Constructive Possession of Controlled Substances: A North Dakota Look at a Nationwide Problem

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I. INTRODUCTION

Drug abuse in America has reached such epidemic proportions that it has been characterized as "one of the major social evils of our time."[1] Today drugs affect virtually every "nationality, race, and economic level."[2] Furthermore, the problem is no longer confined to major cities and selected states, but has "manifested itself in every [community and] State in the Union."[3] Legislatures are becoming increasingly concerned with the societal injury arising from narcotics and other addictive drugs. In an effort to suppress the problem, and in response to a heightened community interest, the North Dakota Legislature has promulgated comprehensive statutes designed to combat the manufacture, sale, use and possession of controlled substances.[4]

The concept of "possession" has been a major source of controversy in criminal proceedings and continues to be a most obscure legal tenet.[5] Criminalizing the possession of controlled

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1. State v. Cleppe, 635 P.2d 435, 439 (Wash. 1981).
2. UNIF. CONTROLLED SUBSTANCES ACT, Prefatory Note, 9 U.L.A. 2 (1988).
3. *Id.*
4. *See* N.D. CENT. CODE §§ 29-29.2-01 to -05 (1991) and 1989 N.D. Laws ch. 399 (authorizing wiretapping and eavesdropping devices in felony narcotics actions); N.D. CENT. CODE §§ 29-31.1-01 to -10 (1991) (permitting the disposition of forfeitable property which has been seized by a law enforcement agency); N.D. CENT. CODE §§ 29-10.2-01 to -06 (1991) (providing for the impaneling of a grand jury in North Dakota which has the jurisdiction to investigate and indict for offenses relating to "organized crime"). *Cf.* N.D. CENT. CODE § 19-03.1-23 (1991). This section provides, in pertinent part:

> 1. Except as authorized by this chapter, it is unlawful for any person to willfully, as defined in section 12.1-02-02, manufacture, deliver, or *possess* with intent to manufacture or deliver, a controlled substance . . . .
> . . . .
> 2. Except as authorized by this chapter, it is unlawful for any person to willfully, as defined in section 12.1-02-02, create, deliver, or *possess* with intent to deliver, a counterfeit substance . . . .
> . . . .
> 3. It is unlawful for any person to willfully, as defined in section 12.1-02-02, *possess* a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter . . . .

Id. (emphasis supplied).

5. Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 751 (1972). The term "possession" is frequently utilized in the context of criminal law without definition. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 3.2, at 201 (2d ed. 1986). This may be a reflection of the fact that word is " 'a common term used in everyday conversation that has not acquired any artful meaning.' " *Id.* (quoting *Kramer v. United States*, 408 F.2d 837, 840 (8th Cir. 1969)). State statutes employ the word "possession" in a vacuum; doing so does little to

substances permits the arrest and conviction of an individual before the prohibited drug is actually used or sold.[6] Traditionally, the imposition of criminal liability for possession was limited to situations where actual possession existed.[7] Today, as a matter of public policy, courts utilize a broader interpretation of what constitutes possession, thereby extending the definition to include constructive possession.[8]

The proscription of possession serves as a more efficient means of facilitating law enforcement, because possession of a narcotic is generally easier to prove than its use or sale.[9] The doctrine of constructive possession furthers this effort by establishing "a legal fiction, a pragmatic construct [designed] to deal with the realities of criminal law enforcement."[10] It does so by significantly broadening the application of possession to include situations in which bona fide physical control of a substance cannot be directly proven, but a strong inference exists that the defendant actually possessed the substance at one time and continued to exercise "dominion and control over it."[11]

A primary source of confusion surrounding constructive possession is that the term "possession" has many nuances of mean-

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describe the offense. Douglas B. King, Note, *Possession of Dangerous Drugs in Indiana*, 8 IND. L. REV. 690, 690 (1975). Instead, it is left to the judiciary to give the language meaning. *Id.* Consequently, "lack of legislative guidance" has been responsible for some of the confusion surrounding the term. *Id.*

6. Whitebread & Stevens, *supra* note 5, at 753-54.

7. *See* Tyler v. Commonwealth, 91 S.E. 171, 172 (Va. 1917) (finding constructive possession to be an insufficient basis for the imposition of criminal liability); see *infra* note 10 for definitions of actual and constructive possession.

8. *See, e.g.*, State v. Connery, 441 N.W.2d 651, 655 (N.D. 1989) (holding that the requirement of possession can be fulfilled in a narcotics conviction by an affirmative showing of either actual or constructive possession).

9. Whitebread & Stevens, *supra* note 5, at 753-54.

10. Commonwealth v. Aviles, No. 1650, 1991 WL 285792, at *3 (Pa. Super. Ct. 1992). It has been said that "[f]unctionally, actual possession is possession which exists as a matter of fact. Constructive possession is a legal fiction used by courts to find possession in situations where it does not in fact exist, but where they nevertheless want an individual to acquire the legal status of a possessor." Whitebread & Stevens, *supra* note 5, at 761-62. *See* Jacobson v. Aetna Casualty & Sur. Co., 46 N.W.2d 868, 871 (Minn. 1951) (a civil action to recover for loss caused by the theft of an automobile in which the court found the existence of constructive possession to be "wholly in contemplation of law without possession in fact."); State v. Florine, 226 N.W.2d 609, 610 (Minn. 1975). The police in *Florine* discovered narcotics in a notebook that was located on the back seat of an unlocked, abandoned vehicle. *Id.* The notebook bore the defendant's name, and several documents in the vehicle belonged to the defendant. *Id.* The defendant was convicted of possession despite the fact that the vehicle did not belong to him and others had ready access to it. *Id.* The *Florine* court held that, although the defendant did not have exclusive possession of the automobile in which the narcotics were found, the evidence was sufficient to "support an inference that the defendant at one time had [actual] physical possession" of the contraband. *Id.* at 611. Moreover, the court indicated that the defendant did not relinquish his possessory interest in the substance, but rather retained the right to control the drugs until the time of the arrest. *Florine*, 226 N.W.2d at 611.

11. State v. Florine, 226 N.W.2d 609, 610-11 (Minn. 1975).

ing.[12] Furthermore, the variety of factual contexts in which possession is applied renders the word incapable of an exacting definition and has provided the fuel for debate in the legal community.[13] It has been suggested that the term "possession" is ambiguous because it is frequently used by courts and scholars to describe both actual possession and constructive possession.[14] Drawing a distinct line between actual and constructive possession is difficult because the terms so embody one another that it is nearly impossible to pinpoint where one begins and the other ends.[15] In its broadest sense, possession is simply that evidence which in its totality enables a reasonable person to conclude that a sufficient enough relationship exists between an individual and the property in question.[16] Hence, when drawing an analytical distinction between actual and constructive possession, it is the relationship between the individual and the particular property which must be scrutinized.[17] Actual possession is an actual physical holding of the property, consisting of the capacity to control it coupled with an intent to do so.[18] Constructive possession also consists of the capacity and the intent to control such property, but actual physical control is absent.[19]

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12. Jacobson v. Aetna Casualty & Sur. Co., 46 N.W.2d 868, 870 (Minn. 1951).

13. *Id.* The court noted:

> Ambiguity in the meaning of the word *possession* dates from the introduction into the law of the concept of *constructive possession*. Disputes as to the meaning of possession stem either from an inadvertent disregard of the origin and scope of the constructive-possession concept or from a placing of the word *possession* in a context which creates or leaves a doubt as to whether *actual*—namely, possession in its ordinary or original sense or *constructive possession* is meant. It would seem that an understanding of the inception of the term *constructive possession* would eliminate any ambiguity in the meaning of *possession* . . . .

Id. at 871 (emphasis in original).

14. *See* National Safe Deposit Co. v. Stead, 232 U.S. 58, 67 (1914).

15. *Stead*, 232 U.S. at 67. *Stead*, although not a narcotics case, stated that "both in common speech and in legal terminology, there is no word more ambiguous in its meaning than [p]ossession." *Id. See* State v. Larson, 274 N.W.2d 884, 886 (N.D. 1979) (Burdick, S. Ct. Comm'r, concurring specially) (noting that cases in which actual or exclusive possession are at issue pose little difficulty); United States v. Staten, 581 F.2d 878, 883 (D.C. Cir. 1978) (finding the difficulty of the doctrine of constructive possession to be based on its imprecision); Commonwealth v. Aviles, No. 1650, 1991 WL 285792, at *3 (Pa. Super. Ct. 1992) (acknowledging the difficulty of applying tests for determining constructive possession which are logical and helpful in the abstract to actual factual situations); United States v. Holland, 445 F.2d 701, 703 (D.C. Cir. 1971) (Tamm, J., concurring) (describing judicial decisions in the area of constructive possession as establishing "ill-defined guidelines," built on "obscure reasoning," suggesting "judicial subjectivity" the result being the achievement of a particular outcome rather than providing a "workable index of objective standards").

16. *See* Whitebread & Stevens, *supra* note 5, at 758.

17. *Id.*

18. *Id.* at n.20.

19. *See* Rodella v. United States, 286 F.2d 306, 311 (9th Cir. 1960), *cert. denied*, 365 U.S. 889 (1961); People v. Rumley, 222 P.2d 913, 915 (Cal. Ct. App. 1950).

This Note examines the application of the doctrine of constructive possession, insofar as it relates to the possession of controlled substances, in an effort to provide North Dakota practitioners with an analysis of the current state of the law. Additionally, this Note will provide guidance in dealing with the perplexing issue of constructive possession in light of recent legislation which significantly altered North Dakota's criminal possession statute.[20] Finally, evidentiary requirements held dispositive by courts in support of a finding of possession, where it did not exist in fact, will be examined.

II. HISTORY OF CONSTRUCTIVE POSSESSION

A. EARLY DEVELOPMENT

As far back as 1808, constructive possession served as a viable doctrine within the context of admiralty, debtor-creditor, and property law.[21] Larceny cases, however, offer some of the earliest applications and discussions of the doctrine within the criminal context.[22] In fact, the doctrine's inception has been traced by one court to an action rooted in larceny:

> At common law, the idea developed that for larceny there must be a trespass, *a taking from the possession of another without his consent.* A modification of this idea emerged from the problem of whether a servant had cus-

20. *See* N.D. CENT. CODE § 19-03.1-23(3) (1991). When North Dakota adopted the Uniform Controlled Substances Act in 1971, it included the *mens rea* requirement of "knowingly or intentionally" as set forth in the Federal Controlled Substances Act. *See* 1971 N.D. Laws ch 235 § 23(3). As a result of the 1975 overhaul of the North Dakota Criminal Code [Title 12.1], mention of a *mens rea* requirement within the narcotics possession statute was omitted. *See* 1975 N.D. Laws ch. 106. In 1989, § 19-03.1-23(3) was amended to include the *mens rea* requirement of "willfully," defined in § 12.1-02-02 as conduct which is intentional, knowing or reckless. N.D. CENT. CODE § 12.1-02-02 (1985 and Supp. 1991). *See also* 1971 N.D. Laws ch. 235 § 23; 1973 N.D. Laws ch. 199 §§ 1, 2; 1975 N.D. Laws ch. 106 § 168; 1975 N.D. Laws ch. 110 §§ 9 to 11; 1979 N.D. Laws ch. 172 § 28; 1979 N.D. Laws ch. 187 § 29; 1979 N.D. Laws ch. 287 § 4; 1983 N.D. Laws ch. 255 § 1; 1989 N.D. Laws ch. 267 § 1 (indicating the various amendments to § 19-03.1-23(3)).

21. *See generally* The Gran Para, 23 U.S. (10 Wheat.) 497, 500 (1825) (in an action for execution for property where a court of admiralty had parted with possession of the property, the court found that any remedy to be sought had to rest on grounds of actual or constructive possession); Leonard v. Neale, 1 D.C. (1 Cranch) 338 (D.C. Cir. 1806) (an action founded in debtor-creditor law where law enforcement officials held property in trust for creditors pursuant to a replevy order); Beggs v. Thompson, 2 Ohio 95 (1825) (an action based on the adjudication of real property requiring the plaintiff to have actual or constructive possession of the property in question in order to maintain the action).

22. *See* United States v. Holland, 26 F. Cas. 343, 345 (Cir. Ct. S.D.N.Y 1843) (No. 15,378) (holding that in order to constitute larceny there must be either an actual or constructive taking of the object); Commonwealth v. McDonald, 73 N.E. 852, 853 (Mass. 1905) (finding the requirement of actual or constructive possession to be a necessary element of larceny); Jackson v. State, 11 Ohio St. 104 (1860) (involving an action based in larceny where neither actual nor constructive possession was shown).

> tody or possession of goods delivered to him by his master where the goods were to remain in the master's house or his personal presence. To solve this problem, a statute was enacted which provided that when chattels were delivered to a servant by his master and the servant converted them, it should be a felony. This statute was strictly construed by the courts so that when a master delivered money to a servant to carry off the premises and the servant converted it, he was not guilty of committing a felony. Thereafter, . . . the court finally remedied the situation by introducing a new concept: Because of the status of master and servant, the master had *constructive possession* even where the last vestige of *actual* possession or physical control by the master has been eliminated; as a result, a servant who was to leave the premises with money delivered to him by his master and who converted the money was guilty of larceny *since he only had custody and not possession.* The courts resorted to the fiction of *constructive possession* to expand the definition of possession in a servant-and-master relationship, thereby preventing injustice.[23]

In the doctrine's early development, although acknowledging that constructive possession was enough to create civil liability, some courts deemed it to be an insufficient basis for the imposition of criminal liability.[24] It has been generally agreed that exclusive control over and knowing possession of the stolen item are essential elements for a larceny conviction.[25]

In *State v. Drew*,[26] stolen goods were found in the home

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23. Jacobson v. Aetna Casualty & Sur. Co., 46 N.W.2d 868, 871 (Minn. 1951) (emphasis in original) (footnotes omitted).

24. Tyler v. Commonwealth, 91 S.E. 171, 173 (Va. 1917). The court held:

> '[C]onstructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold [a defendant] to a criminal charge. He can only be required to account for the [properties] which he actually and knowingly possessed . . . . If [the contraband is] found upon premises owned or occupied as well by others as himself, or in a place to which others had equal facility and right of access, there seems no good reason why he, rather than they, should be charged upon this evidence alone.'

Id. at 172 (citing 3 Greenleaf, Ev. § 33).

25. *See, e.g.*, State v. Drew, 78 S.W. 594 (Mo. 1904). ' "[T]o raise the presumption of guilt from the possession of the fruits of the crime by the . . . [accused], it is necessary that they be found in his exclusive possession." ' *Id.* at 595 (quoting State v. Castor, 5 S.W. 906 (Mo. 1887)). An accused "can only be required to account for the possession of things which he actually and knowingly possessed." *Id.*

26. 78 S.W. 594 (Mo. 1904).

where the accused and his family lived.[27] The court held that the mere fact that the stolen goods were found in the house, without more, did not amount to sufficient evidence to support a finding of guilt.[28] This was especially true when the possession of the stolen goods could readily, with equal right, be attributed to members of the family domicile other than the defendant.[29] Hence, mere constructive possession, without establishing knowledge or assent, did not justify a finding of guilt.[30]

B. DEVELOPMENT DURING PROHIBITION

1. *Early Definition of Constructive Possession*

In the 1920s, courts in a number of jurisdictions began to expand the scope of their criminal possession statutes by adopting the doctrine of constructive possession.[31] Some of the earliest reported cases in which actual possession was not a prerequisite to obtaining a conviction of criminal possession of a controlled substance involved intoxicating liquors.[32]

In *People v. Vander Heide*,[33] the defendant was found guilty of possession of liquor contained in trunks that were in the actual

27. State v. Drew, 78 S.W. 594, 594 (Mo. 1904). The prosecuting witness testified that the general merchandise store which he owned was broken into and burglarized. *Id.* Shoes, tobacco, meat and other miscellaneous goods were taken. *Id.* Upon a search of the defendant's residence by the police, some of the stolen items were found in a locked trunk and unlocked bureau drawer. *Id.* at 595. The defendant, however, was not present at the time of the search. *Id.* at 596.

28. *Id.* at 596.

29. *Id.* There was no evidence presented that the defendant had actual knowledge of the existence of the goods found in his home. *Id.* The court recognized that his daughter or wife could have readily stolen the items. *Id.* The court held that under circumstances where the prosecution was unable to demonstrate an affirmative showing of a conscious possession on the part of an accused, the result could readily lead to punishing the innocent for the acts of the guilty. *Id.* Without an affirmative showing of an actual, exclusive, and conscious possession, the court refused to find that the act of "possession," for which the law imposed liability, existed. *Id.*

30. *Drew*, 78 S.W. at 596. *See* State v. Castor, 5 S.W. 906 (Mo. 1887). *Castor* involved a larceny conviction where the evidence showed that stolen property was found in the defendant's trunk, to which he and others had access. *Id.* at 907. Upon arrest, the defendant professed his innocence and denied having any knowledge of the goods contained in the trunk. *Id.* at 908. The court held that such possession was not sufficient to sustain a guilty verdict, as an accused could only be required to account for that which he knowingly possessed. *Id.* at 909. Additionally, the court found that such possession will give rise to a criminal offense only where the possession was exclusive and unexplained. *Id.*

31. *See* Reynolds v. State, 111 So. 285, 286 (Fla. 1926) (an "actual manucaption" of liquor is not required to constitute possession, nor is it necessary that it actually be found on the accused's person); People v. Vander Heide, 178 N.W. 78, 81 (Mich. 1920) (holding that possession is not limited to "manual touch or personal custody"); State v. Parent, 212 P. 1061, 1062 (Wash. 1923) (finding that a right to immediate, actual possession will suffice); State v. Spillman, 188 P. 915, 917 (Wash. 1920) (stating that one may be guilty of possession without having an actual possession of the proscribed item).

32. *See, e.g.*, State v. Parent, 212 P. 1061 (Wash. 1923).

33. 178 N.W. 78 (Mich. 1920).

possession of another.[34] Constructive possession was found because the defendant had passenger baggage checks on his person which corresponded to the trunks where the liquor was stored.[35] The court held that actual possession of the baggage checks constituted prima facie evidence of ownership, right to possession, and control.[36] Finding constructive possession to be sufficient to sustain a conviction, the court determined that possession in such circumstances was not restricted to merely "manual touch or personal custody."[37]

In *State v. Parent*,[38] the defendant was the proprietor of an inn who, with an employee, was charged with the crime of unlawful possession of intoxicating liquor.[39] Upon arrival at the inn, police found the defendant's employees and a dozen or so other individuals gathered inside.[40] Approximately six of them, all customers, were seated at a table with glasses containing alcohol in front of them.[41] A further search of the premises revealed a bottle of alcohol located in a pantry that was connected to the kitchen.[42] The defendant was working in the pantry at the time the police arrived and discovered the alcohol.[43] At trial, he denied knowledge of the alcohol found on the premises.[44] He testified that when the police arrived, "there were six employees on the premises, all of whom had access" to the areas where the alcohol was discovered.[45] The *Parent* court found that possession could be constructive, as well as actual.[46] The court went on to hold that possession meant simply owning or having a thing under one's influence so that actual direction over it could be exercised.[47] Acknowledging that no actual possession existed, the court con-

34. People v. Vander Heide, 178 N.W. 78, 80 (Mich. 1920).

35. *Id.* Although not expressly requiring knowledge to be an element of the offense, evidence that the defendant knew of the contents of the trunks was clear. *Id.*

36. *Id.* Such evidentiary factors indicated an ability or capacity to possess the contraband. *Id.*

37. *Id.* at 81.

38. 212 P. 1061 (Wash. 1923).

39. State v. Parent, 212 P. 1061, 1061 (Wash. 1923).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Parent*, 212 P. at 1061.

45. *Id.* at 1061-62. The defendant testified that, prior to the arrival of the police, a number of "employees had walked back and forth from the pantry to the dining room." *Id.* Since others had equal opportunity and access to the contraband, the defendant argued that any presumption of possession from ownership of the premises was sufficiently rebutted. *Id.*

46. *Id.* at 1062.

47. *Id.*

jured a form of constructive possession.[48] It stated that the possession supporting the conviction in this case was possession in law.[49] The fact that the defendant had a proprietary interest in the premises gave him the right to immediate and actual possession of the alcohol.[50]

2. *Modern Definition of Constructive Possession*

State v. Spillman[51] was one of the first reported cases in which a court articulated a definition of possession that is consistent with many of the evidentiary requirements and definitions of possession employed in a number of jurisdictions today.[52] In *Spillman*, the appellant and his associate were arrested for possession of intoxicating liquor, despite their initial denial of any knowledge or connection with the contraband.[53] They were found walking toward a crate of whiskey which was located approximately a half a block away from where they were apprehended.[54] Finding possession to exist, the court held:

> 'Possession may be either actual or constructive. Actual possession exists when the property is in the individual occupancy of a party or his agent, and is frequently expressed as *possession in fact.* Constructive possession is that possession which the law annexes to the legal title or ownership of property, and where there is a right to the immediate, actual possession of property. Such possession is designated as "*possession in law,*" but not actual possession.'
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> One may have a thing in his possession without having it actually on his person.[55]

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48. *Parent*, 212 P. at 1062. *See also* State v. Loucks, 209 N.W.2d 772 (N.D. 1973). The *Loucks* court found the defendant guilty of "possession" of marijuana despite the fact that there was no "actual" possession. *Id.* at 774. The police, upon entering the defendant's apartment, found marijuana in plain view. *Id.* Despite the fact that the defendant had a roommate, that there were a number of visitors present in the immediate vicinity, and that he was neither smoking marijuana at the time nor had any on his person, the defendant's conviction for "possession" was affirmed. *Id.* at 774-76. Although it was clear that the conviction was based on constructive possession, the *Loucks* court failed to articulate a distinction between actual and constructive possession. *See id.*

49. *Parent*, 212 P. at 1062.

50. *Id.*

51. 188 P. 915 (Wash. 1920).

52. State v. Spillman 188 P. 915, 917 (Wash. 1920). *See also* Reynolds v. State, 111 So. 285, 286 (Fla. 1926) (defining possession as "having personal charge of or exercising the right of ownership, management, or control over the [item] in question.").

53. *Spillman*, 188 P. at 916.

54. *Id.*

55. *Id.* at 917 (emphasis supplied). " 'Possession means simply the owning or having a thing in one's power.' " *Id.* "The meaning 'cannot be limited to manual touch or personal

C. DEVELOPMENT IN NARCOTICS CASES

People v. Herbert[56] was the first reported narcotics case in which a defendant was prosecuted for willful and felonious possession, even though the proscribed item was found some eight to fifteen feet away from him.[57] Despite the defendant's contention that possession must be personal and actual, rather than constructive, the court held to the contrary.[58] It found that the burden rested with the prosecution to prove that the proscribed item was in the immediate and exclusive possession of the defendant, and once that burden was met, constructive possession was deemed to exist.[59] The trial judge instructed the jury that in order to find the accused guilty of criminal possession, the prosecution was also required to show that the contraband was under his dominion and control.[60] The appellate court affirmed the lower court's decision, finding sufficient evidence to constructively connect the defendant with the narcotics.[61]

In *People v. Sinclair*,[62] Sinclair was arrested after having ordered a co-defendant, who was riding as a passenger, to throw a match-book containing morphine from the car into the street.[63] The court held that Sinclair was guilty of possession, despite the fact that he never actually possessed the contraband, because he was in the exclusive control of the vehicle, he negotiated for the sale of the morphine, and he picked up the co-defendant who did have actual, physical possession.[64] Moreover, the fact that the morphine was thrown by the passenger from the vehicle according to Sinclair's direction buttressed the finding that dominion and control over the contraband existed.[65]

The *Sinclair* court thus expanded the holding in *Herbert* and

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custody.' One who deposits the prohibited articles 'in a place of concealment' may be deemed to 'have them in his possession.' " *Id.*

56. 210 P. 276 (Cal. 1922).

57. People v. Herbert, 210 P. 276, 276 (Cal. 1922). Herbert, at the time of his arrest, threw a package containing narcotics into the street. *Id.* The arresting officer did not actually see anything being thrown, but felt the motion of Herbert's arm and heard a corresponding sound. *Id.* Using his flashlight, the officer found several packages containing drugs some distance away. *Id.*

58. *Id.* at 277.

59. *Id.*

60. *Id.*

61. *Id.* *But see* Whitebread & Stevens, *supra* note 5, at 756. Whitebread & Stevens interpret the court's holding in the *Herbert* decision to be based on actual possession, rather than constructive possession: "[T]he negative pregnant of the court's holding is that an instruction on constructive possession would have been error." *Id.*

62. 19 P.2d 23 (Cal. Ct. App. 1933).

63. People v. Sinclair, 19 P.2d 23, 24 (Cal. Ct. App. 1933).

64. *Id.*

65. *Id.*

earlier cases by broadening the requirement of "exclusive control."[66] The court focused upon the proprietary interest a defendant had in an item or an area where narcotics were discovered.[67] Moreover, the court substantially expanded the notion of "dominion and control" to encompass not only actual and immediate physical control, but also the defendant's capacity to exercise a "directing influence" over the contraband.[68]

The early cases dealing with possession of controlled substances ostensibly held that knowledge of the character of the substance in question was a necessary prerequisite to a finding of possession.[69] Additionally, the term "possess" as used in criminal statutes has ordinarily been deemed to denote an intentional control of a specific item accompanied by the actual knowledge of its nature.[70] Outside the criminal context, however, knowledge of the presence of an item or its character is not a requisite element of possession.[71]

III. DEVELOPMENT OF NORTH DAKOTA LAW

A. HISTORY

The Uniform Controlled Substances Act was fashioned to achieve uniformity between the laws of the individual states and

66. *Id.* The requirement of "exclusive control" rested upon defendant's proprietary interest in the vehicle, which was the area where the contraband was located just prior to arrest. Whitebread & Stevens, *supra* note 5, at 757.

67. Whitebread & Stevens, *supra* note 5, at 763. The proprietary of interest test, alluded to in *Sinclair*, is a test that attaches importance to the accused's proprietary of interest in the place or thing where contraband is discovered. *Id.* A jurisdiction that blindly imputes possession based exclusively upon this test, effectively punishes a property owner for acquiescing to the presence of narcotics within the realm of his proprietary of interest. *Id.* at 764. The exclusive use of the proprietary of interest test as a basis for imposing criminal liability can lead to unwarranted results, as the test does not demonstrate that an accused had the capacity to exercise dominion or control over the contraband. Whitebread & Stevens, *supra* note 5, at 763. *See also* State v. Larson, 274 N.W.2d 884, 885-86 (N.D. 1979) (Burdick, S. Ct. Comm'r, concurring specially). Constructive possession was found where the defendant, as the owner of the motor vehicle, was aware of the presence of the narcotics in his vehicle and transported them without objection, although another defendant claimed exclusive possession. *Id. See also* People v. Torres, 43 P.2d 374, 374 (Cal. Ct. App. 1935) (finding possession to be immediate and exclusive and under the dominion and control of the defendant when narcotics were found in an unoccupied room of a boarding house that was owned and operated by the defendant).

68. Whitebread & Stevens, *supra* note 5, at 757.

69. *See, e.g.*, Reynolds v. State, 111 So. 285, 286 (Fla. 1926). See *supra* notes 25-37.

70. State v. Labato, 80 A.2d 617, 622 (N.J. 1951). *See* Baender v. Barnett, 255 U.S. 224, 225 (1921) (upholding as valid a federal law making it a crime to possess counterfeiting dies when the statute was construed to necessitate conscious possession).

71. *See* Whitebread & Stevens, *supra* note 5, at 753 n.4. *See also* South Staffordshire Water Co. v. Sharman, 2 Q.B. 44, 45 (1896) (finding a landowner to have possession of a ring discovered by a finder at the bottom of a pool on his land, although the landowner had no prior knowledge of its existence).

those enacted by the federal government.[72] Prior to legislative adoption of the Act, possession of narcotics in North Dakota was ostensibly a strict liability crime.[73] Section 19-03-02 of the North Dakota Century Code provided that: "it shall be unlawful for any person to grow, manufacture, possess, have under his control, sell, prescribe, administer, dispense, furnish, give away, trade, or compound any narcotic drug . . . ."[74] North Dakota case law discussing the *mens rea* requirement within this statutory period is scant.

In 1971, the North Dakota Legislature substantially adopted the major provisions of the Uniform Controlled Substances Act while also using the Federal Controlled Substances Act as a model.[75] Regarding the possession of controlled substances, the North Dakota codification of the Uniform Act mirrored the *mens rea* requirement set forth in the Federal Controlled Substances Act and provided that: "It is unlawful for any person *knowingly* or *intentionally* to possess a controlled substance . . . ."[76] The North Dakota statute which codified the Uniform Act remained virtually unchanged until 1975.[77]

A 1973 study led to a subsequent overhaul of the North Dakota Criminal Code, which had existed without material change for a number of decades.[78] The committee that studied the matter found that crimes were scattered throughout the entire Century Code and were defined with little consistency.[79] Varying culpabilities and definitions of criminal intent existed, setting forth

72. UNIF. CONTROLLED SUBSTANCES ACT, Prefatory Note, 9 U.L.A. 2 (1988). *See also* United States v. Balint, 258 U.S. 250 (1922). The halting of the spread of addiction to narcotics was originally said to be an "incidental purpose" of the original federal legislation, which served as a basis for the Federal Controlled Substances Act. *Id.* at 253.

73. *See* N.D. CENT. CODE § 19-03-02 (1960).

74. *Id.*

75. *See generally* UNIF. CONTROLLED SUBSTANCES ACT, Prefatory Note, 9 U.L.A. 1 (1988). The Legislature repealed the Uniform Drug Act (N.D. CENT. CODE §§ 19-03-01 to 19-03-32) by 1971 N.D. Laws ch. 235, and enacted in lieu thereof the Uniform Controlled Substances Act. This provision was originally codified at section 19-03.1 of the North Dakota Century Code and went into effect on July 1, 1971. *Id.* The Uniform Controlled Substances Act was derived from the Federal Controlled Substances Act. State v. Rippley, 319 N.W.2d 129, 133 (N.D. 1982).

76. *See* 1971 N.D. Laws ch. 235 § 23(3) (emphasis supplied). *See also* 21 U.S.C. § 841(a) (1988). It should be noted that the culpability language of "knowingly" and "intentionally," while present in the Federal Controlled Substances Act, is absent from the Uniform Controlled Substances Act.

77. *See* 1973 N.D. Laws ch. 199 §§ 1, 2.

78. *See* SENATE STANDING COMMITTEE MINUTES ON S.B. 2441 BEFORE THE NORTH DAKOTA SENATE COMM. ON JUDICIARY (1989) [hereinafter MINUTES] (statements of Senator Wayne Stenehjem and Bruce Quick of the Attorney General's Office); *see also* NORTH DAKOTA LEGISLATIVE COUNCIL MINUTES OF COMM. ON JUDICIARY "A" (May 18, 1973) (background to crimnal code).

79. MINUTES, *supra* note 78, at 2 (testimony of Bruce Quick).

the need for greater clarification.[80] The culpability requirement of all crimes that existed outside of the Criminal Code was subsequently removed, with the intention that an automatic cross-referencing into the Criminal Code would occur.[81]

When examining the controlled substances statute of the North Dakota Century Code, the committee examined the culpability requirement of "knowingly" and "intentionally" that was set forth in its Controlled Substances Act.[82] The committee concluded that codifying the culpability requirement set forth therein was unnecessary under North Dakota law.[83] Section 12.1-02-02 of the North Dakota Criminal Code provided the rationale for the decision: "If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully."[84] "Willfully," as defined in the Code, encompassed the "intentionally" and "knowingly" culpability requirement set forth in the Federal Controlled Substances Act and North Dakota's adaptation thereof.[85] The committee's intention was that this "catch-all" language would then apply to *all* crimes that did not articulate a specific *mens rea* requirement.[86]

The North Dakota Supreme Court, however, did not interpret the possession statute or the corresponding legislative intent in this manner.[87] To the contrary, the court determined that whether a specific *mens rea* requirement was an element of a criminal offense had to be determined by the specific language of the statute in light of its "manifest purpose and design."[88] Commentators suggested that the court analyzed section 12.1-02-02, which provided in part: "[f]or [the] purposes of this *title*," while

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* *See* N.D. CENT. CODE § 12.1-02-02(2) (1985).
85. N.D. CENT. CODE § 12.1-02-02(1)(e) (1985). "A person engages in conduct . . . 'Willfully' if he engages in the conduct intentionally, knowingly or recklessly." *Id.*
86. *See supra* note 78 (articulating the ostensible intent of the North Dakota Legislature). This intention by the committee seems to be supported by a plain reading of section 12.1-02-02(2) of the North Dakota Criminal Code. See N.D. CENT. CODE § 12.1-02-02(2) (1985) (providing that "[i]f a statute . . . does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.").
87. *See* State v. Rippley, 319 N.W.2d 129, 133 (N.D. 1982). The court analyzed the legislative history of section 19-03.1-23 and determined that the legislature intended the statute to contain no culpability requirement. *Id.* "The Legislature has *clearly* indicated its intent to make possession of a controlled substance a strict-liability offense." State v. Morris, 331 N.W.2d 48, 57 (N.D. 1983) (emphasis supplied).
88. *Rippley*, 319 N.W.2d at 133.

noting the absence of a *mens rea* requirement in section 19-03.1-23(3).[89] In doing so, the court rejected the committee's original design and expressly refused to apply the culpability requirement set forth in section 12.1-02-02 of the Code to other parts of the Code.[90] Consequently, the court deemed North Dakota's possession statute a strict liability offense.[91] By judicially construing the

89. See *supra* note 78 (emphasis in original). Section 12.1-02-02 provided (and still provides):

1. For the purposes of this title, a person engages in conduct:
   a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so.
   b. "Knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.
   c. "Recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 12.1-04-02, awareness of the risk is not required where its absence is due to self-induced intoxication.
   d. "Negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.
   e. "Willfully" if he engages in the conduct intentionally, knowingly, or recklessly.
2. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.
3. a. Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, except that where the required culpability is "intentionally", the culpability required as to an attendant circumstance is "knowingly".
   b. Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to the result.
   c. Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for grading.
   d. Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in chapters 12.1-01 through 12.1-06; otherwise the least kind of culpability required for the offense is required with respect to such facts.
   e. A factor as to which it is expressly stated that it must "in fact" exist is a factor for which culpability is not required.
4. Any lesser degree of required culpability is satisfied if the proven degree of culpability is higher.
5. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this title.

N.D. CENT. CODE § 12.1-02-02 (1985).

90. *See supra* note 78.

91. *Rippley*, 319 N.W.2d at 133. The court required no proof of guilty knowledge. *Id.* It stated:

> Whether or not § 19-03.1-23(1) is a strict liability offense is a question of legislative intent to be determined by the language of the . . . [statute] in connection with its manifest purpose and design.
>
> Our review of the legislative history of § 19-03.1-23 indicates that the

omission of any mention of criminal intent from the legislative enactment as a dispensing of it, the state was no longer required to prove that a defendant who was in the proximity of a controlled substance knew of its presence or its character.[92]

In *State v. Rippley*,[93] Rippley argued that the court's interpretation of the North Dakota possession statute as a strict liability statute violated the United States Constitution as well as the North Dakota Constitution because "it provide[d] for severe penalties which may be levied against the innocent or mistaken, as well as against conscious wrongdoers, and therefore . . . fail[ed] to give fair warning of criminality and permit[ted] excessive discretion in law enforcement."[94] Although not directly addressing the constitutional issue, the court stated that North Dakota's possession statute "by its express language, require[d] neither knowledge nor intent."[95] The court added that the state has the power to prohibit the doing of an act, such as possession of narcotics, which involved neither moral turpitude nor evil motive,[96] especially as to public welfare offenses, by not requiring a specific *mens rea* to sustain a finding of guilt.[97] In an effort to protect its citizenry, the regulation of such public welfare offenses has been found to fall directly

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> legislature intended the statute to contain no culpability requirement. Not only does subsection 1 contain no language requiring culpability but, also, in 1975 the legislature removed from § 19-03.1-23(3) the terms 'knowingly or intentionally.'
>
> The Uniform Controlled Substances Act is based on the Federal Controlled Substances Act, 21 U.S.C. § 801 et seq. The federal counterpart to § 19-03.1-23, NDCC, is 21 USC § 841, which contains a culpability requirement of 'knowingly or intentionally.' This culpability language is absent in the Uniform Act and in its North Dakota adaptation.
>
> We conclude, therefore, that § 19-03.1-23(1) [and 19-03.1-23(3)] defines a strict liability offense . . . .

Id. (citations omitted).

See State v. Coutts, 364 N.W.2d 88 (N.D. 1985). The North Dakota Supreme Court has, on occasion, readily interpreted the legislative intent to apply crimes set forth in title 12.1, the North Dakota Criminal Code, to the Uniform Controlled Substances Act set forth in chapter 19 of the Century Code. *Id.* It should be noted, however, that *Coutts* involved a conspiracy charge and that specific language in the chapter provided for it to apply outside the chapter. *Id.* at 91.

92. *See* State v. Rippley, 319 N.W.2d 129 (N.D. 1982).

93. 319 N.W.2d 129 (N.D. 1982).

94. State v. Rippley, 319 N.W.2d 129, 134 (N.D. 1982).

95. *Id.* at 133. The court did not directly address the statute's constitutionality because it held that Rippley could only challenge the statute as it applied to him. *Id.* at 134. Rippley did not contend that he mistakenly possessed the contraband. *Id.* He therefore lacked standing to make such a constitutional objection. *Id.*

96. *Id.* at 131, 132 (citing State v. McDowell, 312 N.W.2d 301, 306 (N.D. 1981)). Courts in various jurisdictions have traditionally employed alternative terminology to connotate the requisite *mens rea* requirement which personifies an "evil purpose or mental culpability." Morissette v. United States, 342 U.S. 246, 252 (1952).

97. *Rippley*, 319 N.W.2d at 133. The court stated:

> We find it difficult to conceive of any offense which so adversely affects public welfare and interest as the wrongful sale of narcotic drugs. This unquestionably justifies a State, in the exercise of its police power, to prohibit [the possession]

within the state's police power.[98] The existence of a general risk to the community due to the presence of narcotics therein provides the underlying basis for the imposition of strict liability for

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thereof, . . . and to place on all persons the responsibility to see that they do not [possess] drugs unlawfully.

Id. at 133 (quoting State v. Page, 395 S.W.2d 146, 149 (Mo. 1965)). *See* State v. Napolis, 436 S.W.2d 645, 647 (Mo. 1969) (approving the same language). The state, in pursuance of public policy, may enact strict liability crimes. *See* Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69-70 (1910). "[S]uch legislation may, in particular instances, be harsh, but we can only say again what we have so often said, that this court cannot set aside legislation because it is harsh." *Id.* at 70. *See also* United States v. Balint, 258 U.S. 250 (1922). Many instances of strict liability statutes "are to be found in regulatory measures in the exercise of what is called police power where the emphasis of the statute is evidently upon [the] achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*." *Id.* at 252; Coates v. Commonwealth, 469 S.W.2d 346, 347 (Ky. 1971) (holding that a statute which prohibits the possession of a drug did not violate any constitutional guarantee simply because it did not require criminal intent or knowledge). *But see* Dennis v. United States, 341 U.S. 494, 500 (1951) ("The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."); Morissette v. United States, 342 U.S 246 (1952). The court in *Morissette* stated:

> The 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. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'

Id. at 250-51. Intent is generally an indispensable part of a criminal offense. State v. Brown, 389 So. 2d 48, 50 (La. 1980). The criminalization of the unknowing possession of narcotics not only offends the conscious, but cannot be made legal. *Id.*

It is generally more desirable to impose criminal liability upon those who are "morally blameworthy" for the offense of narcotics possession. King, *supra* note 5, at 711. "Arguments of authority, policy, and reason compel the conclusion that it is desirable to punish *only* those who knowingly and intentionally possess dangerous drugs and not to force individuals to act at their own peril." *Id.* (emphasis in original). The necessity for the existence of an appropriate *mens rea* requirement in a criminal statute such as narcotics possession furthers the overriding cornerstone of modern punishment—deterrence. *Id.* at 713. Commentators have stated:

> 'Our system does not interfere till harm has been done and has been proved to have been done with the appropriate *mens rea*. But the risk that is here taken is not taken for nothing. It is the price we pay for general recognition that a man's fate should depend upon his choice and this is to foster the prime social virtue of self-restraint.'

Id. at 714 (citations omitted). It is the common-law view that it is guilty knowledge or intent which makes a particular act criminal. *Id.* at 713. Without such knowledge or intent, the punishment of an individual for a particular act is "just plain unfair." *Id.*

98. McCrary v. State, 429 So. 2d 1121, 1125 (Ala. Crim. App. 1982), *cert. denied*, 464 U.S. 913 (1983). The Supreme Court of the United States has generally given much deference to the historical power of a state to enact strict liability offenses. State v. Buttrey, 651 P.2d 1075, 1081 (Or. 1982).

> The doctrines of *actus reus*, [and] *mens rea*, . . . have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical view of the nature of man. This process of adjustment has always been thought to be the province of the States.

Id. (citing Powell v. Texas, 392 U.S. 514, 536 (1968) (plurality opinion)).

narcotics possession.[99] Consequently, whether or not scienter is an element of an offense is a matter of legislative intent, and it is within the province of the judiciary to ascertain the manifest purpose of the statute.[100]

In *State v. Morris*,[101] the defendant was found guilty of narcotics possession when contraband was discovered in plain view in a van in which he and another individual were passengers.[102] The court readily acknowledged that possession could be actual or constructive.[103] Consequently, the state did not have to establish actual possession, as possession could be established by an affirmative showing that the defendant constructively possessed the substance.[104] The court further held that a showing of constructive possession did not require that the defendant have knowledge of the drug's presence or knowledge that the material he possessed was a controlled substance.[105] The court stated that constructive possession could be inferred from a "totality of the circumstances" and was deemed sufficient to sustain the conviction.[106] Evidence

99. David S. Caudill, Comment, *Probability Theory and Constructive Possession of Narcotics: On Finding that Winning Combination*, 17 HOUS. L. REV. 541, 545 n.40 (1980) (the risk of narcotics addiction is present even if the possessor has no criminal purpose). *See* State v. Buttrey, 651 P.2d 1075, 1077 (Or. 1982) (citing WAYNE R. LAFAVE AND AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW 218 (1972)) (stating that "[s]trict liability statutes have been passed because of the difficulty in proving intent, knowledge, recklessness or negligence, and because of a legislative perception that evil should be eradicated, even at the risk of convicting blameless defendants.").

100. United States v. Balint, 258 U.S. 250, 251-52 (1922).

101. 331 N.W.2d 48 (N.D. 1983).

102. State v. Morris, 331 N.W.2d 48, 54 (N.D. 1983). Upon a tip from an informant, police officers stopped a vehicle that fit the informant's description. *Id.* at 51. Looking inside, one of the officers saw a marijuana cigarette and a plastic bag containing additional marijuana. *Id.* A further search of the vehicle revealed a large quantity of marijuana. *Id.* The contraband was located behind a console and between two seats. *Id.*

103. *Id.* at 53.

104. *Id.* Distinguishing actual possession from constructive possession, the *Morris* court stated that a party is deemed to have actual possession of a controlled substance if it was found on his person. *Id.* Constructive possession is shown by evidence establishing an accused's power and capability to exercise dominion and control over the contraband. *Id.*

105. *Id.* at 54. It should be noted that the trial court in *Morris* essentially required the state to prove beyond a reasonable doubt that Morris knowingly possessed the contraband by including the knowledge requirement in its instruction to the jury. *See id.* at 57. A later decision by the North Dakota Supreme Court has indicated that the instruction given in *Morris* placed a greater burden of proof on the state than what the statutes required. *See* State v. Michlitsch, 438 N.W.2d 175, 177 (N.D. 1989).

106. *Morris*, 331 N.W.2d at 54. Factors giving rise to an inference of possession in *Morris* were his "presence in the place where a controlled substance is found, his proximity to the place where it is found, and the fact that the controlled substance is found in plain view." *Id.* (citations omitted). The factors enumerated in *Morris* are not an all-inclusive list. State v. Dymowski, 458 N.W.2d 490, 500 (N.D. 1990). *See also* United States v. Knox, 888 F.2d 585, 587 (8th Cir. 1989) (supporting the "totality of the circumstances" test); People v. Pittman, 575 N.E.2d 967, 970 (Ill. App. Ct. 1991) (finding the totality of the circumstances to indicate that the accused constructively possessed the narcotics); Commonwealth v. Aviles, No. 1650, 1991 WL 285792, at *3 (Pa. Super. Ct. 1992) (*reargument granted* (Mar. 12, 1992)) (holding that "constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not.").

of constructive possession is that which establishes an accused's power and capability to exercise dominion and control over the contraband.[107] Dominion and control is established where the evidence supports the conclusion that the defendant has the right or ability "to control, in a realistic and practical sense, the area where, or the container in which, the contraband is found."[108] Despite the fact that the conviction was based entirely upon circumstantial evidence, the court held that the defendant's proximity[109] to the place the substance was found, his mere presence, and the fact that the controlled substance was in plain view, were evidentiary factors which supported the inference of possession.[110]

State v. Michlitsch[111] marked the beginning of a retreat from a rigid adherence to the *Rippley* and *Morris* strict liability standard for possession of controlled substances. The court in *Michlitsch* held that the defendant could claim lack of knowledge as an affirmative defense to a charge of possession of a controlled substance.[112] In *Michlitsch*, the defendant was a tenant of a trailer but was not present when law enforcement officials arrived and arrested Ronald Zuraff, who was in a bedroom where two cake pans containing several bags of marijuana were found.[113] Zuraff, who did not reside in the trailer, often spent the night and stored some clothing and other personal effects there.[114] Zuraff pled guilty to the charges against him and testified that the contraband was owned solely by him and that the defendant had no knowl-

107. State v. Morris, 331 N.W.2d 48, 53 (N.D. 1983).

108. *Id.* at 54.

109. *See* State v. Mathews, 484 P.2d 942, 943 (Wash. Ct. App. 1971). Although not necessarily dispositive, a number of courts focusing more narrowly on the control element of constructive possession have held that the accused's proximity to the contraband (proximity test) constitutes a factor for determining the existence of possession. *Id. See also* Duran v. People, 360 P.2d 132, 133 (Colo. 1961) (where the contraband was in easy reach of defendant, it was enough to find that it was under his dominion and control, even though it was concealed and he did not own the vehicle or the purse in which the contraband was discovered); State v. Dodd, 137 N.W.2d 465, 468 (Wis. 1965). It is not compulsory to have actual physical possession in order to sustain a conviction for possession. *Id.* It suffices if the defendant has constructive possession or is "within such juxtaposition" to the contraband as to justify a finding of possession. *Id. But see* Moffatt v. State, 583 So. 2d 779, 781 (Fla. Dist. Ct. App. 1991) (holding that mere proximity by itself is not enough to sustain a conviction); Cunningham v. State, 583 So. 2d 960, 962 (Miss. 1991) (holding that proximity alone is an inadequate basis to infer that the accused was in a position to exercise dominion and control over the particular substance).

110. State v. Morris, 331 N.W.2d 48, 55 (N.D. 1983). *See also* State v. Connery, 441 N.W.2d 651, 655 (N.D. 1989) (holding that possession, actual or constructive, can be shown entirely by circumstantial evidence and reasonable inferences that may be drawn therefrom).

111. 438 N.W.2d 175 (N.D. 1989).

112. State v. Michlitsch, 438 N.W.2d 175, 178 (N.D. 1989).

113. *Id.* at 176.

114. *Id.*

edge of its presence.[115] The trial court refused to instruct the jury that it was an affirmative defense to the crime of possession and that the accused had no knowledge of the identity of the contraband or its presence, despite the defendant's request.[116]

On appeal, the North Dakota Supreme Court adhered to the conclusion set forth in *Rippley* and *Morris* that the North Dakota Legislature intended the possession statute to constitute a strict liability offense.[117] However, it acknowledged that it would be difficult to sustain such an interpretation of the statutory provision, without the inclusion of such an instruction, against a constitutional attack by an accused who possessed a controlled substance unwittingly.[118] The court recognized that the affirmative defense was a logical accommodation that acknowledged the rationale for the legislative designation of such crimes as strict liability offenses while recognizing the constitutional interests of an accused.[119] Consequently, reversible error was found and the case was

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115. *Id.*

116. *Id.* The instruction Michlitsch requested stated in part:

> It is an affirmative defense to the crime of possession . . . that the defendant (1) had no knowledge of the presence of the drug or (2) had no knowledge of the identity of the substance. If the accused can affirmatively establish she possessed the controlled substance unknowingly, then she will not be held to have unlawfully possessed the substance in violation of the law.

Id. As Michlitsch's primary defense was unwitting possession, the trial court's refusal to give an appropriate instruction was reversible error. *Id.* at 179. Despite the state's contention, the court held that such an instruction did not ' "completely ignore" ' the previous holdings enumerated in *Morris* and *Rippley*, which required no proof of knowledge with respect to neither the existence nor the nature of the prohibited substance. *Id.* at 176-77.

117. *Michlitsch*, 438 N.W.2d at 178.

118. *Id.* In reaching this conclusion, the court found persuasive the language set forth in State v. Cleppe, 635 P.2d 435 (Wash. 1981), *cert. denied*, 456 U.S. 1006 (1982) (Washington's possession statute is substantially identical with the former version of North Dakota's possession statute):

> That unwitting possession has been allowed as an affirmative defense in simple possession cases may seem anolamous. If guilty knowledge or intent to possess are not elements of a crime, of what avail is it for the defendant to prove his possession was unwitting? Such a provision ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance. If the defendant can affirmatively establish his 'possession' was unwitting, then he had no possession for which the law will convict. The burden of proof, however, is *on the defendant* . . . .

Michlitsch, 438 N.W.2d at 177-78 (quoting *Cleppe*, 635 P.2d at 439-440) (emphasis in original). *See* State v. Buttrey, 651 P.2d 1075, 1083 (Or. 1982) (noting that there is no constitutional bar to the creation of a criminal offense without culpable conduct, provided that an opportunity exists for an excuse or mitigating factor in the way of an affirmative defense). Although the North Dakota Supreme Court adopted the Washington affirmative defense scheme, there is a fundamental difference between the holdings in *Morris*, *Rippley*, and *Michlitsch* and those expressed by the courts in Washington. State v. Morris, 331 N.W.2d 48, 54 n.3 (N.D. 1983). Although both jurisdictions agreed that simple possession required no proof of knowledge, the Supreme Court of Washington requires an affirmative showing of knowledge by the state when the charge is either "delivery of a controlled substance" or "possession of a controlled substance with intent to deliver." *Id.*

119. *Michlitsch*, 438 N.W.2d at 178.

remanded to the trial court with the jury to be instructed on the affirmative defense.[120]

It was evident in *Michlitsch* that the North Dakota Supreme Court was concerned about the constitutionality of its previous interpretation of the state's possession statute, as set forth in *Rippley* and *Morris*.[121] The court in *Michlitsch* side-stepped striking down the problematic statute by asserting that unwitting possession was an affirmative defense to a possession of a controlled substance charge.[122] The availability of the "lack of knowledge" affirmative defense, which permitted the defendant to prove that his or her possession was unwitting, in essence relieved the state of an obligation to prove some degree of intent.[123] In providing for the affirmative defense, the North Dakota Supreme Court implied that the statute in its present version did not sufficiently safeguard the rights of an accused.[124] As such, the affirmative defense essentially became a bootstrap by which the state's burden of proving what should have been an essential element of the offense was alleviated.[125]

B. NEW LEGISLATION

The North Dakota Legislature, in an effort to more accurately convey its intention and remedy the judicial interpretation of the statute, amended and reenacted it.[126] The reenactment, which is

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120. *Id.* at 180.

121. *See id.* at 178.

122. *Id.* at 177-78. The state is not required to prove the nonexistence of the defense. *Id.* at 178. *See* State v. Rodriguez, 454 N.W.2d 726, 731 (N.D. 1990) (affirming the holding in *Michlitsch*, 438 N.W.2d 175).

123. *See generally Michlitsch*, 438 N.W.2d at 175.

124. *Id.*; *see also* Patterson v. New York, 432 U.S. 197 (1977). Although placing on the accused the burden of proving an exculpatory fact is not necessarily unconstitutional, the state may not shift onto the defendant the burden of proving the nonexistence of an essential ingredient of the offense charged. *Id.* at 203 n.9.

> The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Id. " 'For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance, or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge . . . .' " *Id.* at 203-04 n.9 (citations omitted).

125. *See generally Michlitsch*, 438 N.W.2d 175. Although adhering to the conclusion that the North Dakota Legislature did not intend knowledge to be an element of the offense, the court acknowledged the questionable constitutionality of the statutory provision. *Id.* at 178.

126. *See* 1989 N.D. Laws ch. 267 § 1.

the current reading of the statute, requires that possession of a controlled substance be shown to have been *willful* in order to sustain a conviction.[127] The effective date of the amendment was July 1, 1989.[128] Consequently, North Dakota's criminal possession of a controlled substance statute has been statutorily abrogated to the extent that it is no longer a strict liability offense.[129] The current statute explicitly mandates a *mens rea* requirement by requiring the state to prove culpability, rather than forcing a defendant to prove a lack thereof by way of an affirmative defense.[130] To date, the North Dakota Supreme Court has not had an opportunity to fully communicate the evidentiary requirements that it finds persuasive in light of the recent amendment.[131] How a North Dakota court will formulate its decision will largely depend upon the weight that it will give certain evidentiary requirements. Consequently, it becomes necessary to look to other jurisdictions which have similar statutory schemes and have addressed the matter.

IV. EVIDENTIARY REQUIREMENTS

There are a great number of evidentiary factors and circumstances from which a jury may infer possession.[132] Although some factors weigh more heavily than others, no single variable is generally determinative.[133] Each case arises as a unique combination of variables that juries are asked to evaluate when considering guilt.[134]

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127. *Id.*

128. State v. Rodriguez, 454 N.W.2d 726, 730 n.3 (N.D. 1990). The Legislature did not give retroactive effect to the statute; hence, those defendants charged prior to the July 1, 1989 amendment received the application of the former statute. *Id.* at 731 n.3.

129. *Id.* at 731.

130. *Id.* at 730-31 n.3.

131. *See generally Rodriguez*, 454 N.W.2d 726 (the last reported case directly addressing the issue of constructive possession of narcotics in North Dakota to date).

132. Caudill, *supra* note 99, at 542. Evidentiary factors include, but are not limited to: odor, refusal to give one's name to law enforcement, informant or co-defendant testimony, prior convictions, the defendant's arrival during the search, the contraband in plain view, the defendant's proximity to the substance, the proprietary interest in the substance or in the object where the contraband is found, the proprietary interest in belongings found near the contraband, the defendant's prior visits to the premises where the contraband is known to exist, the defendant's mail delivered to the premises, defendant admissions and res gestae statements, conflicting statements, fingerprints on the drug container, attempts to flee, the presence of the accused, the presence of other people, debris or evidence of use, needle marks if recent, convenience in accessibility, and suspicious moves or conduct. *Id.* at 557 n.116.

133. *See id.* at 556-67. *See also* State v. Kroening, No. 66,023, 1991 WL 270748, at *6 (Kan. Ct. App. Dec. 13, 1991) (holding that mere knowledge of an item's presence or mere physical control will not be enough to sustain a conviction).

134. Caudill, *supra* note 99, at 542. Evidentiary factors tending to establish an affirmative link between the accused and the prohibited item must be considered in

A. DOMINION AND CONTROL

It is not necessary to prove ownership of the contraband, in the sense of title, to establish constructive possession.[135] However, it is generally held that an individual has constructive possession over a controlled substance if it can be established that an accused has ownership, dominion and control over the contraband itself,[136] or dominion and control over the premises in which the contraband was discovered.[137] Control has been readily found where the defendant has, by way of legal authority or in a practical sense, maintained a possessory interest in the item where the contraband was discovered.[138]

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combination, as no one factor alone is decisive. *Id.* at 549 n.64. The infinite variation in factual situations prevents empirical studies of constructive possession and reliance on precedent from being of much utility. *Id.* at 548 n.62.

135. State v. Brown, 404 A.2d 1111, 1116 (N.J. 1979). The court found that an existence of ownership in conjunction with possession was not an essential component of a possessory crime, as one can knowingly control contraband without actually owning it. *Id.* *See* United States v. Dreyfus de Campos, 698 F.2d 227, 229 (5th Cir.), *cert. denied*, 461 U.S. 947 (1983) (stating that one who exercises dominion and control over a thing in which narcotics are concealed, may be deemed in possession of them); United States v. Horton, 488 F.2d 374, 381-82 (5th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) (holding that mere ownership did not constitute constructive possession where, although the accused owned the vehicle where the contraband was found, the attache case containing the narcotics did not belong to him nor did he did have the keys to his car on his person); United States v. Hutchinson, 488 F.2d 484, 488-89 (8th Cir. 1973), *cert. denied*, 417 U.S. 915 (1974) (finding that control over the premises where the narcotics are found is strong evidence in support of a finding of possession); Peachie v. State, 100 A.2d 1, 2 (Md. 1953) (inferring that actual ownership is not a mandatory requirement of constructive possession, although an evidentiary factor); Cunningham v. State, 583 So. 2d 960, 962 (Miss. 1991) (finding there to be a "presumption of constructive possession [which] arises against the owner of premises upon which [narcotics are] found.").

136. *See* United States v. Byfield, 928 F.2d 1163, 1166 (D.C. Cir. 1991) (holding that constructive possession is determined by whether an accused had dominion and control over a substance).

137. United States v. Townley, 942 F.2d 1324, 1325 (8th Cir. 1991). The accused's fingerprints on a package of cocaine was the only link connecting him to it. *Id.* The court held that, alone, such evidence was insufficient to support a finding of possession because in the absence of additional evidence, the circumstances were not indicative of a right to control the contraband. *Id.* at 1326-27. *See also* United States v. Tisdale, No. 90-3302, 1992 WL 56, at *2 (6th Cir. 1992) (defining constructive possession as the 'ownership, dominion or control' over an article or the premises where it is discovered); United States v. Temple 890 F.2d 1043, 1045 (8th Cir. 1989) (defining constructive possession as knowledge of presence plus control; both elements were established where the accused was seen removing an object, which later was determined to be crack cocaine, from his clothing and throwing it); United States v. Knox, 888 F.2d 585, 588 (8th Cir. 1989) (holding that constructive possession includes dominion and control over the premises where the controlled substance was discovered); State v. Woodruff, 288 N.W.2d 754, 756 (Neb. 1980) (holding that despite defendant's denial of knowledge, "constructive possession may be [shown] . . . by the accused's proximity to the substance at the time of the arrest or by a showing of ownership, dominion, and right of control . . . .").

138. *See* Borchardt v. United States, No. 82-1719, 725 F.2d 681 (5th Cir.), *cert. denied*, 469 U.S. 937 (1984) (renumbered No. 83-1643) (Brennan, J., and Marshall, J., dissenting). In an unreported opinion, the trial court in *Borchardt* convicted the defendant of possession where a plane containing large amounts of narcotics crashed. *Id.* at 938-39. The defendant was not on board at the time, but dominion and control was found to exist from evidence which showed that he loaded the plane. *Id.* at 942-43 n.5. The Fifth Circuit agreed, holding that the defendant's participation in the venture, *inter alia*, permitted the

It is not uncommon for constructive possession to be judicially interpreted even more broadly to include a right, a capacity, or an ability to reduce the substance to one's control.[139] Consequently, an accused need not be presently exercising his or her right to control the contraband at the time of arrest; it is enough that he or she could have done so.[140] In this light, nonfeasance can be the *actus reus* which gives rise to the imposition of criminal liability.[141] In other words, the forbidden act giving rise to a finding of possession is the failure of an accused to affirmatively act to terminate his or her ability to control the contraband.[142] Considering that the failure to affirmatively act to eliminate the circumstances which give rise to a finding of dominion and control, "it is obvious that to have constructive possession one must have some knowledge that the material is present."[143] Therefore, it becomes incumbent upon a judicial body to require a demonstrated showing of a "conscious right" to dominion and control as a prerequisite to a finding of guilt.[144]

Some jurisdictions require that in order to find that the accused "possessed," or had dominion and control over, the contraband in question, the control must be more than momentary.[145]

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inference of constructive possession. *Id.* *See also* United States v. Jones, 676 F.2d 327, 332 (8th Cir.), *cert. denied*, 459 U.S. 832 (1982) (having on his person the keys to the trunk where narcotics were later discovered constituted control of the substance located therein); United States v. Williams, 503 F.2d 50, 53 (6th Cir. 1974) (finding that claim check corresponding to luggage containing narcotics was deemed sufficient evidence of dominion and control over the contraband, even where the luggage was lost in transit).

139. United States v. Martinez, 588 F.2d 495, 498 (5th Cir. 1979) (possessing the key to the trunk of a vehicle and keys to containers holding narcotics found inside the trunk demonstrated that the accused knowingly had the power to exercise control over the contraband; therefore, the substance could readily be reduced to actual possession). *See* United States v. DiNovo, 523 F.2d 197, 201 (7th Cir. 1975) (holding that constructive possession exists where an accused is in a position to exercise dominion or control over the contraband); Stewart v. State, No. CA CR 91-118, 1991 WL 271059, at *1 (Ark. Ct. App. 1991) (implying constructive possession when the substance was found in a place where the accused had an immediate and exclusive access, thereby giving him a right to control it). *See also* BLACK'S LAW DICTIONARY 314 (6th ed. 1990) (defining constructive possession as the power and intent to control an item or as one who is in a position to exercise dominion and control over an item).

140. *See* King, *supra* note 5, at 692 n.11. Some commentators suggest that it is not required that an accused be able to control the contraband at the time of arrest in order to sustain a finding of possession; it being enough that he or she could have done so in the past. *Id.*

141. King, *supra* note 5, at 692.

142. *Id.*

143. Greely v. State, 301 N.E.2d 850, 852 (Ind. Ct. App. 1973).

144. Commonwealth v. Aviles, No. 1650, 1991 WL 285792, at *3 (Pa. Super. Ct. 1992) (defining constructive possession as "conscious dominion" and demonstrated by a showing that the accused had the power of control over an item coupled with an intent to exercise the same). *See* People v. Gory, 170 P.2d 433, 436 (Cal. 1946) (finding knowledge of the item's presence to be the essence of the offense of possession and requiring such knowledge to precede control).

145. *See* Reynolds v. State, 111 So. 285, 286 (Fla. 1926) (requiring a material and

This is probably a better approach because to hold to the contrary "could result in manifest injustice to admittedly innocent individuals."[146] The critical inquiry is whether a finder of fact, looking at the totality of the circumstances of a particular case, could conclude that a defendant had some appreciable ability in a readily discernible fashion to guide the destiny of the substance in question.[147]

B. KNOWLEDGE

A number of jurisdictions not only require the state to prove knowledge of the contraband's presence beyond a reasonable doubt, but also require proof that the defendant actually knew of its illicit character.[148] Such a position treats the two aspects of

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conscious possession, as distinguished from a mere superficial or involuntary possession); State v. Gorder, 811 P.2d 1291, 1292 (Mont. 1991) (defining possession as the knowing control of an item for a sufficient period of time); State v. Coca, 341 N.W.2d 606, 610 (Neb. 1983) (holding that "[t]o possess a narcotic drug means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature."); State v. Williams, 319 N.W.2d 748, 751 (Neb. 1982) (finding possession to mean "something more than momentary control"). *But see* People v. Sierra, 379 N.E.2d 196, 199 (N.Y. 1978) (holding that crimes of possession "include but make no allowance or exception for fleeting or momentary contact," thus the alleged "brief handling" of the substance in question was not a defense); Gillis v. Commonwealth, 208 S.E.2d 768, 771 (Va. 1974) (asserting that the duration of possession is immaterial as long as dominion and control is shown).

146. People v. Mijares, 491 P.2d 1115, 1119 (Cal. 1971) (en banc). The defendant in *Mijares* went to the assistance of a friend who had passed out and could not breathe. *Id.* at 1116. Before summoning aid, the defendant removed a package of narcotics from the friend's pocket and threw it into a field. *Id.* At trial, the jury found that the momentary grasp of the package by the defendant constituted possession of it by him. *Id.* at 1117. The court disagreed and held that when the circumstances are such that possession is merely a transitory handling, criminal prosecution for such a superficial possession was not warranted and indeed would be unfair. *Id.* at 1119-20.

147. United States v. Staten, 581 F.2d 878, 883 (D.C. Cir. 1978). The court found it unnecessary to establish that the contraband was discovered on the accused's person or within his immediate reach in order to sustain a finding of possession. *Id.* It was enough to show that he was in a position to exercise some measure of control over the contraband, be it directly or indirectly. *Id. See* Greer v. United States, 600 A.2d 1086, 1087 (D.C. 1991) (finding the defendant not to be in a position to exercise dominion and control over the contraband because she was not in a position to guide its destiny). *See also* United States v. Crippen, 459 F.2d 1387, 1388 (3d Cir. 1972) (deeming the defendant to be in constructive possession of the contraband despite the fact that another person actually handled the drugs and was arrested in another location, where it was shown that the defendant directed his activities).

148. *See, e.g.*, Moffatt v. State, 583 So. 2d 779, 781 (Fla. Dist. Ct. App. 1991) (holding that not only must the accused have knowledge of the contraband's presence, but knowledge of its illicit nature is also required); Martin v. State, 372 N.E.2d 1194, 1197 (Ind. Ct. App. 1978) (holding that "the evidence must establish knowledge of both the item's presence and of its forbidden character"); State v. Nicolosi, 81 So. 2d 771, 773 (La. 1955) (finding that there can be no possession in the legal sense without the ingredient of knowledge); State v. Florine, 226 N.W.2d 609, 610 (Minn. 1975) (holding that the state must prove that the accused consciously possessed the substance as well as proving that he had actual knowledge of its nature); Cunningham v. State, 583 So. 2d 960, 962 (Miss. 1991) (stating that the burden is upon the prosecution to establish that the accused had knowledge of the substance's criminal nature); State v. Gorder, 811 P.2d 1291, 1292-93 (Mont. 1991) (opining that both knowledge of the item's presence and it's forbidden character must be shown); State v. Giddings, 352 P.2d 1003, 1009 (N.M. 1960) (concluding

knowledge as inseparable components of the same requirement.[149] In those jurisdictions, the state must establish that the accused consciously possessed and had actual knowledge of the nature of the contraband.[150] The requisite knowledge—with respect to both an item's presence and its illicit nature—which is sufficient to sustain a conviction can be inferred entirely from circumstantial evidence, such as the declarations, acts, or conduct of the accused[151] and has readily been inferred from proof of possession.[152] Such an inference creates a presumption that an accused is fully cognizant of the presence and nature of the contraband.[153]

Although a definitive showing of both elements is essential in most jurisdictions in order to sustain a finding of constructive possession, there exists a conflict of authority among the remaining states as to whether an accused must have knowledge of both the presence of the substance and its criminal nature.[154] The small number of jurisdictions requiring no such showing of knowledge in narcotics cases[155] have either promulgated statutes that are in

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that actual knowledge of presence and character must be proven in order to sustain a conviction); People v. Cullen, 405 N.E.2d 1021, 1025 (N.Y. 1980) (requiring that knowledge of the contraband and possession occur at the same time). *But see* United States v. Berick, 710 F.2d 1035, 1040 (5th Cir.), *cert. denied*, 464 U.S. 918 (1983) (holding that an accused need not know the exact nature of the contraband in order to be convicted of possession).

149. King, *supra* note 5, at 695.

150. Commissioner of Revenue v. Fort, 479 N.W.2d 43, 46 (Minn. 1992). *Fort* was a case in which constructive possession of narcotics was considered for the purposes of assessing tax liability. *Id.* at 43. However, a comparison and contrast of criminal liability was also made. *Id.* at 46-47.

151. *See* United States v. Wainwright, 921 F.2d 833, 836 (8th Cir. 1990) (stating that constructive possession need not be proved by direct evidence, but rather can be sufficiently premised upon wholly circumstantial evidence); State v. Connery, 441 N.W.2d 651, 655 (N.D. 1989) (utilizing similar language); State v. Larson, 274 N.W.2d 884, 885 (N.D. 1979) (holding that evidence that supports a finding of possession can be entirely circumstantial); Commonwealth v. Caterino, No. 91-P-605, 1991 WL 272383, at *2 (Mass. Ct. App. 1991) (stating that constructive possession can be established by circumstantial evidence and by inferences that may be drawn from such evidence). *See also* Martin v. State, 372 N.E.2d 1194, 1198-99 (Ind. Ct. App. 1978) (finding that conduct of the accused, such as running down a hallway to the bathroom and running the water in the sink, was admissible to show knowledge); State v. Maldonado, 322 N.W.2d 349, 353 (Minn. 1982) (narcotics were found in a truck driven and owned by the accused who fled upon approach by the authorities).

152. *See* Feltes v. People, 498 P.2d 1128, 1131 (Colo. 1972) (where the court readily determined that knowledge of the drug's character could be inferred from proof of possession).

153. King, *supra* note 5, at 696. It should be noted that great care should be taken to refrain from equating mere proximity to a substance found somewhere other than on the defendant's person with knowledge. *Id.* at 696-97. Consequently, there must be a distinct proof of knowledge which is independent from a proof of proximity in such circumstances. *Id.* at 706.

154. Whitebread & Stevens, *supra* note 5, at 753 n.4. Those jurisdictions which are in agreement that knowledge is a requisite element of the offense may differ on the issue of the extent of knowledge that is required. *Id.*

155. *See, e.g.*, State v. Edwards, 514 P.2d 192 (Wash. Ct. App. 1973). The court in *Edwards* held that "[t]here is no element of guilty knowledge or intent in the charge of possession of narcotics." *Id.* at 193.

essence strict liability, similar to that which North Dakota maintained prior to the 1989 abrogation, or do not require an accused to have knowledge with respect to both the presence and character of the contraband.[156] The latter view is an untenable position under North Dakota's possession statute, as logic and reason dictate that an accused could not "willfully" possess a drug unless he or she knows the substance is a narcotic.[157]

V. JOINT POSSESSION

Although the crime of possession is, by its nature, unique to the individual, it is universally held that possession also may be joint.[158] Therefore, the state is not required to prove that the contraband was in the exclusive possession of an accused.[159] Where such possession becomes most problematic is when the contraband is found in an area of joint control or equal access.[160] Reconciling the "ability to control" test with situations in which innocents whose " 'crime' is merely being in the wrong place at the wrong time" calls for the most exacting scrutiny.[161] In these situations,

156. *See, e.g.*, State v. Adame, 785 P.2d 1144 (Wash. Ct. App. 1990). Despite defendant's contention that knowledge was a necessary element of dominion and control, the court held that the state may prove possession of a controlled substance without regard to whether the accused actually knew of the presence or the identity of the substance. *Id.* at 1146-47. In Washington, as was the case under North Dakota's previous strict liability statute, the defendant who raises the affirmative defense has the burden of proving unwitting possession. *Id.* The prosecution was only required to prove the fact of possession and that the substance possessed was forbidden by statute. *Id.* at 1146.

157. King, *supra* note 5, at 695 n.25. See *supra* note 85 for the definition of "willfully" as set forth in section 12.1-02-02 of the North Dakota Century Code. An approach in which "willful" possession is inferred from circumstances where the requisite knowledge is only that of the physical object itself without regard to its particular nature, can conceivably lead to absurd results. *See* Commonwealth v. Lee, 117 N.E.2d 830, 831-32 (Mass. 1954) (affirming a conviction of possession of narcotics where the defendant received an unopened package in the mail which was later, upon opening at the direction of police officers, found to contain narcotics). *But see infra* note 171 (noting an arguably diminished requirement of knowledge stemming from the statutory definition of "willfully").

158. Delgado v. United States, 327 F.2d 641, 642 (9th Cir. 1964). "It is fundamental to our system of criminal law that guilt is individual." *Id.*

159. *See* People v. Hamilton, 35 Cal. Rptr. 812, 813 (1963). The fact that one individual was found to be guilty of possession does not preclude a finding that another defendant was also in possession of the same narcotic. *Id.* Stated differently, possession does not have to be exclusive in any single individual. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 3.2, at 201 (2d ed. 1986). *See also* State v. Brown, 404 A.2d 1111, 1116 (N.J. 1979) (finding that equal criminal responsibility exists when joint possession of an item can be demonstrated); State v. Morris, 331 N.W.2d 48, 53 (N.D. 1983) (two defendants were found guilty of possessing the same contraband); State v. Larson, 274 N.W.2d 884, 885 (N.D. 1979) (despite the fact that another testified that he, rather than the defendant, was in the exclusive possession of the contraband, defendant's conviction was sustained).

160. *See* Moffatt v. State, 583 So. 2d 779, 780 (Fla. Dist. Ct. App. 1991). The *Moffatt* court held that in the area of joint control, an ability to control the contraband will not be inferred; it must be established by independent proof other than an accused's mere proximity to it. *Id.*

161. King, *supra* note 5, at 697. One commentator cautioned that "[w]hen the accused is only one of many with access to the place where the drugs are found, the technique of

mere proof that an accused was present where the contraband was found or mere association with a person who has dominion and control over the contraband, or the property where it is discovered, is generally an insufficient basis to sustain a conviction for possession.[162]

Additionally, where others have an equal access to an area where contraband is discovered, evidence of the accused's mere opportunity to control the contraband will not be enough to support a finding of guilt.[163] Nor will a defendant's mere acquiescence to the presence of contraband be a sufficient basis to say that he or she possessed it, thus making it contraband as to him or her.[164] In order to sustain a conviction, it is imperative that there be some nexus or identifiable link beyond mere accessibility to the

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transforming proximity to the drugs into the crime of 'possession' of those drugs seems dangerous indeed." *Id.* at 699.

162. *See* United States v. Johnson, 952 F.2d 1407, 1411-12 (D.C. Cir. 1992). The court in *Johnson* asserted that "constructive possession should not be lightly imputed to one found in another's apartment or home." *Id.* at 1411. Under such circumstances, a heightened judicial solicitude is appropriate because mere proximity to a contraband or association with an individual possessing an illegal substance will not satisfy the requirements of constructive possession. *Id.* at 1412. *See also* Parker v. United States, 601 A.2d 45, 51 (D.C. 1991) (holding that although mere proximity to an illegal substance does not prove knowledge plus dominion and control, where the "proximity 'is colored by evidence linking the accused to an ongoing criminal operation of which that possession is a part,' " the circumstances might very well give rise to an inference sufficient to sustain a finding of possession); United States v. Di Novo, 523 F.2d 197, 201-02 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975) (stating that even if she knew of her husband's possession of the contraband found in their trailer, this was not deemed to be the type of "special relationship" necessary to lead a fact finder to conclude that she also possessed it); People v. Fusaro, 96 Cal. Rptr. 368, 377 (1971), *cert. denied*, 407 U.S. 912 (1972) (holding that mere access or proximity to the contraband was not enough to constitute possession); State v. Nesmith, 600 A.2d 780 (Conn. 1991) (Berdon, J., dissenting). Additional incriminating circumstances "tending to buttress such an inference" of knowledge and control must be demonstrated. *Id.* at 787. Mere presence in an area where the contraband is discovered, although an evidentiary factor, is insufficient when the accused is not in the exclusive possession of the premises. *Id.* Commonwealth v. Harris, 397 A.2d 424, 429 (Pa. Super. Ct. 1979) ("[p]roving guilt by association is unacceptable."); State v. Olivarez, 820 P.2d 66, 67 (Wash. Ct. App. 1991) (having dominion and control over a location where drugs are found is but one of the circumstances from which an inference of constructive possession may be drawn). *But see* People v. Valenzuela, 345 P.2d 270 (Cal. Dist. Ct. App. 1959). It should be noted, however, that the fact that others may have an equal right of access to the contraband, does not necessarily negate the finding of joint possession. *Id.* at 272.

163. Commonwealth v. Aviles, No. 1650, 1991 WL 285792, at *3 (Pa. Super. Ct. Jan. 13, 1992). The issue in *Aviles* was whether possession was sufficiently established by virtue of an affirmative showing that the appellant was the primary tenant of a house, because she was present at the time of the police search and because the rooms in which the narcotics were discovered were unlocked. *Id.* at *2.

164. City of Wahpeton v. Wilkie, 477 N.W.2d 215, 217 (N.D. 1991). Wilkie appealed from a conviction of possession of alcohol by a minor. *Id.* at 216. On the evening leading up to his arrest, Wilkie's roommate, Kessler, was having a party in the apartment shared by both of them. *Id.* Invited guests at the party were consuming alcoholic beverages. *Id.* Wilkie was absent at the time, but arrived at approximately 9:15 p.m. to find the on-going party. *Id.* He complained to his roommate about the party, and 15 minutes later left the apartment. *Id.* The party was still in force when Wilkie returned at approximately 2:30 a.m. *Id.* After again complaining to Kessler about the party, Wilkie went to his bedroom.

drugs between a defendant and the contraband, thus making it fair to sufficiently associate the defendant with it.[165] Hence, in situations where possession is nonexclusive, there must be some additional independent evidence present to buttress the inference of knowing possession, thereby distinguishing the conscious possessor from the inadvertent guest.[166]

To sustain a conviction, an affirmative link must be established between the defendant and the controlled substance—not merely a link to the area where the prohibited substance was found.[167] That link must be established by independent facts and circumstances from which a jury may infer that the accused exercised control.[168] This means that in a situation where joint possession is contemplated, there must be sufficiently independent evidence to support a finding of possession as to each defendant.[169] Absent such additional and independent proof, narcotics possession becomes either a crime of strict liability or a diminished burden of proof for the state.[170]

Id. A short time later, the police arrived to discover minors present. *Id.* Wilkie was subsequently arrested for possession. *Id.*

The city contended that the element of dominion and control was established by virtue of the fact that Wilkie was a co-renter. *Wilkie*, 477 N.W.2d at 217. The court held that Wilkie was not in constructive possession of the alcohol merely because he was present in his own apartment. *Id.* Constructive possession may not be established by mere presence in a location or proximity to an illegal substance without an additional link between the defendant and the alcohol. *Id.* The court added that even if the defendant acquiesced to the consumption of alcohol by others, this fact did not provide an inference of an intent to possess or an exercise of control over the alcohol. *Id.* at 218.

165. *See* United States v. Caspers, 736 F.2d 1246, 1249 (8th Cir. 1984) (requiring independent proof making it fair to connect the defendant to the contraband); Bailey v. State, 821 S.W.2d 28, 30 (Ark. 1991) (holding that joint occupancy of a residence alone is not enough to establish joint possession; there must be an additional factor linking the accused to the drugs); Petty v. People, 447 P.2d 217, 220 (Colo. 1968) (concluding that a conviction of joint possession of marijuana cannot be sustained by a mere showing that the defendant had been in the company of one having actual possession of the substance, without an additional, independent link connecting it to him); Pier v. State, 400 N.E.2d 209, 211-12 (Ind. Ct. App. 1980) (although an accused's presence in the area where narcotics are discovered tends to establish that he or she has the capability of exercising dominion and control over the substance, it cannot be inferred therefrom that there was knowledge of its presence and control over the drugs, absent additional incriminating evidence).

166. *See* United States v. Holland, 445 F.2d 701 (D.C. Cir. 1971). Although the accused knew about the presence of the narcotics, and even though narcotics were used in the presence of the defendant, more is required before it can be said that the defendant possessed the substance himself. *Id.* at 703.

167. *Id.* at 703. Appellant was jointly indicted after he was found undressed in a bedroom where narcotics were discovered. *Id.* at 702. When asked to get dressed, he removed clothing from a dresser in the bedroom, suggesting more than a fortuitous visit to the home. *Id.* The court stated that constructive possession will not be lightly imputed to one merely found in another's apartment or home. *Id.* at 703.

168. *Id.* at 703.

169. Delgado v. United States, 327 F.2d 641, 642 (9th Cir. 1964). Even where there is no doubt that at least one of two defendants, and perhaps both, possessed the drug, pure speculation as to whether the possession was joint will not suffice. *Id.*

170. *See generally* King, *supra* note 5, at 711.

VI. CONCLUSION

A conviction for possession of controlled substances in North Dakota may be founded upon either actual or constructive possession. Either can be proven by direct or circumstantial evidence. Actual possession, the literal, physical control of an item, poses little difficulty. Constructive possession, a legal fiction used by courts to impose criminal liability in situations where there is no actual possession, continues to be the subject of much debate and confusion. The hallmark of constructive possession is an evidentiary showing by the state that the accused had some measure of dominion and control over the contraband. This measure of dominion and control can be present in the right or ability to exercise the same. It is crucial to recognize that elements of dominion and control alone cannot establish guilt in North Dakota. Logic and justice mandate that the state establish the existence of some degree of knowledge contemporaneously with the elements of dominion and control.

The analysis under the constructive possession doctrine is necessarily fact-driven. As no one evidentiary factor standing alone is conclusively demonstrative, it must be inferred from the totality of circumstances of a particular case.

Joint constructive possession may be found when illegal narcotics are discovered in an area of equal access. Hence, joint criminal liability can be imposed even if the evidence calls for a conclusion whereby the accused are said to have possessed the same item simultaneously. The analysis in cases in which joint possession is at issue mandates the most exacting scrutiny. Absent other incriminating evidence, possession cannot be established by virtue of the fact that the defendant has been in the company of one who has a narcotic on his or her person or is present in an area where narcotics are found. Independent evidence that links each defendant to the contraband must be presented in order to sustain a conviction for joint possession.

As North Dakota's criminal possession statute has been recently amended to include the *mens rea* requirement of "willfully," it is a foregone conclusion that some degree of knowledge must now be proven by the prosecution as an independent element of the offense.[171] The defendant in a criminal proceeding

171. A caveat of significant import should be noted. It is at least arguable that the North Dakota Legislature has still not completely solved the *mens rea* dilemma of the troublesome possession statute. The 1989 reenactment of section 19-03.1-23, which amended the possession statute by inserting the *mens rea* requirement of "willfully," is

will no longer be required to bear the burden of providing lack of knowledge, or unwitting possession, as an affirmative defense to escape the imposition of a criminal sentence. North Dakota courts have not yet had an opportunity to articulate the exact extent of knowledge which must be proven as a prerequisite to a finding of guilt. The majority view requires independent proof that an accused have knowledge of *both* the contraband's presence and its forbidden nature in order to sustain a conviction. This is the better approach because it not only safeguards the *mens rea* requirement as an element of the offense, which logic and policy require, but provides a rational and just basis for the imposition of criminal liability.[172]

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itself conceptually problematic. The source of the potential problem emanates from the statutory definition of "willfully." The North Dakota Century Code defines "willfully" as that conduct which is intentional, knowing, or reckless. *See* N.D. CENT. CODE § 12.1-02-02(1)(e) (1985).

The requirement that the state prove the act of possession was *knowing* or *intentional*, mandates a detailed examination into whether an accused actually exercised, or had a right to exercise, a *conscious* dominion and control over that substance which the law proscribes. However, within the context of possession of controlled substances in North Dakota, a conviction for possession may be obtained on a conceivably diminished requirement of knowledge in that conduct which is merely *reckless* may readily serve the basis for the imposition of criminal liability. Reckless conduct has been defined as a "conscious . . . disregard . . . of the existence of the relevant facts or risks, . . ." so as to be "a gross deviation from acceptable standards of conduct. . . ." N.D. CENT. CODE § 12.1-02-02(1)(c) (1985). Although some degree of knowledge is a necessary element of recklessness, one need only be aware that his or her conduct *might* cause a certain result. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 3.7(f), at 239 (2d ed. 1986). Hence, while the culpability of "knowingly" and "intentionally," as set forth in section 12.1-02-02, "require a consciousness of almost-certainty, recklessness requires a consciousness of something far less than certainty or even probability." *Id.* at 239-40.

It seems doubtful that the North Dakota Legislature envisioned or intended a result which permitted the imposition of criminal sanctions for the possession of controlled substances absent a culpability requirement which evinces a conscious-knowing possession. The North Dakota Legislature should amend section 19-03.1-23, thereby returning to its original promulgation of the Uniform Controlled Substances Act, by deleting the *mens rea* requirement of "willfully" and substituting the requirements of "knowingly" and "intentionally." In addition to preserving the knowledge requirement as an independent element of the offense, proof of *knowing* and *intentional* possession will operate as a realistic check on the obscure doctrine of contructive possession. *See generally* King, *supra* note 5, at 715.

172. *See generally* King, *supra* note 5, at 715.