UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-474 Caption [use short title]

Motion for: Leave to file a brief of amici curiae Copeland, et al. v. Vance, et al.

Set forth below precise, complete statement of relief sought:

Leave of Court to file the attached brief of proposed amici curiae law professors in support of Appellants and reversal (Appellants consent to amici filing).

MOVING PARTY: Proposed amici curiae **OPPOSING PARTY:** Appellees Vance, et al.

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Douglas M. Garrou **OPPOSING ATTORNEY:**

[name of attorney, with firm, address, phone number and e-mail]

Hunton & Williams LLP
951 East Byrd St.
Richmond, VA 23219
804-788-8355; dgarrou@hunton.com

Court-Judge/Agency appealed from: Southern District of New York (Forrest, J.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): Appellees' counsel has advised they take no position on motion

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Douglas M. Garrou **Date:** 6/7/17 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080 (rev. 7-12)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

COPELAND, et al.,	17-474
Plaintiffs-Appellants,	ECF Case
v.	
VANCE, et al.,	
Defendants-Appellees.	

MEMORANDUM IN SUPPORT OF MOTION OF PROFESSORS GIDEON YAFFE, BRETT DIGNAM, JEFFREY FAGAN, EUGENE FIDELL, STEPHEN GARVEY, HEIDI HURD, DOUGLAS HUSAK, ISSA KOHLER-HAUSMANN, TRACY MEARES, GABRIEL MENDLOW, MICHAEL MOORE, STEPHEN MORSE, MARTHA RAYNER, SCOTT SHAPIRO, KENNETH SIMONS, JAMES WHITMAN, AND STEVEN ZEIDMAN FOR LEAVE TO FILE BRIEF OF AMICI CURIAE SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

INTRODUCTION

Profs. Gideon Yaffe, Brett Dignam, Jeffrey Fagan, Eugene Fidell, Stephen Garvey, Heidi Hurd, Douglas Husak, Issa Kohler-Hausmann, Tracy Meares, Gabriel Mendlow, Michael Moore, Stephen Morse, Martha Rayner, Scott Shapiro, Kenneth Simons, James Whitman, and Steven Zeidman respectfully request the Court grant them leave to file a brief of amici curiae supporting plaintiffs-appellants and reversal.

A copy of the proposed brief is attached as Exhibit 1 to the accompanying declaration of Douglas M. Garrou ("Garrou Decl."). Appellants have consented to this filing of the brief, and appellees have taken no position with respect to this motion. Garrou Decl. ¶¶ 2-3.

INTEREST OF AMICI

The movants are professors who study, teach, and publish in the substantive area of the criminal law. Specifically:

Gideon Yaffe is a Professor of Law, Professor of Philosophy, and Professor of Psychology at Yale University. His research interests include the philosophy of law, particularly criminal law, and the study of intention and the theory of action. He has written extensively about *mens rea* and on the extent to which criminal possession statutes can be compatible with the criminal law's general restriction of liability to acts and omissions.

Brett Dignam is a Clinical Professor at Columbia Law School. Prof. Dignam teaches a prison clinic in which she supervises students in state and federal prison litigation on issues ranging from habeas corpus challenges to conviction, parole, and the constitutionality of prison conditions.

Jeffrey Fagan is the Isidor and Seville Sulzbacher Professor of Law and Professor of Epidemiology at Columbia University. His research and scholarship examine legal and social regulation of police. He teaches courses on criminal law, policing, and empirical analysis in law. He is Fellow of the American Society of Criminology, and served on the Committee on Law and Justice of the National Research Council.

Eugene R. Fidell is the Florence Rogatz Visiting Lecturer in Law and Senior Research Scholar at Yale Law School. Among the courses he teaches are Military Justice and Habeas Corpus.

Stephen P. Garvey is Professor of Law at Cornell Law School. He has written and taught in the areas of capital punishment, criminal law, and the philosophy of criminal law. He is co-author of a widely used casebook on criminal law.

Heidi M. Hurd is the David C. Baum Professor Law and Philosophy at the University of Illinois College of Law. Prof. Hurd has taught American criminal

law for 28 years and has written numerous articles that address fundamental principles of criminal responsibility within Anglo-American systems of justice.

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Issa Kohler-Hausmann is an Associate Professor of Law and Sociology at Yale University. Her research and scholarship focuses on misdemeanor arrests and lower court adjudication. Her forthcoming book documents the extensive collateral consequences stemming from arrest and prosecution for minor crimes, including "gravity knife" possession.

Tracey L. Meares is the Walton Hale Hamilton Professor of Law at Yale University. She has taught criminal justice related subjects, including criminal law, for over 20 years, and she has published widely in these areas focusing primarily on the public legitimacy of criminal law and institutions.

Gabriel S. Mendlow is an Assistant Professor of Law and Assistant Professor of Philosophy at the University of Michigan. He teaches criminal law and criminal law theory, and has published on mens rea and criminal responsibility. He previously prosecuted federal gun possession offenses as a Special Assistant United States Attorney in the Eastern District of Michigan.

Michael S. Moore is the Charles Walgreen University Chair at the University of Illinois and Center for Advanced Study Professor of Law and Philosophy at the University of Illinois at Urbana-Champaign. Professor Moore has written extensively on the elements of criminal liability and has specialized in the psychology, philosophy, and history behind Anglo-American criminal law's *mens rea* requirements.

Stephen J. Morse is the Ferdinand Wakeman Hubbell Professor of Law and Professor of Psychology and Law in Psychiatry at the University of Pennsylvania. He is an expert in criminal law and mental health law and has written extensively about *mens rea* and strict liability.

Martha Rayner is a Clinical Associate Professor of Law at Fordham University School of Law. She co-directs Fordham's Criminal Defense clinic, in which her students represent many clients charged with possession of knives deemed to be "gravity knives" when opened in a particular manner by New York Police Department officers.

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Kenneth W. Simons is the Chancellor's Professor of Law and Professor of Philosophy by courtesy at the University of California, Irvine School of Law. Prof. Simons specializes in criminal law and torts, and has published widely on the nature and role of mental states in criminal law, torts, and constitutional law, and on the justifiability of strict criminal liability.

James Q. Whitman is the Ford Foundation Professor of Comparative and Foreign Law at Yale Law School. His subjects are comparative law, criminal law, and legal history.

Steven Zeidman is a Professor of Law at CUNY School of Law. His research interests include criminal procedure, evidence, and criminal justice generally. His teaching responsibilities include supervising students representing indigent clients in the New York City Criminal Court.

Proposed amici offer the attached brief, based on their expertise in criminal law and *mens rea*, to apprise this Court of important considerations that support plaintiff-appellants' challenge to New York's gravity-knife law. They argue that the strict liability imposed by the gravity knife law is inconsistent with traditional notions of due process, as expressed by numerous federal courts, and that this absence of a *mens rea* requirement adds considerable force to the vagueness challenge brought by plaintiffs-appellants.

For these reasons, movants respectfully request leave of Court to submit the attached brief as amici curiae.

June 7, 2017

/s/ Douglas M. Garrou
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Attorneys for Proposed Amici Curiae

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

COPELAND, et al., *Plaintiffs-Appellants,* v. VANCE, et al., *Defendants-Appellees.*	17-474 **DECLARATION OF DOUGLAS M. GARROU IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF PROPOSED AMICI CURIAE**

DOUGLAS M. GARROU deposes and says:

1. I am a partner at the law firm of Hunton & Williams, LLP, counsel to proposed amici curiae professors Gideon Yaffe, Brett Dignam, Jeffrey Fagan, Eugene Fidell, Stephen Garvey, Heidi Hurd, Douglas Husak, Issa Kohler-Hausmann, Tracy Meares, Gabriel Mendlow, Michael Moore, Stephen Morse, Martha Rayner, Scott Shapiro, Kenneth Simons, James Whitman, and Steven Zeidman.

2. Plaintiffs-Appellants have consented by telephone to the filing of proposed amici curiae's brief.

3. By e-mails dated June 6, 2017, Defendants-Appellants have taken no position with respect to this motion.

4. Attached as Exhibit 1 is the proposed Brief of Amici Curiae in Support of Plaintiffs-Appellants and Reversal.

5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 7, 2017

/s/ *Douglas M. Garrou*
DOUGLAS M. GARROU

EXHIBIT 1

17-474

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN COPELAND, PEDRO PEREZ, NATIVE LEATHER, LIMITED,

Plaintiff-Appellants,

KNIFE RIGHTS, INC., KNIFE RIGHTS FOUNDATION, INC.,

Plaintiffs,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* PROFS. GIDEON YAFFE, BRETT DIGNAM, JEFFREY FAGAN, EUGENE FIDELL, STEPHEN GARVEY, HEIDI HURD, DOUGLAS HUSAK, ISSA KOHLER-HAUSMANN, TRACY MEARES, GABRIEL MENDLOW, MICHAEL MOORE, STEPHEN MORSE, MARTHA RAYNER, SCOTT SHAPIRO, KENNETH SIMONS, JAMES WHITMAN, AND STEVEN ZEIDMAN

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Attorneys for Amici Curiae Profs. Gideon Yaffe, Brett Dignam, Jeffrey Fagan, Eugene Fidell, Stephen Garvey, Heidi Hurd, Douglas Husak, Issa Kohler-Hausmann, Tracy Meares, Gabriel Mendlow, Michael Moore, Stephen Morse, Martha Rayner, Scott Shapiro, Kenneth Simons, James Whitman, and Steven Zeidman

—against—

CYRUS R. VANCE, JR., in his official capacity as
THE NEW YORK COUNTY DISTRICT ATTORNEY, CITY OF NEW YORK,

Defendant-Appellees,

ERIC T. SCHNEIDERMAN, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant.

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I. IDENTITY OF AMICI CURIAE[1]

Gideon Yaffe is a Professor of Law, Professor of Philosophy, and Professor of Psychology at Yale University. His research interests include the philosophy of law, particularly criminal law, and the study of intention and the theory of action. He has written extensively about *mens rea* and on the extent to which criminal possession statutes can be compatible with the criminal law's general restriction of liability to acts and omissions.[2]

Brett Dignam is a Clinical Professor at Columbia Law School. Prof. Dignam teaches a prison clinic in which she supervises students in state and federal prison litigation on issues ranging from habeas corpus challenges to conviction, parole, and the constitutionality of prison conditions.

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[1] This brief was not authored, in whole or in part, by counsel to any party. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than amici or their counsel, contributed money that was intended to fund preparing or submitting this brief. This brief represents only the views of amici, not the institutions with which they are affiliated.

[2] *See, e.g.,* Gideon Yaffe, *In Defense of Criminal Possession*, 10 Crim. L. & Phil. 441 (2016).

Criminology, and served on the Committee on Law and Justice of the National Research Council.

Eugene R. Fidell is the Florence Rogatz Visiting Lecturer in Law and Senior Research Scholar at Yale Law School. Among the courses he teaches are Military Justice and Habeas Corpus.

Stephen P. Garvey is Professor of Law at Cornell Law School. He has written and taught in the areas of capital punishment, criminal law, and the philosophy of criminal law. He is co-author of a widely used casebook on criminal law.

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Steven Zeidman is a Professor of Law at CUNY School of Law. His research interests include criminal procedure, evidence, and criminal justice generally. His teaching responsibilities include supervising students representing indigent clients in the New York City Criminal Court.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

In the proceedings below, the City of New York made a remarkable claim. In the view of the City's witness, even if a person *reasonably and justifiably* satisfies himself that a common folding knife is not a prohibited "gravity knife," that person can *still* be legitimately prosecuted for possession of that knife, so long as the knife can subsequently be opened by someone else via the so-called "Wrist-Flick Test."[3]

Not surprisingly, a law that admittedly generates this result is constitutionally suspect in several ways. Plaintiffs-Appellants here assert an as-applied constitutional vagueness challenge to the relevant statutes, New York Penal Law sections 265.00(5) and 265.01(1) (together, the "Gravity Knife Law"). They argue, correctly, that the Wrist-Flick Test—a functional test for determining whether a folding knife is an illegal gravity knife—is inherently indeterminate, and that as a result, no one can know how to conform his or her conduct to the manner in which Defendants enforce the Gravity Knife Law.

But there is another constitutional lens through which the Gravity Knife Law can and should be inspected. The unfortunate knife owner described so accurately by the State's witness is not merely unable to conform his or her conduct to avoid prosecution (the concern of the vagueness doctrine). That knife owner *also* is sub-

[3] Joint Appendix ("A__") at A1057-A1059; Trial Transcript ("T:[page]-[line]") at T:83-2 to T:85-17.

ject to prosecution and conviction—perhaps for a felony—even though, by the State's own admission, he or she plainly lacks *mens rea* with respect to the knife's characteristics or illegality. A long line of federal cases demonstrates that the Gravity Knife Law thus offends core notions of due process—rendering the vagueness defect all the more crippling.

III. ARGUMENT

A. *Mens Rea* and Due Process

The idea that the stigma of a criminal conviction should be imposed only on culpable actors has long been at the very core of our system of justice. As the Supreme Court noted in *Morissette v. United States*,

> [t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[4]

Exceptions to this approach have commonly been limited to "minor violations," crimes often characterized as "public-welfare offenses."[5]

Although the due process dimension of the *mens rea* requirement is a "clear message" of the case law,[6] it is also true that the precise circumstances in which a

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[4] 342 U.S. 246, 250 (1952).

[5] *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 496 (E.D.N.Y. 1993).

[6] *Id.* at 515.

federal court can wield the Due Process Clause to invalidate a strict-liability criminal statute remain frustratingly underdeveloped.[7] The primary problem is that federal courts addressing the due process dimensions of *mens rea* generally do so in cases involving the construction and interpretation of federal criminal statutes, and fail to separate the constitutional issues from the statutory ones.[8] For example, relying on core concerns of due process, the Supreme Court has noted that it takes "particular care" to avoid "construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'"[9]

These cases' signposts regarding due process and *mens rea* are, nevertheless, highly relevant here, even if they are not employed as a license to actually invalidate the Gravity Knife Law under the Due Process Clause. This is so because analysis of a statute's vagueness, the principal issue in this appeal, is informed by whether the statute has a *mens rea* requirement that comports with due process, *i.e.*, that would prevent convictions for innocent conduct.[10] As Judge Weinstein

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[7] *Id.* at 505 ("*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes." (quoting Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 107)); *id.* at 508 ("The [Supreme] Court's treatment of strict liability in the criminal law continues to provide little guidance with respect to the constitutional status of the *mens rea* principle.").

[8] *Id.* at 505.

[9] *Staples v. United States*, 511 U.S. 600, 610 (1994) (quoting *Liparota v. United States,* 471 U.S. 419, 426 (1985)).

[10] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), *abrogated on other grounds by Johnson v. United States*, 135 S.

noted in 1993, in the end "[t]here is much similarity between saying that a law is unconstitutional because it punishes the person who lacks criminal intent and saying it is unconstitutional because it captures the person who cannot know whether that law applies to his or her conduct."[11]

Amici contend that the Gravity Knife Law's strict liability is in fact well outside the due process perimeter drawn by the Supreme Court, and that this defect is a fatal blow in the vagueness inquiry.

B. The Gravity Knife Law Imposes Strict Liability with Respect to the Unlawful Characteristics of the Knife

To begin the analysis, there can be no doubt that the Gravity Knife Law is, in its material respects, a strict-liability criminal possession statute—the only *mens rea* required is knowledge of possession.

In *People v. Parrilla*, for example, the defendant was in possession of a folding utility knife at the time of his arrest.[12] After the knife was able to be opened in a Wrist-Flick Test, Parrilla was charged with possession of an illegal gravity knife. *Id.* Parrilla argued that the State was required to prove not only that he was knowingly in possession of "a" knife (a fact he admitted), but also that he knew that the

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Ct. 2551, 2561 (2015) ("[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.").

[11] *Cordoba-Hincapie*, 825 F. Supp. at 513.

[12] *People v. Parrilla*, 53 N.E.3d 719, 720 (N.Y. 2016).

knife met the statutory definition of a gravity knife.[13] In short, Parrilla argued that there was a *mens rea* requirement of knowledge with respect to the knife's illegality or its illegal characteristics.

The *Parrilla* court, citing gravity-knife precedent dating to 1996, disagreed, in the clearest possible terms.[14] The court observed that

> [t]he plain language of the [Gravity Knife Law] demonstrates that the legislature intended to impose strict liability to the extent that defendants need only be aware of their physical possession of the knife . . . . [I]t is not necessary that defendants know that the knife meets the technical definition of a gravity knife under the [Gravity Knife Law].[15]

C. In Criminal Possession Statutes, *Mens Rea* Is Generally Required with Respect to Both Possession *and* Characteristics Generating Illegality

New York's interpretation of the intent required under the Gravity Knife Law is at war with the due process principles routinely applied by federal courts. In general, constitutionally permissible criminal possession statutes (and particularly felony possession statutes) require knowledge with respect to both possession of the item or substance in question *and* knowledge with respect to its illegality or illegal characteristics.

In *Staples*, for example, the defendant was in possession of a rifle that had the external appearance of an entirely lawful semi-automatic weapon, the AR-15.

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[13] *Id.*

[14] *Id.* at 721-22.

[15] *Id.*

But the rifle had been internally modified so that it was capable of firing fully automatically (i.e., as a machine gun), an illegal characteristic.[16] The government, echoing the *Parrilla* court, contended it need only prove that Staples was knowingly in possession of the firearm, regardless of his knowledge of its illegal full-auto capability.[17]

The Supreme Court, however, required the government to prove both that the defendant knowingly possessed the firearm, *and* that the defendant was aware of the weapon's unlawful characteristic.[18] To do otherwise, the *Staples* Court noted, would mean that

> any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic.[19]

This same constitutional reasoning with respect to *mens rea* applies to statutes criminalizing the possession of unlawful "analogue" drugs. To avoid imposing the stigma of criminal punishment upon innocent conduct, the Supreme Court has required not only that a defendant knowingly possessed the substance in question, but *also* that the defendant "knew he was dealing with 'a controlled sub-

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[16] *Staples*, 511 U.S. at 603.

[17] *Id.* at 608.

[18] *Id.* at 619.

[19] *Id.* at 615.

stance.'"[20] The latter knowledge can be shown in two ways—"either by knowledge that a substance is listed or treated as listed by operation of the Analogue Act, or by knowledge of the physical characteristics that give rise to that treatment."[21]

The analyses in *Staples* and *McFadden* echo the Court's earlier observation, in *United States v. International Minerals & Chemical Corp.*, that prohibiting possession of apparently ordinary items can run afoul of the Due Process Clause. As that Court noted:

> Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in [*United States v. Murdock*, 290 U.S. 389 (1933)], "*mens rea*" as to each ingredient of the offense.[22]

The exceptions to the rule of *Staples* and *McFadden* are equally as instructive regarding the due process dimensions of *mens rea*. For example, where a per-

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[20] *McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015).

[21] *Id.* at 2306 (citation omitted). There is some variability here among the states. For example, for purposes of a prima facie drug-possession case, the State of Washington does not require, as part of the State's prima facie case, proof that the defendant knowingly possessed the substance. Washington does, however, permit an "affirmative defense of unwitting possession." *See, e.g.*, *State v. Bradshaw*, 98 P.3d 1190, 1195 (Wash. 2004). That defense may be supported by a showing that the defendant (a) did not know he was in possession of the controlled substance, *or* (b) did not know the nature of the substance he possessed. *See State v. Staley*, 872 P.2d 502, 505 (Wash. 1994). Whatever might be said about the constitutionality of this regime, it is clearly not equivalent to the strict liability of the Gravity Knife Law.

[22] 402 U.S. 558, 564-65 (1971).

son is knowingly in possession of a hand grenade, it is permissible to impose strict liability with respect to whether the grenade is also unregistered (and thus illegal).[23] As the *Staples* Court noted, the reason is that a hand grenade is so unusually hazardous that it puts knowing possessors "on notice that they stand 'in responsible relation to a public danger.'"[24] Put another way, there is little risk that imposing strict liability with respect to the registration status of hand grenades might "criminalize a broad range of apparently innocent conduct."[25]

D. Criminal Possession Statutes Require *Knowledge*, Rather than Recklessness, with Respect to Illegal Characteristics

Before moving on to the Gravity Knife Law, it is worth focusing on the fact that in general, criminal possession statutes require not merely *some* level of *mens rea*—they require *actual knowledge*. On this point, the Model Penal Code ("MPC") agrees with the holdings of *Staples*, *McFadden*, and related cases.

It is true that the MPC uses recklessness as a default minimum *mens rea* for establishing criminality.[26] Under the MPC's "one-for-all" rule, however, a stated *mens rea* for the initial element of a crime "travels" through the remaining elements, applying to all of them (assuming no other intent is identified for those ele-

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[23] *United States v. Freed*, 401 U.S. 601, 609 (1971).

[24] *Staples*, 511 U.S. at 611 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281 (1943)).

[25] *Id.* at 610.

[26] Model Penal Code § 2.02(3) (Am. Law Inst. 1985).

ments).[27] Because the MPC applies an intent requirement of knowledge to the act of possession,[28] that intent therefore applies to the other elements of a possession crime.

The revised New York Penal Law of 1965 "drew heavily upon the Institute's proposals [in the MPC] both in general provisions and in treatment of specific crimes."[29] The *Parrilla* court, however, in determining that the Gravity Knife Law imposed strict liability, apparently did not consider the MPC's approach on this point.

E. The Gravity Knife Law's Strict Liability Plainly Contradicts Principles of Due Process Identified in Supreme Court Precedents

Certainly, there is room for argument at the edges of *Staples* and *McFadden*—there is, for example, space to accommodate potentially divergent views of state and federal legislators with respect to what is "apparently innocent conduct." Thus, within the confines of New York City, where firearms are widely understood to be strictly regulated, perhaps an AR-15 is constitutionally equivalent to a hand grenade: Perhaps a New Yorker's knowing possession of an AR-15 would itself be sufficient to put her on notice that she was "in responsible relation to a public

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[27] *Id.* § 2.02(4); Kenneth W. Simons, *Should the Model Penal Code's* Mens Rea *Provisions Be Amended?*, 1 Ohio St. J. Crim. L. 179, 181 n.6 (2003).

[28] Model Penal Code § 2.01(4).

[29] Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425, 1428 (1968).

danger," such that further proof of her knowledge of the weapon's fully automatic capability would be unnecessary.

But the Gravity Knife Law does not exist anywhere close to any conceivable *mens rea* gray area. Instead, the Law's strict liability with respect to the illegality or illegal characteristics of the knife plainly exceeds the "outer limits of what is permissible" under the Due Process Clause,[30] failing to protect innocent conduct.

To begin, a key point is that folding knives are employed in the City and elsewhere in the State as *entirely ordinary hand tools*. In fact, they are simply the folding version of a common tool that dates to the Stone Age, and that can be found today in essentially every household and workplace—where they are used routinely, often daily, for entirely peaceful purposes. As one New York court has noted, the folding knives that are potentially prohibited by the Gravity Knife Law are:

> widely manufactured and sold across the country in hardware and outdoor stores under brand names such as Clip-it, Husky Utility Folding Knives and other brands. They are sold for and are used for purely legitimate purposes. Despite "locking" safety features, many can be "flicked" open with the appropriate amount of force. Thus, these knives are routinely carried by many New Yorkers for legitimate purposes ignorant of the fact that they may be in violation of the law and face a potential automatic one-year jail sentence.[31]

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[30] *Cordoba-Hincapie*, 825 F. Supp. at 515.

[31] *People v. Trowells*, Ind. No. 3015/2013, at *4 (N.Y. Sup. Ct. Bronx County July 11, 2014), *available at* http://tinyurl.com/k32ek6u.

It is worth noting in this regard that in 2010, when the District Attorney of New York seized some 1,300 purportedly illegal gravity knives, he obtained them not from the pockets of robbers, or from smugglers, or from black marketeers—but from the aisles of ordinary stores including Orvis and Home Depot.[32]

The use of folding knives by the individual plaintiffs in this case provides a particularly vivid example of the innocent conduct, associated with these common hand tools, that is criminalized every day under the Gravity Knife Law. Simply put, the plaintiffs here were not criminals. John Copeland—a world-recognized painter—bought his folding knife at Paragon Sports in Manhattan, and used it in connection with his work.[33] Pedro Perez has been a purveyor of fine arts and paintings for over 22 years, and used his folding knife to cut canvas and open packaging.[34] Yet the Gravity Knife Law criminalized these men's indisputably ordinary and innocent occupational conduct.

The final factor pushing the Gravity Knife Law's strict liability well beyond the "outer limits of what is permissible" under the Due Process clause is the extent of the potential sanction. Violation of the Gravity Knife Law is no "minor" violation. Jail time is available for misdemeanor convictions, and even more troubling,

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[32] *See* A782-A792 ("Deferred Prosecution Agreement" between Orvis and the District Attorney of New York); A804-A814 (same with respect to Home Depot).

[33] A53-A57 (Trial Declaration of John Copeland (March 9, 2016)).

[34] A58-A61 (Trial Declaration of Pedro Perez (March 8, 2016)).

violations can be punished as felonies. Specifically, violation of the Gravity Knife Law can be charged as a Class D Felony, under the so-called "felony bump-up rule," if the defendant has previously been convicted of another crime.[35] In felony cases, in particular, the Gravity Knife Law presents a scenario where strict liability is extremely likely to run afoul of the Due Process Clause.[36]

IV. CONCLUSION

Of the many objectives of the criminal law, certainly one goal must be to ensure that innocent people, engaged in innocent conduct, will not face the stigma of criminal prosecution and conviction—much less conviction for a felony. Yet under the Gravity Knife Law, the State of New York indisputably has charged and convicted large numbers of New Yorkers who have *no culpability whatsoever*. At the heart of New York's fundamental error is its failure to impose the *mens rea* requirement compelled by the Due Process Clause. Because there is no *mens rea* "safety valve" that can rescue the unpredictable Wrist-Flick Test from a vagueness challenge, this Court should reverse the decision below.

[35] N.Y. Penal L. §§ 70.00(2)(d), (3)(b); 265.02(1).

[36] *See Staples*, 511 U.S. at 618-19.

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This brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Local Rules 29.1(c) and 32.1(a)(4)(A) of the Local Rules and Internal Operating Procedures of the Court of Appeals for the Second Circuit because it contains 3,796 words, excluding the parts of the brief exempted by Rule 32(f).

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