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Criminal Law—Statutory Definition of Knowledge—State v. Shipp, 93 Wn. 2d 510, 610 P.2d 1322 (1980)

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CRIMINAL LAW—STATUTORY DEFINITION OF KNOWLEDGE—*State v. Shipp*, 93 Wn. 2d 510, 610 P.2d 1322 (1980).

In *State v. Shipp*[1] the Washington Supreme Court interpreted the meaning of "knowledge" as used in Washington's criminal culpability statute.[2] Defendants in three different trials were convicted of crimes requiring proof of knowledge.[3] In each case the trial court gave jury instructions directing the jury "to find that a person has knowledge if it finds that 'he has information which would lead a reasonable person in the same situation to believe that [the relevant] facts exist.' "[4] The issue in *Shipp* was whether these instructions, which were taken almost verbatim from the statute, were correct.

By a six to three majority,[5] the court in *Shipp* ruled that the instructions were incorrect.[6] The court interpreted the criminal culpability statute as merely permitting, rather than requiring, a jury to conclude that a defendant has knowledge when it finds that a reasonable person would have had knowledge in the same situation.[7] The court arrived at its conclusion through a process of elimination. It proposed three possible ways to interpret the statute and then attempted to show that, of the three, only this

1. 93 Wn. 2d 510, 610 P.2d 1322 (1980).

2. WASH. REV. CODE § 9A.08.010 (1981). This statute defines four levels of culpability applicable to the Washington criminal code, WASH. REV. CODE tit. 9A (1981): intent, knowledge, recklessness, and criminal negligence. "Knowledge" is defined as follows:

> A person knows or acts knowingly, or with knowledge when:
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> (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
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> (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

Id. § 9A.08.010(1)(b).

3. The three cases, State v. Shipp, No. 82,357 (King County Super. Ct., Dec. 9, 1977), State v. Hinz, No. 80,397 (King County Super. Ct., Nov. 29, 1977), and State v. Van Antwerp, No. 81,140 (King County Super. Ct., July 28, 1977), were consolidated for the appeal. The defendant in *Van Antwerp* was convicted for knowingly riding in a stolen car, *see* WASH. REV. CODE § 9A.56.070(1) (1981); in *Hinz* for knowing assault with attempt to commit rape, *see id.* § 9A.36.020(1); and in *Shipp* for knowingly promoting prostitution in the first and second degrees, *see id.* §§ 9A.88.070-.080. 93 Wn. 2d at 512-13, 610 P.2d at 1324.

4. *Shipp*, 93 Wn. 2d at 512, 610 P.2d at 1324. The instruction came directly from WASHINGTON PATTERN JURY INSTRUCTIONS—CRIMINAL, 11 WASHINGTON PRACTICE § 10.02 (1977).

5. Justice Brachtenbach wrote for the majority, with Justice Rosellini writing for the dissent.

6. In two of the three consolidated cases, this inaccuracy was judged to be sufficient to mandate a new trial. 93 Wn. 2d at 517, 610 P.2d at 1326. In the third case, State v. Hinz, No. 80,397 (King County Super. Ct., Nov. 29, 1977), which involved assault with intent to commit rape, the jury found that the defendant had acted intentionally. Intent, the most culpable mental state, subsumes the less culpable mental state of knowledge. WASH. REV. CODE § 9A.08.010(2) (1981). Thus, the erroneous instruction on knowledge was deemed harmless error. 93 Wn. 2d at 517-18, 610 P.2d at 1326-27.

7. 93 Wn. 2d at 516, 610 P.2d at 1326.

"permitting rather than requiring" interpretation could escape charges of unconstitutionality and internal inconsistency.[8]

This note argues that, contrary to the view expressed by the *Shipp* majority, the statutory definition of criminal knowledge, RCW § 9A.08.010(1)(b), can be interpreted reasonably in only one way: The jury must find that a defendant had knowledge of the fact in question if it finds that a reasonable person in the same situation possessing the same information would have had such knowledge. In other words, for the purposes of the Washington criminal code, this note argues that the term "knowledge" has been redefined by the Washington Legislature to embrace not only actual knowledge, but constructive knowledge as well. This interpretation of the statute can withstand an attack on constitutional grounds. Further, although it does yield a substantial inconsistency within the statute,[9] this interpretation is directed by well-established rules of statutory construction.

The Washington courts are not bound, by the doctrine of stare decisis, to perpetuate an erroneous interpretation of a statute.[10] Consequently it is hoped that this note, in illuminating the weaknesses in the *Shipp* majority's analysis, will convince subsequent tribunals considering the question to adhere to the interpretation intended by the legislature.[11]

I. BACKGROUND: ACTUAL VERSUS CONSTRUCTIVE KNOWLEDGE

In the majority of jurisdictions, knowledge is either defined or construed to mean actual knowledge.[12] Several states, however, have chosen to equate constructive knowledge with actual knowledge.[13]

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8. *Id.* at 514–17, 610 P.2d at 1325–26.

9. *See id.* at 515, 610 P.2d at 1325; notes 61–70 and accompanying text *infra*.

10. Jepson v. Department of Labor & Indus., 89 Wn. 2d 394, 407, 573 P.2d 10, 17 (1977); Windust v. Department of Labor & Indus., 52 Wn. 2d 33, 38, 323 P.2d 241, 244 (1958).

11. In State v. Funkhouser, 30 Wn. App. 617, 631–32, 637 P.2d 974, 981–82 (1981), and State v. Matthews, 28 Wn. App. 198, 203–04, 624 P.2d 720, 724 (1981), the court of appeals followed the supreme court's analysis in *Shipp*.

12. *See, e.g.*, Cochran v. State, 255 Ind. 374, 265 N.E.2d 19 (1970); State v. Sheffey, 234 N.W.2d 92 (Iowa 1975); State v. Beale, 299 A.2d 921 (Me. 1973); Commonwealth v. Boris, 317 Mass. 309, 58 N.E.2d 8 (1944); State v. Grant, 17 N.C. App. 15, 193 S.E.2d 308 (1972); Commonwealth v. McFarland, 226 Pa. Super. 138, 308 A.2d 126 (1973).

The Model Penal Code (MPC) states that "[w]hen 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) (Proposed Official Draft 1962). Thus, under the MPC one need not have actual knowledge, but must have actual awareness. Such awareness is not required in RCW § 9A.08.010(1)(b). The MPC's approach generally is followed in the federal courts. *See* United States v. Valle-Valdez, 554 F.2d 911 (9th Cir.

Whether Washington joined the minority position with its 1975 legislative change of the definition of criminal "knowledge" was the issue in *Shipp*. The prior statutory definition of knowledge stated that "knowledge of any particular fact *may be inferred* from the knowledge of such other facts as should put an ordinarily prudent man upon inquiry."[14] This section was interpreted by the Washington Supreme Court to require actual knowledge.[15] In 1975, when RCW § 9A.08.010(1)(b) was enacted,[16] the legislature decided[17] to drop the "may be inferred" concept, opting instead, it seemed, to make proof of constructive knowledge conclusive on the issue whether the defendant had knowledge. The court in *Shipp*, however, paid no heed to this legislative decision.[18]

1977); United States v. Jewell, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976); Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955).

13. *E.g.*, Woods v. State, 15 Ala. App. 251, 73 So. 129, 130 (1916); Ball v. State, 149 Ga. App. 270, 253 S.E.2d 886, 888 (1979); Bennett v. State, 211 So. 2d 520, 526 (Miss. 1968), *appeal dismissed*, 393 U.S. 320 (1969); Scheckells v. Ice Plant Mining Co., 180 S.W. 12, 15 (Mo. Ct. App. 1915); State v. Thompkins, 263 S.C. 472, 211 S.E.2d 549, 554 (1975).

14. Act of Mar. 22, 1909, ch. 249, § 51(4), 1909 Wash. Laws 903 (repealed 1975) (emphasis added). Quoted in full, this section read as follows:

> The word "knowingly" imports a knowledge that the facts exist which constitute the act or omission of a crime, and does not require knowledge of its unlawfulness; knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent man upon inquiry.

15. State v. Tembruell, 50 Wn. 2d 456, 312 P.2d 809 (1957).

16. Washington Criminal Code, ch. 260, § 9A.08.010(1)(b), 1975 Wash. Laws 826.

17. The Washington criminal code was passed as a whole in 1975. Unfortunately, no useful legislative history exists on § 9A.08.010(1)(b). However, according to Richard H. Holmquist, the principal drafter of the Washington criminal code, § 9A.08.010(1)(b) played an important role in the political maneuvering that led up to the code's enactment. Telephone interview with Richard H. Holmquist (Dec. 22, 1981) (summary of interview on file with the *Washington Law Review*). For the code to have had a reasonable chance of legislative approval, it was generally felt that it should be endorsed by both prosecution and defense factions. Consequently, at the suggestion of the Washington State Senate Judiciary Committee, the Washington State Bar Association formed a task force of knowledgeable representatives (including Mr. Holmquist) from both ends of the criminal-law spectrum. The task force's job was to work out compromises and arrive at a consensus version of the code. As it turned out, one of the major compromises yielded the constructive knowledge section, § 9A.08.010(1)(b)(ii). According to Mr. Holmquist, the task force members representing prosecution interests were very much opposed to having to prove subjective mental states, i.e., actual knowledge. Considerable concern arose that these members would reject the entire code unless the constructive knowledge section were added. Thus, in what was evidently an 11th-hour decision, § 9A.08.010(1)(b)(ii) was included in the task force's version of the code. The task force members were well aware that this addition disrupted the hierarchical scheme set out in § 9A.08.010(2). *See generally* notes 61–70 and accompanying text *infra* (discussing the hierarchical scheme). Nevertheless, due to time constraints and fears that further impasses would result from attempts to harmonize the section, they left it in its internally inconsistent state. Virtually all of the members of the task force correctly anticipated that, if the code were passed and the inconsistency remained, it would be resolved through litigation.

18. *See* 93 Wn. 2d at 516, 610 P.2d at 1326. In effect, the court in *Shipp* resurrected the "may be inferred" concept.

II. THE *SHIPP* COURT'S REASONING

The *Shipp* majority felt that RCW § 9A.08.010(1)(b)(ii) might reasonably be interpreted as creating a mandatory presumption of knowledge.[19] However, since a mandatory presumption would be unconstitutional in this setting,[20] the court concluded that alternative ways of reading the statute should be investigated.[21]

Accordingly, the majority next considered the viability of interpreting the constructive knowledge section as constituting a redefinition of the word "knowledge."[22] The court readily disposed of this option, however, finding it to be subject to at least two major shortcomings: First, such a reading was felt to be highly inconsistent with the hierarchical theme of RCW § 9A.08.010(2);[23] second, the court determined that a redefinition of this sort would violate the United States Constitution because the average citizen would not have adequate notice of the terms of the law.[24]

Because neither of the foregoing interpretations was deemed acceptable, the majority concluded that "the statute must be interpreted as only permitting, rather than directing, the jury to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances."[25] In the court's opinion, this was the only interpretation that was immune to claims of unconstitutionality and internal inconsistency.[26]

The three dissenting justices found the majority's discussion of the mandatory-presumption interpretation to be inapposite.[27] They felt that

19. *Id.* at 514, 610 P.2d at 1325. The court said that an instruction based on this statute might lead a juror to believe that, if the juror found that the defendant had received information from which a reasonable person would have derived the requisite knowledge, then the juror must also find, as a mandatory presumption, that the defendant had knowledge.

20. *See id.* at 515, 610 P.2d at 1325; notes 31–43 and accompanying text *infra*. The majority also said that interpreting the section as creating a mandatory presumption was defective because it prevented the jurors from considering the defendant's subjective intelligence or mental condition. 93 Wn. 2d at 514, 610 P.2d at 1325. However, as was pointed out by the dissent, this concern is unfounded, for if a defendant can show that he did not "have" the pertinent information (even though a reasonable person similarly situated would have "had" it), he will not, under the terms of the statute, be deemed to have had knowledge. *Id.* at 521, 610 P.2d at 1328 (Rosellini, J., dissenting).

21. *Id.* at 515, 610 P.2d at 1325.

22. *Id.* In other words, for purposes of the Washington criminal code, "knowledge" would be interpreted to mean not only actual knowledge, but constructive knowledge as well.

23. *Id.; see* notes 61–70 and accompanying text *infra*.

24. 93 Wn. 2d at 515–16, 610 P.2d at 1326; *see* notes 44–60 and accompanying text *infra*.

25. 93 Wn. 2d at 516, 610 P.2d at 1326.

26. *Id.* at 514–15, 610 P.2d at 1325.

27. *Id.* at 520–21, 610 P.2d at 1328. The dissenters felt that the cases cited by the majority in support of its mandatory presumption argument were inapplicable. Implicit in the dissent's elaboration of this point was the idea there are no presumptions of any sort operating as a result of §

only the redefinition interpretation was appropriate.[28] Although they did not respond to the majority's concern over disruption of the statute's internal hierarchy, they did dispute, although somewhat summarily, the seriousness of the notice problem.[29] The gist of the dissenters' viewpoint was best expressed by their statement:

> [I]t is apparent . . . that the legislature intended that persons who ought to have known what they were doing should be punished the same as persons who actually knew. It was for the legislature to decide whether the two groups are equally culpable, and not a judgment to be made by this court.[30]

III. ANALYSIS

A. Mandatory Presumption

As noted above, the majority in *Shipp* claimed that RCW § 9A.08.010(1)(b) was subject to three different interpretations, the first being that the statute could be read as creating an unconstitutional mandatory presumption.[31] As the dissent implied,[32] however, the statute creates no presumptions of any kind. Rather, the legislature simply redefined the word "knowledge" to include not only actual knowledge, but constructive knowledge as well.[33]

It is a well-settled constitutional principle that all elements of a crime must be proven beyond a reasonable doubt.[34] Thus, a mandatory presumption that directs the jury to presume the existence of an ultimate elemental fact on the basis of a proven suggestive fact is unconstitutional.[35] In the three cases considered in *Shipp*, however, there were no presumptions, mandatory or otherwise.

Although there are numerous definitions of the various types of presumptions,[36] a common thread runs through all of them. The jury will be

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9A.08.010(1)(b)(ii). That section of the statute simply involves a legislative definition of an element of a crime. *See* notes 31–43 and accompanying text *infra*.

28. 93 Wn. 2d at 519–22, 610 P.2d at 1328–29.

29. *Id.* at 521, 610 P.2d at 1328.

30. *Id.* at 522, 610 P.2d at 1329.

31. *Id.* at 514–15, 610 P.2d at 1325.

32. *See id.* at 520–21, 610 P.2d at 1328 (Rosellini, J., dissenting).

33. *See* State v. Van Antwerp, 22 Wn. App. 674, 681, 591 P.2d 844, 848 (1979), *rev'd sub nom.* State v. Shipp, 93 Wn. 2d 510, 610 P.2d 1322 (1980).

34. *See In re* Winship, 397 U.S. 358 (1970).

35. Sandstrom v. Montana, 442 U.S. 510 (1979). However, a mandatory presumption can withstand constitutional attack if the suggestive fact is indicative of the ultimate fact beyond a reasonable doubt. Ulster County Court v. Allen, 442 U.S. 140 (1979).

36. *See, e.g.*, Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 332 (1980). A typical definition used by Washington courts is that "[p]resumptions are assumptions of fact that the law requires to be

required, authorized, or encouraged to find fact *X*, an element of the offense charged, upon proof of fact *Y*. Contrary to the *Shipp* majority's conclusion, RCW § 9A.08.010(1)(b) does not present this type of arrangement. The statute does not say that the trier of fact must or may presume the defendant to have had actual knowledge if it finds that the defendant had constructive knowledge. Rather it says, in very explicit terms, that for the purposes of the Washington criminal code "knowledge" is *either* actual knowledge *or* constructive knowledge. It is "knowledge," not actual knowledge, that must be proven, and under section 9A.08.010(1)(b) constructive knowledge *is* "knowledge." Consequently, in each of the cases consolidated in *Shipp* all that was required was that the jury find beyond a reasonable doubt that the defendant in question had information that would have imparted actual knowledge to a similarly situated reasonable person. This requirement was met in all three cases.

The power of the legislature to sidestep the problems associated with mandatory presumptions by taking the redefinition route cannot, in this case, be doubted.[37] The legislature's power to define crimes is "virtually exclusive [and] nearly unlimited."[38] Moreover, as a general rule the legislature may, in defining a word, give it a broader than normal meaning.[39] The fact that the net effect of such a redefinition is to make simple negli-

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made from another fact or group of facts found or otherwise established in an action." Lappin v. Lucurell, 13 Wn. App. 277, 284, 534 P.2d 1038, 1043 (1975). Mandatory presumptions recently were defined by the U.S. Supreme Court as being evidentiary devices which tell the trier "that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." Ulster County Court v. Allen, 442 U.S. 140, 157 (1979) (emphasis added).

37. *See* Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1388 (1979):

> In every case in which the constitutional objection to a presumption hinged on its departure from the reasonable-doubt standard rather than on the substantive inadequacy of the facts proved, the supposed defect could be cured simply by making the law more onerous. Thus, for example, forbidding a presumption of fact *X* from proof of fact *Y* would induce the government *either* to prove *X* beyond a reasonable doubt *or* to make *Y* an independently sufficient basis of liability.

38. Hendrix v. City of Seattle, 76 Wn. 2d 142, 157, 456 P.2d 696, 706 (1969). *See* Morgan v. Devine, 237 U.S. 632 (1915); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820). An example of the legislature's power can be found in Washington's drunk driving law, which states that "[a] person *is* guilty of driving while under the influence of intoxicating liquor or any drug if he drives a vehicle within this state while: (1) He has 0.10 percent or more by weight of alcohol in his blood . . . ." WASH. REV. CODE § 46.61.502 (1981) (emphasis added). Certainly it is possible that some people can drive safely with 0.10 percent alcohol in their blood. *See* Gardner, *Breath Tests For Alcohol: A Sampling Study of Mechanical Evidence*, 31 TEX. L. REV. 289, 292–98 (1953). Yet, under this statute, such people are guilty of driving while intoxicated regardless of whether the alcohol has had a detrimental effect upon their driving.

39. City of Seattle v. Buchanan, 90 Wn. 2d 584, 604, 584 P.2d 918, 928 (1978); 1A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 20.08 (4th ed. C. Sands 1972).

gence punishable as a crime[40] is irrelevant,[41] provided that the intent to do so is clearly expressed.[42] This is true even if the proscribed behavior is malum in se.[43] Consequently, the Washington Legislature did not exceed its authority in redefining knowledge to include both actual and constructive knowledge.

B. Redefining "Knowledge"

1. Fair Warning

In the next phase of its opinion, the court in *Shipp* expressly recognized that RCW § 9A.08.010(1)(b) can be read as constituting a redefinition rather than as creating a mandatory presumption.[44] Having acknowledged the redefinition interpretation, however, the court was quick to discard it.

40. Note that the definition of constructive knowledge found in § 9A.08.010(1)(b) does indeed yield this result. When a person with actual knowledge of certain facts fails to derive from those facts the conclusion that a reasonable person would have reached, that person is guilty of negligence.

41. *See, e.g.*, State v. Williams, 4 Wn. App. 908, 913, 484 P.2d 1167, 1171 (1971), *cited with approval in* State v. Foster, 91 Wn. 2d 466, 475, 589 P.2d 789, 796 (1979). In *Williams*, the court of appeals stated:

> Under [the Washington manslaughter statutes] the crime is deemed committed even though the death of the victim is the proximate result of only simple or ordinary negligence. . . .
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> . . . If, therefore, the conduct of a defendant, regardless of his ignorance, good intentions and good faith, fails to measure up to the conduct required of a man of reasonable prudence, he is guilty of ordinary negligence because of his failure to use "ordinary caution." . . . If such negligence proximately causes the death of the victim, the defendant, as pointed out above, is guilty of statutory manslaughter.

4 Wn. App. at 913, 484 P.2d at 1171.

42. Where the statute is silent on mens rea and the crime in question involves moral turpitude (i.e., the crime is malum in se), courts generally hold that intent or knowledge is an essential element of the crime. *See, e.g.*, State v. Turner, 78 Wn. 2d 276, 280, 474 P.2d 91, 94 (1970). *But see* State v. Winger, 41 Wn. 2d 229, 233, 248 P.2d 555, 557 (1952). However, where the legislature clearly indicates that intent or actual knowledge need not be proven, the courts are powerless to hold otherwise. *See, e.g.*, State v. Stroh, 91 Wn. 2d 580, 584, 588 P.2d 1182, 1184 (1979) ("whether intent is an element of a statutory crime depends upon the intent of the legislature"); State v. Williams, 4 Wn. App. 908, 484 P.2d 1167 (1971).

43. There is little dispute that legislation proscribing conduct which is a malum prohibitum will generally be upheld even though proof of intent or knowledge is not required. *See, e.g.*, State v. Turner, 78 Wn. 2d 276, 280, 474 P.2d 91, 94 (1970). In contrast, a considerable body of authority argues that scienter is a necessary element of crimes that are mala in se. *E.g., id.;* State v. Gregor, 11 Wn. App. 95, 100, 521 P.2d 960, 963 (1974); City of Tacoma v. Lewis, 9 Wn. App. 421, 426, 513 P.2d 85, 88 (1973). Yet, this latter proposition applies only to statutes that are silent on the issue whether scienter is required. *See* note 42 *supra*. In other words, the legislature may prohibit offenses that are mala in se without requiring knowledge or intent. In State v. Foster, 91 Wn. 2d 466, 475, 589 P.2d 789, 796 (1979), the court stated that it found "no persuasive authority for [the] argument that all statutory offenses other than mala prohibita offenses must, in every instance, contain a legislatively designated element of intent." *See also* United States v. Greenbaum, 138 F.2d 437, 438 (3d Cir. 1943).

44. 93 Wn. 2d at 514, 610 P.2d at 1325.

It concluded that, since the redefinition did not appear in "the same section or even in the same chapter as any of the sections which specify the elements of the crimes,"[45] a person could be deprived unconstitutionally of fair warning of the types of conduct that are prohibited.[46] The court cited no authority on point for this proposition.[47] Countless statutes have been struck down under the void-for-vagueness doctrine because, due to ambiguous terminology, they failed to provide the requisite fair warning.[48] Courts have not, however, declared a statute invalid simply because in reading it one would have to refer to a general definition section to ascertain the full meaning of the words contained therein.

In cases involving a separate definition section that clearly pertained to the operative word or phrase in question,[49] the courts have failed to even address this aspect of the fair-warning issue.[50] These courts have confined

45. *Id.* at 516, 610 P.2d at 1326.

46. The due process requirement of fair warning is almost always discussed in the context of the void-for-vagueness doctrine. The classic statement of that doctrine appeared in Connally v. General Constr. Co., 269 U.S. 385, 391 (1926):

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

See also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); City of Seattle v. Pullman, 82 Wn. 2d 794, 797, 514 P.2d 1059, 1061–62 (1973); WASH. REV. CODE § 9A.04.020(1)(c) (1981).

47. The court did cite two cases, Winters v. New York, 333 U.S. 507 (1947), and City of Seattle v. Pullman, 82 Wn. 2d 794, 514 P.2d 1059 (1973), but both these cases involved statutes containing ambiguous, indefinite language. The statutes were declared invalid on the basis of these uncertainties, not because of a need to refer to a separate definition section in order to resolve them.

48. *See* Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (definitive article by Anthony Amsterdam).

49. It is undisputed that Washington's criminal culpability statute, WASH. REV. CODE § 9A.08.010 (1981), entitled "General requirements of culpability," pertains to the numerous, more specific statutes that follow in the Washington criminal code, WASH. REV. CODE tit. 9A (1981). *See id.* § 9A.04.090. *See generally* 1A J. SUTHERLAND, *supra* note 39, § 27.02.

50. *E.g.*, City of Seattle v. Koh, 26 Wn. App. 708, 614 P.2d 665 (1980). In *Koh*, the defendant was convicted, under § 301(a) of the Seattle Building Code, of "changing the occupancy" of his apartment building without first securing a permit from the Building Department. The court stated:

> Standing alone, [the term "changing the occupancy"] may not be readily understandable. However, the term "occupancy" is defined in *section 416* of the Code as "the purpose for which a building, or part thereof, is used or intended to be used." When the legislative body provides a definition for a statutory term it is that definition to which a person must conform his conduct. . . . Thus, to "change the occupancy" is to bring about a change in the permitted use of a building.

Id. at 710–11, 614 P.2d at 668 (emphasis added). Nowhere in the opinion did the court take issue with the fact that the definition was in a statute entirely separate from the one stating the crime under consideration. *See also* United States v. Clark, 412 F.2d 885, 890 (5th Cir. 1969) (the separate definitions statute aided, rather than hindered, the defendant); City of Seattle v. Shepherd, 93 Wn. 2d

their inquiry to the sufficiency of the language used in the definition, not even considering the hardship occasioned by the need to look outside the immediate statute to become aware of that language.

This approach to the question of fair warning is not unusual. It is well settled that, in testing a statute against a void-for-vagueness challenge, courts will read the statute in light of the common law,[51] prior judicial construction,[52] and legislative purpose.[53] If defendants can be charged with knowledge of such amorphous and relatively inaccessible bodies of information as these, then surely they can be charged with knowledge of a definition that is contained within the introductory chapters of the very title in which the criminal statute in question appears.

Perhaps the most severe shortcoming of the *Shipp* court's opinion on fair warning is that a uniform application of the opinion's underlying premise would, in a great number of cases, present the prosecution with an almost insurmountable hurdle. In effect, the majority in *Shipp* has said that a defendant cannot be convicted of a statutory crime unless it is determined that an ordinary person could, in reading only the statute and the chapter within which it is found, discern what conduct is and is not proscribed.[54] Although it would be highly desirable to be able to guarantee such a safeguard, it is wholly unrealistic and impractical to do so. Not only would each word that had been given a broader or narrower than normal meaning have to be defined in every chapter in which the word is used, but all of the relevant legislative history, common law, and judicial constructions would have to be incorporated into the chapter or statute as well.[55]

861, 866, 613 P.2d 1158, 1161–62 (1980) (defendant held to a definition found in a separate section of the very lengthy statute describing the offense); Garrison v. State Nursing Bd., 87 Wn. 2d 195, 197, 550 P.2d 7, 9 (1976) (definition found in wholly separate act was binding, since the pertinent section of both acts dealt with the same subject matter, and since there was nothing "in the context or the nature of things to indicate that [the legislature] intended a different meaning").

51. Note, 109 U. PA. L. REV., *supra* note 48, at 84 n.83.

52. Collings, *supra* note 48, at 223–27; Note, 62 HARV. L. REV., *supra* note 48, at 81–83. In Winters v. New York, 333 U.S. 507 (1948), the Court stated that a defendant, "at the time he acted, was chargeable with knowledge of the scope of *subsequent* interpretation." *Id.* at 514–15 (emphasis added). Furthermore, the Court has even allowed criminal statutes the "benefit of whatever clarifying gloss state courts may have added in the course of litigation of the very case at bar." Note, 109 U. PA. L. REV., *supra* note 48, at 73.

53. Jacobsen v. Board of Chiropractic Examiners, 169 Cal. App. 2d 389, 337 P.2d 233, 236 (1959); City of New Orleans v. Kiefer, 246 La. 305,164 So. 2d 336, 338 (1964).

54. The exact language used by the court was:

> [The redefinition of knowledge] does not appear in the same section or even in the same chapter as any of the sections which specify the elements of the crimes. The ordinary person reading one of the criminal statutes would surely be misled if the statute defining knowledge were interpreted to effect such a drastic change in meaning.

93 Wn. 2d at 516, 610 P.2d at 1326.

55. *See* notes 51–53 and accompanying text *supra*.

If indeed this is the requirement, it is likely that the courts of this state will soon encounter a significant increase in the number of criminal defendants moving to dismiss their prosecutions on the basis that the statute is void for vagueness.[56] For example, defendants charged in Washington with first degree arson[57] or second degree burglary[58] would often be inclined to make such a motion because both statutes use the word "building"; yet only the criminal code's general definition section reveals that "building" means such things as "fenced area, vehicle, railway car [and] cargo container."[59] When one considers the number of arguably peculiar definitions found in the general definition section together with the many unforeseeable twists that courts have read into various criminal statutes, one becomes aware of the troubling implications of the *Shipp* majority's fair-warning analysis.[60]

2. *Hierarchical Inconsistency*

In addition to finding that the redefinition interpretation was unconstitutionally vague, the court found, quite accurately, that it was inconsistent with the hierarchical scheme set out in RCW § 9A.08.010(2).[61] This section demonstrates that knowledge is intended to be the second most culpable mental state, preceded by intent and followed by recklessness and criminal negligence.[62] Because constructive knowledge is the equivalent of the objective standard of negligence,[63] it is clear that the drafters'

56. Note that in the recent case of State v. Zuanich, 92 Wn. 2d 61, 593 P.2d 1314 (1979), the Washington court seems to have indicated that defendants will be allowed to challenge a statute under the void-for-vagueness doctrine without first having to show that they were personally misled, provided that they allege that the statute could not be constitutionally applied to any set of facts. *See generally* Note, *Void-for-Vagueness—Judicial Response to Allegedly Vague Statutes*, 56 WASH. L. REV. 131 (1980).

57. WASH. REV. CODE § 9A.48.020 (1981).

58. *Id.* § 9A.52.030.

59. *Id.* § 9A.04.110(5). The full definition is as follows:

> "Building," in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

60. A defendant could raise a void-for-vagueness challenge on the basis of statutes contained in several of the other introductory chapters as well. *See, e.g., id.* ch. 9A.16 (defenses); *id.* ch. 9A.28 (anticipatory offenses).

61. 93 Wn. 2d at 515, 610 P.2d at 1325.

62. WASH. REV. CODE § 9A.08.010(2) (1981) states that:

> When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

63. *See* note 40 *supra*.

intention was not realized. Yet, contrary to the court's implicit conclusion,[64] this resulting inconsistency does not mandate invalidating the redefinition interpretation.

A court's ultimate objective in interpreting a statute is to ascertain and give effect to the legislative intent.[65] When confronted with conflicting provisions, courts resort to the established rules of construction in order to better realize this objective. In this case, the applicable rule of construction says that, where there is inescapable conflict between general and specific terms of a statute, the specific will prevail and be given effect over the general.[66] The Washington counterpart to this rule is usually expressed somewhat differently: "[W]here provisions conflict, that which is more clearly expressed should control."[67] The rationale underlying both of these versions of the rule has been stated as follows:

> [W]hen one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto . . . because the legislative mind having been, in the one section, directed to this matter must be presumed to have there expressed its intention thereon rather than in other sections where its attention was turned to other things.[68]

64. The court said:

> Because the [mandatory presumption and redefinition] interpretations of the statutory definition of knowledge are unconstitutional and inconsistent with the statutory scheme, the statute must be interpreted as only permitting, rather than directing, the jury to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances.

93 Wn. 2d at 516, 610 P.2d at 1326. It is not clear whether, in the court's mind, the hierarchical inconsistency would, by itself, have been sufficient reason to strike down the redefinition interpretation. It is likely, however, that it would have been sufficient, for the court was clearly quite concerned with the incongruous results to which the inconsistency could give rise:

> [U]nder this redefinition, it would be possible to convict every negligent driver who causes injury, in a situation where the ordinary person would have known that injury would result, of second-degree assault, because RCW 9A.36.020(1)(b) makes it a class B felony, punishable by 10 years' incarceration, to "knowingly inflict grievous bodily harm upon another." This punishment is equal in severity to the more serious crime of first-degree reckless manslaughter, RCW 9A.32.060.

Id. at 515, 610 P.2d at 1325.

65. *See, e.g.*, Hart v. Peoples Nat'l Bank, 91 Wn. 2d 197, 203, 588 P.2d 204, 208 (1978); Gross v. City of Lynnwood, 90 Wn. 2d 395, 398, 583 P.2d 1197, 1199 (1978); Strenge v. Clarke, 89 Wn. 2d 23, 29, 569 P.2d 60, 63 (1977).

66. 2A J. SUTHERLAND, *supra* note 39, § 46.05; *see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1936).

67. State v. Douty, 20 Wn. App. 608, 614, 581 P.2d 1074, 1078 (1978), *rev'd on other grounds*, 92 Wn. 2d 930, 603 P.2d 373 (1979). *See* State *ex rel.* Adjustment Dep't of Olympia Credit Bureau, Inc. v. Ayer, 9 Wn. 2d 188, 194, 114 P.2d 168, 171 (1941); Williams v. Pierce County, 13 Wn. App. 755, 758, 537 P.2d 856, 858 (1975). This rule, when applicable, supersedes the rule that says that, when two provisions are in conflict, the latest in order of position will prevail. Schneider v. Forcier, 67 Wn. 2d 161, 164, 406 P.2d 935, 937 (1965); *Ayer*, 9 Wn. 2d at 194, 114 P.2d at 171.

68. Long v. Culp, 14 Kan. 412, 415 (1875); *see* Rath v. Rath Packing Co., 257 Iowa 1277, 136

Application of the foregoing rule and accompanying rationale to the conflicting provisions of RCW § 9A.08.010 produces a clear result. The section defining knowledge[69] is both more specific and more clearly expressed than is the section setting out the hierarchical arrangement.[70] In the latter section the drafters were speaking in broad, conclusory terms, whereas in the former they dealt with a single, isolated subject in highly definitive language. Consequently, the statutory definition of knowledge should control.

The result in *Shipp,* interpreting knowledge to mean only actual knowledge, may not be objectionable. It is objectionable, however, for the court to reach that result in spite of clearly contrary legislative intent.[71] There is nothing inherently wrong with ridding a criminal code of its constructive knowledge element; indeed, the vast majority of jurisdictions have, at least implicitly, opted against equating constructive knowledge with actual knowledge.[72] However, by doing so in this case the *Shipp* court usurped the power of the legislature. It thereby violated one of the most fundamental tenets of our system of government.

IV. CONCLUSION

RCW § 9A.08.010(1)(b) declares that a person has "knowledge" when "he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense." The majority in *Shipp* found that this statute could be interpreted in three different ways: (1) as creating a mandatory presumption; (2) as redefining the word "knowledge" to include constructive knowledge; or (3) as permitting, but not requiring, the jury to find that the defendant had knowledge if it finds that a reasonable person would have had knowledge under the circumstances. The court determined that the first two interpretations were, as applied to this case, unconstitutional. Furthermore, it noted that the second interpretation yielded an inconsistency within the statute's internal hierarchy. Thus, it concluded that the third interpretation, which is subject to neither of these shortcomings, is the correct one.

The court's reasoning in *Shipp* is unsound. It is not justified by the language of the statute, for that language leads to a contrary result. Nor

N.W.2d 410, 416 (1965); County Bd. of Educ. v. Fiscal Court, 221 Ky. 106, 298 S.W. 185, 186 (1927); *see also* United States v. Windle, 158 F.2d 196 (8th Cir. 1946).

69. WASH. REV. CODE § 9A.08.010(1)(b) (1981), *reprinted in* note 2 *supra*.

70. *Id.* § 9A.08.010(2), *reprinted in* note 62 *supra*.

71. *See generally* note 17 *supra* (discussing the legislative intent behind the criminal "knowledge" section).

72. *See* note 12 and accompanying text *supra*.

can it be justified by the court's process of elimination. The first interpretation is inappropriate, for no presumptions of any sort were created. The third interpretation merely resulted from the court's process of elimination and has no independent basis for support. The second interpretation, rejected by the court, should have prevailed. That this second interpretation creates an inconsistency within the statute's hierarchy is not, in this case, grounds to strike the statute down. Likewise, that a person would have to look to a separate definitional section in order to ascertain the meaning of the word "knowledge" as it is used in the Washington criminal code is also an insufficient basis on which to invalidate the statute.

The clear legislative mandate in RCW § 9A.08.010(1)(b) is that, for the purposes of the criminal code, constructive knowledge is equivalent to actual knowledge. Although the result in *Shipp* may not be objectionable, the errors in the court's reasoning and its disregard for this legislative mandate have troubling implications for future cases.

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