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COMMENT

BACK TO REALITY: WHAT “KNOWINGLY” REALLY MEANS AND THE INHERENTLY SUBJECTIVE NATURE OF THE MENTAL STATE REQUIREMENT IN ENVIRONMENTAL CRIMINAL LAW.

The president of the company knows all of the facts surrounding the repeated dumping of hazardous chemicals generated by his business, but he has seldom actually done the dumping himself. He approaches one of his supervisors, and tells him, “we are going to need the truck tomorrow to pick up another load” of hazardous waste so the truck had better be empty. The supervisor tells him that there was no room left in their storage tanks and no drums to pump the material into. When the supervisor asks him what to do with the truckload of waste already inside the truck, the president, says “this is a job that I hired you for, you handle it.” Immediately after his conversation with the president, the supervisor pumped the truck’s contents, hazardous solvents, directly onto the ground.¹

INTRODUCTION

This Comment evaluates the interpretation of mens rea² requirements in contemporary federal environmental criminal law³. Part I explores the subjective meaning of the “knowingly” mens rea and compares its “traditional” definition to that in an environmental context. Part II examines the distinction between a “knowingly” mens rea and the absence of subjectivity as embodied in a strict liability standard. Part III addresses arguments of some courts and commentators who argue that environmental laws are ambiguous and therefore the Rule of Lenity should be applied. Part IV defends the propriety of felony level penalties for violations of environmental laws. Finally, Part V evaluates alternatives to direct evidence by implying knowledge of relevant facts via the Willful Blindness and Responsible Corporate Officer Doctrines.

I. KNOWINGLY –WHAT DOES IT MEAN?

As the Supreme Court noted in *Morrisette*:

“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.”⁴

In a free society, we govern behavior of individuals through criminal sanctions. As our system has evolved over time, we have developed distinctions among mental states in order to punish behavior according to its culpability.⁵ Pursuant to these goals, Congress has enacted massive regulatory programs that use criminal sanctions to protect the public and the environment against the ‘ills of the industrial revolution,’ like unsafe products and environmental pollution.⁶ In order to achieve such goals, Congress provided for criminal sanctions for more egregious derelictions from the law, like those punished in the Resource Conservation and Recovery Act.⁷

As a general proposition, ignorance of the law is not an excuse.⁸ This notion is based on the common law presumption that the law is definite and knowable.⁹ The Supreme Court in *Lambert v. California* stated that:

“The rule “ignorance of the law will not excuse” ... is deep in our law, as is the principle that of all the

¹ The above fact pattern is based upon *U.S. v. Greer*, 850 F.2d 1447, 1451 (11th Cir. 1988)

² Blacks Law Dictionary defines mens rea, “[a]n element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent.” Black’s Law Dictionary 985 (6th ed. 1990).

³ The primary laws reviewed in this Comment are: Resource Recovery and Recovery Act §§ 6901-6992k, 42 U.S.C. 1002 (1986); Clean Water Act §§ 1251-1387, 33 U.S.C. 101 (1987); Clean Air Act §§ 7401-7671q, 42 U.S.C. 101 (1990).

⁴ *Staples v. U.S.*, 511 U.S. 600, 606, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) quoting *Morrisette*, 342 U.S. at 250.

⁵ *Staples*, 511 U.S. at 605; LaFave et al., *Criminal Law* § 3.5 (West 2d Ed. 1986).

⁶ *Morrisette*, 342 U.S. at 253-54.

⁷ *U.S. v. Johnson & Towers, Inc.*, 741 F.2d 662, 666 (3d Cir. 1984).

⁸ LaFave et al., *Criminal Law*, §5.1 at 407 (West 2d Ed. 1986)

⁹ *Cheek v. U.S.*, 498 U.S. 192, 199, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991).

powers of local government, the police power is “one of the least limitable.” ... On the other hand, Due Process places some limits on its exercise. Ingrained in our concept of Due Process is the requirement of notice.”¹⁰

In *Lambert*, the Supreme Court considers an ordinance that required “convicted criminals” to register with the Police when they came to town.¹¹ The court invalidated the ordinance because where there was “no proof of probability of such knowledge, a person may not be convicted consistently with Due Process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.”¹² As a society, we charge all people with constructive knowledge of our laws, but where criminal sanctions are involved, due process demands proper notice.

Congress deals with the issue of notice by requiring a “willfully” mens rea to be used for certain crimes that are of a technical and complicated nature. In heightening the level of culpability to be convicted of a crime, Congress and the Courts require proof of some “wrongful purpose.”¹³ While acknowledging that the term ‘willfully’ means different things in different contexts, the *Ratslaf* Court quotes *Liparota* that:

“On occasion, criminal statutes – including some requiring proof of ‘willfulness’ – have been understood to require proof of an intentional violation of a known legal duty, i. e., specific knowledge by the defendant that his conduct is unlawful. But where that construction has been adopted, it has been invoked only to ensure that the defendant acted with a wrongful purpose.”¹⁴

The Courts and Congress use this standard to protect against criminalizing “otherwise innocent conduct.”¹⁵

In the criminal tax evasion context, the Supreme Court in *Cheek* found that a “willfully” standard was appropriate when the defendant was not aware of the specific code section that made his conduct illegal.¹⁶ The Court noted that there is a traditional exception in the tax fraud context to a lower mens rea because of the complexity of the Internal Revenue Code.¹⁷ While conceivably a broadly applicable concept, Federal courts since *Cheek* decline to extend this idea beyond tax fraud crimes.¹⁸

In a recent article, Joshua D. Yount argues that since environmental legislation and the regulations that interpret them are so incredibly complex, courts should apply a standard similar to ‘willfulness’ in the environmental criminal context.¹⁹ Yount points out that:

“Many important provisions are buried in mountains of regulations. Furthermore, many of the requirements are published in memos, preambles, and other informal publications, a practice that subverts the notice and comment process and creates an “underground environmental law.” Interpreting such a morass of overlapping and occasionally conflicting statutes, regulations, and policy statements asks too much in the criminal context.”²⁰

While conceptually and superficially attractive, there is no reason to extend *Cheek* to environmental crimes. First, requiring heightened mens rea requirements would clearly undermine the Congressional purpose stated in the express language in recent amendments to environmental legislation.²¹ Second, Federal courts have already held that such an

¹⁰ *Lambert v. California*, 355 U.S. 225 (1957).

¹¹ *Id.*

¹² *Id.*

¹³ *Ratslaf v. U.S.* 510 U.S. 135, 142, 114 S. Ct. 655, 126 L. Ed 2d 615 quoting *Liparota v. U.S.*, 471 U.S. 419, 426, 85 L. Ed. 2d 434, 105 S. Ct. 2084 (1985).

¹⁴ *Id.*

¹⁵ *Staples*, 511 U.S. at 611.

¹⁶ *Cheek*, 498 U.S. at 199.

¹⁷ *Id.*

¹⁸ See generally *U.S. v. Hildebrandt*, 961 F.2d 116 (8th Cir. 1992).

¹⁹ Joshua D. Yount, *The Rule of Lenity and Environmental Crime*, 1997 U. Chi. Legal F. 607, 621 (1997) citing Kathleen Brickley, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory* (Washington University School of Law Working Paper No. 96-4-1, 1996) at 15.

²⁰ *Id.*

²¹ *U.S. v. Hopkins*, 53 F.3d 533, 540 (2d Cir. 1995).

extension of a heightened construction, even to other tax cases, is inappropriate.²² The 8th Circuit in *Hildebrandt* found that *Cheek* rested on a violation of a specific section; since the case before the court involved a general criminal provision, a higher mental state would be inappropriate. This type of provision is highly analogous to environmental criminal provisions that have a general section delineating different categories of violations as illegal. Since these provisions are fewer in number and cover violations of many subsections, they more conspicuously give notice to an actor of their illegal activity.

Third, whereas the Tax Code considers and provides for prosecution of both individual and corporate taxpayers, environmental statutes are primarily intended to affect the behavior of corporate actors.²³ The 'willfully' exception found in both *Liparota* and *Staples* were in the context of a single individual not engaged in significant commercial enterprise. In contrast, the vast majority of criminal environmental prosecutions have been against individuals engaged in significant commercial enterprise; these persons are the ones who make the decisions about handling hazardous materials and are more culpable.²⁴

A mens rea of 'knowingly' solely requires that a person be aware of their action; this standard is distinguishable from a mens rea of 'willfully' that requires a person to actually be aware of the law or regulation in question and intentionally transgress it.²⁵ The distinction is the difference between "general" and "specific" intent; the former merely requires an awareness of the facts while the latter requires an intent to achieve a further goal.²⁶ According to the Model Penal Code § 2.02(2)(b) (1962), "A person acts knowingly with respect to a material element of an offense when: (i)... the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct of that nature or that such circumstances exist." The Supreme Court decision in *U.S. v. Bailey* serves as a general guide for the meaning of a 'knowingly' mens rea.²⁷ The defendants in *Bailey* violated federal prison law when they escaped from a federal penitentiary while awaiting trial.²⁸ The defendants were not required to have specific knowledge of the law they transgressed, but merely that they were aware of their actions, (leaving the jail), and that they were aware of the attendant circumstances, (that they were not authorized to do so).²⁹ In reversing the Court of Appeals below, the Supreme Court held that the 'knowingly' standard did not require a conscious objective of violating the law; it meant merely an awareness of conduct.³⁰

In a broader sense, 'knowingly' does not require the higher standard of being aware of the requirements of the law and intentionally violating them.³¹ A 'knowingly' mens rea is a lesser standard than 'willfully'; if awareness of conduct can be proven, it is permissible for a jury to infer knowledge on the part of the actor.³² In attempting to clarify the distinction between 'knowingly' and higher levels of culpability, the comments to Model Penal Code § 2.02 state that:

"[k]nowledge that the requisite external circumstances exist is a common element in both conceptions. But action is not purposive with respect to the nature or result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result. It is meaningful to think of the actor's attitude as different if he is simply aware that his conduct is of the required nature or that the prohibited result is practically certain to follow from his conduct."³³

²² See generally *U.S. v. Hildebrandt*, 961 F.2d 116 (8th Cir. 1992).

²³ *Johnson & Towers*, 741 F.2d at 666; *U.S. v. Sellers*, 926 F.2d 410, 416 n2 (8th Cir. 1991); *Hopkins*, 53 F.3d at 537; *U.S. v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989); *U.S. v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993); *U.S. v. International Minerals and Chemicals Corp.*, 402 U.S. 558, 565, 915 S.Ct. 1697, 29 L.Ed. 2d 178 (1971).

²⁴ See *Greer*, 850 F.2d at 1451; *U.S. v. M/G Transport Services, Inc.* 173 F.3d 584 (6th Cir 1999); *U.S. v. Iverson*, 162 F.3d 1015, (9th Cir. 1998); *U.S. v. Wilson*, 133 F.3d 251 (2d Cir. 1997); *U.S. v. Self*, 2 F.3d 1071 (10th Cir. 1993); *U.S. v. Laughlin*, 10 F.3d 961 (2d Cir. 1992); *U.S. v. Wagner*, 29 F.3d 264 (7th Cir. 1994); *U.S. v. Hopkins*, 53 F.3d 533; *U.S. v. Hoflin*, 880 F.2d 1033; *U.S. v. Sinskey*, 119 F.3d 712 (8th Cir. 1997); *U.S. v. Buckley*, 934 F.2d 84; *U.S. v. Kelley Technical Coatings, Inc.*, 157 F.3d 432 (6th Cir 1998); *U.S. v. Baytank*, 934 F.2d 599 (5th Cir. 1991); *U.S. v. Dean*, 969 F.2d 187 (6th Cir. 1992); *U.S. v. MacDonald & Watson Waste Oil Company*, 933 F.2d 35 (1st Cir. 1991); *U.S. v. Hayes International, Inc.*, 786 F.2d 1499, 1504 (11th Cir. 1986); *U.S. v. Johnson & Towers, Inc.*, 741 F.2d 662 (3rd Cir. 1984).

²⁵ *Cheek*, 498 U.S. at 199.

²⁶ "As pointed out in the preliminary study of the subject for the Brown Commission, the distinction is "between a man who wills that a particular act or result takes place and another who is merely willing that it should take place." Model Penal Code Comments to §2.02 (1962) quoting 1 Brown Commn. Working Papers 124.

²⁷ See *U.S. v. Bailey et al.*, 444 U.S. 394, 100 S. Ct. 624, 62 L.Ed.2d 575, (1980).

²⁸ *Id.*

²⁹ *Bailey*, 444 U.S. at 408.

³⁰ *Id.*

³¹ LaFave et al., §3.5(b) (West 2d Ed. 1986).

³² *Id.*

³³ Model Penal Code § 2.02(2)(b) (1962)

The actor may not care what the result may be of their actions, but may nonetheless be aware that the result is possible.³⁴

A. Controlled Substances

Courts interpret the meaning of the ‘knowingly’ standard similarly under federal laws dealing with controlled substances like cocaine.³⁵ It is common knowledge that drugs like cocaine, crack and heroin are illegal; it is inconceivable that a person caught in possession of such substance would not be aware of a high probability of government regulation. Indeed, even as early as 1922, the Supreme Court in *U.S. v. Balint* found that a person in possession of opium and coca leaf derivatives has an affirmative duty to determine the applicable law.³⁶

In delineating the parameters of what ‘knowingly’ means in prosecutions for possession and distribution of controlled substances, the government is not required to prove that the defendant knew the material to be a controlled substance.³⁷ In *Marsh*, a husband and wife team were convicted of conspiring to manufacture “euphoria,” a controlled substance. Based on evidence showing that they had purchased all of the chemicals necessary and acquired detailed instructions to the manufacture of the drug, the Court found that jury instructions that did not require the defendants to know that euphoria was a controlled substance were appropriate.³⁸ In delineating the government’s burden of proof, the Court stated that:

“The government was not required to prove that the Marshes knew that euphoria was a controlled substance. In construing criminal statutes, we have often held that one may “knowingly” commit criminal acts without knowing that the acts are criminal.”³⁹

The Sixth Circuit in *Decker* confirms the holding of *Marsh* that the government need not prove actual knowledge of a specific controlled substance.⁴⁰

As can be distilled from the holding in *Balint*, *Marsh* and *Decker*, even in the complicated regulatory structure of controlled substances, courts applying a ‘knowingly’ standard merely require that defendants be aware of their actions. As the New York Court of Appeals in *People v. Marrero* pointed out in addressing a defendant’s argument of a good faith mistake of law:

“[i]f the defendant’s argument were accepted, the exception would swallow the rule. There would be an infinite number of mistake of law defenses which could be devised from a good-faith, perhaps reasonable but mistaken, interpretation of criminal statutes, many of which are concededly complex. [Allowing such arguments] would not serve the ends of justice but rather would serve game playing and evasion from properly imposed criminal responsibility.”⁴¹

Requiring the government to prove a defendant’s subjective awareness of the illegality of their conduct would fundamentally degrade distinctions among levels of culpability and erode the legitimacy of our judicial system.

B. ‘Knowingly’ in the Environmental Context

In 1999, it can be fairly said that there is a general awareness in this country of the dangerous nature of hazardous waste materials, just as there is a general awareness of the dangerous nature of drugs.⁴² Back in 1987 and 1990, Congress amended the Clean Water Act, the Resource Recovery and Reclamation Act and the Clean Air Act in response to public

³⁴ *Id.*

³⁵ Black’s Law Dictionary defines the term ‘Controlled Substance’ as: “Any drug so designated by law whose availability is restricted; i.e. so designated by federal or state Controlled Substances Acts (*q.v.*) Included in such classification are narcotics, stimulants, depressants, hallucinogens and marijuana.” Black’s Law Dictionary 329 (6th ed. 1990).

³⁶ *Balint*, 258 U.S. at 254.

³⁷ *U.S. v. Marsh*, 894 F.2d 1035 (9th Cir. 1989); *U.S. v. Decker*, 19 F.3d 287, 290 (6th Cir. 1994).

³⁸ *Marsh*, 894 F.2d at 1041.

³⁹ *Id. citing* United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988).

⁴⁰ *Decker*, 19 F.3d at 290.

⁴¹ See generally *People v. Marrero*, 69 N.Y.2d 382, 507 N.E. 2d 1068 (1987)

⁴² Robert V. Percival et al., *Environmental Regulation: Law Science and Policy* at 195 (2d ed. 1996).

pressure to strengthen federal environmental laws.⁴³ In part because no major environmental statute has been enacted or amended significantly since 1990, corporations that deal with hazardous wastes find that compliance is more or less routine as they have increasingly relied on in-house counsel and consultants for compliance advice.⁴⁴ The 4th Circuit in *Dean* found that *International Minerals*:

“stands for the proposition that persons involved in hazardous waste handling have every reason to be aware that their activities are regulated by law, aside from the rule that ignorance of the law is no excuse.”⁴⁵

In addition to the above factors there are strong economic incentives for compliance due to substantial enforcement related penalties; §6928 of RCRA, for example, provides for penalties of up to \$25,000 per day in violation.⁴⁶ Especially in a commercial setting, a claim that a responsible person is unaware of the illegality of their actions when handling hazardous materials rings hollow.⁴⁷

Basing its decision in part upon *U.S. v. Freed*, the majority in *International Minerals* held that ignorance of regulations regarding hazardous materials is not an excuse.⁴⁸ The Court saw “no reason that the word “regulations” should not be construed as a shorthand designation for specific acts or omissions which violate the Act.”⁴⁹ In elaborating on the concept, the Court in *Sinskey* found that:

“In construing other statutes with similar language and structure, that is, statutes in which one provision punishes the “knowing violation” of another provision that defines the illegal conduct, we have repeatedly held that the word “knowingly” modifies the acts constituting the underlying conduct.”⁵⁰

The Sixth Circuit in *U.S. v. Dean* convicted a defendant of improper disposal under RCRA where he instructed his employees to dig a forty-foot-long pit behind the plating business he managed, and had hazardous plating waste dumped **directly into the earthen pit. When confronted by investigators about his activities the defendant said that he “had read this RCRA waste code but thought it was a bunch of bulls... ”**⁵¹ Even where the materials are not hazardous in nature, if they are regulated under a statute that does deal with hazardous wastes, like the Clean Water Act, “the government need prove only that the defendant knew the operative facts which make his action illegal.”⁵² The Second Circuit Court in *Hopkins* interpreted Supreme Court precedent in regards to ‘knowledge’ in the Clean Water Act to mean that:

“[i]n defining the mental state required under a given statute, however, the courts must seek the proper “inference of the intent of Congress,” **and in construing knowledge elements that appear in so-called “public welfare” statutes – i.e. statutes that regulate the use of dangerous or injurious goods or materials –** the Supreme Court has inferred that Congress did not intend to require proof that the defendant knew his actions were unlawful.”⁵³

The *Hopkins* Court went on to infer that when Congress amended the Clean Water Act in 1987 and reduced the mens rea requirement from “willfully” to “knowingly,” that “Congress intended not to require proof that the defendant knew his

⁴³ S.Rep. No. 50, 99th Cong., 1st Sess. 30 (1985), H.R.Conf.Rep.No.1004, 99th Cong., 2d Sess. 138 (1986) (both discussing the CWA); *Sinskey*, 119 F.3d at 716; *Hopkins*, 53 F.3d at 540; *Laughlin*, 10 F.3d at 416; *Weitzenhoff*, 35 F.3d at 1283; *Hoflin*, 880 F.2d at 1038; *Wilson*, 133 F.3d at 263; See generally Lois J. Schiffer and James F. Simon, The Reality of Prosecuting Environmental Criminals: A Response to Professor Lazarus, 83 Geo. L.J. 2531, 2535 (1995); Yount *supra* note 19, at 609.

⁴⁴ Michael B. Gerrard, Trends in the Supply and Demand for Environmental Lawyers, Presentation before the D.C. Bar Association (July 7, 1999).

⁴⁵ *Dean*, 969 F.2d at 192.

⁴⁶ Resource Recovery and Recovery Act (RCRA) § 6928(d)(2)(A), 42 U.S.C. 3008 (1986).

⁴⁷ *Hoflin*, 880 F.2d at 1037; *Hayes International*, 786 F.2d at 1506-07; *Hopkins*, 53 F.3d at 541.

⁴⁸ *International Minerals*, 402 U.S. at 561-62 citing *U.S. v. Freed*, 401 U.S. 601.

⁴⁹ *Id.* at 562.

⁵⁰ *Sinskey*, 119 F.3d at 715 citing *U.S. v. Farrell*, 69 F.3d 891-893 (8th Cir. 1995), cert. denied, 134 L. Ed. 2d 228, 116 S. Ct. 1283 (1996), and *U.S. v. Hern*, 926 F.2d 764, 766-68 (8th Cir. 1991).

⁵¹ *Dean*, 969 F.2d at 189.

⁵² *Wilson*, 133 F.3d at 264.

⁵³ *Hopkins* 53 F.3d at 537-38 citing *Staples*, 511 U.S. at 605 (quoting *Balint*, 258 U.S. at 253), *International Minerals*, 402 U.S. at 565, *U.S. v. Freed*, 410 U.S. 601, 607-08, 28 L. Ed. 2d 356, 91 S.Ct. 1112 (1976), *Dotterweich*, 320 U.S. at 280-81.

conduct violated the law.”⁵⁴ In response to the argument that courts should require the government to prove knowledge of illegality, the Fourth Circuit Court of Appeals held that “[i]f we construe the word “knowingly” as requiring that the defendant must appreciate the illegality of his acts, we obliterate its distinction from the willfulness.”⁵⁵ The Sixth Circuit recently found in regards to the “knowledge of illegality” argument that it “has also been rejected by every other court of appeals that has considered the issue.”⁵⁶

Consistent with the idea that a person need not know whether a chemical is a controlled substance, courts have not required knowledge of whether the material is a EPA listed hazardous waste.⁵⁷ Every court that has considered the ‘listed waste’ issue has found that such specific knowledge is not required.⁵⁸ The rationale for imposing criminal liability is that since these laws attempt to safeguard the “public welfare,” where a person is dealing with an “obnoxious” material, it is permissible for a jury to infer that the actor knows that her or his activity is regulated.⁵⁹ In assessing allowable inferences about what a person who runs a business should know about RCRA, the 11th Circuit in *Hayes International* found that:

“section 6928(d)(1) is undeniably a public welfare statute, involving a heavily regulated area with great ramifications for public health and safety. As the Supreme Court has explained, it is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of regulatory provisions.”⁶⁰

Therefore, especially where a person is involved in the day-to-day operation of a business that generates hazardous waste, it is consistent with due process to allow a jury to infer notice and charge such a person with the responsibility to determine how to comply with regulations.⁶¹

If courts were to require that a person knew that they were handling a hazardous waste, they would be, in effect, raising the level of mens rea to close to a “willfully” level; this outcome is clearly not supported by the language of the statute and goes against the clear intent of Congress to make environmental crimes easier to prosecute.⁶² The 5th Circuit Court of Appeals in *Baytank* found that:

“the statute -- § 6928(d)(2)(A) -- does use the word “knowingly,” but we conclude, as *Dee*, *Hoflin*, and *Hayes International* all indicate, that “knowingly” means no more than that the defendant knows factually what he is doing ... and it is not required that he know that there is a regulation which says that what he is storing is hazardous under the RCRA.”⁶³

While courts have consistently found that a person is not required to know if the material is a listed hazardous waste, courts have differed over whether a person has to be aware of a mere potential for harm to human health or environment or a “substantial” potential to do so.⁶⁴

Beginning with the Supreme Court in *International Minerals*, the majority of circuit courts have required the government to prove that the defendant know the general hazardous nature of the substance under their control.⁶⁵ Some

⁵⁴ *Id.* at 540.

⁵⁵ *Wilson*, 133 F.3d at 262.

⁵⁶ *Kelley Technical Coatings*, 157 F.3d at 436-37 citing *Dean*, 969 F.2d at 191; *Self*, 2 F.3d at 1089-91; *U.S. v. Goldsmith*, 978 F.2d 643, 645 (11th Cir. 1992); *Baytank*, 934 F.2d at 613; *Dee*, 912 F.2d at 745; *Hoflin*, 880 F.2d at 1037-39; *Johnson & Towers*, 741 F.2d at 669.

⁵⁷ *Buckley*, 934 F.2d at 88; *Laughlin*, 10 F.3d at 965; *Sellers*, 926 F.2d at 417; *Self*, 2 F.3d at 1090; *Hopkins*, 53 F.3d at 538; *Hayes International*, 933 F.2d at 1503-04; *Dee*, 912 F.2d at 745; *Baytank*, 934 F.2d at 612; but see *Johnson & Towers*, 741 F.2d at 669 (while the Court did not hold that a defendant must specifically know that a material is “listed” by the EPA, it did require that the defendant know that the waste was “hazardous” which infers a different kind of knowledge than of a “substantial potential” for harm.)

⁵⁸ *Id.*

⁵⁹ *International Minerals* at 565; *Buckley*, 934 F.2d at 88; *Laughlin*, 10 F.3d at 965; *Sellers*, 926 F.2d at 417; *Self*, 2 F.3d at 1090; *Hopkins*, 53 F.3d at 538; *Hayes International*, 933 F.2d at 1503-04; *Dee*, 912 F.2d at 745; *Baytank*, 934 F.2d at 612; but see *Johnson & Towers*, 741 F.2d at 668-69.

⁶⁰ *Hayes International*, 786 F.2d at 1503.

⁶¹ *Hoflin*, 880 F.2d at 1037; *Hayes International*, 786 F.2d at 1506-07; *Hopkins*, 53 F.3d at 541.

⁶² *Schiffer*, *supra* note 43, at 2535; *U.S. v. Laughlin*, 10 F.3d 961; *Hopkins*, 53 F.3d at 540; *Hoflin*, 880 F.2d at 1038; *Weitzenhoff*, 35 F.3d at 1283; *Sinsky*, 119 F.3d at 716.

⁶³ *Baytank*, 934 F.2d at 613.

⁶⁴ *Laughlin*, 10 F.3d at 967; *Sellers*, 926 F.2d at 417; *Iverson*, 162 F.3d at 1027; *Hopkins*, 53 F.3d at 538; *Hayes International*, 933 F.2d at 1502; *Dee*, 912 F.2d at 745; *Hoflin*, 880 F.2d at 1039; *Kelley Technical Coatings*, 157 F.3d at 441; *Greer*, 850 F.2d at 1452.

⁶⁵ *Id.*

circuit courts have held that the preferable standard would be to require evidence that the defendant had knowledge of “substantial” potential to harm human health and the environment.⁶⁶

Section 6903(5) of RCRA reads:

“The term “hazardous waste” means a solid waste, or combination of solid wastes, which because of its quantity, concentration or physical, chemical, or infectious characteristics may --(B) pose a substantial present or potential hazard to human health or the environment.”⁶⁷

Some courts have interpreted this language to only require knowledge that the materials involved were not benign like water.⁶⁸ Other courts have found that requiring a defendant to know more than just a “potential” was a preferable jury instruction.⁶⁹ Indeed, the court in *U.S. v. Laughlin* found that, while not reversible error, a jury instruction that only required knowledge of a “potential” harm was insufficient and that the instruction should have required the jury to find a “substantial potential” for harm to human health and the environment.⁷⁰ The *Laughlin* court reasoned that it would be more consistent with the statutory language to require knowledge of a “substantial potential.” In *U.S. v. Sellers*, the defendant was convicted of disposing of hazardous waste without a permit when he dumped sixteen 55-gallon drums of paint and solvent wastes on the side of a creek in rural Mississippi.⁷¹ In contrast to *Laughlin*, the *Sellers* Court rejected a claim of plain error where no instructions were given on this element at the trial level, holding that the jury merely should have been instructed that there was a potential harm to human health and environment:

“It is clear that paint and paint solvent waste, by its very nature, is potentially dangerous to the environment and to persons. Thus it should have come as no surprise that the disposal of that waste is regulated. The evidence presented at trial established that Sellers knew that the waste he was disposing included M.E.K., [Methyl Ethyl Ketone], a paint solvent, and that this substance was extremely flammable. There can be no doubt that Sellers knew that the substance he was disposing was potentially dangerous to human beings and the environment and that regulations, therefore, would exist governing the manner of its disposal.”⁷²

Where a defendant is knowledgeable about RCRA requirements, signs annual hazardous waste registration forms and arranged for legal disposal of hazardous waste in the past, it is proper to infer that they know that the material has the potential to cause harm.⁷³ In light of Congressional intent,⁷⁴ the remedial nature of public welfare and environmental statutes⁷⁵ and the fact that the people making decisions about how to handle obnoxious materials know what they’re doing,⁷⁶ courts should only require that defendants be proven aware of the “potential” for harm to human health and environment.

II. STRICT LIABILITY

Critics argue that the mental state requirements in public welfare environmental statutes are akin to strict liability; violations of such statutes have traditionally been, and should be, punished as misdemeanors and not felonies, so the argument goes. This conception is a fundamental misunderstanding of criminal provisions in environmental laws due to the inherently subjective nature of a “knowingly” mens rea requirement.⁷⁷ Strict liability crimes do not require any

⁶⁶ *Laughlin*, 10 F.3d at 967; *Kelley Technical Coatings*, 157 F.3d at 441.

⁶⁷ 42 U.S.C. §6903(5) and (5)(B).

⁶⁸ *Sellers*, 926 F.2d at 417; *Iverson*, 162 F.3d at 1027; *Hoflin*, 880 F.2d at 1039; *Self*, 2 F.3d at 1091; *Dee*, 912 F.2d at 745.

⁶⁹ *Laughlin*, 10 F.3d at 967; *Baytank*, 934 F.2d at 612; *Kelley Technical Coatings*, 157 F.3d at 441.

⁷⁰ *Laughlin*, 10 F.3d at 967.

⁷¹ *Sellers*, 926 F.2d at 412.

⁷² *Id.* at 417.

⁷³ *Kelley Technical Coatings*, 157 F.3d at 441.

⁷⁴ Congress stated that it had “not sought to define ‘knowing’ for offenses under [§6928 of RCRA] subsection (d); that process has been left to the courts under general principles” *Hayes International*, 933 F.2d at 1502 quoting S.Rep. No. 172, 96th Cong., 2d Sess. 39 (1980), U.S. Code Cong. & Admin. News 1980, pp.5019, 5038.

⁷⁵ *Johnson & Towers*, 741 F.2d at 666; *Sellers*, 926 F.2d at 416 n.2; *Hopkins*, 53 F.3d at 537; *Hoflin*, 880 F.2d at 1038; *Weitzenhoff*, 35 F.3d at 1286.

⁷⁶ *Self*, 2 F.3d at 1088; *Greer*, 850 F.2d at 1451-52; *Kelley Technical Coatings*, 157 F.3d at 437.

⁷⁷ *Johnson & Towers*, 741 F.2d at 668; *Sinskey*, 119 F.3d at 717; *Dean*, 969 F.2d at 192; See Bruce R. Bryan, *The Battle Between Mens Rea and*

subjective culpability or awareness of conduct;⁷⁸ while the mental state requirements were lowered from “willfully” to “knowingly,” this change does not eliminate a requirement of *mens rea*.⁷⁹ The Eighth Circuit in *Sinskey* aptly noted that: “requiring the government to prove only that the defendant acted with awareness of his or her conduct does not render [a criminal provision] a strict liability offense.”⁸⁰

Strict liability crimes were not favored at common law, but were primarily created by legislatures that wrote statutes to “simply provide that whoever does (or omits to do) so-and-so, or whoever brings about such-and-such a result, is guilty of a crime, setting forth the punishment.”⁸¹ Such is the case with statutory rape statutes. Due to the seriousness of the crime, Legislatures wrote laws that irrespective of the subjective intent of the actor, he (or she) would be guilty of an offense with significant criminal penalties.⁸²

As is discussed above, the “knowingly” mens rea in criminal provisions of environmental statutes require proof that a defendant knew he or she was disposing of dangerous wastes in an unsafe manner. While some subsections of environmental criminal provisions arguably contain some strict liability elements, the knowledge mens rea requirement for most offenses is inherently subjective and not properly characterized as strict liability.⁸³

A. Mistake of Fact

Allowing for a mistake of fact defense in public welfare cases adds another layer of subjectivity in finding a knowing violation.⁸⁴ Courts allow for a mistake of fact defense where the possessor honestly does not know what the material in their possession was.⁸⁵ If a person honestly does not know what they possess or is unaware of its “noxious” qualities, the inference of knowledge and notice in this instance would not be appropriate.⁸⁶

The Supreme Court in *International Minerals* stated that “[p]encils, dental floss, [and] paper clips may also be regulated,” but since these products were not ‘obnoxious,’ they would raise concern about due process if there were not a requirement of a mens rea.⁸⁷ The Court was concerned about the potential overbreadth of the public welfare doctrine for the situations where there would be no notice sufficient to infer culpability.⁸⁸ Indeed, the Model Penal Code states that where a mistake of fact “negatives the ... knowledge ... required to establish a material element of the offense,” such mistake constitutes a valid defense.⁸⁹ These propositions are based upon the fundamental concept in criminal law that requires both an illegal action and a culpable mind.⁹⁰

In this vein, several courts have discussed situations where such a defense would be appropriate.⁹¹ The 11th Circuit in *Hayes International* presents an interesting variation on the traditional mistake of fact defense. In *Hayes International*, the defendant was convicted for knowingly transporting hazardous waste to a facility that did not have a proper permit.⁹² The defendant entered an agreement with another party that would accept the defendant's wastes, a mixture of paints and solvents generated from refurbishing airplanes, and recover valuable materials therefrom.⁹³ The court found that, in principle, where the defendant reasonably believed the materials were being recycled, they would be able to make a valid mistake of fact defense.⁹⁴

the Public Welfare: United States v. Laughlin Finds a Middle Ground, 6 Fordham Envtl. Law J. 157 (1995); LaFave et al., Criminal Law, §3.8 at 242 (West 2d Ed. 1986).

⁷⁸ LaFave et al., Criminal Law, §3.8 at 242-43 (West 2d Ed. 1986).

⁷⁹ The 2nd Circuit Court of Appeals in *Hopkins* found that another “way of heightening sanctions is to reduce the mens rea element of the prohibited acts, and a change from prohibiting “willful” acts to prohibiting “knowing” acts may be viewed as such a reduction.” *Hopkins*, 53 F.3d at 539.

⁸⁰ *Sinskey*, 119 F.3d at 717.

⁸¹ LaFave et al., Criminal Law, §3.8 at 242-43 (West 2d Ed. 1986).

⁸² *Id.* at 245, n. 16.

⁸³ LaFave et al., Criminal Law, §3.8 at 243 (2d ed West 1986).

⁸⁴ See Schiffer, *supra* note 43, 2535; *Id.*

⁸⁵ *International Minerals*, 402 U.S. at 564; U.S. v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1996); *Staples*, 511 U.S. at 607; *Self*, 2 F.3d at 1091; Bryan, *supra* note 77, at 191.

⁸⁶ *Id.*

⁸⁷ *International Minerals*, 402 U.S. at 564.

⁸⁸ *Id.*

⁸⁹ Model Penal Code § 2.04(1)(a) (1962).

⁹⁰ LaFave et al., Criminal Law, § 1.2(b) at 8 (West 2d Ed. 1986); Model Penal Code § 2.01(1) (1962)

⁹¹ *International Minerals*, 402 U.S. at 564; *Ahmad*, 101 F.3d at 391; *Staples*, 511 U.S. at 607; *Self*, 2 F.3d at 1091.

⁹² *Hayes International*, 786 F.2d at 1500.

⁹³ See *Id.* at 1506.

⁹⁴ See *Id.* at 1505, (However, the court found sufficient evidence that the defendant knew that the wastes were in fact not being recycled).

Similarly, the 4th Circuit in *Wilson* found that if a defendant believed his activity, (here, filling in wetlands), to be sanctioned based upon an incorrect permit, the court would also allow a mistake of fact defense.⁹⁵ In *Wilson*, a developer was charged for knowingly violating the Clean Water Act where he discharged fill into wetlands without obtaining the correct permit.⁹⁶ By allowing a defense on the basis of a lack of knowledge of the essential facts, courts impliedly require a heightened level of culpability for environmental criminal offenses.⁹⁷ This conclusion weighs directly against characterizing violations of public welfare statutes as strict liability offenses.⁹⁸

B. Permit Requirement

In contrast with other parts of environmental criminal provisions, the elements that require a person to have a permit to dispose of or otherwise handle waste is akin to strict liability.⁹⁹ Major environmental laws that have provisions requiring a permit of some kind do not have the word “knowingly” in the same phrase.¹⁰⁰ The vast majority of circuit courts hold that proof of knowledge of the need for a permit or knowledge of its breach is not necessary to find a violation of the permit requirement.¹⁰¹

The Third Circuit in *Johnson & Towers*, the dissent in *Weitzenhoff* and some commentators argue that despite the absence of an explicit mens rea requirement for the existence of and violation of a permit, at least a knowingly mens rea requirement should be inferred.¹⁰² The Court in *Johnson & Towers* in a RCRA context found that where the knowingly mens rea was present in the other subsections of §6928(d), that it would be “arbitrary and nonsensical” not to require culpability for the permit requirement.¹⁰³ This interpretation has been rejected by every other court of appeals that has considered it.¹⁰⁴

In what has been called “the most analytically robust” argument for the imposition of a mental state to the permit requirement, the dissent in *Weitzenhoff* asserts that where a person did not know that they had actually violated their effluent permit limit, they didn’t knowingly commit such an offense.¹⁰⁵ The defendants in the *Weitzenhoff* case were sanitary workers who bypassed the normal processing procedure in discharging raw sewage into Hawaii’s oceans; by doing so, they circumvented a monitoring device in order to hide evidence of violations of the facility’s discharge permit.¹⁰⁶ Judge Kleinfeld’s dissent made much of the fact that the permit was only exceeded by 6%; moreover, the dissent argues, by treating the permit requirement as akin to strict liability, the majority opinion captures much innocent conduct and makes it criminal.¹⁰⁷ This argument is internally inconsistent. The existence of a permit necessarily imputes some level of subjective knowledge of a limit for discharging since the permit is tailored specifically to that facility.¹⁰⁸ The culpability the dissent argues is lacking is directly undermined by the fact by the defendant’s knowledge of the existence of the permit in the first place and the fact that the defendant’s conduct was consciously directed at evading the responsibilities under the permit. Admittedly, however, the minimal subjectivity generated by the permit does not rise to the level of culpability of other elements.

The rationale for interpreting criminal provisions so as to virtually dispense with a mens rea element is based on a reading of the language of the sections,¹⁰⁹ Congressional policy choices¹¹⁰ and the weight of judicial interpretation.¹¹¹

⁹⁵ *Wilson*, 133 F.3d at 264.

⁹⁶ *See Id.* at 251.

⁹⁷ *See Schiffer*, *supra* note 43, at 2535; *International Minerals*, 402 U.S. at 564; *Ahmad*, 101 F.3d at 391; *Staples*, 511 U.S. at 607; *Self*, 2 F.3d at 1091.

⁹⁸ *Johnson & Towers*, 741 F.2d at 668; *Sinskey*, 119 F.3d at 717; *Dean*, 969 F.2d at 192; *See Bryan*, *supra* note 77; LaFave et al., *Criminal Law* §3.5(b) at 218-220 (West 2d Ed. 1986).

⁹⁹ *See Weitzenhoff*, 35 F.3d at 1296, (Kleinfeld dissenting); Resource Recovery and Recovery Act (RCRA) § 6928(d)(2)(A), 42 U.S.C. 3008 (1986); Clean Water Act (CWA) § 1319 (c)(2)(A), 33 U.S.C. 309 (1987); Clean Air Act § 7413 (c)(1)(C), 42 U.S.C. 113 (1990).

¹⁰⁰ *Id.*

¹⁰¹ *Laughlin*, 10 F.3d at 966; *Hopkins*, 53 F.3d at 538-40, 544; *Hayes International*, 786 F.2d at 1503-04; *Dean*, 969 F.2d at 191; *Hoflin*, 880 F.2d at 1037; *Weitzenhoff*, 35 F.3d at 1286; *Kelley Technical Coatings*, 157 F.3d at 437; *U.S. v. Wagner*, 29 F.3d 264, 266 (7th Cir. 1994); *Sinskey*, 119 F.3d at 715 *but see Johnson & Towers*, 741 F.2d at 670 (knowledge applies to all elements; this is the only court to so hold.)

¹⁰² *Johnson & Towers*, 741 F.2d at 670; *Weitzenhoff*, (Kleinfeld dissenting), 35 F.3d at 1296; *See Yount*, *supra* note 19, at 609.

¹⁰³ *Johnson & Towers*, 741 F.2d at 668.

¹⁰⁴ *Dee*, 912 F.2d at 744-45; *Hopkins*, 53 F.3d at 537; *Hoflin*, 880 F.2d at 1036-37; *Hayes International*, 786 F.2d at 1503-4; *Buckley*, 934 F.2d at 88.

¹⁰⁵ *Yount supra* note 19, at 618.

¹⁰⁶ *Weitzenhoff*, 35 F.3d at 1281-82.

¹⁰⁷ *Id.* at 1296.

¹⁰⁸ LaFave et al., *Criminal Law*, §3.8 at 242 (West 2d Ed. 1986).

¹⁰⁹ Resource Recovery and Recovery Act (RCRA) § 6928(d)(2)(A), 42 U.S.C. 3008 (1986); Clean Water Act (CWA) § 1319 (c)(2)(A), 33 U.S.C.

Section 6928(d) of the Resource Conservation and Recovery Act provides, in pertinent part:

Any person who--

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subtitle--

(A) without a permit under this subtitle...;

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards

shall, upon conviction, be subject to a fine of not more than \$25,000 ... or to imprisonment not to exceed one year ... or both. 42 U.S.C. § 6928.

A close reading of § 6928(d) provides that there are some sub-sections that contain culpability elements and some that do not; the subsection that deals with the permit requirement clearly does not delineate a mental state. The Ninth Circuit in *Hoflin* found that:

“The absence of the word “knowing” in subsection (A) is in stark contrast to its presence in the immediately following subsection (B). The statute makes a clear distinction between non-permit holders and permit holders, requiring in subsection (B) that the latter knowingly violate a material condition or requirement of the permit. To read the word “knowingly” at the beginning of section (2) into subsection (A) would be to eviscerate this distinction. Thus, it is plain that knowledge of the absence of a permit is not an element of the offense defined in subsection (A).” *Hoflin*, 880 F.2d at 1037.

Based upon the idea that “interpretive constructions [of statutes] which would render some of the words surplusage ... are to be avoided,” since Congress decided to omit the word “knowingly” from sections regarding permits, Congress did not intend a mental state to apply to them.¹¹² The language Congress chose evidences an intent to make criminal enforcement more effective; indeed, the Second Circuit decision in *Hopkins* stands for the proposition that decreasing a mens rea requirement is a means for heightening enforcement.¹¹³ The *Hoflin* Court notes that by eliminating the mens rea requirement:

“[t]hose who handle such waste are, therefore, affirmatively required to provide information to the EPA in order to secure permits. Placing this burden on those handling hazardous waste materials makes it possible for the EPA to know who is handling hazardous waste, and enforce compliance with the statute. On the other hand, persons who handle hazardous waste materials without telling the EPA what they are doing shield their activity from the eyes of the regulatory agency and thus inhibit the agency from performing its assigned tasks.”¹¹⁴

It has become a settled proposition in the vast majority of circuit courts that proof of knowledge of the permit requirement is not necessary.¹¹⁵

Even if it is granted that the permit requirement is a strict liability offense, Congress is empowered to protect the public welfare through legislation.¹¹⁶ LaFave and Scott note that: “[o]ther things being equal, the more serious the

309 (1987); Clean Air Act § 7413 (c)(1)(C), 42 U.S.C. 113 (1990).

¹¹⁰ S.Rep. No. 50, 99th Cong., 1st Sess. 30 (1985), H.R.Conf.Rep.No.1004, 99th Cong., 2d Sess. 138 (1986) (both discussing the CWA); See S.Rep. No. 172, 96th Cong., 2d Sess. 39 (1980), U.S. Code Cong. & Admin.News 1980, pp.5019 (RCRA).

¹¹¹ *Laughlin*, 10 F.3d at 966; *Hopkins*, 53 F.3d at 538-40, 544; *Hayes International*, 786 F.2d at 1503-04; *Dean*, 969 F.2d at 191; *Hoflin*, 880 F.2d at 1037; *Weitzenhoff*, 35 F.3d at 1286; *Kelley Technical Coatings*, 157 F.3d at 437; *Wagner*, 29 F.3d at 266; *Sinskey*, 119 F.3d at 715 but see *Johnson & Towers*, 741 F.2d at 670.

¹¹² *Laughlin*, 10 F.3d at 966; *Hopkins*, 53 F.3d at 537-38; *Dean*, 969 F.2d at 191; *Weitzenhoff*, 35 F.3d at 1286; *Kelley Technical Coatings*, 157 F.3d at 437; *Wagner*, 29 F.3d at 266.

¹¹³ *Hopkins*, 53 F.3d at 539.

¹¹⁴ *Hoflin*, 880 F.2d at 1038-39.

¹¹⁵ *Laughlin*, 10 F.3d at 966; *Hopkins*, 53 F.3d at 538-40, 544; *Hayes International*, 786 F.2d at 1503-04; *Dean*, 969 F.2d at 191; *Hoflin*, 880 F.2d at 1037; *Weitzenhoff*, 35 F.3d at 1286; *Kelley Technical Coatings*, 157 F.3d at 437; *Wagner*, 29 F.3d at 266; *Sinskey*, 119 F.3d at 715.

¹¹⁶ *Balint*, 258 U.S. at 254, (“Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger..., and concluded that the latter was the result preferably to be avoided.”)

consequences to the public, the more likely the legislature meant to impose liability without regard to fault."¹¹⁷ Public welfare statutes originated out of a concern of the general public that individuals cannot adequately protect themselves from the perils of the industrial revolution.¹¹⁸ Congress made a choice to help protect the public at large by enacting statutes that provide more powerful tools to aid government enforcement in deterring potentially dangerous activities.¹¹⁹

Early "public welfare" statutes created misdemeanor offenses with lower mental state requirements where the individual or corporation dealt with a product that could adversely affect public health.¹²⁰ These lower mental state requirements placed a greater burden on those who dealt with such products to seek out the necessary obligations to comply with applicable laws.¹²¹ Crimes that require a low or non-existent mental state necessarily raise constitutional questions about due process.¹²² Where the penalty is lower, the mental state is also low; when the penalty is more severe, due process requires a higher mental state that incorporates the concept of notice.¹²³

What inherently differentiates public welfare statutes is the nature of the material that is being regulated. Things like radioactive waste are likely to put its possessor on notice of regulation whereas things like food stamps are not.¹²⁴ Where a material is sufficiently "obnoxious," courts are willing to allow the jury to infer notice of the potential for regulation on the part of its possessor.¹²⁵ The Supreme Court in *U.S. v. Balint* found that such an inference is justifiable since Congress weighed notice concerns with the concern for public health and found the latter more persuasive. The Court found that where the defendant was in possession of illegal drugs like opium, it was incumbent on them to determine how to comply with the law.¹²⁶

The distinction in public welfare statutes is that there is a permissible inference of notice with "obnoxious" materials; at least one commentator characterizes the mens rea of such statutes as a hybrid between a "negligence" and a "knowingly" standard.¹²⁷ Inherent within this "hybrid" characterization is the recognition of a subjective element inconsistent with strict liability; one has to "know" what one possesses.¹²⁸ A true strict liability standard would not distinguish based upon knowledge of potential illegality;¹²⁹ since public welfare statutes contain and require a mens rea element, they are distinguishable from pure strict liability crimes.

III. RULE OF LENITY

Some courts and commentators argue that environmental statutes and the regulations that interpret them are "notoriously ambiguous."¹³⁰ Several commentators argue, and a small minority of courts have held, that the rule of lenity should apply to environmental criminal provisions due to their ambiguity.¹³¹ A statute is ambiguous when it is unclear how it will be applied in a particular case.¹³² The rule of lenity serves to resolve any ambiguity in a particular statute in favor of the defendant.¹³³ In emphasizing the need to construe a statute narrowly where it is ambiguous, the *Plaza* court quotes Justice Douglas from an opinion involving a prosecution under the Rivers and Harbors Act:

¹¹⁷ LaFave et al., *Criminal Law*, §3.8(b) at 244 (2d Ed West 1986).

¹¹⁸ See *Morrisette v. U.S.*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

¹¹⁹ *Balint*, 258 U.S. at 254; See *U.S. v. Dotterweich*, 320 U.S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943); *Morrisette v. U.S.* 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952); *U.S. v. Park*, 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975); *International Minerals*, 402 U.S. at 565.

¹²⁰ See *Id.*

¹²¹ See *Id.*; *Johnson* at 666; *Sellers*, 926 F.2d at 416, n. 2; *Hopkins*, 53 F.3d at 537; *Hoflin*, 880 F.2d at 1038; *Weitzenhoff*, 35 F.3d at 1286.

¹²² *Liparota*, 471 U.S. at 426; *Staples*, 511 U.S. at 604-05.

¹²³ See *Lambert v. California*, 355 U.S. 225 (1957); Yount, *supra* note 19, at 617.

¹²⁴ *Liparota*, 471 U.S. at 432-33.

¹²⁵ *International Minerals* at 565; *Buckley*, 934 F.2d at 88; *Laughlin*, 10 F.3d at 965; *Sellers*, 926 F.2d at 417; *Self*, 2 F.3d at 1090; *Hopkins*, 53 F.3d at 538; *Hayes International*, 933 F.2d at 1503-04; *Dee*, 912 F.2d at 745; *Baytank*, 934 F.2d at 612; but see *Johnson & Towers*, 741 F.2d at 668-69.

¹²⁶ *Balint*, 258 U.S. at 254.

¹²⁷ Bryan, *supra* note 77, at 177 n.115.

¹²⁸ *International Minerals*, 402 U.S. at 565; *Buckley*, 934 F.2d at 88; *Laughlin*, 10 F.3d at 965; *Sellers*, 926 F.2d at 417; *Self*, 2 F.3d at 1090; *Hopkins*, 53 F.3d at 538; *Hayes International*, 786 F.2d at 1503-04; *Dee*, 912 F.2d at 745; *Baytank*, 934 F.2d at 612; but see *Johnson & Towers*, 741 F.2d at 668-69.

¹²⁹ LaFave et al., *Criminal Law*, §3.8 at 242 (West 2d Ed. 1986).

¹³⁰ *Weitzenhoff*, 35 F.3d at 1283; Yount, *supra* note 19, at 620 citing Brickey, *supra* note 155, at 14; Richard Lazarus, Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law, 83 Georgetown L. J. 2407, 2431 (1995).

¹³¹ Yount *supra* note 19, at 618; *Weitzenhoff*, 35 F.3d at 1295-96 (Kleinfeld dissenting); *U.S. v. Plaza Health Laboratories*, 3 F.3d 643, 646; *U.S. v. Borowski*, 977 F.2d 27, 31-32 cited in Yount *supra* note 19, at 618.

¹³² *Plaza*, 3 F.3d at 646.

¹³³ Yount *supra* note 19, at 612-613.

“This case comes to us at a time in the Nation’s history when there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well. The crisis we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions.”¹³⁴

The purpose of narrowly construing criminal statutes is that, if ambiguous, a person would not have adequate warning that his or her conduct is deemed illegal.¹³⁵ Another purpose of the rule of lenity is to force Congress to work out the details of criminal sanctions in the legislative process instead of delegating interpretive responsibility to the courts.¹³⁶ The dissent in *Weitzenhoff* reflects this sentiment and adds that the rule of lenity is especially appropriate when dealing with public welfare statutes due to the lower requirements for showing culpability and the broad range of activity covered by the Clean Water Act.¹³⁷

But since public welfare statutes still require substantial proof of the culpability of the defendant, such arguments are unfounded. The Court in *Plaza* held that it would be appropriate to apply the rule of lenity only after considering the language and structure of the act itself, legislative history, judicial interpretations and “interpretive statements by the agency in charge of implementing the statute.”¹³⁸ In that case the Court was attempting to discern the application of the definition of the term “point source” as it related to an individual who, by his own hands, placed contaminated blood vials next to a bulkhead where the vials were subsequently taken out to sea.¹³⁹ The Court explained that:

“[w]e find no suggestion either in the act itself or in the history of its passage that congress intended the CWA to impose criminal liability on an individual for the myriad, random acts of human waste disposal, for example, a passerby who flings a candy wrapper into the Hudson River, or a urinating swimmer. Discussions during the passage of the 1972 amendments indicate that congress had bigger fish to fry.”¹⁴⁰

Therefore, the Court held that since the term was ambiguous as applied to the defendant, it would be appropriate to apply the rule of lenity despite what the Court had characterized as “such an obviously wrong act.”¹⁴¹ However, *Plaza* merely stands for use of the rule of lenity for definitional aspects of crimes; by contrast, there is nothing ambiguous about the mental state requirements. The above rationale from *Plaza* is also significantly limited due to its interpretation of a jurisdictional element that arguably does not require proof of mens rea.

The Supreme Court recently held that the rule of lenity only applies when there is “grievous ambiguity or uncertainty in the statute” and when “after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.”¹⁴² The ambiguity that is the essence of the argument for the rule of lenity can be clarified by analyzing the language of the statute and determining the intent of Congress.¹⁴³ As I’ve shown in Section II, the knowledge requirement is not ambiguous, therefore application of the rule of lenity is inappropriate.

IV. PROPRIETY OF FELONY LEVEL PENALTIES

Some courts and commentators argue that since violations of environmental criminal provisions constitute felonies, the absence of a culpability requirement is improper.¹⁴⁴ In critiquing the application of the public welfare doctrine to felony level crimes, proponents point out that the original penalties contemplated by the doctrine were only misdemeanors.¹⁴⁵ Due to the absence of a mens rea in the statutes there is an implied duty on behalf of those dealing in such obnoxious materials to seek out their obligation to comply with the applicable laws.¹⁴⁶ In construing the justification

¹³⁴ U.S. v. Standard Oil Co., 384 U.S. 224, 225, 86 S.Ct. 1427, 1428 16 L.Ed.2d 492 (1966) cited in *Plaza*, 3 F.3d at 650.

¹³⁵ *Liparota*, 471 U.S. at 427 cited in Bryan *supra* note 77, at 172; Yount *supra* note 19, at 617.

¹³⁶ *Plaza*, 3 F.3d at 649; *Id.*

¹³⁷ *Weitzenhoff*, 35 F.3d at 1295-96 (Kleinfeld dissenting).

¹³⁸ *Plaza*, 3 F.3d at 646.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Plaza*, 3 F.3d at 649.

¹⁴² *Muscarello v. U.S.*, 524 U.S. 125, 141 L. Ed. 2d 111, 118 S. Ct. 1911, 1919 (1998) quoted in *Iverson*, 162 F.3d at 1025, n. 8.

¹⁴³ *Dean*, 969 F.2d at 191; *Hoflin*, 880 F.2d at 1037; *Plaza*, 3 F.3d at 646; *Weitzenhoff*, 35 F.3d at 1283.

¹⁴⁴ See generally Yount *supra* note 19 at 609; Lazarus, *supra* note 43 at 2431; See Bryan *supra* note 77: *Ahmad*, 101 F.3d at 391; *Weitzenhoff*, 35 F.3d at 1298-99 (Kleinfeld dissenting).

¹⁴⁵ *Ahmad*, 101 F.3d at 391; *Weitzenhoff*, 35 F.3d at 1298-99 (Kleinfeld dissenting); Yount *supra* note 19, at 609; Lazarus *supra* note 43 at 2431.

¹⁴⁶ *Balini*, 258 U.S. at 254; *Dotterweich*, 320 U.S. at 280.

for lowered culpability requirements in “public welfare” offenses, the Supreme Court in *U.S. v. Park*, explained that:

“Dotterweich and the cases which have followed reveal that in providing sanctions which reach and touch the individuals that execute the corporate mission... the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services affect the health and well-being of the public that supports them.”¹⁴⁷

As public sentiment grew regarding the seriousness of environmental issues, so did interest in making penalties more severe.¹⁴⁸ In contrast to older fashioned public welfare statutes, contemporary environmental statutes provide for felony level penalties for knowing violations.¹⁴⁹

Some commentators argue that the line of Supreme Court cases marked by *Liparota* and *Staples* hold that public welfare statutes in general do not allow for felony level penalties.¹⁵⁰ The Supreme Court found in *Liparota v. U.S.* that where a statute did not have a mental state delineated within the applicable section, it would be improper to find a person guilty of a felony offense. All courts that addressed *Liparota* before the decision in *Staples* was handed down held that such reasoning was inapplicable in the environmental context; food stamps, unlike hazardous waste, do not have the “obnoxious” characteristics that would ostensibly put their possessors on notice of the potential for regulation.¹⁵¹

Some courts and commentators have argued that the Supreme Court’s subsequent decision in *Staples* took the *Liparota* reasoning further to severely limit the scope of liability for public welfare offenses.¹⁵² In *Staples* the Supreme Court considered a law that prohibited the manufacture of, or conversion to, a fully automatic machine gun; the court went on to find that guns are not the kind of article that would necessarily make a person aware of the potential for regulation.¹⁵³ Justice Thomas, writing for the majority, cited a long tradition of gun ownership in America, all of which occurred in a non-commercial setting.¹⁵⁴ Commentators rely on *Staples* to argue that if fully automatic machine guns are not enough to put a person sufficiently on notice of the potential for regulation, neither is hazardous waste.¹⁵⁵ Therefore, some would argue, it would be improper for a jury to hold a person liable merely for his or her unlawful disposal of a hazardous material since there might be insufficient notice to permissibly infer knowledge on behalf of its possessor.¹⁵⁶ Since there is arguably insufficient notice, this would make environmental statutes too much like strict liability offenses, and would therefore make the application of felony level penalties inappropriate.¹⁵⁷

Although *Staples* would seem to mandate such a conclusion, the Court backed off going all the way to outlawing felony public welfare offenses.¹⁵⁸ As is pointed out in *Weitzenhoff* and confirmed in *Hopkins*, the *Staples* court acknowledged that earlier cases suggest that public welfare offenses might not extend to felonies, yet noted that “we need not adopt such a definitive rule of construction to decide this case.”¹⁵⁹ This leaves open the possibility for enhanced penalties for public welfare legislation.

In addition to the unwillingness in *Staples* to rule out felony penalties, there are several reasons that the proponents of the above interpretation of *Liparota* and *Staples* to curtail the public welfare doctrine are wrong. While perhaps in 1994, or by taking a purely historic approach to viewing gun use in America, one could come to the conclusion that something like a machine gun would not alert a person to the potential for regulation; a look at recent events in this country proves enlightening. The dangerousness of guns in the past year alone is demonstrated not only in “traditional problem areas,” but also with the traumatic hemorrhage of events at Columbine High School in Colorado and other school

¹⁴⁷ *Park*, 421 U.S. at 673.

¹⁴⁸ Robert V. Percival et al., *Environmental Regulation: Law Science and Policy* at 195 (2d ed. 1996).

¹⁴⁹ Resource Recovery and Recovery Act (RCRA) § 6928(d)(2)(A), 42 U.S.C. 3008 (1986); Clean Water Act (CWA) § 1319 (c)(2)(A), 33 U.S.C. 309 (1987); Clean Air Act § 7413 (c)(1)(C), 42 U.S.C. 113 (1990).

¹⁵⁰ Yount *supra* note 19, at 609; Lazarus *supra* note 43 at 2431; See Bryan *supra* note 77.

¹⁵¹ *Self*, 2 F.3d at 1090; *Hayes International*, 933 F.2d at 1502.

¹⁵² Yount *supra* note 19, at 609; See Bryan *supra* note 77; *Ahmad*, 101 F.3d at 391; *Weitzenhoff*, 35 F.3d at 1298-99 (Kleinfeld dissenting).

¹⁵³ *Staples*, 511 U.S. at 611.

¹⁵⁴ *Id.*

¹⁵⁵ *Ahmad*, 101 F.3d at 391.

¹⁵⁶ *Id.*; Yount *supra* note 19, at 609; See Bryan *supra* note 77; *Weitzenhoff*, 35 F.3d at 1298-99 (Kleinfeld dissenting).

¹⁵⁷ *Id.*

¹⁵⁸ *Staples*, 511 U.S. at 618-19.

¹⁵⁹ *Id.* cited in *Weitzenhoff*, 35 F.3d at 1286; *Hopkins*, 53 F.3d at 540.

shootings by young people that made even the NRA consider canceling its annual meeting. Although there may have been only a limited legislative response, it would be unrealistic to find that the average person would not be put on notice of possible regulation when in possession of a machine gun.

Secondly, guns and hazardous wastes are very different in the nature of their composition and patterns of use. Few would likely argue that hazardous waste has a long tradition of lawful use in this country that wouldn't necessarily place its possessor on notice of regulation. Indeed, what the *Staples* court was trying to protect was the individual gun owner in a primarily non-commercial setting. For the most part, obnoxious materials are not utilized by individuals in a non-commercial setting. In contrast to the general nature of gun use, such materials are usually generated in a commercial context and are generally considered a liability, not a treasured tradition exemplifying American values.¹⁶⁰

Hazardous waste, by its smell, appearance, and reactive properties is a substance that inherently should generate caution in its possessor.¹⁶¹ This is especially true in light of the increased public awareness and concern over environmental degradation;¹⁶² this same concern prompted Congress to amend and toughen the criminal provisions of many federal environmental laws.¹⁶³ Therefore, since Congress can be assumed to be aware of the continued vitality of the public welfare doctrine when it amended legislation, they were presumably aware of the consequences of lowering the mental state and increasing penalties. While Congress did not explicitly address the felony/misdemeanor issue, the wording of the statutes show a consistent and conscious choice not to require a mens rea for some elements despite their strict liability nature.¹⁶⁴ The great majority of Circuits that have considered both the strict liability and *Liparota-Staples* thread have found them not to apply in the context of environmental public welfare legislation.¹⁶⁵

V. WHO'S RESPONSIBLE? CONCEPTS OF IMPLIED AND ASSUMED KNOWLEDGE

The purpose of the criminal provisions of environmental laws is to have the greatest deterrent effect with limited prosecutorial resources.¹⁶⁶ The means for achieving this end is to prosecute the people in higher positions within a business entity who seek to insulate themselves from criminal liability by using subordinates to do the "dirty" work.¹⁶⁷ In targeting those making the decisions, courts have utilized the "Willful Blindness"¹⁶⁸ and "Responsible Corporate Officer"¹⁶⁹ doctrines as a way to demonstrate culpability where direct evidence is weaker. Using circumstantial evidence via the above doctrines does not lower the level of awareness needed to be proven at trial so as to make the mens rea akin to strict liability; they merely provide an alternate means of amassing evidence to prove a count.¹⁷⁰

A. Willful Blindness

The Willful Blindness doctrine is a means to prove knowledge "where it can almost be said that the defendant actually knew," as when a person "has his suspicion aroused but then deliberately omits to make further inquiries, because

¹⁶⁰ *Staples*, 511 U.S. at 611.

¹⁶¹ *Sellers*, 926 F.2d at 417; *Iverson*, 162 F.3d at 1027; *Hoflin*, 880 F.2d at 1039; *Self*, 2 F.3d at 1091; *Dee*, 912 F.2d at 745; *Laughlin*, 10 F.3d at 967; *Baytank*, 934 F.2d at 612; *Kelley Technical Coatings*, 157 F.3d at 441.

¹⁶² Robert V. Percival et al., *Environmental Regulation: Law Science and Policy* at 195 (2d ed. 1996).

¹⁶³ S.Rep. No. 50, 99th Cong., 1st Sess. 30 (1985), H.R.Conf.Rep.No.1004, 99th Cong., 2d Sess. 138 (1986) (both discussing the CWA); *Sinskey*, 119 F.3d at 716; *Hopkins*, 53 F.3d at 540; *Laughlin*, 10 F.3d at 416; *Weitzenhoff*, 35 F.3d at 1283; *Hoflin*, 880 F.2d at 1038; *Wilson*, 133 F.3d at 263; *See generally* Schiffer *supra* note 43; *Yount supra* note 19, at 609.

¹⁶⁴ S.Rep. No. 172, 96th Cong., 2d Sess. 39 (1980), U.S. Code Cong. & Admin.News 1980, pp.5019, 5038.

¹⁶⁵ *Self*, 2 F.3d at 1090; *Hopkins*, 53 F.3d at 540; *Hayes International*, 786 F.2d at 1402; *Weitzenhoff*, 35 F.3d at 1285-86; *Wilson*, 133 F.3d at 263; *Kelley Technical Coatings*, 157 F.3d at 437-38.

¹⁶⁶ Joseph Hutchison, Counsel to the United States Attorney, Remarks to the Environmental Law Class, Quinnipiac College School of Law, Sept. 14, 1999.

¹⁶⁷ Stefan A. Noe, "Willful Blindness": A Better Doctrine for Holding Corporate Officers Criminally Liable For RCRA Violations, 42 DePaul L. Rev. 1461, 1461 *citing* Jane F. Barrett & Veronica M. Clarke, Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA after United States v. Dee, 59 Geo. Wash. L. Rev. 862, 883 (1991).

¹⁶⁸ *Buckley*, 934 F.2d at 88; *Self*, 2 F.3d at 1087, 1088; *Hayes International*, 933 F.2d at 1504; *MacDonald*, 933 F.2d at 55.

¹⁶⁹ *Iverson*, 162 F.3d at 1025; *M/G Transport* at 590-92; *Self*, 2 F.3d at 1088; *Greer*, 850 F.2d at 1451-52; *but see MacDonald*, 933 F.2d at 53 "We have found no case, and the government cites none, where a jury was instructed that the defendant could be convicted of a federal crime expressly requiring knowledge as an element, solely by reason of a conclusive, or "mandatory" presumption of knowledge of the facts constituting the offense." *citing* *Carella v. California*, 491 U.S. 263 (1989) (per curiam); *Francis v. Franklin*, 471 U.S. 307, 314 & n.2 (1985); *Hill v. Maloney*, 927 F.2d 646, 648 & n.3 (1st Cir. 1990).

¹⁷⁰ LaFave et al., *Criminal Law*, §3.5(b) at 219 (West 2d Ed. 1986).

he wishes to remain in ignorance.”¹⁷¹ Since the doctrine requires some evidence that the actor had notice of facts that should alert them to illegal activity, the doctrine is therefore relatively narrow and makes subsequent inaction more culpable.¹⁷² The Model Penal Code reflects this narrow construction:

“When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes it not to exist.”¹⁷³

The classic case is *U.S. v. Jewell*, where a person driving a truck from Mexico knew about a secret compartment but deliberately chose not to look inside and was found to be culpable for smuggling drugs under the willful blindness doctrine.¹⁷⁴ Subsequent decisions have found that the test for willful blindness requires two inferences: “(1) the defendant was subjectively aware of a high probability of the existence of illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct.”¹⁷⁵ The second prong can be proven by either an admission by the defendant of an intent to avoid knowledge or the circumstances surrounding the facts of the case are “overwhelmingly” suspicious.¹⁷⁶

In the environmental context, the doctrine of willful blindness is used to circumstantially infer “knowledge” for essential elements of criminal violations. For example, where the defendant has substantial experience in the industry, facts like an unusually low cost for hazardous waste disposal, and a defendant’s lack of inquiry can be used to show a conscious intent to remain unaware.¹⁷⁷ The Second Circuit in *Hopkins* noted that:

“A [wilful blindness] charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt “that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.”¹⁷⁸

The *Hopkins* court held that where the defendant was found to have “studiously avoided” confirming the tampering with samples, as evidenced by such statements as, “I know nothing, I hear nothing” on 25-30 occasions, the jury properly found him guilty.¹⁷⁹ Similarly, where a person tells another to “handle” the disposal of hazardous waste without actually directly telling them to dispose of it, a court would likely find such person meeting the “knowledge” requirement.¹⁸⁰ Some courts outside of an environmental context have cautioned against the use of the doctrine out of fear it may blend a “knowledge” standard into a “recklessness” standard; all courts that have dealt with the issue of circumstantial proof of knowledge in an environmental context have not found this to be the case.¹⁸¹

B. Responsible Corporate Officer Doctrine

The Responsible Corporate Officer Doctrine holds that where a corporate officer is in a position to harm the public health or pollute the environment he or she is individually responsible for their actions.¹⁸² The Responsible Corporate Officer Doctrine was first enunciated in the Supreme Court’s decision in *U.S. v. Dotterweich* in the context of introducing unsafe medicine into the “stream of commerce” for public consumption; the president of the corporation was found to be in a “responsible relation” to public health and therefore criminally liable.¹⁸³ The doctrine was substantially

¹⁷¹ *Id.* quoting G. Williams, *Criminal Law: The General Part* 157, 159 (2d ed. 1961).

¹⁷² *Id.* at 219 citing *U.S. v. Rivera*, 944 F.2d 1563 (11th Cir. 1991) (new) n. 22; Noe, *supra* note 192, at 1471 citing *U.S. v. Lara-Vasquez*, 919 F.2d 946, 951-52 (5th Cir. 1990).

¹⁷³ Model Penal Code §2.02(7) (1962).

¹⁷⁴ *U.S. v. Jewell*, 532 F.2d 697 (9th Cir. 1976) cited in LaFave et al., *Criminal Law* §3.5(b) at 219 (West 2d Ed. 1986).

¹⁷⁵ Noe, *supra* note 192, at 1471-72 citing *Lara-Velasquez*, 919 F.2d at 951.

¹⁷⁶ *Id.*; LaFave et al., *Criminal Law* §3.5(b) at 220 (West 2d Ed. 1986) citing *U.S. v. Hester*, 880 F.2d 799 (4th Cir. 1989).

¹⁷⁷ *Hopkins*, 53 F.3d at 541-42; *Buckley*, 934 F.2d at 88; *Self*, 2 F.3d at 1087-88; *Hayes International*, 933 F.2d at 1504; *Greer*, 850 F.2d at 1451-52; *MacDonald*, 933 F.2d at 55.

¹⁷⁸ *Hopkins*, 53 F.3d at 542 citing *U.S. v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993).

¹⁷⁹ *Hopkins*, 53 F.3d at 542.

¹⁸⁰ *Greer*, 850 F.2d at 1451-52 cited in *Self*, 2 F.3d at 1088.

¹⁸¹ *Hopkins*, 53 F.3d at 541-42; *Buckley*, 934 F.2d at 88; *Self*, 2 F.3d at 1087-88; *Hayes International*, 933 F.2d at 1504; *Greer*, 850 F.2d at 1451-52; *MacDonald*, 933 F.2d at 55.

¹⁸² See generally *U.S. v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L. Ed. 48 (1943); *U.S. v. Park*, 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed.2d 489 (1975).

¹⁸³ See generally *U.S. v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L. Ed. 48 (1943).

developed in *U.S. v. Park* where the Supreme Court found that, even though the task of seeking out illegal conditions was “onerous,” where a president of a corporation had knowledge of illegal conditions at one of its food distribution centers, he was criminally liable for not further investigating and remedying unsafe conditions.¹⁸⁴ However, the *Park* court emphasized that “the concept of ‘responsible relationship’ ... imports some measure of blameworthiness,” and that while its burden is significant, the doctrine “does not require that which is objectively impossible.”¹⁸⁵

In an environmental context, where a person runs the day-to-day operations of a facility, develops policy for disposal of waste, or merely has the authority to control discharges of hazardous waste, he or she could be held liable under the Responsible Corporate Officer doctrine.¹⁸⁶ While all courts would likely consider a defendant’s position within the company as evidence contributing to knowledge, there is a minority view that mere position alone is not enough to justify felony level penalties.¹⁸⁷ The Ninth Circuit addressed the argument of whether felony level penalties are appropriate with the Responsible Corporate Officer Doctrine in its decision in *Iverson*:

“In 1987, after the Supreme Court decided *Park*, Congress revised and replaced the criminal provisions of the CWA. (Most importantly, Congress made a violation of the CWA a felony, rather than a misdemeanor.) In replacing the criminal provisions of the CWA, Congress made no changes to its “responsible corporate officer” provision. That being so, we can presume that Congress intended for *Park*’s refinement of the “responsible corporate officer” doctrine to apply under the CWA.”¹⁸⁸

While the Court in *U.S. v. MacDonald & Watson* reversed a conviction on the basis of a jury instruction that allowed for knowledge to rest solely on the defendant’s position in the company, the court found that, “knowledge may be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers.”¹⁸⁹ The Tenth Circuit Court in *U.S. v. Self* found that where the defendant was responsible for the day-to-day management of the facility, oversaw all bills, assisted in acquiring hazardous materials from generators and brokers, could see drums storing hazardous materials from his office, ordered the doors to the warehouse containing the hazardous materials closed, and in one instance assisted in closing the doors when informed of an impending inspection, it was proper to charge him with knowledge of the illegality of his conduct.¹⁹⁰ Where a corporate officer is responsible for policies that affect the public health and environment, they are in a “responsible relation” to them; it is manifestly proper to use the Responsible Corporate Officer doctrine to circumstantially provide evidence of culpability.

CONCLUSION

The main point of criminal prosecution of federal environmental laws is to hold those responsible who make the decisions to dispose of hazardous materials illegally.¹⁹¹ Congress amended major environmental laws to increase penalties and require a lower mens rea, “knowingly,” in response to public concern over the seriousness of environmental crimes.¹⁹² A ‘knowingly’ mens rea merely means being aware of the conduct that violates the law and does not require

¹⁸⁴ See generally *U.S. v. Park*, 421 U.S. 658, 95 S. Ct. 1903, 44 L.Ed.2d 489 (1975).

¹⁸⁵ *Id.* cited in LaFave et al., Criminal Law § 3.10(e) at 267 (West 2d Ed. 1986)

¹⁸⁶ *Iverson*, 162 F.3d at 1025; *M/G Transport*, 173 F.3d at 590-91; *Self*, 2 F.3d at 1088; *Dee*, 912 F.2d at 747; *Greer*, 850 F.2d at 1452-52; but see *MacDonald*, 933 F.2d at 52, 55.

¹⁸⁷ *Id.*; Noe, *supra* note 192, at 1475; “In a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* is not an adequate substitute for direct or circumstantial proof of knowledge.” *MacDonald*, 933 F.2d at 55.

¹⁸⁸ *Iverson*, 162 F.3d at 1024 citing *U.S. v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991); *U.S. v. Frezzo Brothers, Inc.*, 602 F.2d 1123, 1130 n.11 (3d Cir. 1979); Susan F. Mandiberg, Moral Issues in Environmental Crime, 7 *Fordham Envtl. L.J.* 881, 895 (1996); Jeremy D. Heep, Adapting the Responsible Corporate Officer Doctrine in Light of *United States v. MacDonald & Watson Waste Oil Co.*, 78 *Minn. L. Rev.* 699, 702-03 (1994); Brenda S. Hustis and John Y. Gotanda, The Responsible Corporate Officer: Designated Felon or Legal Fiction?, 25 *Loy. U. Chi. L.J.* 169, 172 (1994); Barry M. Hartman and Charles A. De Monaco, The Present Use of the Responsible Corporate Officer Doctrine in Criminal Enforcement of Environmental Laws, 23 *Envtl. L. Rep.* 10145, 10146-48 (1993).

⁸⁹ *MacDonald*, 933 F.2d at 55.

⁹⁰ *Self*, 2 F.3d at 1087.

⁹¹ *M/G Transport Services, Inc.*, 173 F.3d at 590-91; *Iverson*, 162 F.3d at 1025; *Self*, 2 F.3d at 1088; *Greer*, 850 F.2d at 1451-52; Schiffer et al. *supra* note 43 at 2535 (1995).

¹⁹² *Laughlin*, 10 F.3d 961; *Hopkins*, 53 F.3d at 540; *Hoflin*, 880 F.2d at 1038; *Weitzenhoff*, 35 F.3d at 1283; *Sinskey*, 119 F.3d at 716; Yount *supra* note 19.

awareness of the law or its regulations.¹⁹³

Some critics argue that the criminal provisions are strict liability offenses, but they ignore the inherently subjective nature of a “knowingly” mens rea requirement.¹⁹⁴ Others argue that environmental criminal provisions are ambiguous and therefore the rule of lenity should be used.¹⁹⁵ This argument is based in an incorrect interpretation of the relevant statutes; use of the rule of lenity has not been adopted by any circuit courts for the knowledge element.¹⁹⁶

Knowledge can be inferred where hazardous materials are involved,¹⁹⁷ or can be proven circumstantially by the Willful Blindness Doctrine¹⁹⁸ or the Responsible Corporate Officer Doctrine.¹⁹⁹ In light of the remedial purpose of public welfare statutes,²⁰⁰ recent Supreme Court²⁰¹ and seminal Circuit Court²⁰² decisions, the goal of deterring decision-makers from illegal activity would be best served by adhering to a traditional construction of a “knowingly” mens rea.

JONATHAN SNYDER

¹⁹³ *Buckley*, 934 F.2d at 88; *Laughlin*, 10 F.3d at 965; *Dee*, 912 F.2d at 745; *Weitzenhoff*, 35 F.3d at 286; *Kelley Technical Coatings*, 157 F.3d at 436-37; *Baytank*, 934 F.2d at 613.

¹⁹⁴ *Johnson & Towers*, 741 F.2d at 668; *Sinskey*, 119 F.3d at 717; *Dean*, 969 F.2d at 192; *See Bryan supra* note 77; LaFave et al., *Criminal Law*, §3.8 at 242 (West 2d Ed. 1986).

¹⁹⁵ *Plaza*, 3 F.3d at 649; *Ahmad*, 101 F.3d at 391; *Weitzenhoff*, 35 F.3d at 1295, 99 (Kleinfeld dissenting); *See generally* Yount, *supra* note 19, at 609; Schiffer et al. *supra* note 43, at 2535; Lazarus *supra* note 43 at 2431.

¹⁹⁶ *Dean*, 969 F.2d at 191; *Hoflin*, 880 F.2d at 1037; *Plaza*, 3 F.3d at 646; *Weitzenhoff*, 35 F.3d at 1283.

¹⁹⁷ *International Minerals*, 402 U.S. at 565; *Dean*, 969 F.2d at 191; *Weitzenhoff*, 35 F.3d at 1284; *Hopkins*, 53 F.3d at 538.

¹⁹⁸ *Buckley*, 934 F.2d at 88; *Self*, 2 F.3d at 1087; *MacDonald*, 933 F.2d at 55; *Hayes*, 786 F.2d at 1504.

¹⁹⁹ *See generally* U.S. v. Park, 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975); *Self*, 2 F.3d at 1088; *M/G Transport*, 173 F.3d at 590-91; *Iverson*, 162 F.3d at 1025; *MacDonald*, 933 F.2d at 52; *Greer*, 850 F.2d at 1451-52.

²⁰⁰ *See generally* U.S. v. Balint, 258 U.S. 250, 45 S. Ct. 301, 66 L. Ed. 604 (1922); U.S. v. Dotterweich, 320 U.S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943); *Morrisette v. U.S.* 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952); *International Minerals*, 402 U.S. 558, 565; *Park*, 421 U.S. 658; *Johnson & Towers*, 741 F.2d at 666; *Sellers*, 926 F.2d at 416 n. 2; *Hopkins*, 53 F.3d at 537; *Hoflin*, 880 F.2d at 1038; *Weitzenhoff*, 35 F.3d at 1286.

²⁰¹ “The rule of lenity only applies when there is “grievous ambiguity or uncertainty in the statute” and when “after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.” *Muscarello v. U.S.*, 524 U.S. 125, 141 L. Ed. 2d 111, 118 S. Ct. 1911, 1919 (1998) *quoted in Iverson*, 162 F.3d at 1025 (footnote 8)

²⁰² *Dean*, 969 F.2d at 191; *Hoflin*, 880 F.2d at 1037; *but see Weitzenhoff*, 35 F.3d at 1283; *Plaza*, 3 F.3d at 1284.