the following day. However, when May finally does arrive, and the last exam, be it Contracts, Constitutional law or Property, is completed and turned into the professor, a new, completely different legal experience begins. It becomes time to move from the world of leaping onto moving trains with a bag full of firecrackers and an ensuing explosion with a force powerful enough to topple a heavy scale onto an unsuspecting pedestrian,<sup>1</sup> to a place where the bad guys are real and the cases rarely if ever involve a banana peel: the summer clerkship.

A summer clerk's job varies. One moment a law clerk could be conducting stimulating legal research that he or she would be happy to do without any compensation whatsoever while the next moment, the clerk could be given an assignment involving thousands of mind-numbing documents that no amount of money could justify doing.

After an intense spring filled with an uncountable number of cover letters, resumes, and follow-up phone calls, I was lucky enough to obtain a clerkship in the State Attorney's Office. Though I have come across many of the typical issues that a practicing attorney in the field of criminal law might expect, such as reasonable suspicion, search and seizure, constructive possession, and improper identifications, there have been one or two situations that have arisen that would surprise and possibly amuse even the most seasoned legal advocate.

Recently, I was given an assignment involving a motion that challenged the constitutionality of the counterfeit license plate statute in the Florida Criminal Code. Needless to say, when the assistant state attorney handed me the defense counsel's motion, it contained a sticky pad note with the words "have fun."

After browsing the document for just five minutes, my second semester Criminal Law class came flashing before my eyes: actus reus, mens rea, statutory construction, plain meaning, legislative intent. The terms were flying around in my head so quickly, and I wondered how I would ever come up with a sufficiently convincing enough argument for the assistant state attorney who had given me the assignment to turn into the judge. Luckily, I was able to revert back to the basic concepts and material that I learned throughout my first year and managed to draft a winning argument that made me the self proclaimed hero of the office.

## **II. THE LEGAL QUESTION**

Substantive due process is the doctrine stating that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective.<sup>2</sup> Florida Statute Section 320.26(1)(a) prohibits the possession a counterfeit license plate. The offense has no listed criminal element. The legal question then is: Does a statute which punishes the possession of a counterfeit license plate violate the hallowed principle of substantivedue process if the law does not contain an explicit scienter element?

### **III. THE DISCUSSION: How do we determine if the law is constitutional?**

There is very little case law involving the counterfeit license plate statute in question and absolutely no authority governing its constitutionality. For that reason, we start our journey by keeping one founded legal principle in mind. Courts are obligated to interpret statutes in a way that avoids labeling the law as unconstitutional.<sup>3</sup> This established common law point encourages the interpreter of a statute which lacks a specific mens rea term to construe the law as containing an implicit criminal intent component. If mens rea is implied, then any constitutional problems are resolved, and as long as it is fair to do so, courts should construe a statute to avoid constitutional issues.<sup>4</sup>

#### ***1. So, is it fair to imply a mens rea term into the law?***

The portion of the statute in question is as follows: “No person shall counterfeit registration license plates, validation stickers, or mobile home stickers, or *have in his or her possession any such plates or stickers*” (emphasis added).<sup>5</sup> The conflict in this case involves the portion in italics. Noticeably absent from the italicized portion of the statute is an explicit requirement of criminal intent. However, in spite of the lack of an overt scienter requirement, because the Legislature is responsible for promulgating the law, determining whether or not mens rea is an essential element of an offense is a question of legislative intent.<sup>6</sup>

The first step in determining the intentions of the legislature is to analyze the actual language of the statute.<sup>7</sup> As we have noted, the italicized portion of the statute above makes no reference to any knowledge requirement, i.e. knowing that that the plates or stickers are counterfeit. The argument could then be made that this lack of a specifically stated mens rea requirement translates to no mens rea requirement at all and thus, a violation of due process. However, the absence of a mens rea requirement does not necessarily mean that the Legislature intended to dispense with a conventional scienter element.<sup>8</sup> Mens rea may be implied from the terms of a statute even if the statute itself lacks an implicit criminal intent component.<sup>9</sup>

If statutory intent is unclear from the plain language of the law (and in this case it seems to be), then we move to the next step, applying the rules of statutory construction and exploring the legislative history to determine the intentions of the legislature.<sup>10</sup> Unfortunately, the history of section 320.26 gives us no assistance in ascertaining the Legislature’s intentions when the law was first adopted or amended. Consequently, the burden to interpret the statute in question falls to case law.

As we all learned in our respective criminal law classes, actus reus is the wrongful deed that comprises the physical elements of a crime,<sup>11</sup> and mens rea is defined as the mental state which the prosecution must prove in order to secure a conviction, i.e. criminal intent.<sup>12</sup> Traditionally at common law, all crimes consisted of both a mens rea and an actus reus.<sup>13</sup> As a result, “the general rule was that mens rea was a necessary element in the indictment and proof of every crime.”<sup>14</sup> Moreover, mens rea has been labeled “the rule rather of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”<sup>15</sup>

The Supreme Court of the United States has stated that a statute must be interpreted in light of the background rules of the common law, in which a requisite guilty state of mind is firmly established.<sup>16</sup> Additionally, Florida courts had held that there is a presumption that statutes contain a general mens rea requirement when an express intent is absent,<sup>17</sup> and this point of law has been echoed in our nation’s highest court as well.<sup>18</sup> Additionally, offenses that do not include a mens rea are disfavored, and it has been recently suggested that either an express or implied criminal intent is required as an element of every criminal offense.<sup>19</sup>

With all these points of law in mind, one might think that our journey has ended, but we first must consider another demon from second semester Criminal Law, strict liability offenses. Only then may we properly determine if section 320.26(1)(a) contains an implicit mens rea element or if it is substantively unconstitutional.

## ***2. Strict liability crimes***

In our American governmental system of checks and balances, it is the duty of the Legislature to promulgate laws.<sup>20</sup> It may develop new statutes, reword existing statutes or repeal older, outdated laws in order to keep up with the changing times. Thus, it logically follows that the Legislature is vested with the authority to define the elements of a crime.<sup>21</sup> As a result, regardless of what any judge or justice might imply to the contrary, it is the Legislature that has the authority to determine whether or not scienter is an essential element of a statutory offense.<sup>22</sup>

When there is no mens rea requirement, an offense is thus labeled as a strict liability crime.<sup>23</sup> These crimes, which only include an actus reus as an elemental requirement, have been addressed by the United States Supreme Court and have been repeatedly upheld.<sup>24</sup> Strict liability legislation is meant to serve as a way of regulating certain conduct.<sup>25</sup> Certain activities are strictly prohibited and punished despite the intentions of the actor, be they harmless or criminal. The penalties are imposed and no criminal mindset is required due to the Legislature’s desire to regulate certain types of potentially harmful or injurious items.<sup>26</sup> The idea is that due to the character of the item, a person should immediately be aware that it is susceptible to strict regulation.<sup>27</sup>

Though the specific purpose of license plates is not stated within any of the statutes pertaining to license plates, their purpose is implicitly obtained from analyzing Florida Statute section 320.02. License plates help to ensure that all vehicles driven on the streets and highways are properly registered so that the safety of other drivers on the road may be assured.<sup>28</sup> License plates assist in protecting the true owner of a vehicle from theft; they help to guarantee to others on the road that the person behind the wheel is proficient in the art of driving, and they assure to other motorists that the vehicle being

driven has proper accident insurance.<sup>29</sup> (There are several different purposes of vehicle registration, and the benefits listed above certainly do not exhaust the list). Therefore, it is not far fetched to assume that a person might immediately realize that counterfeiting a license plate or being in possession of a counterfeit plate is prohibited because it completely defeats the purpose of the statute. A counterfeit license plate, nullifies all the guarantees and assurances that a proper registration license plate includes.

Despite the compelling legal reasoning above, the argument will be made that because violation of section 320.26(1)(a) results in the commission of a third degree felony punishable up to five years,<sup>30</sup> the statute should be declared unconstitutional because its lack a mens rea requirement. Though strict liability statutes are not unconstitutional simply because they impose imprisonment as a punishment,<sup>31</sup> the strict liability offenses that include harsh penalties have been generally limited to statutes that regulate potentially harmful or injurious items such as hand grenades or guns or deadly chemicals.<sup>32</sup>

Therefore, as long as fundamental notions of justice are not offended, the legislature is well within its police power to declare an act criminal regardless of the mental state of the actor,<sup>33</sup> even if violation of the offense would result in a prison term. While imposing no mens rea requirement on a statute regulating a “deleterious device,”<sup>34</sup> appears to be constitutional, it is difficult to apply the same line of reasoning to a statute prohibiting the possession of a counterfeit license plate. To my knowledge, a person can do much more damage with one hand grenade, than with one thousand xeroxed paper temporary license tags.

### ***3. Safeguarding Innocent Conduct and Punishing Criminal Activity***

It is logical then that possessing a counterfeit license plate, which carries with it a penalty of imprisonment of up to 5 years,<sup>35</sup> would contain a knowledge requirement in order to protect lawful conduct. “Knowledge is desirable in order to safeguard innocent persons from being made the victims of unlawful acts perpetrated by others, and of which they have no knowledge.”<sup>36</sup>

The Florida Legislature could not possibly have intended to completely exclude a mens rea requirement when drafting section 320.26(1)(a). In *United States Gypsum Co.*, the Supreme Court noted that “certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.”<sup>37</sup> In more simple terms, just because you don’t see it, it doesn’t mean it’s not there.

If the lack of specific criminal intent language translated to no requirement at all, then a host of seemingly innocent, law-abiding behavior would thus become criminalized. For example, section 320.26(1)(a) could be used to convict a postman delivering a package which contains a counterfeit license plate. The postman would technically be in possession of the illegal item , subject to a five year prison term.<sup>38</sup> Another example involves the unsuspecting driver who borrows a vehicle from a friend. If the car bears a counterfeit license plate, the driver, who was only using the vehicle to visit his sick mother in Tallahassee, would be guilty of a third degree felony.<sup>39</sup> Undoubtedly, the Florida Legislature did not intend these drastic results when it promulgated the legislation in question.

#### ***4. A Similar Situation: food stamp fraud***

The law in controversy in *Liparota v. United States* is very much like section 320.26(1)(a). *Liparota* involved a federal law governing food stamp fraud.<sup>40</sup> The statute provided that “whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by the statute or the regulations” is subject to a fine and imprisonment.<sup>41</sup> Both this federal statute and the Florida statute in question involve possessing certain items, and neither law makes reference to any specific criminal intent to accompany the actus reus of illegal possession. In other words, simply possessing the “contraband” could be a violation of the statute despite a complete and total lack of any criminal intent. The Court in *Liparota* found that, in order to safeguard innocent conduct, implied in section 2024 is the requirement that the Government prove during prosecution that the food stamps were acquired in a manner unauthorized by statute or regulations.<sup>42</sup> To be guilty of illegally possessing food stamps, the Government must show that the defendant knew or should have known that his conduct was illegal.

#### ***5. One Final Point: The principle of lenity***

In order for a judge to grant a facial challenge to the constitutionality of a statute, it must first be determined that no set of circumstances exists under which the statute would be valid.<sup>43</sup> This is a difficult task to accomplish as any given statute has two potential interpretations, one constitutional and one unconstitutional. Also, courts have established a founded principle of lenity when dealing with potentially ambiguous criminal statutes.<sup>44</sup> This principle was developed in order to give fair warning concerning illegal conduct when the legislature’s intent is unclear.<sup>45</sup> A mens rea element to section 320.26(1)(a) would be consistent with the concept of lenity by giving offenders of the statute the benefit of the doubt in terms of their criminal intent until the prosecution proved otherwise. This reading of the statute would be seen as a substantively constitutional interpretation.

#### ***6. How should a Court interpret § 320.26(1)(a)?***

“The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.”<sup>46</sup> This means that if a general criminal intent is sufficient to separate innocent behavior from criminal acts then only general intent will be implied. Accordingly, if a more precise brand of intent is necessary to make a distinction between criminal and non-criminal acts, then specific intent will be read into the statute. (Note: Since there does not appear to be one accepted definition for each phrase, to define general and specific intent at this point, while it may seem logical, would only result in unnecessary confusion not germane to the point of this article. Specific intent is a form of intent above and beyond the level of general intent. Let us leave it at that.)

The general criminal intent component which the Supreme Court found in *Liparota* is the same requirement which could be reasonably read into Florida Statute

section 320.26(1)(a). General criminal intent would suffice to separate wrongful behavior from innocent activity, and it would extinguish any potential constitutional dilemmas. To require knowledge of possession of a counterfeit license plate is not overly burdensome on the prosecution, and it protects those people who have not purposely violated the law.

Therefore, the statute should be interpreted as follows: No person shall counterfeit registration license plates, validation stickers, or mobile home stickers, or have in his or her possession any such plates or stickers, *knowing said plates or stickers are counterfeit*.

#### **IV. CONCLUSION: Where do we stand?**

In the case of Florida Statute section 320.26(1)(a), a challenge to its constitutionality in an appellate court would be a case of first impression. Until the point that this issue reaches a higher court, we, as legal scholars in Florida, are left with this sole document as the only source which makes even the vaguest reference to this unchallenged law. As a result, this issue has been appearing frequently in recent months in the circuit courts. In my final month at the state attorney's office in which I worked, I became aware of at least three challenges to the constitutionality of this law.

The arguments that have been made in favor of section 320.26(1)(a) are not complicated in nature. As we all know from our first year Criminal Law final exams, mens rea is not an issue specific to one type of offense. It transcends the entire criminal code and is found in various forms depending on the severity of the conduct being prohibited. Thus, even if the reasoning and argument found in this article fail to persuade an appellate level judge in the future, the legal principles and case law cited can be used to formulate similar mens rea arguments for any number of different statutes which lack an explicit scienter requirement.

However, regardless of the simplicity of the legal reasoning behind this article, the fact still remains that this issue is undecided on any court level where stare decisis would eventually rule, and thus the circuit courts are free to rule in any way they see fit. Hopefully, an attorney will eventually appeal a circuit court decision so that some precedent can be set for the future. But, until that one day when Florida Statute section 320.26(1)(a) is challenged in a district court of appeal or in front of the Florida Supreme Court, take pleasure in the fact that you have read Florida's utmost (and only) legal "authority" on the constitutionality of the counterfeit license plate statute.

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<sup>1</sup> *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (N.Y. 1928).

<sup>2</sup> Black's Law Dictionary 211 (New Pocket ed. 1996).

<sup>3</sup> *State v. Giorgetti*, 868 So.2d 512, 518 (Fla. 2004).

<sup>4</sup> *Cashatt v. State*, 873 So.2d 430, 436 (1st DCA 2004).

<sup>5</sup> Fla. Stat. § 320.26(1)(a).

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- <sup>6</sup> *Chicone v. State*, 684 So.2d 736, 741 (Fla. 1996).
- <sup>7</sup> *Staples v. United States*, 511 U.S. 600, 605, 114 S.Ct. 1793 (1994).
- <sup>8</sup> *Id.*
- <sup>9</sup> 21 Am. Jur. 2d Criminal Law § 129.
- <sup>10</sup> *BellSouth Telecommunications, Inc. v. Meeks*, 863 So.2d 287, 289 (Fla.2003).
- <sup>11</sup> Blacks Law Dictionary 14 (Pocket Edition 1996).
- <sup>12</sup> *Id.* at 412.
- <sup>13</sup> *Giorgetti*, 868 at 512.
- <sup>14</sup> *Chicone*, 684 at 741 (upholding conviction of possession of cocaine and paraphernalia even though neither counts alleged the element of knowledge).
- <sup>15</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422, 436, 98 S.Ct. 2864 (1978).
- <sup>16</sup> *Staples*, 511 at 605.
- <sup>17</sup> *Cashatt*, 873 at 436 (upholding an internet child solicitation statute that lacked an explicit scienter requirement).
- <sup>18</sup> *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159 (2000)(implying a general criminal intent requirement into a lesser included robbery statute in order to separate wrongful conduct from innocent, lawful actions).
- <sup>19</sup> *Chicone*, 684 at 743.
- <sup>20</sup> *See State Dept. of Children and Family Services v. I.B.*, 891 So.2d 1168 (Fla. 1st DCA 2005).
- <sup>21</sup> *Chicone*, 684 at 741.
- <sup>22</sup> *Id.*
- <sup>23</sup> Black's Law Dictionary 157 (New Pocket ed. 1996).
- <sup>24</sup> *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301 (1922).
- <sup>25</sup> *Staples*, 511 U.S. at 607.

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See* Fla. Stat. § 320.02 (listing all the requirements for proper vehicle registration).

<sup>29</sup> *Id.*

<sup>30</sup> Fla. Stat. § 775.082(3)(d).

<sup>31</sup> *Dreamland Ballroom and Social Dance Club v. City of Fort Lauderdale*, 789 So.2d 1099, 1103 (Fla. 4<sup>th</sup> DCA 2001).

<sup>32</sup> *See, U. S. v. International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565, 91 S.Ct. 1697 (1971)(listing the limited situations in which strict liability offenses have been upheld).

<sup>33</sup> 21 Am. Jur. 2d *Criminal Law* § 144.

<sup>34</sup> *International Minerals & Chemical Corp.*, 402 at 565.

<sup>35</sup> Fla. Stat. § 775.082(3)(d).

<sup>36</sup> *Giorgetti*, 868 at 516.

<sup>37</sup> *United States Gypsum Co.*, 438 at 438.

<sup>38</sup> *See* § 775.082(3)(d).

<sup>39</sup> *See id.*

<sup>40</sup> *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084 (1985).

<sup>41</sup> 7 U.S.C.A. § 2024 (2004).

<sup>42</sup> *Liparota*, 471 at 433

<sup>43</sup> *Cashatt*, 873 at 434

<sup>44</sup> *Id.* at 427

<sup>45</sup> *Id.*

<sup>46</sup> *Carter*, 530 at 269.