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Determining Mental States for Narcotics Offenses under the Missouri Criminal Code

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DETERMINING MENTAL STATES FOR NARCOTICS OFFENSES UNDER THE MISSOURI CRIMINAL CODE

State v. Green[1]

Criminal statutes that do not expressly define requisite mental states for the acts prohibited create problems in determining what the legislature intended to proscribe. Tension exists between construing a statute as a strict liability offense or reading a culpable mental state into it. A court may require a mental state to avoid the harshness of punishing an apparently innocent act. With narcotics offenses, however, courts are more willing to dispense with mental culpability to protect the public welfare.

The Missouri Supreme Court has adopted a new method for construing mental states for narcotics offenses. This approach tends to disregard historically developed methods of statutory construction in favor of the standard adopted by the new Missouri Criminal Code (Code).[2] As interpreted by the *Green* court, the Code standard limits the judicial role in construing criminal statutes and creates uncertainty in interpreting strict liability narcotics offenses.

Lawrence Green presented prescriptions for two controlled narcotics to a pharmacist at a drug store in Independence, Missouri. The prescriptions were issued in the name of Stephen Devore. The pharmacist became suspicious of the requested quantity and discovered that the prescriptions had been falsified.[3] Green was arrested and charged under Missouri Revised Statutes sections 195.170.1[4] and 195.250[5] of the Missouri Uniform Controlled Substances

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1. 629 S.W.2d 326 (Mo. 1982) (en banc).

2. 1977 Mo. Laws 662. The new Missouri Criminal Code (Code) is contained in Mo. REV. STAT. §§ 556.011-600.096 (1978 & Supp. 1983). The Committee for a Modern Criminal Code submitted its final draft of a revised code for legislative approval in 1973. Thus the Code is often referred to as the 1973 Missouri Criminal Code. *See generally* Houser, *Symposium—Proposed Missouri Criminal Code—Introduction,* 38 MO. L. REV. 364 (1973).

3. The prescription authorized the dispensing of 90 tablets, which according to the pharmacist, was an unusually large number of potent pain killers to be written on a hospital prescription. The pharmacist also testified that the defendant acted nervously while in the pharmacy. 629 S.W.2d. at 327.

4. (1978). This section provides:

> No person shall obtain or attempt to obtain a controlled substance or procure or attempt to procure the administration of the controlled substance by fraud, deceit, misrepresentation, or subterfuge; or by the forgery or alteration of a prescription or of any written order; or by the concealment of a material fact; or by the use of a false name or the giving of a false address.

5. (1978). Section 195.250 contains similar prohibitions with regard to substances listed in Schedules III, IV, and V. *See* notes 8-9 *infra.*

Act (MUCSA)[6] with attempting to obtain controlled narcotics by the use of a false name and address. At trial, Green testified that he was having the prescriptions filled at the request of a friend, who had supplied him with the prescriptions and Devore's identification cards. Green contended that he did not know that the prescriptions had been falsified or that the identification cards had been stolen.[7]

Green was found guilty of attempting to obtain a Schedule II[8] and a Schedule IV[9] controlled substance by fraud through the use of a false name and address. He was sentenced to concurrent terms of imprisonment for each count.[10] On appeal, Green argued that the verdict directing instructions were erroneous because they failed to require that the jury find that Green knew he was using a false name and prescription in attempting to obtain the drugs.[11] The Missouri Court of Appeals for the Western District reversed the convictions and transferred the case to the Missouri Supreme Court.[12] The supreme court reversed the convictions and ordered a new trial.[13] The court held that although a mental state of knowledge is not expressly provided for in sections 195.170.1 and 195.250, the instructions were prejudicially erroneous for failing to submit to the jury the element of knowledge.[14]

The supreme court was constrained to follow the construction provisions of the Code, even though the offense of attempting to obtain a controlled substance by fraud is defined outside of the Code.[15] The Code provides that "unless expressly provided or unless the context otherwise requires," its provisions shall govern the construction of non-Code offenses.[16] Thus, the court looked to

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6. MO. REV. STAT. §§ 195.010-.320 (1978 & Supp. 1983). The basic criminal offense under MUCSA consists of knowingly and intentionally possessing a substance, chemically defined on a schedule of prohibited narcotics, without a specific authorization or exemption. *See* Richart & Wampler, *Missouri's New Drug Law: Chapter 195,* 29 J. MO. B. 305 (1973). An objective of MUCSA was to establish a closed regulatory system for legitimate handlers of drugs to prevent illicit drug traffic. *See* UNIF. CONTROLLED SUBSTANCES ACT introductory comment, 9 U.L.A. 187, 188 (1979). MUCSA prohibits the unauthorized manufacture, possession, control, sale, prescription, administration, dispensing, distribution, and compounding of any controlled substance. *See* MO. REV. STAT. § 195.020 (Supp. 1983).

7. The defendant testified that he did not become suspicious of the prescriptions because he knew that his friend worked at the Truman Medical Center, where the prescriptions had been written. 622 S.W.2d at 327.

8. MO. REV. STAT. § 195.015.1 (1978) grants authority to the Division of Health to place narcotic substances on schedules according to kind, effect, and abuse potential. Schedule II lists substances with a high potential for abuse that can lead to severe psychic or physical dependence. *Id.* §§ 195.017.3-.4.

9. *Id.* § 195.017.7-.8. Schedule IV contains substances with a low potential for abuse, which may lead to limited physical or psychological dependence.

10. The jury fixed punishment at 1.5 years imprisonment for both counts. The trial court found appellant to be a persistent offender under MO. REV. STAT. § 558.016 (1978), and extended his sentence to 2.5 years on each count. 629 S.W.2d at 326.

11. 629 S.W.2d at 327. The instructions were patterned after MO. APPROVED INSTR.-CRIM. Nos. 32-10, 32-16 (2d ed. 1979).

12. 629 S.W.2d at 326.

13. *Id.* at 326, 329.

14. *Id.*

15. *Id.* at 328.

16. MO. REV. STAT. § 556.031.2 (1978). The court found that the offenses were defined

section 562.021.2[17] of the Code, which states: "Except as provided in section 562.026 if the definition of an offense does not expressly prescribe a culpable mental state, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly or recklessly, but criminal negligence is not sufficient." Missouri Revised Statutes section 562.026[18] exempts a mental state requirement for infractions[19] or where the statute defining the offense "clearly indicates a purpose to dispense with the requirement." The court stated that sections 195.170.1 and 195.250 do not indicate a purpose to dispense with a culpable mental state[20] and summarily concluded that a mental state is required for the offense Green was charged with committing.[21]

Green was the first opportunity for a Missouri appellate court to construe the mental state for a narcotics offense according to the Code.[22] Prior to the adoption of the Code in 1977,[23] Missouri criminal law contained a patchwork of archaic definitions, proscriptions, and sanctions.[24] Numerous terms were utilized to describe culpable mental states for a wide variety of offenses.[25]

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outside of the Code and were committed after January 1, 1979, the effective date of the Code. Thus, the provisions of the Code govern the construction of §§ 195.170.1 and 195.250. 629 S.W.2d at 328. An example of a non-Code offense in which the statute itself, rather than the Code, expressly provides for its own construction, is second degree murder, MO. REV. STAT. § 565.004 (1978) (all kinds of murder at *common law* other than first degree murder, manslaughter, and justifiable homicide are second degree murder). *See* State v. Mannon, 637 S.W.2d 674, 677-78 (Mo. 1982) (en banc) (unnecessary to look to the Code to construe the elements of second degree murder since the statute provides that second degree murder is defined by the common law); *see also* State *ex rel.* Egger v. Enright, 609 S.W.2d 381, 383 (Mo. 1980) (en banc) (capital murder is a non-Code offense).

17. (1978).

18. (1978).

19. An offense is an infraction if designated by the statute, or if only a fine or civil forfeiture is authorized. An infraction is not a crime and conviction does not give rise to any legal disability or disadvantage associated with conviction of a crime. MO. REV. STAT. § 556.021 (1978). In *Green,* the court held that the offense was not an infraction. 629 S.W.2d at 328. Violations of any provision of MUCSA involve maximum penalties of 10-20 years imprisonment for the first offense. MO. REV. STAT. §§ 195.200, .270 (1978 & Supp. 1983).

20. 629 S.W.2d at 328-29.

21. *Id.* at 329.

22. Prior to *Green,* mental states for only Code offenses had been construed according to sections 556.031.2 and 562.021. *See, e.g.,* State v. Saffold, 639 S.W.3d 243, 249 (Mo. Ct. App. 1982) (robbery), State v. Foster, 631 S.W.2d 672, 675 (Mo. Ct. App. 1982) (rape). For post-*Green* decisions construing mental states for Code offenses, see State v. Rideau, 650 S.W.2d 675, 676-77 (Mo. Ct. App. 1983) (manslaughter); State v. Scott, 649 S.W.2d 559, 561 (Mo. Ct. App. 1983) (rape). In State v. Perkins, 650 S.W.2d 339 (Mo. Ct. App. 1983), the court applied § 562.021.2 to the offense of unlawfully selling a controlled narcotic, MO. REV. STAT. § 195.020 (Supp. 1983), and summarily concluded that purpose, knowlege, or recklessness is an element of the offense. The court did not refer to *Green.* 650 S.W.2d at 341.

The *Green* court could have escaped the problem of trying to apply a single standard of statutory interpretation to MUCSA offenses by holding that the Code does not govern the construction of MUCSA offenses. MO. REV. STAT. § 556.031.2 (1978) states that the Code does not control the construction of non-Code offenses where the "context" of the statute "otherwise requires." While it is not clear what offenses are excluded by § 556.031.2, it could be argued that MUCSA offenses must be construed in light of the Act's unique prohibitory and regulatory purposes.

23. *See* note 2 *supra.*

24. *See* Houser, *supra* note 2, at 365.

25. *Id.; see, e.g.,* MO. REV. STAT. § 557.010 (1969) (repealed 1977) (perjury) ("willfully

These terms varied from statute to statute, and dozens of judicial decisions were often required to determine their meanings.[26] Other statutes did not mention mental states and raised uncertainties as to whether the mere performance of the act proscribed constituted an offense.[27]

The Code was designed to simplify the construction of mens rea requirements by adopting requisite mental states similar those found in the Model Penal Code.[28] For the accused to be found guility of an offense under the Code, he must have acted with purpose, knowledge, recklessness, or criminal negligence.[29] Many Code offenses expressly incorporate these mental states.[30] Where the statute does not mention a culpable mental state, the Code requires purpose, knowledge, or recklessness.[31] Recent Missouri cases have applied the mental state requirements of Missouri Revised Statutes section 562.016[32] literally when interpreting Code offenses that do not expressly describe a mental state.[33] Prior to *Green,* however, there were no cases applying section 562.016 to non-Code narcotics offenses.[34]

Green represents a shift in Missouri law regarding mental states required for narcotics offenses. Case law prior to the adoption of the Code interpreted

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and corruptly"); *id.* § 559.010 (murder) ("willful, deliberate and premeditated"); *id.* § 559.200 (mayhem) ("on purpose and of malice aforethought").

26. *See* MO. ANN. STAT. § 562.021 comment (Vernon 1979).

27. *See* Houser, *supra* note 2, at 365.

28. Mental states in the Code are based on MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962); ILL. REV. STAT. ch. 38, §§ 4-3 to 4-9 (1969); and N.Y. PENAL LAW §§ 15.00, 15.05 (McKinney 1965). MO. ANN. STAT. § 562.016 comment (Vernon 1979).

29. MO. REV. STAT. § 562.016 (1978) provides:

> 2. A person "*acts purposely*", or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in the conduct or to cause that result.
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> 3. A person "*acts knowingly*", or with knowledge,
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> (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
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> (2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.
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> 4. A person "*acts recklessly*", or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.
>
> 5. A person "*acts with criminal negligence*" or is criminally negligent when he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of case which a reasonable person would exercise in the situation.

30. *See, e.g.,* MO. REV. STAT. §§ 565.050.1(1), .060.1(1)-(2), .070.1(1)-(5), 569.040.1, .060.1, .065.1 (1978).

31. *Id.* § 562.021.2.

32. (1978); *see* note 29 *supra.*

33. *See* note 22 *supra.* In State v. Foster, 631 S.W.2d 672 (Mo. Ct. App. 1982), the defendant unsuccessfully challenged a rape conviction, contending that the jury should have been required to find that he acted knowingly, rather than recklessly, with regard to victim's lack of consent. The statute did not define the required mental state for consent. The court held that § 562.021.2 controls the construction of the offense statute and therefore recklessly is a sufficient mental state for consent. *Id.* at 675-76.

34. *See* MO. ANN. STAT. § 562.016 notes (Vernon 1979 & Supp. 1984).

many MUCSA offenses as not requiring culpable mental states.[35] *Green* requires a mental state for at least one of these offenses, the fraudulent procurement of a controlled substance.[36] Although the court did not explain the reasons for this shift, it considered the result to be mandated by the Code,[37] rather than by any fundamental change in the reasons that originally led to MUCSA offenses being classed as strict liability crimes.[38]

Cases construing narcotics offense statutes prior to the adoption of the Code demonstrate how *Green* changes the law. Missouri courts had construed mental state requirements for narcotics offenses by utilizing the test set out in *City of St. Louis v. Williams*.[39] *Williams* involved a charge of displaying an obscene magazine with the intent to sell it to minors. Williams, an employee in a St. Louis drug store, was arrested after selling an obscene magazine. The defendant contended that she knew nothing of the contents of the magazine as it had just been delivered. The city ordinance,[40] which made it unlawful to exhibit and sell obscene literature to minors, defined no required mental state regarding the contents of the literature.[41] In determining whether a mental state was required, the *Williams* court considered two factors: the language of the ordinance, and the subject matter and purpose of the prohibition.[42] The court concluded that scienter was not intended to be part of the offense.[43]

The *Williams* court stated that the common law rule requiring mens rea

35. State v. Napolis, 436 S.W.2d 645, 648 (Mo. 1969) (sale); State v. Darabcsek, 412 S.W.2d 97, 103 (Mo. 1967) (possession); State v. Page, 395 S.W.2d 146, 149 (Mo. 1965) (sale); State v. Rivers, 554 S.W.2d 548, 551 (Mo. Ct. App. 1977) (distribution). The major exception to not requiring culpable mental states for narcotics offenses is unlawful possession. *See* MO. REV. STAT. § 195.020 (1978 & Supp. 1983). The defendant must know of the presence and character of the substance within his control. *See* State v. Wiley, 522 S.W.2d 281, 292 (Mo. 1975) (en banc); State v. Burns, 457 S.W.2d 721, 725 (Mo. 1970); State v. Young, 427 S.W.2d 510, 513 (Mo. 1968). In other jurisdictions, the possession of narcotics is considered such a hazard that the courts have held the unauthorized possession of narcotics to be a strict liability offense. *See, e.g.*, Jenkins v. State, 215 Md. 70, 77, 137 A.2d 115, 118 (1957) (not necessary to allege scienter unless required by statute); Commonwealth v. Lee, 331 Mass. 166, 168, 117 N.E.2d 830, 832 (1954) (burden on actor to ascertain whether possession is prohibited); State v. Hames, 74 Wash. 2d 721, 724, 446 P.2d 344, 346 (1968) (intent to possess not a necessary element).

36. MO. REV. STAT. §§ 195.170.1, .250 (1978).

37. The *Green* court decided that the Code, rather than the context of MUCSA, controls the construction of MUCSA offenses. 629 S.W.2d at 328. Apparently, the court of appeals had concluded that knowledge was required for the fraudulent procurement of narcotics by analogizing §§ 195.170.1 and 195.250 to § 195.020, which requires scienter for unlawful possession. The supreme court found the reasoning persuasive but indicated "that the answer lies" in the Code. 629 S.W.2d at 328.

38. *See* text accompanying notes 69-77 *infra*.

39. 343 S.W.2d 16 (Mo. 1961).

40. ST. LOUIS ORDINANCE No. 47516, § 2 (1955) (repealed 1962), made it unlawful to "sell, exhibit, give away, distribute, keep in . . . possession with intent to sell or give away, or in any way furnish or attempt to furnish to any minor, any picture, comic book, magazine or other publication which is of an obscene or indecent nature."

41. Although the ordinance included the element of intent, the court held that this referred solely to the purpose of possessing the literature and not to the defendant's knowledge of its contents. 343 S.W.2d at 19.

42. *Id.*

43. *Id.* at 20.

as an element of a criminal offense[44] has no application where the legislature intends to dispense with a mental state for a particular offense.[45] Since the ordinance did not expressly prescribe a mental state, and because cases at the time the ordinance was enacted had not considered scienter an element for similar offenses,[46] the court refused to read a scienter element into the ordinance. The court viewed the common law rule requiring mental states as merely a rule of "implication."[47] Thus, if a mental state is not indicated in a statute, a court should not imply a mental state merely because of the common law rule.[48]

The *Williams* test was first applied to a narcotics statute in *State v. Page,*[49] which involved a conviction for the unlawful sale of marijuana. The statute contained no requirement that the accused know that the item sold was a narcotic.[50] The court observed that the United States Supreme Court had held that the elimination of knowledge as an element is a proper exercise of legislative discretion with respect to laws prohibiting the sale of narcotics.[51] The *Page* court concluded that the justification for making the sale of narcotics a strict liability offense was the state's interest in maintaining public health and welfare.[52]

In *State v. Napolis,*[53] the Missouri Supreme Court adopted the reasoning of *Page* to expand the catagories of drug offenses that do not require cupable mental states. Although *Napolis,* like *Page,* involved a conviction for the sale of narcotics,[54] in dicta the court stated: "The State has the same right, in the exercise of its police power, to prohibit possession, sale, distribution, or transfer of barbiturates and stimulant drugs . . . and it is not necessary that the legislature make knowledge or criminal intent an element of the offense."[55] *State v. Gordon*[56] later held that *Page* and *Napolis,* which were decided under

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44. *See* State v. Hefflin, 38 Mo. 236, 249, 89 S.W.2d 938, 946 (1936).

45. 343 S.W.2d at 19.

46. *See* People v. Shapiro, 6 A.D.2d 271, 274, 177 N.Y.S.2d 670, 674 (1958); Commonwealth v. Havens, 6 Pa. C. 545 (1887).

47. 343 S.W.2d at 20. *But see* Gasser v. Morgan, 498 F. Supp. 1154, 1161 (N.D. Ala. 1980) ("with statutory crimes scienter may be implied if a court finds that it was the intent of the legislature to require such" even if the offense was not a common law crime).

48. Ultimately, the court found that the ordinance was unconstitutional. Based on Smith v. California, 361 U.S. 147 (1959), the court held that by dispensing with any requirement of the seller's knowledge of the contents, the ordinance tended to impose a severe limitation on the public's access to constitutionally protected literature. 343 S.W.2d at 22.

49. 395 S.W.2d 146 (Mo. 1965).

50. MO. REV. STAT. § 195.020 (1959) (amended 1982).

51. *See* United States v. Balint, 258 U.S. 250, 252 (1922).

52. 395 S.W.2d at 149 (wrongful sale of narcotics so adversely affects public welfare as to justify a state to "prohibit all sales thereof, except as specifically authorized, and to place on all persons the responsibility to see that they do not sell narcotics unlawfully").

53. 436 S.W.2d 645 (Mo. 1969). *Napolis* was one of four cases containing language expressly overruled in *Green. See* 629 S.W.2d at 329.

54. The statute construed in *Napolis* was MO. REV. STAT. § 195.240 (1959) (repealed 1977), which made unlawful the possession, sale, distribution, or transfer of barbiturates or stimulants. The statute did not expressly define a culpable mental state.

55. 436 S.W.2d at 647.

56. 536 S.W.2d 811 (Mo. Ct. App. 1976). *Gordon* was overruled by *Green. See* 629

the Uniform Narcotic Drug Act,[57] were applicable to MUCSA.[58]

The pre-*Green* approach gave deference to the court's determination of legislative intent if a statute did not expressly provide for a mental state. Factors considered in determining legislative intent were: the language of the statute;[59] the subject matter of the offense;[60] the case law at the time the statute was enacted;[61] the need for effective law enforcement;[62] and public health and safety policies.[63] *Green* makes the Code, rather than the nature and purpose of the statute, the primary emphasis in construing MUSCA offenses. The Code approach requires that a mental state be read into the statute even though the statute is silent as to that element.[64] While the former approach considered the underlying purpose and policy of the statute as central to determining whether the legislature intended to exclude a mental state, the Code relegates such considerations to an exception. Under the Code, a culpable mental state is required unless the statute defining the offense "clearly indicates a purpose to dispense with the requirement."[65] Unfortunately, neither *Green* nor the Code defines what "clearly indicates" a purpose to dispense with a culpable mental state.[66]

S.W.2d at 329.

57. Missouri drug laws prior to MUCSA were patterned after the UNIF. NARCOTIC DRUG ACT (1932), 9B U.L.A. 409 (1966).

58. 536 S.W.2d at 818.

59. *See* State v. St. John, 544 S.W.2d 5, 8 (Mo. 1976) (en banc); State v. Napolis, 436 S.W.2d 645, 648 (Mo. 1969); State v. Darabcsek, 412 S.W.2d 97, 103 (Mo. 1967).

60. *See Napolis,* 436 S.W.2d at 647; State v. Page, 395 S.W.2d 146, 149 (Mo. 1965); *Gordon,* 536 S.W.2d at 818.

61. *See Napolis,* 436 S.W.2d at 647; State v. Rivers, 554 S.W.2d 548, 550 (Mo. Ct. App. 1977); *Holden,* 548 S.W.2d at 195; *Gordon,* 536 S.W.2d at 817.

62. *See Page,* 395 S.W.2d at 149; *see also* United States v. Greenbaum, 138 F.2d 437, 438 (3d Cir. 1943); City of Hays v. Schueler, 107 Kan. 635, 193 P. 311 (1920); 21 AM. JUR. 2D *Criminal Law* § 139 (1981).

63. *See Napolis,* 436 S.W.2d at 647; *Page,* 395 S.W.2d at 149; *Gordon,* 536 S.W.2d at 817. Courts consider five factors in deciding whether a particular statute is to be construed as a strict liability criminal offense: (1) the legislative history, *e.g.,* State v. Dobry, 217 Iowa 858, 250 N.W. 702 (1933) (legislature that removed "knowingly" from statute intended to create a strict liability offense); (2) the severity of the punishment (the greater the penalty the less likely the legislature intended to do away with a mental state); (3) the seriousness of the harm to the public; (4) the ease with which the defendant could ascertain the truth regarding the proscribed activity (the easier it is to discover the truth, the more likely the legislature intended strict liability); and (5) the expected frequency of prosecutions (the more frequently the legislature expected the state to prosecute the offense, the less likely the legislature intended the state to have to prove a mental state). W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 219-20 (1972).

64. MO. REV. STAT. § 562.021.2 (1978).

65. *Id.* § 562.026.2.

66. The comment to section 562.026.2 states that this "permits doing away with the requirement of a mental state as to an element of a 'true crime,'" but does not define a "true crime." The comment predicts, however, that "there will be very few instances of such criminal liability without fault." MO. ANN. STAT. § 562.026 comment (Vernon 1979). In a post-*Green* decision, State v. Beishir, 646 S.W.2d 74 (Mo. 1983) (en banc), the court concluded that the statute defining the crime of sodomy (deviate sexual intercourse with a person under 14 years of age, MO. REV. STAT. § 566.060.1(2) (1978)) clearly indicated a purpose to dispense with the requirement of any culpable mental state. Finding that no mental state was prescribed in the statute, the court considered what it felt was the "absurdity" of requiring a voluntary act of sexual intercourse to be committed purposely, knowingly, or recklessly. Thus, the court looked to

Green expressly overruled earlier cases that had held that mental states were not required for certain narcotics offenses.[67] This heavy emphasis on a mental state requirement, however, seems inconsistent with the purpose of MUCSA, particularly since the trend in Missouri was to expand the number of narcotics offenses that required no mental state.[68]

The *Green* court believed that the elimination of a mental state requirement for the narcotics offenses involved in the old cases was based solely on the fact that there was no affirmative statement by the legislature that a mental state was required.[69] This conclusion is incorrect. The *Napolis* court premised its holding on the policy that the adverse effects of unregulated drug trafficking justifies strict liability narcotics offenses.[70] In light of this policy and the absence of a mental state in the statute, *Napolis* held that "the language of [section] 195.240 indicates a legislative intent not to require such knowledge or criminal intent."[71] Other cases overruled by *Green* used the same reasoning.[72] By ignoring the policy bases of these earlier holdings, *Green* extended a mental state requirement to offenses which had been determined to be strict liability criminal offenses.[73] The *Green* approach places too much emphasis on literally applying the Code, severely limiting the importance of public policy in construing narcotics statutes.

Green creates uncertainty regarding all strict liability narcotics offenses, since the decision was not limited to the crime of attempting to obtain controlled narcotics by fraud.[74] The court overruled holdings which had eliminated mental states for the unlawful sale and distribution of narcotics.[75] If it had restricted its holding to sections 195.170.1 and 195.250, the court could have pointed out that the fraudulent nature of the offense required knowledge as a mental state.[76] Thus, the court could have stated that policy considerations demonstrated a clear legislative intent to require no mental state for the unlawful sale and distribution of narcotics. If the court had been confronted directly with construing a mental state for unlawful sale and distribution, it probably would have taken policy into consideration in determining whether

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cases decided before the adoption of the Code and found that a mental state was not an element the offense. 646 S.W.2d at 77.

67. 629 S.W.2d at 329.

68. *See* State v. Napolis, 436 S.W.2d 645, 648 (Mo. 1969); text accompanying notes 53-58 *supra.*

69. 629 S.W.2d at 329.

70. 436 S.W.2d at 647.

71. *Id.* at 648.

72. *See* State v. St. John, 544 S.W.2d 5, 8 (Mo. 1976) (en banc); State v. Gordon, 536 S.W.2d 811, 817-18 (Mo. Ct. App. 1976).

73. For discussion of strict liability criminal offenses, see text accompanying notes 78-93 *infra.*

74. *See* MO. REV. STAT. §§ 195.170.1, .250 (1978).

75. 629 S.W.2d at 329; *see* State v. Napolis, 436 S.W.2d 645, 647-48 (Mo. 1969) (sale); State v. Gordon, 536 S.W.2d 811, 817-18 (Mo. Ct. App. 1976) (distribution).

76. For discussion of fraud as an element of the offense, see text accompanying notes 95-111 *infra.*

these offenses have requisite mental states.[77] Thus, it remains to be explored how Missouri courts can hold that certain MUCSA statutes can still be construed as strict liability offenses.

Strict liability criminal offenses are an exception to the common law rule that a culpable mental state is a necessary element of a criminal offense.[78] The common law rationale is that criminal penalties are not justifiable for those who unintentionally cause harm.[79] Before a statute is construed as eliminating a mental state, the intent of the legislature must be clear.[80]

A legislative intent to dispense with a mental state requirement often is found in regulatory offenses.[81] Regulatory offenses are usually enacted to punish acts capable of inflicting widespread injury or endangering public welfare, where proving the offender's mental state would hinder effective enforcement of the prohibition.[82] In *Morissette v. United States*,[83] the United States Supreme Court distinguished strict liability regulatory offenses from most common law crimes.[84] The Court noted that the Industrial Revolution had prompted an increase in government regulation of industries and trades.[85] To make these regulations more effective, lawmakers eventually assigned criminal penalties to violations of some of the regulations.[86] The resulting class of crimes did not fit neatly into any of the accepted classifications of common law offenses.[87] The chief distinction shared by these regulatory offenses was the elimination of a criminal mental state as an element of the offense.[88] The need to forbid certain publicly harmful actions justified eliminating the mental state element.[89] Criminal penalties served to induce compliance, rather than to pun-

77. *See* text accompanying notes 17-21 *supra*.

78. *See* Dennis v. United States, 341 U.S. 494, 500 (1951); State v. Hefflin, 338 Mo. 236, 249, 89 S.W.2d 938, 946 (1936). While ordinarily a criminal intent must exist to support a conviction, the legislature may enact a law making certain conduct a crime in the absence of criminal intent. Such a law is *malum prohibitum*, and merely doing the prohibited act constitutes the crime. Fitzpatrick v. Board of Medical Examiners, 96 Ariz. 309, 315, 394 P.2d 423, 427 (1964); *see also* State v. McLarty, 414 S.W.2d 315, 318 (Mo. 1967). While it is a permissible exercise of the police power to enact strict liability criminal statutes, punishment without proof of a voluntary act or omission (*actus reus*) is generally unconstitutional. *E.g.*, People v. Belcastro, 356 Ill. 144, 148, 190 N.E. 301, 303 (1934) ("With mere guilty intention, divorced from an overt act or outward manifestation thereof, the law does not concern itself."); *see also* Robinson v. California, 370 U.S. 660, 666-67 (1962) (criminal punishment for status of narcotic addiction violates the eighth amendment).

79. *See, e.g.*, State v. Lisbon Book Sales Co., 21 Ohio Op. 2d 455, 457, 182 N.E.2d 641, 644 (Com. Pl. 1961); *see also* A. LOEWY, CRIMINAL LAW 115 (1975).

80. *See* United States v. Balint, 258 U.S. 250, 252 (1922); People v. Stuart, 47 Cal. 2d 167, 173, 302 P.2d 5, 9 (1956); State v. Shedoudy, 45 N.M. 516, 524, 118 P.2d 280, 286 (1941).

81. *See* Morrisette v. United States, 342 U.S. 246, 256 (1952); United States v. Dotterweich, 320 U.S. 277, 280-81 (1943); United States v. Pruner, 606 F.2d 871, 873 (9th Cir. 1979).

82. 21 AM. JUR. 2D *Criminal Law* § 139 (1979).

83. 342 U.S. 246 (1952).

84. *Id.* at 252.

85. *Id.* at 254.

86. *Id.* at 255.

87. *Id.*

88. *See id.*

89. *Id.* at 256.

ish deviant behavior.[90] Penalties for regulatory offenses commonly are small, and conviction does no grave damage to the offender's reputation.[91]

The Supreme Court has recognized that federal narcotics statutes may be construed as strict liability offenses.[92] Since MUCSA was patterned after the federal narcotics statutes[93] and was enacted primarily to control the harmful effects of narcotics, no criminal mental state should be required for most MUCSA offenses.

Sections 195.170.1 and 195.250 cannot be readily classified as either common law offenses (requiring a mental state) or purely regulatory offenses (justifying the elimination of a mental state).[94] Both sections deal with obtaining or attempting to obtain a controlled substance by fraud or the use of a false name. The offenses are regulatory in that they are part of the MUCSA scheme. Obtaining a controlled substance by fraud, however, is similar to a common law crime in at least two respects. First, fraud is a classic common law crime, which requires a willful and knowledgeable misrepresentation.[95] Second, the offense is a felony,[96] which is uncommon for purely regulatory offenses[97] and demonstrates a purpose to punish deviant behavior. A heavy penalty is usually associated with a criminal offense rather than a regulatory offense.[98] Nevertheless, the importance of regulating narcotics has been held to justify the imposition of criminal penalties.[99] Thus, attempting to procure a

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90. *Id.* at 258-59. Imposing heavy sentences for narcotics offenses often raises the constitutional issue of proportionality. *See generally* Note, *Drug Abuse, Law Abuse, and the Eighth Amendment: New York's 1973 Drug Legislation and the Prohibition Against Cruel and Unusual Punishment,* 60 CORNELL L. REV. 639 (1975); Note, *Do the Sentencing Provisions of the New York Drug Laws Constitute Cruel and Unusual Punishment?*—People v. Broadie, 25 DE PAUL L. REV. 193 (1975).

91. 342 U.S. at 256; *see generally* Perkins, *A Rationale of Mens Rea,* 52 HARV. L. REV. 905 (1939); Perkins, *The Civil Offense,* 100 U. PA. L. REV. 832 (1952); Sayre, *Public Welfare Offenses,* 33 COLUM. L. REV. 55 (1933).

92. *See* United States v. Behrman, 258 U.S. 280, 288 (1922); United States v. Balint, 258 U.S. 250, 252 (1922).

93. *See* 21 U.S.C. §§ 801-965 (1982).

94. The Uniform Controlled Substances Act segregates fraud dealing with the manufacture and distribution of narcotics from other narcotics regulations. The drafters pointed to the adverse effect of fraud on the integrity of the drug regulatory system to justify criminalizing it independent of the drug involved. *See* UNIF. CONTROLLED SUBSTANCE ACT § 403 comment (1970), 9 U.L.A. 495-96 (1979). Section 403 of the Act includes the mental states of "knowingly or intentionally" for fraud offenses. When Missouri adopted the Uniform Controlled Substances Act, it apparently opted for the former reading of the statute, which did not contain mental states, based on the Uniform Narcotic Drug Act. *See* MO. REV. STAT. § 195.170 (1969) (repealed 1977); note 57 *supra.*

95. The elements of fraud are: a material representation, its falsity, the speaker's knowledge of its falsity or ignorance of its truth, the intent that the representation should be acted upon by the hearer in a manner reasonably contemplated, the hearer's ignorance of its falsity, his reliance and right to rely thereon, and a consequent injury. 37 C.J.S. *Fraud* § 3 (1943); *see also* Ackmann v. Keeney-Toelle Real Estate Co., 401 S.W.2d 483, 488 (Mo. 1966) (en banc).

96. MO. REV. STAT. §§ 195.200, .270 (1978 & Supp. 1983).

97. *See* Morrisette v. United States, 342 U.S. 246, 256 (1942).

98. *Id.*

99. *See* State v. Page, 395 S.W.2d 146, 149 (Mo. 1965); *see also* United States v. Balint, 258 U.S. 250, 252 (1922).

regulated substance is made a criminal act only when perpetrated by fraud. Yet the fraud is made culpable only because the substance obtained is regulated.[100] The absence of either element seems to remove the act from the realm of criminality.[101]

The *Green* court reached a just result. The purpose of the statute is to prevent willful falsification of prescriptions.[102] Fraud is included as an element of the statute to prevent persons who may otherwise lawfully procure drugs from obtaining them by misrepresentation.[103] Persons who innocently use forged prescriptions or false names should not be held criminally liable.[104] By

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100. *See, e.g.*, People v. One 1962 Chevrolet Bel Air, 248 Cal. App. 2d 725, 56 Cal. Rptr. 878 (1962) (defendant gave false name when purchasing cough syrup containing codeine, for which no prescription was required; found not guilty because mere possession was not unlawful).

101. There is a difference between knowledge of the falsity of a prescription and knowledge that the narcotic obtained is a controlled substance. *Green* indicates that all the acts proscribed in §§ 195.170.1 and 195.250 must be performed purposely, knowingly, or recklessly. 629 S.W.2d at 329. This holding is consistent with MO. REV. STAT. § 562.021.1. (1978) (prescribed mental state applies to each material element of an offense unless otherwise specified). Although no mental state is specifically prescribed in §§ 195.170.1 and 195.250, it is probable that fraud presumes the mental state of knowledge. *See* note 95 *supra*. Thus, pursuant to § 562.021.1, it could be argued that the defendant must also have knowledge of the nature or character of the drug obtained (similar to the mental element required for possession of controlled narcotics), in addition to knowledge that the prescription was false. *See* note 35 *supra*.

102. *See, e.g.*, State v. St. John, 544 S.W.2d 5, 7 (Mo. 1976) (en banc) ("[The] purpose of § 195.250 is not to control the defrauding or deceit of druggists or pharmacists but rather to prohibit the misuse of narcotic drugs."); *see also* State v. McFall, 5 Ariz. App. 539, 546, 428 P.2d 1013, 1020 (1967) (purpose of statute prohibiting obtaining a narcotic with a forged prescription was not to protect the druggist, but to prevent misuse of drugs), *vacated on other grounds*, 103 Ariz. 234, 439 P.2d 805 (1968) (en banc); Helmuth v. Morris, 598 P.2d 333, 335 (Utah 1979) (purpose of drug statute held to regulate narcotics and prevent procurement by falsification, whereas criminal code fraud designed to prohibit alteration of documents for purpose of defrauding another).

103. Manufacturers, pharmacists, and doctors may lawfully procure controlled substances. *See* MO. REV. STAT. § 195.050 (1978). Any person presenting a proper prescription may obtain a controlled substance. *See id.* § 195.060. A "good faith" requirement protects dispensers from liability for delivering controlled substances to non-qualified persons. *See id.* §§ 195.060, .070.

104. It has been suggested that the violation of a regulatory offense by an innocent act will not justify a conviction where the injustice outweighs the danger created by not making the activity the subject of the regulation. United States v. Pruner, 606 F.2d 871, 874 (9th Cir. 1979) ("[A] person should not be punished for a crime unless they [sic] . . . intended to commit a crime."). The importance of distinguishing between an innocent and a criminal breach of a MUCSA offense can be noted by comparing State v. Gordon, 536 S.W.2d 811 (Mo. Ct. App. 1976) with State v. Rivers, 554 S.W.2d 548 (Mo. Ct. App. 1977). Both cases involved prosecutions for unlawful distribution of a controlled narcotic. In *Gordon*, the defendant attempted to rid himself of narcotics to avoid difficulties with approaching police. The court (relying on *Page* and *Napolis*) held that § 195.020 does not require intent to distribute, and that the defendant's distribution of a controlled substance was sufficient for conviction. 536 S.W.2d at 818. In *Rivers*, the defendant was asked by a bartender to pass a cigarette to a customer. The defendant was unaware that the cigarette contained marijuana. The court held that under § 195.020 the state was required to prove that defendant had knowledge of the nature of the substance *and* intent to distribute the substance. The court based its holding on State v. Burns, 457 S.W.2d 752, 752 (Mo. 1970) and State v. Young, 427 S.W.2d 510, 513 (Mo. 1968), which held that possesory intent and knowledge of the nature of the substance were elements of the offense of possession of a controlled substance.

The *Rivers* court analogized possession to distribution and held that knowledge and intent to distribute are essential elements of the offense. 554 S.W.2d at 551. Since the prosecutions in *Gordon* and *Rivers* involved the same offense, the contrary holdings can only be explained by

making fraud an element of sections 195.170.1 and 195.250, the legislature intended to punish those who decieve to make it appear that they are lawfully obtaining drugs.

The *Green* court could not have construed the procurement of a narcotic by fraud as a strict liability offense without facing the illogic of concluding that the fraud did not require a knowledgeable misrepresentation.[105] Prior Missouri cases construing narcotics offenses had not dealt with fraud.[106] They dealt with the unlawful possession, sale, or distribution of narcotics—actions which are unlawful because of the nature of the substances involved.[107] It was these actions that the MUCSA drafters intended to control, not the state of mind to carry out the actions.[108] For attempting to obtain a narcotic by fraud, however, the legislature desired to control the intent to do unlawfully what one may, with the proper prescription, do lawfully.[109] One may only commit a fraud if he knows he is making a false misrepresentation.[110] Thus, by including

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distinguishing the facts. Rivers acted as an innocent intermediary, whereas Gordon passed along the drugs in an attempt to avoid arrest. Since the elimination of mental states from regulatory offenses is justified primarily to control particular persons, industries, and activities, Rivers' conduct fell outside that which MUCSA was purported to control. *See also* State v. Scarborough, 170 So. 2d 458, 460 (Fla. Dist. Ct. App. 1965) (innocent person passing forged prescription in good faith cannot be held criminally liable).

Green could not have escaped liability under the doctrine that the innocent agent of a purchaser of contraband is not liable as a seller of the contraband to his principal. The procuring agent defense has been rejected in Missouri. *See* State v. Perkins, 650 S.W.2d 339, 341 (Mo. Ct. App. 1983); State v. Miles, 599 S.W.2d 948, 950 (Mo. Ct. App. 1980). Federal courts reject the defense on the grounds that federal law requires the element of participation in the narcotics transaction as a whole. *See* United States v. Pruitt, 487 F.2d 1241, 1245 (8th Cir. 1978). Some states, however, still recognize the procuring agent defense. *See, e.g.,* Jones v. State, 481 P.2d 169, 174 (Okla. Crim. App. 1971); Commonwealth v. Harvard, 356 Mass. 452, 456-57, 253 N.E.2d 346, 349 (1969); People v. Fortes, 24 A.D.2d 428, 429, 260 N.Y.S.2d 716, 717 (1965), *appeal dismissed,* 17 N.Y.2d 583, 215 N.E.2d 519 (1966); Smith v. State, 396 S.W.2d 876, 878 (Tex. Crim. App. 1965). Others have limited it to prosecutions involving the unlawful sale of contraband. *See, e.g.,* Bailey v. People, 630 P.2d 1062, 1069 (Colo. 1981) (en banc); Dixon v. State, 94 Nev. 662, 664, 584 P.2d 693, 694 (1978); Note, *A Procuring Agent May Not be Convicted of Narcotics Sale,* 22 U. KAN. L. REV. 272, 280 (1974). The defense has not been extended to fraudulent procurement of narcotics.

105. In State v. St. John, 544 S.W.2d 5 (Mo. 1976) (en banc), the court faced the paradox of deciding whether a conviction for obtaining a controlled substance by fraud was possible where there was no victim who relied upon the misrepresentation. The court concluded that reliance was not a necessary element of the fraud in § 195.250. *Id.* at 8. Though reliance may be dispensed with when there is no victim, knowledge of the falsity of the representation is essential to make the act of misrepresentation a criminal offense.

106. *See* note 35 *supra.*

107. Where the substance obtained is not within the definition of prohibited narcotics or other specified classes of drugs made the subject of a criminal offense by statute, no offense is committed. 28 C.J.S. *Drugs and Narcotics* § 161a (1974).

108. *See* Morisette v. United States, 342 U.S. 246, 254 (1952); State v. St. John, 544 S.W.2d 5, 8 (Mo. 1976) (en banc).

109. Obtaining a narcotic by fraud is an element of the offense of attempting to fraudulently procure a narcotic. *See* State v. Blea, 20 Utah 2d 133, 137, 434 P.2d 446, 449 (1967).

110. Knowledge that the prescription or order used to obtain the narcotic was forged is an essential element of the offense of obtaining a narcotic by means of a false prescription. *See* State v. McFall, 5 Ariz. App. 539, 545, 428 P.2d 1013, 1019 (1967), *vacated on other grounds,* 103 Ariz. 234, 439 P.2d 805 (1968) (en banc); Morrison v. Commonwealth, 607 S.W.2d 114, 115 (Ky. 1980).

the words "fraud" or "false" in sections 195.170.1 and 195.250, the legislature intended the offense of obtaining a controlled substance by fraud to include the element of knowledge of the fraud on the part of the violator.[111]

The *Green* court should have recognized that the common law nature of sections 195.170.1 and 195.250 required a culpable mental state. This nature distinguishes these statutes from the strict liability regulatory sections of MUCSA.[112] If the court had drawn this distinction, it could have left intact previous cases which properly interpreted other sections of the MUCSA as strict liability regulatory offenses. *Green* unnecessarily expands the Code to require mental states for offenses which clearly indicate a legislative intent that no such element be required. Missouri courts, therefore, will have to penetrate the reasoning of *Green* to reveal this distinction if they desire to preserve the strict liability nature of other MUCSA criminal offense statutes.

The necessity of making this distinction, however, will not occur until a court must construe a mental state requirement for a MUCSA offense that was considered a strict liability crime prior to *Green.* A court will then have to consider how to limit the scope of *Green* because of the importance of maintaining the strict liability nature of most regulatory narcotics offenses. The best approach would be to distinguish the common law crime elements of the *Green* offense from the purely regulatory nature of other MUCSA offenses. This would limit *Green* to violations of sections 195.170.1 and 195.350, leaving courts to continue treating other MUCSA offenses as strict liability crimes. The *Green* court took a step in this direction when it stated that the cases it was overruling could no longer be followed where the elimination of a mental state was based *solely* upon the absence of an affirmative statement by the legislature that one was required.[113] These past cases in fact eliminated mental states because of strong public policy considerations, in addition to the absence of express mental states in the offense statutes. Thus, *Green* can be limited as objecting only to holdings that do not require mental states for criminal offenses simply because the statute does not describe one. By emphasizing the

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111. The word "false" has two distinct meanings: intentionally, knowingly, or negligently untrue; or untrue by mistake, accident, or honesty after the exercise of reasonable care. *See* Metropolitan Life Ins. Co. v. Adams, 37 A.2d 345, 350 (D.C. 1944). "False" in a criminal statute usually implies a knowing and willful intent to deceive. *See* United States v. Lange, 528 F.2d 1280, 1286 n.10 (5th Cir. 1976); Lanier v. State, 448 P.2d 587, 592 (Alaska 1968); Laughlin v. Bon Air Hotel Inc., 85 Ga. App. 43, 46, 68 S.E.2d 186, 189 (1951). Courts construing statutes dealing with false statements have generally held that knowledge of the falsity of the statement is implicit in the word "false." *See* Heindel v. United States, 150 F.2d 493, 497 (6th Cir. 1945); Wilensky v. Goodyear Tire & Rubber Co., 67 F.2d 389, 390 (1st Cir. 1933); Gilpin v. Merchant's Nat'l Bank, 165 F. 607, 611 (3d Cir. 1908); McBride v. People, 126 Colo. 277, 282, 248 P.2d 715, 728 (1952) (en banc); *see also* State v. Scarborough, 170 So. 2d 458, 460 (Fla. Dist. Ct. App. 1965) (in a prosecution for obtaining a narcotic by fraud or deceit, "[k]nowledge or scienter is implicit in the language of the statute and thus . . . does not have to be alleged separately").

112. Where a statute codifies a common law offense, the mental state required at common law remains an element if the statute does not specifically eliminate it. 21 AM. JUR. 2D *Criminal Law* § 139 (1981); *see* State v. Shedoudy, 45 N.M. 516, 519, 118 P.2d 280, 285 (1941); Masters v. United States, 42 App. D.C. 350, 354 (1914).

113. 629 S.W.2d at 329; *see* MO. REV. STAT. § 562.026(2) (1978).

policy necessities for eliminating mental states from some MUCSA offenses, a court can deal honestly with *Green* and the Code by demonstrating that other MUSCA offenses clearly indicate a legislative intent to dispense with a mental state requirement.

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