MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 16 | Issue 4 Article 4

1990

"Knowing" Environmental Crimes

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"KNOWING" ENVIRONMENTAL CRIMES

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INTRODUCTION

The majority of federal environmental statutes[1] criminalize certain conduct by persons[2] within the regulated community. In particular, most of these statutes target for criminal liability certain conduct that is engaged in "knowingly."[3] In light of repeated promises by the United States' Environmental Protection Agency and Department of Justice Land and Natural Resources Division to increase prosecution of environmental crimes,[4] individuals and corporations within the regulated community must examine what it means to have "knowingly" acted for purposes of potential criminal liability under federal

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1. This article focuses on criminal provisions in federal environmental statutes. Almost every state has in some form criminalized certain conduct relating to state environmental regulation. For a thorough discussion of state environmental crimes, *see* DeCicco & Bonanno, *A Comparative Analysis of the Criminal Environmental Laws of the Fifty States: The Need for Statutory Uniformity as a Catalyst for Effective Enforcement of Existing and Proposed Laws*, 5 J. LAND USE & ENVTL. L. 1 (1989).

2. For purposes of this article, persons regulated under the federal environmental statutes are assumed to include both corporations and individuals.

3. *See, e.g.*, Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136l(b) (1988); Toxic Substances Control Act, 15 U.S.C. §§ 2614, 2615(b) (1988); Federal Water Pollution Control Act, 33 U.S.C. § 1319(c) (Supp. V 1987); Solid Waste Disposal Act, 42 U.S.C. § 6928(d) (Supp. V 1987) (commonly referred to as the Resource Conservation and Recovery Act or RCRA); Clean Air Act, 42 U.S.C. § 7413(c) (1982); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9603 (1982 & Supp. V 1987) (commonly referred to as "Superfund"); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11045(b)(4) (Supp. V 1987). Other state of mind requirements appear in separate provisions of the Clean Water Act and in RCRA. Under the Clean Water Act, negligent violations of certain provisions are misdemeanors on a first conviction and felonies thereafter. *See* 33 U.S.C. § 1319(c)(1) (Supp. V 1987). Both the Clean Water Act and RCRA establish "knowing endangerment" provisions, the violation of which subjects a person to heightened criminal sanctions. *See* 33 U.S.C. § 1319(c)(3) (Supp. V 1987); 42 U.S.C. § 6928(e) (Supp. V 1987). *See also* Volz & Gray, *Knowing Endangerment: The New Darling of the Environmental Prosecutors*, CHEM. WASTE LITIG. REP., June 1988, at 39.

4. *See, e.g., Criminal Prosecutions, State Cooperation Seen as Key Enforcement Priorities in 1990*, [Current Developments] ENV'T REP. (BNA) No. 40, 1714–16 (Feb. 2, 1990).

environmental statutes.[5]

Because of certain judicial principles formulated in criminal jurisprudence and because of caselaw trends in the regulatory crimes area, individuals and corporations could conceivably face criminal prosecution under environmental laws for conduct that is, at worst, negligent. This article illustrates that rote application of these principles under environmental statutes could lead to criminal prosecution for conduct that is and should remain uniquely subject to civil enforcement.

Part I of this article sets forth traditional substantive law on the scope of the "knowing" state of mind. Part I also focuses on the "willful blindness" and "collective knowledge" principles, developed in criminal jurisprudence, that dilute a statutory "knowledge" requirement. Part II then outlines trends in regulatory crimes caselaw. Specifically, part II discusses the "responsible relationship" and "public welfare offense" doctrines in the context of "knowing" offenses. Whether or not all public welfare statutes contain "public welfare offenses" is also addressed. The discussion in part III critiques recent cases that have misused these developments to abrogate the "knowing" element present in most federal environmental statutes. Part IV demonstrates there is a real risk of criminalizing conduct—by individuals and corporations—that is merely negligent, or that traditionally has been the basis of civil enforcement on a strict liability basis. In particular, part IV discusses the legal precedents applicable to an analysis of "knowing" environmental offenses and argues in support of cautious application of certain criminal law principles in judicial analysis of environmental crime cases.

I. The Scope of a "Knowing" State of Mind

As indicated previously, most criminal provisions in the federal environmental statutes require a person to have done something "knowingly" before criminal liability will attach.[6]

5. This article addresses the state of mind aspect of "knowing" conduct under environmental statutes. For a thoughtful analysis of when a state of mind requirement should apply to particular elements of an environmental crime, see Comment, *Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?*, 16 B.C. Envtl. Aff. J. 53 (1988) (arguing that, consistent with the Model Penal Code, courts should determine liability for environmental crimes only after a careful application of culpability principles to each element of an offense).

6. *See supra* note 3.

The consistent use by Congress in these statutes of a seemingly straightforward word—"knowingly"—would logically lead one to believe Congress contemplated a particular mental state be present in order to trigger criminal liability. With one exception,[7] however, Congress apparently left to the courts the task of defining the requisite mental state embodied in the term "knowingly."[8]

A. Traditional View of a "Knowing" Culpability Requirement

Judicial construction of the "knowing" mental state has highlighted the ambiguity of that term[9] and has resulted in that term including a range of mental states.[10] The modern view, reflected in the Model Penal Code, is that "one 'knows' of present . . . events only if he is actually aware of them."[11] The word "knowingly" thus denotes crimes that require actual awareness of the nature of the act or omission, the results that will follow from an act or omission, or the circumstances indicating an act or omission.[12]

Under the Model Penal Code, crimes requiring a knowing mental state are distinguished from (1) crimes requiring an in-

7. Congress set forth standards concerning the "knowing" requirement for purposes of RCRA's "knowing endangerment" provision. *See* 42 U.S.C. § 6928(e) (Supp. V 1987). Knowing endangerment is defined as "[a]ny person . . . who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury . . . ." *Id.*

8. Under RCRA's criminal provision, for example, Congress indicated it had "not sought to define 'knowing' for offenses under [42 U.S.C. § 6928(d) (Supp. V 1987) (RCRA § 3008)] subsection (d); that process has been left to the courts under general principles." S. REP. No. 172, 96th Cong., 2d Sess. 39, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5038.

9. Much of the difficulty involved in ascertaining what, if any, state of mind is required for a particular crime lies in the ambiguous meaning of the particular word or phrase used. Even "knowingly" is not entirely clear; for instance, does one know a fact (e.g., that property is stolen) when he is 95% sure of it but not completely certain?

1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.4(b), at 299 (1986).

10. The range of mental states is described as:

> Cases have held that one has knowledge of a given fact when he has the means for obtaining such knowledge, when he has notice of facts which would put one on inquiry as to the existence of that fact, when he has information sufficient to generate a reasonable belief as to that fact, or when the circumstances are such that a reasonable man would believe that such a fact existed. . . . [Thus,] the word "knowledge" has been taken to mean many different things . . . .

Id. § 3.5(b), at 308–09 (footnotes omitted).

11. *Id. See also* MODEL PENAL CODE § 2.02(2)(b) (1985).

12. W. LAFAVE & A. SCOTT, *supra* note 9, § 3.5(b), at 307.

tention or purpose to do a prohibited act, cause a prohibited result, or fail to perform a required act;[13] (2) crimes requiring recklessness in performing an act, in failing to perform an act, or in causing a prohibited result;[14] and (3) crimes based on negligence in acting, failing to act, or causing a result.[15]

Thus, a "knowing" state of mind is a conscious one, but not necessarily a purposeful one. Because it requires consciousness of facts or circumstances, the term "knowingly" likewise denotes more than mere negligence or even recklessness.

B. The Willful Blindness or Deliberate Ignorance Doctrine

The requirement of actual awareness of a fact that is material to an element of an offense is critical to a finding of knowledge under a "knowing" culpability requirement. An important exception to the actual awareness requirement has developed in modern criminal jurisprudence. Known as "willful blindness" or "deliberate ignorance,"[16] the exception exists " 'where it can *almost* be said that the defendant actually knew' " a fact or circumstance that constitutes an element of an offense.[17] An example is "when a person 'has his suspicion aroused but then deliberately omits to make further inquiries, *because he wishes to remain in ignorance*.' "[18]

Although the drafters of the Model Penal Code highlighted the fact that such conduct probably falls somewhere *between* knowledge and recklessness,[19] the Ninth Circuit in *United States v. Jewell* classified this type of conduct as "knowledge," on the basis that "deliberate ignorance and positive knowledge are

13. *Id.* § 3.4(c), at 300.

14. A "reckless" mental state reflects a "subjective fault in that the actor must in his own mind realize the risk which his conduct involves." *Id.*

15. A "negligent" mental state involves "objective fault in creating an unreasonable risk." *Id.* As to which elements of an offense a given culpability requirement applies, the Model Penal Code's position is that a mental state expressed by statute applies to all material elements of a crime "unless a contrary purpose plainly appears in the statute." *Id.* (citing MODEL PENAL CODE § 2.02(4)). *See* Comment, *supra* note 5, at 58.

16. "Deliberate ignorance" is sometimes referred to as "deliberate avoidance." *See, e.g.*, United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096 (9th Cir. 1985).

17. W. LAFAVE & A. SCOTT, *supra* note 9, § 3.5(b), at 307 (quoting G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 57, at 157–59 (2d ed. 1961)) (emphasis added).

18. *Id.* (emphasis added).

19. MODEL PENAL CODE § 2.02 comment 3 (1985).

equally culpable."[20] Building on the notion that deliberate ignorance and knowledge are congruent states of mind, a typical jury instruction on willful blindness provides that: "The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him" and that "a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact."[21] Thus, if a defendant's knowledge or actual awareness of a fact or circumstance is less than one hundred percent, his purposeful failure to expand his knowledge to one hundred percent can subject him to criminal liability.

In application, courts have not paid heed to the limitation stated in early articulations of this principle; namely, that the purpose behind deliberately remaining ignorant must be to provide a defense to later liability or to "avoid learning the truth for fear of learning that contemplated action [or inaction] would be unlawful."[22] Instead, consistent with the Model Penal Code,[23] if a defendant is aware of facts or circumstances indicating a "high probability" of illegality, but fails to investigate, the courts will infer the defendant's "knowledge" of the facts or circumstances constituting an element of the offense.[24]

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20. 532 F.2d 697, 700 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

21. 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.09 (3d ed. 1977).

22. Perkins, *"Knowledge" as a Mens Rea Requirement*, 29 HASTINGS L.J. 953, 964 (1978). The author suggests that the common law concepts of knowledge are much more inclusive than the Model Penal Code's definition of "knowledge." The Model Penal Code's incomplete coverage of knowledge warrants that states drafting their own penal codes depart from the Model Penal Code in the knowledge section and incorporate a more expansive concept. Those states that already have penal codes should amend their codes accordingly.

23. Model Penal Code section 2.02(7) states that if "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 that it does not exist." MODEL PENAL CODE § 2.02(7). This articulation appears to allow the prosecution the benefit of an inference to prove its beyond-a-reasonable-doubt case, once the government shows a high probability of the existence of a critical fact, i.e., a fact that is an element of an offense. The government presumably can show this high probability by proving the existence of, and defendant's awareness of, facts that do not constitute elements of an offense.

24. *See* United States v. Jewell, 532 F.2d 697, 700 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976); *see also* United States v. Peddle, 821 F.2d 1521, 1524–25 (11th Cir. 1987); United States v. Ramsey, 785 F.2d 184, 189 (7th Cir.), *cert. denied sub nom.* McCreary v. United States, 476 U.S. 1186 (1986); United States v. Gold, 743 F.2d 800, 818 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985).

In recognition that the deliberate ignorance principle dilutes the prosecution's burden in a criminal prosecution, some members of the judiciary and some commentators have counseled that courts make sparing use of the doctrine. Dissenting in *United States v. Jewell*, Justice Kennedy[25] (then Judge Kennedy) criticized the majority for upholding an instruction at trial on willful blindness. Justice Kennedy concluded that a defendant's reckless disregard of or suspicion regarding facts or circumstances, followed by a failure to make inquiry, simply did not constitute the requisite culpability when the statute in question based criminal liability on knowledge.[26] The *Jewell* dissent also noted that, if a willful blindness instruction does not allow a defendant to exonerate himself by showing he actually believed the critical fact did not exist, then a defendant can be convicted on an objective theory of knowledge.[27]

Others have criticized the doctrine because the "awareness of a high probability" test presupposes that a defendant has recognized a need to investigate. The problem with the willful blindness doctrine, therefore, is that it focuses on culpability for being (or remaining) ignorant of a critical fact, rather than on proof that a defendant was aware of a need to investigate to ascertain that fact:

> Whenever the need to investigate is *recognized*, culpability is established by a conscious effort to avoid learning the truth for fear of learning that contemplated action would be unlawful. But without awareness of facts indicating a high probability of unlawfulness, the need to investigate may be overlooked. And *there is no conscious purpose to avoid learning the truth when the risk of unlawfulness has not been realized.* In other words, without either other evidence or awareness of facts indicating a high probability of unlawfulness, there is no basis for an inference that the need to investigate had been recognized, and there could be no wilful avoidance without such recognition.[28]

This critique seems valid and, if accepted by a court, would require the prosecution to show a defendant's awareness not

25. At the time of the *Jewell* decision, Justice Kennedy was a judge in the Court of Appeals for the Ninth Circuit.

26. *Jewell*, 532 F.2d at 707 (Kennedy, J., dissenting).

27. "[F]or example, in *Jewell* . . . 'a reasonable man should have inspected the car and would have discovered what was hidden inside.' " W. LAFAVE & A. SCOTT, *supra* note 9, § 3.5(b), at 308 (quoting *Jewell*, 532 F.2d at 707 (Kennedy, J., dissenting)).

28. Perkins, *supra* note 22, at 964 (emphasis added).

only of a high probability of the existence of a critical fact, but also the defendant's awareness of a high probability that an investigation to determine the existence of that fact was legally required.

In *United States v. Pacific Hide & Fur Depot, Inc.*,[29] the Ninth Circuit, led by Justice (then Judge) Kennedy, addressed the scope of the deliberate ignorance doctrine in the context of an environmental crime. The court reversed the trial court's conviction of a corporation and individual defendants for improper disposal of PCB-containing capacitors on the basis of the improper application of the deliberate ignorance jury instruction.[30] Under the Toxic Substances Control Act (TSCA), in order to obtain a criminal conviction, the government must prove a knowing or willful violation of regulations issued under the statute.[31] The regulations at issue prohibited the disposal of capacitors containing PCBs; thus, the Ninth Circuit reasoned that, if the defendants did not know the capacitors contained PCBs, there could be no criminal violation.[32]

In *Pacific Hide*, the trial court had allowed the government's case to go to the jury with the deliberate ignorance instruction. The Ninth Circuit indicated that the use of this instruction was proper "only when [the] defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance."[33] Consequently, it was not enough that the defendant was mistaken, recklessly disregarded the truth, or negligently failed to inquire as to the content of the capacitors. "Instead, the government must present evidence indicating that [the] defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of subsequent prosecution. Absent such evidence, the jury might impermissibly infer guilty knowledge on the basis of mere negligence without proof of deliberate avoidance."[34] Given the statutory mental state requirement of "knowing or willful," the Ninth Circuit concluded that such an inference, based on the deliberate ignorance instruction, was improper.[35]

29. 768 F.2d 1096 (9th Cir. 1985).
30. *Id.* at 1098–99.
31. 15 U.S.C. §§ 2614, 2615(b) (1988).
32. *Pacific Hide*, 768 F.2d at 1098.
33. *Id.*
34. *Id.* (citations omitted).
35. *Id.*

The Ninth Circuit found that the government's evidence in *Pacific Hide* was insufficient to warrant an instruction for deliberate ignorance. In particular, the court found: (1) there was no evidence that the defendants had deliberately avoided learning the true nature of the fluid in the capacitors for the purpose of building a defense to a subsequent prosecution; (2) there was no evidence that the employees who actually disposed of the capacitors were warned by the corporate headquarters that the capacitors might contain PCBs (no awareness of a high probability that a material fact existed); and (3) there was no evidence that the defendants knew what capacitors were or what they contained (no awareness of a high probability that a material fact existed).[36] In addition, the fact that the defendants left capacitors with leaks in open view, even though experts, and indeed EPA investigators that had been on-site, would recognize these items as leaking PCB fluids, indicated to the court a lack of awareness by the defendants that PCB-leaking capacitors violated any law, including TSCA regulations (no awareness of a duty to inquire).[37] The Ninth Circuit also found that the government's evidence indicating that the corporation had instructed its employees to bury the capacitors was not enough to show guilty knowledge. If anything, the Ninth Circuit held, this pointed to actual knowledge rather than deliberate ignorance. Finally, the court found that it was not enough that the defendants knew PCBs could be or were present in transformer fluid, since this fluid was physically dissimilar to that contained in capacitors, and therefore was inconclusive as to defendants' knowledge.[38]

The *Pacific Hide* case illustrates the impropriety of using a deliberate ignorance instruction where a statute requires a "knowing" violation if the facts and circumstances are such that the defendant's mental state is merely one of mistake, reckless (versus knowing) disregard of the truth, or negligent (versus knowing) failure to inquire. The Ninth Circuit's reasoning also puts meaning back into the limitation on the defendant's purposes in remaining deliberately ignorant; namely, that the defendant purposefully avoided learning all of the facts because he wanted to maintain the ability to subsequently

36. *Id.* at 1099.
37. *Id.*
38. *Id.*

deny knowledge in a prosecution. The opinion also supports the notion that, for a deliberate ignorance instruction to be appropriate, there must be proof that a defendant had an awareness of a high probability of a need to investigate. In the *Pacific Hide* case, the government's evidence did not indicate that the defendants were aware of a high probability of being legally obligated to investigate whether or not the capacitors contained PCBs.[39]

C. *The "Collective Knowledge" Doctrine*

As the deliberate ignorance doctrine erodes the requisite awareness an individual must possess to be subject to criminal liability, the "collective knowledge" doctrine similarly dilutes the requisite "knowledge" a corporation must possess to be found criminally liable. Under this doctrine, the collective knowledge of a corporation's employees can be imputed to the corporation to show the requisite mental state.[40] Thus, "a corporation may be held liable for *knowing* violations of the law notwithstanding the absence of proof that any single agent [or employee] intended to commit the offense *or even knew of the existence of the operative facts* that led to the violation."[41]

A case often cited as illustrating the operation of the collective knowledge doctrine is *United States v. T.I.M.E.-D.C., Inc.*[42] In this case, a corporation was convicted of violating a Federal Highway Administration (FHA) regulation that prohibited motor carriers from allowing or requiring drivers to operate vehicles if their ability or alertness was impaired. To combat absenteeism, the company instituted a policy requiring a physician's written confirmation of illness before the absence would be considered excused. The company failed to give its employees notice of the new policy's existence and terms. Two separate drivers called two separate dispatchers to report illness; both drivers ultimately reported to work to avoid having unexcused absences.[43] Criminal prosecution for violating the FHA regulation followed the filing of a union grievance regarding the company's unexcused absence policy.[44]

39. *Id.*
40. K. BRICKEY, CORPORATE CRIMINAL LIABILITY § 4:05, at 93–94 (1984).
41. *Id.* (emphasis added).
42. 381 F. Supp. 730 (W.D. Va. 1974).
43. *Id.* at 733–35.
44. *Id.* at 733.

The court rejected the company's argument that, because it had no actual knowledge the drivers were ill, it had not "knowingly" violated the regulation. Instead, the court held that the company knew the new policy would likely encourage truck drivers to report for work despite illness and was, therefore, chargeable with the knowledge that ill drivers had in fact reported for work.[45] Thus, the corporation's conviction was based on knowledge acquired by various employees in the scope of their employment, notwithstanding that facts critical to establishing the offense were known to separate employees rather than a single employee and "were never brought in aggregate form to the attention of someone who would fully comprehend their significance."[46]

A more recent application of the collective knowledge doctrine is found in *United States v. Bank of New England, N.A.*,[47] in which a bank was convicted for reporting violations under the Currency Transaction Reporting Act. The conviction was based on the theory that "the bank's knowledge [was] the totality of what all of the employees [knew] within the scope of their employment."[48] The First Circuit explained the rationale behind the collective knowledge doctrine as follows:

> A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. The acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment. The law on corporate criminal liability reflects this [conclusion]. Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation [under well-established legal principles]. Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of [these] components constitutes the corporation's knowledge of a particular operation.[49]

Thus, a corporation's requisite mental state can be satisfied

45. *Id.* at 739.

46. K. BRICKEY, *supra* note 40, § 4:05, at 96–97 (emphasis deleted from original) (citing *T.I.M.E.*, 381 F. Supp. at 738).

47. 821 F.2d 844 (1st Cir.), *cert. denied*, 108 S. Ct. 328 (1987); *see also* United States v. Shortt Accountancy Corp., 785 F.2d 1448 (9th Cir.), *cert denied*, 478 U.S. 1007 (1986) (firm held liable even though particular employee who subscribed false tax returns was not aware of fraudulent scheme).

48. *Bank of New England*, 821 F.2d at 855 (quoting trial court's jury instruction).

49. *Id.* at 856 (citations omitted).

even though no single employee or agent has knowledge of *all* the facts necessary to establish elements of the offense, i.e., even though no individual employee or agent could ever be found to have the requisite knowledge to themselves be convicted of the offense.[50]

Courts applying this doctrine either have not addressed or have found irrelevant the fact that there may be no logical or organizational reason why persons in "compartmentalized" subdivisions of a corporation would communicate their knowledge of pertinent facts to one another, or indeed, to a single person within the corporation who has ultimate responsibility for preventing the offense at issue. There is simply no requirement under the collective knowledge doctrine that each component of the requisite knowledge (i.e., each employee's knowledge of a fact necessary to showing an element of the offense) ever come to the attention of a single person or be collected in a common repository of information within the organization.

II. Trends in the Regulatory Crimes Caselaw

As previously discussed, a corporation can be convicted of an offense even where no single employee or agent "knows" all of the facts resulting in a crime. Individual officers of a corporation are also at risk of criminal liability if they stand in a responsible relationship to others whose conduct has violated a regulation or law, and the officers have failed to prevent the violative conduct. As part A below discusses, this "responsible corporate officer" doctrine arose in the context of criminal prosecutions under the Federal Food, Drug and Cosmetic Act (FDCA), which does not specify a requisite mental state in its criminal provisions.[51] Environmental statutes specifying a "knowing" mental state are thus immediately distinguishable.[52] Nevertheless, the fact that this doctrine emerged in the context of a "public welfare" statute[53] provides a possible in-

50. K. Brickey, *supra* note 40, § 4:05, at 97.
51. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 331–334 (1988).
52. *See infra* part IV of this article.
53. *See* Morissette v. United States, 342 U.S. 246, 254 (1952).
Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engen-

road of the doctrine to environmental crime prosecutions, even though "public welfare offenses" to which the responsible corporate officer doctrine applies are defined as those which " 'depend on no mental element but consist only of forbidden acts or omissions.' "[54] Part B below discusses the applicability of a "public welfare offense" analysis where a crime depends on "knowing" conduct.

A. Public Welfare Offenses and the Responsible Corporate Officer Doctrine

One of the early cases recognizing a public welfare offense defined such offenses in terms of strict liability, with the further elaboration that such offenses "are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty."[55] These strict liability offenses are based on the individual corporate officer's responsible relationship to, and presumed power and authority to prevent, the violative conduct of another: "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."[56]

Subsequent applications of the responsible corporate officer and public welfare offense doctrines have recognized that their use by a court depends, in most cases, on the existence of a statute that dispenses with a requisite mental state. In *United States v. Dotterweich*,[57] the United States Supreme Court rejected the defendant's argument that he had no awareness of wrongdoing by finding that the statute in question, the Food, Drug and Cosmetic Act (FDCA), did not require any such awareness or knowledge. The Court concluded that Congress, "[i]n the interest of the larger good," had placed "the burden of acting at hazard upon *a person otherwise innocent* but standing

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dered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

Id.

54. Liparota v. United States, 471 U.S. 419, 432 (1985) (quoting Morissette v. United States, 342 U.S. 246, 252–53 (1952)).

55. *Morissette*, 342 U.S. at 255.

56. *Id.* at 256.

57. 320 U.S. 277 (1943).

in a responsible relation to the public danger."[58]

The Court reasoned that, by omitting an awareness-of-wrongdoing requirement from the criminal sanction provisions of the FDCA, Congress intended that "all who . . . have a responsible share in the furtherance of the transaction which the statute outlaws" could be criminally liable.[59] While recognizing the harshness of this result where a defendant's "consciousness of wrongdoing [is] totally wanting," the Court concluded that Congress had:

> Balanc[ed] relative hardships, . . . [and] preferred to place [the hardship] upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce [marketing adulterated drugs], rather than to throw the hazard on the innocent public who are wholly helpless.[60]

The precision of the Court's holding in *Dotterweich* and its reasoning should not be overlooked: Because Congress wrote the criminal sanction provisions of the FDCA to impose essentially strict liability for certain violations, a defendant's defense of unawareness of wrongdoing was simply legally irrelevant. Although such a defendant presented a sympathetic case, the Court determined that *Congress* had rejected a defendant's ability to assert an unawareness defense by drafting the FDCA to have a pro-consumer stance in *all* cases.

In a subsequent FDCA prosecution, the Supreme Court further delineated the core concept of *Dotterweich*: Under a statute that dispenses with a culpability or awareness-of-wrongdoing requirement, individual corporate officers in a responsible relationship to the offense committed could be held criminally liable even absent direct involvement in commission of the offense.[61] In *United States v. Park*, the Supreme Court recognized that the concept of a "responsible relationship" was not completely without "some measure of blameworthiness."[62] Nevertheless, if "the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation com-

58. *Id.* at 281 (emphasis added).
59. *Id.* at 284.
60. *Id.* at 284–85.
61. *See* United States v. Park, 421 U.S. 658 (1975).
62. *Id.* at 673.

plained of, and . . . failed to do so," criminal liability under the FDCA was appropriate.[63]

The "prevent or correct" concept embraced by the *Park* Court embodies two considerations. First, it is a recognition of an officer's ultimate organizational responsibility for or authority over activities (or omissions) of subordinates who are in a position to directly violate the FDCA's prohibitions.[64] Second, it relies on a reading of the FDCA as imposing affirmative duties on the responsible corporate officer which the officer, because of his position, should be aware of, but which he in fact fails to adequately carry out.[65] In this regard, the Court in *Park* found that the FDCA "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."[66] In other words, responsible corporate officials are required under the FDCA to exercise both "foresight and vigilance."[67]

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63. *Id.* at 673–74. Although the Court did not recognize liability based *solely* on a defendant's "position in the corporation," at least one court has recognized that "[t]he line drawn by the Court between a conviction based on corporate position alone and one based on a 'responsible relationship' to the violation is a fine one, and arguably no wider than a corporate bylaw. Nevertheless, the Court clearly stated that a conviction under the Act could not be based on corporate position alone . . . ." United States v. New England Grocers Supply Co., 488 F. Supp. 230, 234 (D. Mass. 1980) (discussing *Park*, 421 U.S. at 674).

64. For example, a corporate marketing vice-president might have ultimate responsibility for and authority over a shipping warehouse manager who directly violates the FDCA because she is both aware that drugs have become adulterated and proceeds to ship them anyway. Under the FDCA's criminal provisions, the shipping manager could face criminal liability, not because of her awareness, but because of the Act's strict prohibition on putting adulterated drugs into the stream of commerce. Because the shipping manager would, on these facts, be a direct actor, no resort to *Dotterweich* and *Park* would be necessary. Under *Dotterweich* and *Park*, a court could find the marketing vice-president criminally liable as long as her line of authority put her in a position to correct the adulterated drug situation, or her area of responsibility imposed upon her an affirmative duty to prevent the drugs from becoming adulterated or shipped once adulterated, and the vice-president failed to adequately follow through with either task.

65. *Park*, 421 U.S. at 673–74.

66. *Id.* at 672.

67. *Id.* The *Park* Court recognized these requirements "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 and products affect the health and well-being of the public that supports them." *Id.*

B. *Public Welfare Offenses That Require "Knowledge"*

The responsible corporate officer doctrine saw its genesis in cases involving public welfare statutes that do not contain a mental culpability standard for criminal offenses. Inroads of this doctrine into environmental crime cases would thus seem to depend both on whether a particular environmental statute is a public welfare statute defining public welfare offenses[68] and, independent of this question, whether the criminal offenses defined by the environmental statute require some degree of culpability.[69]

A recent Supreme Court case provides some analytical guideposts for courts to follow in analyzing public welfare offenses and the culpability requirements specified for such offenses. In *Liparota v. United States*, the Court addressed the question of whether the prosecution must prove a defendant "knew that he was acting in a manner not authorized by statute or regulations,"[70] in light of the food stamp program's prohibition on "knowingly" acquiring or possessing food stamps "in any manner not authorized by [the statute] or [the] regulations."[71]

The Court began its analysis by recognizing that it is Congress' province to define the elements of a criminal offense in federal crimes, "which are solely creatures of statute."[72] Regarding the *element* of the offense at issue ("in a manner not authorized"),[73] the Court determined that Congress had not made explicit the requisite mental state, "[a]lthough Congress certainly intended by use of the word 'knowingly' to require *some* mental state with respect to *some* element of the crime defined in [the statute] . . . ."[74]

The government argued that, despite Congress' use of the phrase "knowingly . . . [is] not authorized," it need only show (1) that the defendant knew he acquired or possessed food stamps, and (2) that the manner of his acquisition was in fact not authorized by statute or regulation.[75] The defendant

68. *See infra* part IV, section A of this article.
69. *See infra* part IV, section B of this article.
70. 471 U.S. 419, 421 (1985).
71. *Id.* at 420 & n.1 (quoting 7 U.S.C. § 2024(b)(1) (1982)).
72. *Id.* at 424 (citing United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812)).
73. *Liparota*, 471 U.S. at 423.
74. *Id.* at 424 (emphasis in original).
75. *Id.* at 423.

urged the interpretation ultimately adopted by the Court; namely, that a person must both (1) know he has acquired or possessed food stamps and (2) know he has done so in an unauthorized manner.[76] The Court indicated either interpretation would comport both with congressional intent in using the term "knowingly" and with "ordinary usage" of that term.[77] However, this statement by the Court appears to be based on the inherent ambiguity concerning which elements of the offense the term "knowingly" modifies[78] and not on any inherent ambiguity with the scope of a "knowing" mental state itself.

The Court's holding in *Liparota*, that the term "knowingly" indicates a defendant must be shown to have known his actions were unauthorized by statute or regulation, does not mean the prosecution must prove a defendant's knowledge of illegality.[79] Although the *Liparota* opinion is not without internal inconsistencies,[80] the Court appears to require the prosecution, in cases involving a "knowing" mental state, to show the defendant knew his conduct was not authorized by the relevant statute or regulations, but not that his conduct was illegal.[81] In proving the defendant knew his conduct was unauthorized, the prosecution need not show the defendant had knowledge of the specific regulations at issue and knowingly breached them.[82] Regarding the evidence necessary to show the defendant's knowledge, the Court agreed that the prosecution need not introduce "extraordinary evidence" that "conclusively demonstrate[s]" the defendant's mental state: "Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal."[83]

The other important point of *Liparota* is the limited reading the Court placed on what constitutes a public welfare offense.

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76. *Id.*
77. *Id.* at 424–25 n.7.
78. *Id.*
79. *See* Comment, *supra* note 5, at 74 and accompanying text.
80. *Id.* at 74 & n.158.
81. *Liparota*, 471 U.S. at 434.
82. Instead, *Liparota* requires the government to show a defendant's awareness of the facts or circumstances that Congress, in drafting elements of an offense, has determined are material to that offense. A fact with a legal element thus requires the prosecution to prove a defendant's knowledge of that legal element. *Id.*
83. *Id.*

The government in *Liparota* urged the Court to ignore or dilute the "knowing" requirement, solely on the basis that the food stamp offense was a "public welfare offense."[84] The Court, however, emphasized that such offenses are traditionally limited to ones which " 'depend on no mental element but consist only of forbidden acts or omissions.' "[85] The Court rejected the government's argument, indicating that the food stamp offense "differs substantially from those 'public welfare offenses' we have previously recognized."[86] The Court indicated that its previous decisions on public welfare offenses involved statutes where "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[87] The Court distinguished the food stamp offense at issue in *Liparota* from an offense regarding possession of unregistered hand grenades[88] and one regarding adulterated and misbranded drugs.[89] The unregistered hand grenade offense was distinguishable because no reasonable person would assume the activity was unregulated;[90] the adulterated drug offense was distinguishable because the FDCA strictly prohibited shipment of adulterated drugs without regard to " 'consciousness of wrongdoing.' "[91]

The Court thus indicated that the public welfare offense designation has limited applicability; that is, (1) where an activ-

84. In a footnote accompanying this statement, the Court identified several facts and circumstances in the *Liparota* case that would allow a trier of fact to infer the defendant's knowledge that his acquisition or possession of food stamps was unauthorized. This evidence included purchase of the food stamps at a substantial discount, conducting the transaction "in a back room of his restaurant to avoid the presence of other patrons," and the fact that the food stamps are themselves marked "nontransferable." *Id.* at 434 n.17.

85. *Id.* at 432 (quoting Morissette v. United States, 342 U.S. 246, 252–53 (1952)).

86. *Id.* at 432–33.

87. *Id.* at 433.

88. *Id.* (citing United States v. Freed, 401 U.S. 601 (1971)). The Court also made passing reference to United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564–65 (1971). In *International Minerals*, the Court focused on public health and safety issues surrounding the handling and shipping of hazardous materials. *International Minerals*, 402 U.S. at 559.

89. *Liparota*, 471 U.S. at 433 (citing United States v. Dotterweich, 320 U.S. 277, 284 (1943)).

90. *Liparota*, 402 U.S. at 433. " '[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act.' " *Id.* (quoting United States v. Freed, 401 U.S. 601, 609 (1971)).

91. *Liparota*, 402 U.S. at 433 (quoting *Dotterweich*, 320 U.S. at 284). *See also* United States v. Balint, 258 U.S. 250 (1922).

ity affecting human health or safety is so dangerous it can be presumed to be subject to regulation and a reasonable person engaged in the activity can be presumed to know the activity is likely to be regulated, or (2) where a statute defines a criminal offense without regard to "consciousness of wrongdoing."

III. Judicial Application of Criminal Law Principles to "Knowing" Environmental Crimes

The scope of the "knowing" mental state required in most federal environmental statutes, as well as the applicability of the legal principles addressed in parts I and II of this article, have not been clarified by recent judicial decisions in the environmental crimes area. The following review of two recent decisions involving environmental crimes illustrates that a coherent analytical approach for these cases is lacking.

A. United States v. Johnson & Towers, Inc.

In *United States v. Johnson & Towers, Inc.*,[92] the Court of Appeals for the Third Circuit construed section 6928(d)(2)(A) of the Resource Conservation and Recovery Act (RCRA), which prohibits the knowing disposal of hazardous waste without a permit.[93] Acquisition of a permit is governed by a separate provision of RCRA, which states that only owners or operators of a hazardous waste facility must obtain a permit to dispose of hazardous waste.[94]

Because the defendants in the *Johnson & Towers* case were employees rather than owners or operators of a hazardous waste facility, the court first had to determine that the criminal penalty provision of RCRA applied to employees. In so holding, the court indicated that, like owners and operators, employees must be shown to have been aware that they were disposing of hazardous waste in order for the criminal provisions to apply.[95] In addition, employees (but not necessarily owners and operators) must also be shown to be aware that their company was required to obtain a disposal permit, but did not in fact have one. The Third Circuit, therefore, ruled

92. 741 F.2d 662 (3d Cir. 1984), *cert. denied sub nom.* Angel v. United States, 469 U.S. 1208 (1985).

93. *See* 42 U.S.C. § 6928(d)(2)(A) (Supp. V 1987).

94. *See* 42 U.S.C. § 6925 (1982).

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

that the prosecution had to show that the employee defendants knew (1) they were disposing of materials; (2) which were hazardous wastes; (3) at a facility for which there was no RCRA permit; and (4) that a permit requirement existed under the statute and regulations.[96]

In reaching this result, the *Johnson & Towers* court first analyzed whether the "knowing" requirement modified only certain elements of the offense or the entire sentence describing the offense. In resolving this question, the court indicated that the provision involved was part of a public welfare statute. The court determined that RCRA qualified as a public welfare statute because, like the FDCA in *Park* and *Dotterweich*, the congressional purpose in RCRA was "to control hazards that, 'in the circumstances of modern industrialism, are largely beyond self-protection.' "[97] The court reasoned that, because in the FDCA cases it was appropriate to read the statutes as having no *mens rea* requirement, it was appropriate to remove the "knowing" state of mind requirement from one or more of the elements defining the RCRA offense.[98] The Third Circuit also indicated that, because public welfare statutes are to be construed in order to effectuate their regulatory purposes, an interpretation eliminating a mental state requirement from certain elements of an offense was appropriate. After evaluating the public policy justifications, congressional intent, and the language and structure of section 6928(d), the Third Circuit nevertheless concluded that it would be "arbitrary and nonsensical" to completely remove a mental state requirement.[99]

Ultimately, the Third Circuit employed a balancing test to determine whether "knowingly" modified only the first two or all of the elements of the offense defined in section 6928(d)(2)(A). The court found several factors that weighed in favor of requiring a higher culpability standard than the minimum allowed for public welfare statutes, including overall fairness and statutory consistency,[100] the fact that the defendants were merely employees rather than owners or operators of a

96. *Id.* at 668–69.
97. *Id.* at 667 (quoting *Dotterweich*, 320 U.S. at 280).
98. *Id.* at 668.
99. *Id.* at 668–69.
100. *Id.*

facility,[101] the public policy concerns regarding hazardous wastes,[102] and the difficulty of the government's burden of proof.[103] Thus, although the *Johnson & Towers* court held that the "knowing" requirement applied to each element of the offense,[104] the court also stated that on remand the district court could apply the "responsible relationship" test to show the defendants' knowledge.[105]

The Third Circuit's diversion into a discussion of how the public welfare character of RCRA altered its analysis of the "knowing" mental state requirement was unwarranted under *Dotterweich* and *Park*. Like many commentators,[106] the Third Circuit assumed, without analysis, that federal environmental statutes are automatically "public welfare statutes" for purposes of engaging in the *Dotterweich* and *Park* analysis.[107] This presumption by courts and commentators alike appears to be based on the fact that federal environmental statutes are designed to protect the public health and the environment, similar to the FDCA's protection of human health and safety. This reflexive approach is misguided because it juxtaposes "knowing" crimes with an analytical model that has little, if any, applicability where a statute defines an offense in terms of a culpability requirement.

The *Johnson & Towers* court, therefore, assumed that, because RCRA addresses issues of public concern, it is a "public welfare statute" subject to the strict liability analysis of *Dotterweich* and *Park*.[108] This bootstrapping by the court also was inappropriate in that it led the court to presume the "responsible relationship" doctrine was applicable to show the defendants' knowledge.[109] Where a statute specifies a culpability requirement, it is not at all clear that the responsible relationship anal-

101. *Id.* at 664–67.

102. *Id.* at 666–67.

103. *Id.* at 669.

104. *Id.*

105. *Id.* at 670.

106. *See, e.g.*, McMurry & Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A.L. REV. 1133, 1151 (1986) (assuming a lower culpability requirement for environmental crimes based on assumption that environmental laws generally are public welfare statutes).

107. *Johnson & Towers*, 741 F.2d at 666–67.

108. *See supra* notes 55–67 and accompanying text.

109. For a discussion of the "responsible relationship" doctrine see *supra* notes 51–67 and accompanying text.

ysis—developed because of the balance struck by Congress in strict liability statutes—is appropriate, much less applicable.

B. United States v. Hayes International Corp.

An Eleventh Circuit case decided a year after *Liparota* also illustrates a reflexive rather than analytical approach to the public welfare statute issue. In addition, this case reflects the confusion engendered by the *Liparota* Court's interchangeable use of "illegal" and "unauthorized" in its discussion of the scope of a "knowing" culpability requirement. In *Hayes*, a misreading of *Liparota* led to the court effectively employing the willful blindness doctrine without analyzing the appropriateness of its use on the facts.

In *United States v. Hayes International Corp.*, the Eleventh Circuit construed section 6928(d)(1) of RCRA, which prohibits the knowing transportation of hazardous waste to a facility which does not have a permit under section 6925 of RCRA.[110] The *Hayes* court recognized "Congress did not provide any guidance, either in the statute or the legislative history, concerning the meaning of 'knowing' in section 6928(d)."[111] Rather than engaging in determining the scope of the knowing requirement, however, the Eleventh Circuit moved immediately to a discussion of the elements of the offense in section 6928(d)(1) to which the knowing requirement applied.

In finding that a defendant's knowledge of the specific regulations at issue was not required for purposes of the criminal provision, the Eleventh Circuit confronted the *Liparota* opinion, which the Eleventh Circuit viewed as holding that knowledge of *illegality* was necessary.[112] As indicated previously, the *Liparota* Court distinguished between "illegal" and "unauthorized" action, albeit in a footnote.[113] Because the *Hayes* court interpreted section 6928(d)(1) as not making knowledge of illegality an element of the offense, the court concluded that *Liparota* was not controlling.[114] The Eleventh Circuit also read the Supreme Court's opinion as indicating that any significant regulatory program that affects public health and safety by def-

110. 786 F.2d 1499 (11th Cir. 1986).
111. *Id.* at 1502; *see also* 42 U.S.C. § 6928(d)(1) (Supp. V 1987).
112. *Hayes*, 786 F.2d at 1502–03.
113. *Liparota*, 471 U.S. at 425 n.9. *See also* Comment, *supra* note 5, at 74.
114. *Hayes*, 786 F.2d at 1503.

inition qualifies as a public welfare statute for purposes of the public welfare offense analysis. As an apparent further basis for distinguishing *Liparota*, the Eleventh Circuit hastily concluded that "section 6928(d)(1) is undeniably a public welfare statute, involving a heavily regulated area with great ramifications for the public health and safety."[115] Drawing on these two perceived differences from *Liparota*, and without citing any authority, the *Hayes* court continued: "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 the regulatory provisions. . . . Accordingly, in a prosecution under 42 U.S.C. § 6928(d)(1) it would be no defense to claim no knowledge that the paint waste was a hazardous waste within the meaning of the regulations; nor would it be a defense to argue ignorance of the permit requirement."[116]

In reaching this conclusion, the *Hayes* court appears to have relied on a pre-*Liparota* Supreme Court opinion, *United States v. International Minerals & Chemical Corp.*,[117] which analyzed a hazardous materials transportation statute in which Congress created an offense of "knowingly violating a regulation." In *International Minerals*, the defendant was charged with "knowingly" violating an Interstate Commerce Commission (ICC) regulation which prohibited shipping hazardous materials without indicating the nature of the materials on the shipping manifest.[118] The Supreme Court held that knowledge of the specific regulation—requiring that the shipping manifests reflect the nature of the materials shipped—was not an element of the offense. Instead, the use of the term "knowingly" in the statute referred only to the defendant's knowledge that the materials being shipped were dangerous.[119] As the *Hayes* court explained: "The Court [in *International Minerals*] noted the general maxim that ignorance of the law is no excuse, but also reasoned that where 'obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be

115. *Id.*
116. *Id.*
117. 402 U.S. 558 (1971).
118. *Id.* at 559.
119. *Id.* at 565.

presumed to be aware of the regulation.' "[120] Thus, the *Hayes* court apparently relied on this passage from the *International Minerals* case, both to support its conclusion that the RCRA provision at issue was "undeniably a public welfare statute" and to presume knowledge by the defendants of "the regulatory provisions" generally.[121]

Justice Brennan, who wrote the majority opinion in *Liparota*, dissented in *International Minerals* and found it clear under the statute involved "that Congress made punishable only knowing violations of the regulation in question."[122] The majority in *Liparota* cited *International Minerals* as support for the notion that, among the public welfare offenses recognized by the Supreme Court, there are statutes regulating activities that are so dangerous or threatening to public safety that "one would hardly be surprised to learn" the activities are regulated.[123] *Liparota*'s emphasis on the strict liability nature of public welfare offenses,[124] coupled with the Court's requirement that the government prove a defendant's acts were unauthorized,[125] indicates that the reference in *Liparota* to *International Minerals* was not intended to drive analysis of "knowing" environmental crimes under the public welfare offense doctrine. Thus, the *Hayes* court's application of the Supreme Court caselaw to (1) define all crimes in "heavily regulated area(s) with great ramifications for the public health and safety" as public welfare offenses, and (2) allow a presumption of knowledge of specific regulations in "knowing" public welfare offenses[126] is simply inaccurate.

A more consistent reading of *International Minerals* and *Liparota*, giving consideration to Justice Brennan's role as dissenter and majority opinion writer, respectively, is that both cases held that the government need not show a defendant's knowledge of a specific regulation in proving a criminal offense for violating that regulation, and that a presumption of knowl-

120. *Hayes*, 786 F.2d at 1502 (quoting United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971)).

121. *Hayes*, 786 F.2d at 1503.

122. *International Minerals*, 402 U.S. at 565 (Brennan, J., dissenting).

123. Liparota v. United States, 471 U.S. 419, 433 (1985) (quoting United States v. Freed, 401 U.S. 601, 609 (1971)).

124. *Liparota*, 471 U.S. at 432.

125. *Liparota*, 471 U.S. at 425 & n.9.

126. United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986).

edge that one's activities are likely to be subject to regulation is appropriate where certain types of activities are involved. To the extent *International Minerals* may have broadened the universe of "public welfare offenses" by allowing a presumption of knowledge that an activity is regulated solely on the basis that the activity involves materials very likely to be subject to regulation,[127] *Liparota* appears to limit use of the presumption to show that a particular statute defines a public welfare offense.[128] In other words, the universe of public welfare offenses includes strict liability crimes, as well as instances where "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[129] Given the *Liparota* majority's holding that a "knowing" offense requires proof of a defendant's knowledge that his acts were "unauthorized," the presumption of knowledge of an activity's regulated status *to show culpability*, articulated in *International Minerals* and relied upon by *Hayes*, may have limited continued validity. Thus, after *Liparota* it is questionable whether in a case involving a "knowing" public welfare offense a court can allow a presumption of defendant's knowledge that his activities are regulated for purposes of demonstrating culpability under a "knowing" statute. Even if such a presumption remains appropriate, *Liparota* makes clear that knowledge beyond that required by the Court in *International Minerals* is now required in such cases.[130]

Finally, the *Hayes* court's conclusion that knowledge of illegality is not an element of an offense under RCRA is entirely consistent with a proper reading of the *Liparota* opinion. What the *Hayes* court failed to address was the distinction drawn in *Liparota* between actions that are "illegal" and actions that are "unauthorized." *Liparota* indicates that, if there is a legal element in the definition of the "knowing" offense as written by Congress, then the government must prove circumstances that involve knowledge of the legal element: "The knowledge involved is solely knowledge of the circumstances that the law

127. United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971).

128. *Liparota*, 471 U.S. at 433–34.

129. *Id.* at 433.

130. *Id.* at 425 n.9.

has defined as material to the offense."[131] Such a requirement involves knowledge of some law, but not "consciousness of wrongdoing" in the sense of knowledge that one's actions are illegal.[132] The principle that ignorance of the law is no excuse only when a defendant is ignorant that conduct was "prohibited or illegal" is precisely the position adopted by the *Liparota* Court in distinguishing between unauthorized and illegal action.[133] In other words, *Liparota* goes as far as allowing a defense of ignorance that conduct is unauthorized, even though *Liparota* does not create a defense of ignorance of illegality.[134]

Thus, if an element of the offense at issue requires a defendant's knowledge of a fact, which fact itself contains a legal element, then awareness of the legal element appears to be a prerequisite to finding knowledge that one's conduct was "unauthorized." In *Hayes*, for example, some awareness of the specific regulations was a legal element necessary to finding one element of the offense at issue, i.e., whether the facility to which the waste was transported had a RCRA permit. Under a *Liparota* analysis, the government would have to show that a defendant was familiar enough with RCRA to recognize a RCRA permit, or knew enough to inquire as to its existence. Presuming defendant's knowledge of the specific regulations solely because of the nature of the industry and materials handled would not suffice. Thus, in misreading the *Liparota* opinion to require knowledge of illegality, the *Hayes* court fundamentally misconstrued the RCRA provision at issue.

IV. Conduct Constituting an Environmental Crime

As the preceding discussion demonstrates, there is considerable confusion as to the scope of required knowledge and the applicability of a public welfare offense analysis in "knowing" environmental crime cases. The caselaw demonstrates that a misreading of *Liparota* will lead a court to eviscerate a knowledge requirement in contravention of congressional intent. The caselaw to date also does not adequately address two critical questions, namely, whether the public welfare offense model should apply to "knowing" crimes, and, if so, how. Ap-

131. United States v. Freed, 401 U.S. 601, 615 (1971) (Brennan, J., concurring).
132. *Id.*
133. *Liparota*, 471 U.S. at 425 n.9.
134. *See* Comment, *supra* note 5, at 78.

plying the Supreme Court's public welfare offense analysis in "knowing" crimes allows courts to lower the threshold mental state required for a particular offense. In *Hayes*, for example, the court relied on the public welfare offense label to allow a presumption of defendant's knowledge of material elements of a crime. In *Johnson & Towers*, the court's misplaced reliance on the public welfare offense analysis led to an inappropriate application of the *Dotterweich* and *Park* responsible relationship test in the context of a "knowing" crime.

A fair reading of Supreme Court cases demonstrates that, while environmental laws may be "public welfare statutes" in that they are designed to protect human health and the environment, such laws do not necessarily contain "public welfare offenses." Thus, although environmental crimes may occur in industries subject to heavy regulation, this circumstance alone is insufficient to qualify the statutory offense as a "public welfare offense." Even if an environmental crime is a public welfare offense, however, the knowledge requirement should not be presumptively cast aside by courts. Where Congress has specified a particular mental state for the environmental offense, *Liparota* indicates that courts are to require proof of a defendant's awareness of *all* the facts and circumstances—including legal elements—that Congress defined as material to the offense. *Liparota* thus has relevance to determining the appropriate use of the willful blindness and collective knowledge principles in environmental crime cases, including any such crimes that qualify as public welfare offenses. A court's failure to make these necessary distinctions will tend to criminalize innocent conduct, and effectively substitute strict liability or negligence for a knowing mental state in environmental offenses.

A. When is an Environmental Crime a Public Welfare Offense?

Both the *Hayes* and the *Johnson & Towers* opinions characterize RCRA as a public welfare statute because it involves pervasive regulation of the handling of hazardous waste and has as its overall purpose the protection of public welfare interests, namely, human health and the environment.[135] This characterization of RCRA (or other environmental statutes) is true, as far as it goes. What these courts and some commentators have

135. *See* United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502 (11th Cir. 1986); United States v. Johnson & Towers, 741 F.2d 662, 667 (3d Cir. 1984).

assumed, without critical analysis, is that crimes defined in such statutes should automatically be considered "public welfare offenses" for purposes of culpability analysis.[136] A critical review of Supreme Court precedent makes clear, however, that public welfare offenses are crimes requiring more than mere creation under a public welfare statute.

A public welfare offense is found where a public welfare statute defines a criminal offense without regard to "consciousness of wrongdoing."[137] In other words, the statute criminalizes certain conduct essentially on a strict liability basis. The classic example of this type of public welfare offense is the shipment of adulterated drugs under the FDCA, as in *Dotterweich* and *Park*.[138] Thus, where the statute in question imposes an absolute "duty of care or duty of action," non-compliance with that duty for any reason is a criminal offense.[139] Important to recognize with such offenses is that Congress, not the courts, defined the crime in question so as to eliminate a culpability requirement.[140]

The second type of public welfare offense recognized by the Supreme Court involves activities impacting human health and safety that are considered so dangerous that the activity can be presumed to be subject to regulation.[141] A necessary corollary to this presumption is that a reasonable person engaged in the activity can be presumed to be aware that the activity is likely to be regulated.[142] Thus, earlier Supreme Court cases analyzing this type of public welfare offense indicated it was appropriate to hold a defendant to a "reasonableness" standard, in terms of awareness that a dangerous activity has a likelihood of being subject to stringent regulation.[143] Under this approach, knowledge of specific regulations defining the violative acts or

136. *See, e.g.*, Comment, *supra* note 5, at 61 ("Most environmental crimes fit into this relatively new class of public welfare offenses."); McMurry & Ramsey, *supra* note 106, at 1151–52 (1986) (assuming a lower culpability requirement for environmental crimes based on the assumption that environmental laws generally are public welfare statutes).

137. United States v. Freed, 401 U.S. 601, 615 (Brennan, J., concurring).

138. *See supra* notes 57 and 62 and accompanying text.

139. *See* Morissette v. United States, 342 U.S. 246, 255 (1952).

140. *See* Liparota v. United States, 471 U.S. 419, 424, 427 (1985).

141. *Id.* at 433.

142. *Id. See also* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564–65 (1971).

143. *See Liparota*, 471 U.S. at 433.

omissions was not necessary, even under a "knowing violation" statute.

In *International Minerals*, therefore, it was not necessary to show the defendant's awareness of the specific regulations requiring labelling of hazardous materials and prohibiting shipment of unlabelled materials; the government was only required to show that defendant knew he had shipped dangerous materials and that those materials were in fact unlabelled. Once the defendant's awareness of the dangerous nature of the materials was shown, a "reasonableness" test regarding the defendant's awareness of the likelihood of regulation of these materials was appropriate to show culpability under the "knowing violation" standard.

Whether a particular environmental crime falls within this second category of public welfare offense turns on the *Liparota* Court's inquiry: Does the offense involve a human health and safety statute that criminalizes acts or omissions that reasonable people should know is subject to regulation?[144] Under this view of a public welfare offense, it is arguable that offenses requiring knowledge by definition require more than mere negligence as to the existence of regulation (i.e., the "reasonable person should know" standard set forth in *Liparota*), and that such offenses are thus never "public welfare offenses." However, *Liparota* and its predecessor cases indicate that the presumption which attaches is the defendant's awareness of the likelihood of regulation, not a presumption of the defendant's awareness of particular regulations prohibiting specific acts or omissions.[145] If the presumption is applied in this limited manner, the "knowledge" analysis in *Liparota* is not abrogated.

Thus, the *Liparota* Court's analysis classifies a statutory crime as a public welfare offense if it involves activities that no reasonable person would assume are unregulated. This approach does not presume a defendant's knowledge or awareness of specific acts or omissions that are necessary to show an element of the offense.[146] Deeming an environmental crime a public welfare offense at most allows a court to presume a defendant was aware that his activities were of a type likely to be

144. *Id.*
145. *Id.*
146. *See supra* notes 139–42 and accompanying text.

subject to regulation. Under *Liparota*, the knowledge requirement specified in the statute is not satisfied by a showing of this type of awareness because it demonstrates only that a defendant was negligent in being unaware that his activities were likely to be regulated. "Knowing" public welfare offenses still require a showing of a defendant's awareness of facts and circumstances that the statute defines as material to the offense.

In effect, the *International Minerals* approach allowed courts to presume a defendant's knowledge of the regulated status of a dangerous activity as a substitute for showing the defendant's acts or omissions were engaged in with some awareness by the defendant that they were prohibited. After *Liparota*, this aspect of the *International Minerals* approach has come into question for public welfare offenses that have a knowledge requirement. Under *Liparota*, a court can presume only that a defendant was aware of the likelihood his activities were regulated. The prosecution in an environmental crime must still demonstrate the defendant's awareness of fact or circumstances that are material to elements of a crime. The scope of this demonstration is the focus of the remainder of this article.

B. What Must the Prosecution Show for a "Knowing" Environmental Crime?

In the majority of federal environmental statutes, Congress specified a particular mental state for the environmental offense. In this circumstance, *Liparota* indicates that courts are to require proof of a defendant's awareness of *all* the facts and circumstances, including legal elements, that Congress defined as material to the offense. A court's failure to hold the prosecution to this proof will tend to criminalize innocent conduct by effectively substituting strict liability or negligence for the knowledge requirement in environmental offenses.

Courts should not overlook the significance of the fact that Congress chose from among several possible mental states in defining environmental crimes to require a defendant's knowledge of the elements. Under the Model Penal Code and modern criminal jurisprudence, a knowledge requirement in a statutory criminal provision requires consciousness by the defendant of the facts or circumstances that are material to showing elements of the offense. Since a knowing mental state requires consciousness, it is clear that a knowing mental state

cannot be shown by proving a defendant's negligence or recklessness.[147]

Negligence, as a mental state, by definition is distinguished from intentional, knowing, or reckless mental states in that it does not involve a state of awareness or consciousness.[148] If one acts in a criminally negligent manner, by definition he is not aware of the risk created and, therefore, cannot be guilty of having consciously disregarded that risk.[149] The consciousness required by a knowing mental state is also not met by showing a defendant's recklessness. While recklessness and knowing behavior are similar in that both require a state of awareness of a risk, the degree of awareness is critical. In recklessness, the awareness is of a probability, while in knowing behavior, the awareness is of a certain risk.[150] Recklessness is also distinguished from a knowing state of mind because it involves conscious risk creation.[151] Finally, a reckless state of mind must also be shown by demonstrating that the risk consciously disregarded by the defendant was both substantial and unjustifiable.[152]

Application of the willful blindness doctrine, for example, can inappropriately erode the distinction between knowing and negligent states of mind. The willful blindness doctrine essentially entails the following analysis: (1) there was a single, objectively reasonable course of action for the defendant to take; (2) the defendant failed to take this course of action; (3) since there were no other objectively reasonable choices, the courts will presume the defendant purposefully failed to take the single course available; (4) courts will infer from this failure to choose the objectively reasonable path that the defendant had "knowledge" of the facts necessary to support elements of an offense; and (5) courts will thus find the defendant criminally liable. Because the willful blindness doctrine rests on the notion that only one objectively reasonable course

147. *See* MODEL PENAL CODE § 2.02 (1985) (distinguishing among four mental states).

148. *See* MODEL PENAL CODE § 2.02(2) (defining the separate kinds of culpability and the necessary elements of each).

149. *See* W. LAFAVE & A. SCOTT, *supra* note 9, § 3.7(c), at 334.

150. *See id.* § 3.7(f), at 336–37.

151. *See* Siffert & McDonagh, *Recklessness and Gross Negligence as Requisite Mental Elements in Criminal and Civil Cases*, 140 PRAC. LAW INST. 171, 176 (1985) (the course was entitled: *Mens Rea: State of Mind Defenses in Criminal and Civil Fraud Cases*).

152. *Id.* at 176–77.

of action was available to a defendant, culpability is based on mere negligence, rather than on the defendant's awareness of the action or need for action that he is held responsible for failing to take or recognize.

Liparota reaffirmed that, when Congress specifies a knowing mental state, courts must require prosecutors to show a defendant's actual awareness of facts and circumstances that are material to elements of the offense. The *Liparota* Court indicated that the prosecution's burden of proving such knowledge could be eased by the use of inferences to show a defendant's awareness of pertinent facts and circumstances.[153] In the context of environmental crimes, however, Congress has demonstrated that it knows how to dilute a statutory standard of knowledge by allowing proof of that knowledge through inferences. The "knowing endangerment" provision of RCRA, for example, criminalizes conduct that involves a "knowing" RCRA violation,[154] coupled with knowledge at the time of the violation that the conduct places another person in imminent danger of death or serious bodily injury.[155] The statute then sets forth "special rules" for purposes of interpreting the knowledge required to show these violations.

In RCRA's "special rules," in section 6928(f)(1), Congress verified that a knowing state of mind requires a showing of a defendant's awareness of pertinent facts and circumstances.[156] The statute also specifies that knowledge, for purposes of the imminent danger/serious bodily injury portion of the knowing endangerment provision, means a defendant's "actual awareness or actual belief," and that "knowledge possessed by a person other than the defendant, but not by the defendant himself, may not be attributed to the defendant."[157] In addition, for knowing endangerment offenses, Congress provided that prosecutors may use circumstantial evidence to prove a defendant's actual knowledge "including evidence that the defendant took affirmative steps to shield himself from relevant information."[158]

Congress thus specified in section 6928(f)(1) that a knowing

153. Liparota v. United States, 471 U.S. 419, 434 (1985).
154. 42 U.S.C. § 6928(d) (1982 & Supp. V 1987).
155. 42 U.S.C. § 6928(e) (1982 & Supp. V 1987).
156. *See* 42 U.S.C. § 6928(f)(1) (1982).
157. 42 U.S.C. § 6928(f)(2) (1982).
158. *Id.*

violation under RCRA section 6928(d) requires a defendant's actual knowledge. This knowledge requirement was not made subject to the proviso regarding circumstantial evidence, including evidence of deliberate ignorance. The proviso in this section applies only to "proving the defendant's possession of actual knowledge;" it is only with respect to knowledge of imminent danger or serious bodily harm that the statute requires the defendant's possession of actual awareness or actual belief.[159] Thus, Congress made clear that only with respect to a defendant's knowledge that his conduct placed another person in imminent danger of death or serious bodily injury would circumstantial evidence, including deliberate ignorance, be available to prove the defendant's possession of actual knowledge. By negative implication, therefore, Congress did not view the use of such circumstantial evidence as appropriate in proving actual awareness for purposes of a knowing violation of RCRA. This conclusion comports well with the *Liparota* Court's reemphasis that knowledge in a statutory criminal provision means consciousness or awareness. This conclusion also is consistent with the modern view in criminal jurisprudence that knowledge is clearly distinguishable from merely reckless or negligent behavior. Since the latter types of behavior are what is in fact proved when a court resorts to inferences of knowledge from circumstantial evidence, it is clear that, in environmental criminal provisions requiring a knowing state of mind, courts should make sparing use of the criminal jurisprudence principles discussed in parts I and II of this article.

Two circumstances in which cautious application of these principles is particularly appropriate include: (1) where an omission or a duty to inquire or act is involved and the prosecution moves for a deliberate ignorance instruction, and (2) where a statutory violation has occurred despite due diligence by a responsible corporate officer, and the prosecution asserts the responsible corporate officer is strictly liable for that noncompliance notwithstanding his exercise of "foresight and vigilance." A failure by the courts to give meaning to a knowledge requirement will tend to result in criminal convictions for this type of conduct, which is traditionally viewed as merely negligent. In addition, if courts allow doctrines such as deliberate ignorance and the responsible corporate officer principle to di-

159. *Id.*

lute a knowledge requirement, the result will be criminalization of conduct which is already subject to civil enforcement on a strict liability basis for noncompliance with statutory requirements.

It is a basic precept of criminal law that criminal liability which is dependent on a requisite mental state requires more than a mere failure by a defendant to conform his conduct to prescribed standards. Most federal environmental statutes impose strict civil liability for failure to comply with statutory provisions or regulations, regardless of the reason for the failure. Thus, a particular defendant could behave negligently, recklessly, or with absolute "foresight and vigilance;" if there is noncompliance with a regulation or statutory provision, the link between the defendant's mental state and the violation is simply irrelevant to whether civil liability attaches, although it may be relevant to the imposition of penalties. By imposing strict civil liability for statutory or regulatory noncompliance, Congress has indicated that, for purposes of civil violations, it does not matter that a defendant was careful or careless. The standard of performance has been defined, the defendant has not met that standard, and Congress has specified that nonconformance with this standard triggers strict liability. Mere noncompliance with a statute or regulation, however, is not traditionally considered a basis for criminal liability, and indeed, is not the basis for criminal liability in any environmental statute where Congress has specified a knowing state of mind.[160]

Consider, for example, a situation in which criminal prosecution is initiated on the basis of a defendant's failure to act where the regulations impose a duty to act, or his failure to inquire where the regulations impose a duty to inquire. Absent a "smoking gun" demonstrating the defendant's actual awareness of a duty, the prosecution would likely seek a deliberate ignorance instruction to show that the defendant should have known of his duty to act or inquire. Where the prosecution seeks to impose criminal liability on the basis of an omission, a danger always exists that liability may be imposed for that omission "when the defendant was either unaware of the

160. Compare the strict liability criminal provisions in United States v. Park, 421 U.S. 658 (1975) and United States v. Dotterweich, 320 U.S. 277 (1943) with those cited for environmental statutes in *supra* note 3.

facts giving rise to the duty to act or unaware of the existence or scope of the legal duty."[161] The deliberate ignorance instruction in these circumstances would allow criminal liability to be imposed based on a defendant's negligent or reckless failure to recognize the existence or scope of the legal duty, or to recognize the facts giving rise to the duty to act.

When a statute requires a defendant's knowledge before criminal liability will attach, the *Liparota* opinion appears to make the use of the deliberate ignorance instruction inappropriate if its use will result in criminal liability on the basis of a mental state less than a knowing mental state. In other words, under *Liparota*, if a statute specifies a knowing mental state, a defendant may not be held liable because of a deliberate ignorance instruction, based on negligence or recklessness, if the defendant in fact does not know the facts or circumstances indicating a duty to act or inquire.[162]

The prosecution under most environmental statutes can likely make a reasonable argument that such statutes impose both a duty to act reasonably in ascertaining the facts, as well as a duty to take reasonable action once certain facts become known to the defendant. If a defendant is negligent in ascertaining the facts, the duty to take action will never become known to him. As written, the federal environmental statutes generally subject this conduct to strict liability on the civil enforcement side, rather than knowing criminal liability. This result is consistent with the Model Penal Code's and the Ninth Circuit's recognition that deliberate ignorance is not equally culpable with knowledge, unless a defendant recognizes and subsequently ignores a duty to act or inquire.[163] If the reason for a defendant's nonrecognition of a duty is that he was negligent or reckless in failing to ascertain pertinent facts, the requisite culpability for a knowing mental state is simply not present.[164] Under such circumstances, Congress has dictated that civil enforcement on a strict liability basis, rather than criminal enforcement on a knowing basis, is the appropriate course of action for the regulatory agencies to pursue.

161. W. LAFAVE & A. SCOTT, *supra* note 9, § 3.3(b), at 289.

162. *Id.*

163. *See supra* notes 19–20 and accompanying text.

164. *See* United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1098 (9th Cir. 1985) ("It is not enough that defendant was mistaken, recklessly disregarded the truth, or negligently failed to inquire.").

Another circumstance in which the line between civil and criminal liability can be blurred by use of the deliberate ignorance doctrine is where a defendant is aware of pertinent facts but, even with knowledge of those facts, is unaware of the existence or scope of a duty to act or inquire. By application of the general principle that ignorance of the law is no defense, even *Liparota* would appear to suggest that such a circumstance might constitute an adequate basis for a criminal prosecution. However, the *Liparota* Court's distinction between conduct that is illegal and conduct that is unauthorized requires courts to conduct a critical analysis of the defendant's knowledge of all facts that the statute makes material to the offense.[165] If Congress has defined an environmental crime so that the duty to act or the duty to inquire is a material element of the crime, *Liparota* instructs that the prosecution must show the defendant's awareness of that duty to act or inquire. In other words, the prosecution must show that the defendant was aware that his conduct was "unauthorized."[166]

Similarly, commentators have recognized that an exception to the general principle that ignorance of the law is no defense occurs "where the statute only covers 'wilful' or 'knowing' failure to carry out a duty, for there ignorance of the existence or scope of the duty negates the required mental state . . . ."[167] If Congress has defined an environmental crime to require a defendant's knowledge both of a legal duty and the facts giving rise to that legal duty, then *Liparota* indicates that the prosecution must show the defendant's awareness of both of these elements. To the extent that application of principles such as deliberate ignorance would allow the prosecution to demonstrate merely that the defendant was negligent or reckless in failing to ascertain the legal duty or the facts giving rise to that duty, the prosecution's use of such doctrines is limited by *Liparota*.

For similar reasons, a statute which imposes criminal liability on the basis of a knowing mental state requires more than that a corporate officer have knowledge of a duty to act or inquire, attempt to fulfill this duty, and negligently fail to fulfill it either directly or by a negligent delegation of the responsibility to

165. *See* Liparota v. United States, 471 U.S. 419, 425 n.9 (1985).
166. *Id.*
167. W. LaFave & A. Scott, *supra* note 9, § 3.3(b), at 291.

fulfill it. If a corporate officer delegated or attempted to fulfill the duty responsibly, exercised an appropriate degree of diligence or oversight, and noncompliance with a statutory provision or regulation nevertheless occurred, this again appears to be a circumstance where Congress has specified civil liability on a strict liability basis. The *Liparota* Court recognized that Congress has the ultimate responsibility for defining conduct that is subject to criminal liability.[168] Where Congress specifies a knowing mental state, an unknowing failure to comply with the statute or regulation is not criminally culpable behavior.[169] That the responsible corporate officer doctrine arose under statutes imposing criminal liability on a strict liability basis underscores the fact that the negligent standard of conduct underlying that doctrine is simply inappropriate in an analysis of criminal provisions that specify a knowing mental state.[170]

Just as individual liability under the criminal provisions of federal environmental statutes is based on a knowing state of mind undiluted by irrelevant or inappropriate inferential tools, a corporation's criminal liability under such statutes should be similarly confined. If individuals within the corporation could not be held criminally liable under the federal environmental statutes, because of the inapplicability or inappropriateness of a deliberate ignorance or responsible corporate officer instruction, it is illogical to nevertheless impute knowledge of these individual actors to the corporation on a collective knowledge theory for purposes of finding the corporation to have knowingly violated the statute.[171] Thus, where the prosecution's theory of a corporation's criminal liability is on the basis of vicarious liability and the prosecution, for the reasons given above, is not allowed to infer knowledge on the part of the individuals through the use of the deliberate ignorance or responsible corporate officer principles, then for purposes of the collective knowledge doctrine there is no "knowledge" by individuals within the corporation that can be imputed to the corporation for purposes of showing a knowing state of mind.

168. *Liparota*, 471 U.S. at 424, 427.
169. *See supra* note 164 and accompanying text.
170. *See supra* notes 51–52 and accompanying text.
171. *See generally* K. BRICKEY, *supra* note 40, § 4:05, at 97.

CONCLUSION

The type of potentially criminal conduct that is most troublesome, in light of the doctrines discussed in this article, is a defendant's unknowing failure to perform a required duty or his failure to recognize that an affirmative duty exists. Cases in which individuals or corporations are direct actors in breaching an affirmative duty are appropriate cases for application of the inferential tools discussed previously. Where an omission or a failure to perform an affirmative duty (to act or to inquire) is asserted as the basis of criminal liability, congressional directives in the federal environmental statutes, as well as the *Liparota* line of cases, suggest that the government must show not merely the fact of a defendant's omission, a negligent ignorance of the facts, or a responsible corporate position, but instead must show: (1) the statute or regulation creates a duty to perform an affirmative act; (2) the duty to perform this affirmative act applies to the individual in question;[172] (3) that the duty to act or inquire was in fact violated; and (4) that the defendant knew of the duty and consciously ignored it for the purpose of avoiding learning the fact of its unlawfulness. Adherence to this formula, as well as judicious use of the criminal law principles of deliberate ignorance, responsible relationship, and collective knowledge, will ensure that the distinctions drawn by Congress in federal environmental statutes between civil and criminal liability remain intact.

172. If the defendant is a corporation and the prosecution will attempt to use the collective knowledge theory of liability, then the prosecution should have to show the duty applies to each individual whose knowledge will be imputed to the corporation.