



DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD

Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves

The Harvard community has made this article openly available. [Please share](#) how this access benefits you. Your story matters.

Citation	Richard J. Lazarus, Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves, 7 Fordham Env'tl. L. Rev. 861 (2011).
Published Version	http://ir.lawnet.fordham.edu/elr/vol7/iss3/4/
Accessed	February 16, 2015 6:07:07 PM EST
Citable Link	http://nrs.harvard.edu/urn-3:HUL.InstRepos:13548461
Terms of Use	This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA

(Article begins on next page)

Fordham Environmental Law Review

Volume 7, Issue 3

2011

Article 4

Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves

Richard J. Lazarus*

*

Copyright ©2011 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

**MENS REA IN ENVIRONMENTAL CRIMINAL
LAW: READING SUPREME COURT TEA
LEAVES**

*Richard J. Lazarus**

The most significant recent Supreme Court environmental case is undoubtedly *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.¹ At issue in *Sweet Home* was the validity of the Secretary of the Interior's expansive reading of the scope of Section 9 of the Endangered Species Act ("ESA").² By administrative rule, the Secretary had construed Section 9's prohibition on any "taking" of endangered species by "harm[ing]" such species to include significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing its essential behavioral patterns, "including breeding, feeding, or sheltering."³ The plaintiffs raised a facial challenge to the Secretary's rule on the ground that it created a prohibition that Congress did not intend.⁴

There was no obvious jurisprudential significance to *Sweet Home*. The case was extremely important to be sure, but solely because of its *environmental* implications. Habitat modification or degradation is the single greatest cause of species extinction.⁵ Section 9 pro-

* Professor of Law, Washington University (St. Louis). This article is based on a talk presented at a conference on environmental crime at Fordham University School of Law on February 29, 1996, in New York City.

1. 115 S. Ct. 2407 (1995) [hereinafter *Sweet Home*].

2. *Id.* at 2409.

3. 50 C.F.R. § 17.3 (1996).

4. *Sweet Home*, 115 S. Ct. at 2410.

5. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978); EDWARD O. WILSON, *THE DIVERSITY OF LIFE*, 221 (1993).

vides the most significant means, apart from land acquisition,⁶ to restrict activities that modify or the degrade habitat of endangered species on private lands.⁷ From a broader jurisprudential perspective, however, the case presented a fairly straightforward issue of statutory construction: (1) Whether Section 9 possesses a plain meaning capable of either sustaining or overriding the Secretary's construction; or (2) whether, alternatively, the Secretary's construction of ambiguous statutory language is reasonable and therefore should be sustained pursuant to *Chevron U.S.A. v. Natural Resources Defense Council*.⁸ There was certainly no criminal law dimension to what most would assume was exclusively a civil administrative law matter.

Those who attended the oral argument, however, might have been left with a very different impression of the nature of the legal issue presented. The Court was, from the outset, preoccupied with the potential criminal prosecutorial reach of the statute in the event that the Court upheld the government's proffered construction of the meaning of Section 9's prohibition on "taking." The questions raised at argument reflected considerable concern that, absent a meaningful mens rea element, a broad construction of the jurisdictional reach of the Endangered Species Act could criminalize conduct lacking the normal indicia of culpability necessary for criminal prosecution.

Indeed, the very first question from the bench by Justice O'Connor concerned not the meaning of "taking" or "harm," but "what the mens rea requirement is under [the] statute" for criminal prosecution.⁹ When informed that the statute provided that "the

6. See 16 U.S.C. § 1534 (1994).

7. Section 6 of the Act provides a more limited basis for restriction of activities that degrade species habitat, by mandating that each federal agency "insure that any action authorized, funded, or carried out by such agency . . . is not likely to . . . result in the destruction or adverse modification of habitat of such species which is determined by the Secretary to be critical." 16 U.S.C. § 1536(a)(2) (1994); see also 16 U.S.C. § 1532(5)(A)(i) (1994) (defining "critical habitat" as habitat "essential to the conservation of the species").

8. *Sweet Home*, 115 S. Ct. 2407 (citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984)).

9. Official Transcript of the Oral Argument at 4, *Babbitt* (No. 94-859). The reference to Justice O'Connor in the text above and throughout this article is not based on any notation in the official transcript. That transcript deliberately omits

person must act knowingly," Justice O'Connor pressed the government regarding what precise facts the defendant must know, in particular, whether a person must know that the species being harmed is endangered.¹⁰ The government averred that such knowledge of the formal legal status of the species was not required, relying on the fact that "Congress specifically amended the [ESA] in 1978 to change the scienter from wilfully to knowingly, to change it from a specific intent crime to a general intent crime."¹¹ The government acknowledged that "under our interpretation of knowingly, . . . the person must know that the conduct in which he is engaging will have the prescribed effect on the protected wildlife."¹² When further pressed by the Court whether the defendant "would have to know, for example — if you drained a pond on your property, you'd have to know that there is a particular frog or whatever" to sustain a conviction, the government readily agreed.¹³

Now, this may seem to some to be much ado about very little. A few questions asked by a Justice at one oral argument hardly seem significant, especially when the Court's opinion on the merits left those issues largely unaddressed. Justices often pose questions that bear little, if any, relation to their actual beliefs about a case before them. Even academic mills normally require more grist than a question or two at oral argument to justify a contribution to a law review symposium.

This Essay will demonstrate how in this instance much can be effectively gleaned from what otherwise might appear to be a mere incidental oral argument colloquy confined forever to law library microfiche. The essay is structured around three lessons that can be derived from reading the tea leaves supplied by the colloquy. Section I concerns the source of the tensions currently underlying environmental crime. Section II underscores the significance of the

any reference to individual Justices. The Justice O'Connor reference is instead based on conversations that I had with those who attended the oral argument and, therefore, could identify the questioner. Each verified that Justice O'Connor was the questioner.

10. *Id.*

11. *Id.* at 5.

12. *Id.*

13. *Id.* at 6.

mens rea element in addressing those tensions through defining what is and is not criminal conduct in the environmental law context. Finally, section III details the third lesson, which is perhaps the most significant: demonstrating how the colloquy, including the tenor of the Court's questions and the substance of the government's responses, is highly suggestive of the kinds of reforms that are likely to occur in environmental criminal legislation in the near future.

I. THE TENSION BETWEEN CIVIL ENVIRONMENTAL LAW AND CRIMINAL LAW IN ENVIRONMENTAL CRIME

The impetus for the questions regarding the criminal implications of construing Section 9 of the Endangered Species Act in *Sweet Home*¹⁴ is the same as that underlying current controversies surrounding criminal enforcement of environmental law. The criminalization of an otherwise civil regulatory scheme, like environmental law, serves two reinforcing, yet potentially divergent functions. Concern about the possibility of such divergence most likely prompted the Court's questions and likewise underlies much of the current debates regarding the proper scope of criminal sanctions in environmental law.¹⁵

First, imposition of a criminal sanction makes an important symbolic statement regarding the moral culpability of the transgressor. Conduct subject to criminal sanction is not merely unlawful — it is *criminal* in character. Criminal prohibitions serve as a formal societal statement regarding the immorality of certain proscribed acts.¹⁶ Therefore, the formal equation of environmental violations

14. See *supra* notes 9-13.

15. I have previously written at perhaps too great length about the tension between environmental law and criminal law in the fashioning of environmental criminal law. Some of the issues discussed in this essay are more comprehensively examined in those earlier submissions. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L. J. 2407 (1995) [hereinafter *Reforming Environmental Criminal Law*]; Richard J. Lazarus, *The Reality of Environmental Law in the Prosecution of Environmental Crimes: A Reply to the Department of Justice*, 83 GEO. L. J. 2539 (1995); Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867 (1994).

16. Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP.

with criminal misconduct tends to clothe the underlying environmental requirements with a degree of moral legitimacy.¹⁷ This statement of immorality may either merely reflect existing social consensus or serve as a stimulus to creating a new consensus regarding the bounds of moral conduct.¹⁸

A strong case can be made for subjecting environmental violations to criminal sanctions on such moral grounds. The kind of conduct often involved in violating environmental requirements and the kind of harm that results can be virtually identical to that historically subject to criminal punishment. The motivation for the violation is often economic, but so too is the motivation for many crimes, ranging from armed robbery, to embezzlement, and even murder in many circumstances. And while the common theme for environmental violations is that the resulting harm occurs through degradation of the environment, that feature does not reduce the magnitude of harm. Quite the opposite is true. Environmental violations may cause catastrophic results to human health and the natural environment (and consequently for future generations).

Environmental protection also provides a forceful context for extending criminal sanctions beyond long settled notions of morality. The premise of much environmental protection law is that existing behavioral norms were flawed and warrant significant change. The moralizing force of criminal law — which uses criminal law affirmatively to educate the public regarding the immorality of certain behavior — can therefore serve to promote the needed change in social attitudes.

A second function that criminal sanctions serve derives from their unique ability to deter violations. Absent effective sanctions for their violation, noncompliance with environmental requirements is

PROBS. 401, 404 (Summer 1958).

17. This point was underscored at the Fordham symposium when government prosecutors repeatedly emphasized the word "crime" and "criminal" in describing environmental violations, apparently in an effort to capture the moral force of those terms.

18. See John C. Coffee, *Does "Unlawful" Mean "Criminal?"*: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193, 201, 223-233 (1991); see also, Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965).

reduced to merely a cost of doing business. Any fines imposed may just be passed on by the company to consumers of the company's goods or services in the form of higher prices. Even in the worst case of catastrophic fines, the individual owners and operators may be protected from crippling liability by corporate limitations on individual liability¹⁹ or, if needed, bankruptcy provisions.²⁰

The criminal sanction, by contrast, cannot be so easily passed on to others, especially the sanction of incarceration. Incarceration is uniquely personal and deprives the convict of his or her most basic liberty interest. The moral stigma of such a conviction can be long lasting and, as a practical matter, can cripple the defendant's future economic livelihood. It can also destroy the convicted individual's reputation within his or her own community. Thus, the threat of personal criminal sanction can prompt far greater compliance by industry than mere civil sanctions.²¹

The deterrence function of criminal law can also be especially important in the environmental context. Much environmental law is necessarily preventive in design. The laws seek to prevent irreversible, irremediable harm to the natural environment, the precise magnitude of which is often highly uncertain given the inevitable complexity of ecosystems. It is often quite hard, if not impossible, to put the pieces of an ecological puzzle back together again in the aftermath of serious environmental degradation. Monetary remedies do not address the damage issue. Moreover, natural resource restoration may be an illusory goal. Deterrence, therefore, can be essential to the achievement of the preventive objective of environmental law to prevent such harms, rather than merely to redress harms

19. *See, e.g.*, *N.L.R.B. v. Greater Kansas City Refrig.*, 2 F.3d 1047, 1052 (10th Cir. 1993) (entitling shareholders to rely on the protections of limited liability where they follow the technical rules that govern the corporate structure).

20. *See, e.g.*, Arlene E. Mirsky et al., *The Interface Between Bankruptcy and Environmental Laws*, 46 *BUS. LAW* 623 (1991).

21. *Environmental Crimes Act of 1992, Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 14 (statement of Rep. Schumer); Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 *LOY. L.A. L. REV.* 1133, 1158-59 (1986).

once they have occurred.²²

Although the moral culpability and deterrence functions may be somewhat reinforcing within certain bounds, they suggest differing outerbounds regarding the proper reach of the criminal sanction. The deterrence rationale can logically extend far beyond the morality rationale, for example, when the criminal sanction is designed simply to reflect existing social norms of moral culpability; or when the sanction is intended to serve an educational function and thereby affirmatively affect what those social norms are.

In either instance, the deterrence rationale typically turns not on the immorality of the conduct but instead on the amount and character of the harm threatened, and therefore, warranting prevention. The greater the threatened harm, the more valuable the deterrence effect offered by the criminal sanction. Although conduct risking greater harm may, for that reason, be considered morally culpable and warranting deterrence, the primary focus of each rationale for a particular criminal sanction — the moral character of the conduct versus the character and degree of the harm — remains decidedly different.

The deterrence rationale finds its equilibrium at a point of optimal compliance. That may or may not mean that the criminal sanctions are themselves triggered by any violation. Because criminal sanctions serve as such effective deterrents, there might be a significant risk of inducing “overcompliance” if such sanctions were triggered by any violation.²³

Defining the outer reach of criminal sanctions for violations of regulatory laws, like environmental protection laws, necessarily raises a tension between these two aims of criminal law functions: deterring regulatory violations and expressing moral culpability.

22. See, Lazarus, *Reforming Environmental Criminal Law*, *supra* note 15, at 2420-21.

23. By “overcompliance,” I do not mean to suggest that regulated entities would comply too often in terms of frequency of compliance. I do not assume that Congress intended that companies would violate the laws with a certain frequency. “Overcompliance” instead refers to the possibility that regulated entities might reduce pollution even beyond levels society might in fact desire — as reflected in mandated levels of pollution control — in order to guard against even the slight possibility of violating a criminal prohibition and thus subjecting themselves to criminal sanction.

The Court's questions at oral argument in *Sweet Home* can be traced to a concern that the balance was being struck too much in favor of the deterrence rationale in possible derogation of the moral limits necessarily implicated by criminal sanctions. For just as criminal sanctions can be justified by norms of moral culpability, so too may the imposition of criminal sanctions in the absence of such culpability itself run afoul of those very same norms of morality. There are limits beyond which something cannot be deemed immoral because it is criminal. And, when it fails to recognize those limits, the criminal law itself risks moral condemnation.²⁴

In *Sweet Home*, this tension was starkly posed. Extending the jurisdictional reach of Section 9 to include habitat modification or degradation was essential for accomplishment of the statute's fundamental purpose of guarding against species extinction. Endangered species could not be adequately protected if the federal law prohibited only actions that harmed a species by the direct application of physical force against the species. The deterrence rationale strongly supported an extension to habitat modification or degradation on the theory that Congress should be presumed to have created a statutory scheme that authorized the Department of the Interior to prohibit those activities necessary to achieve the statute's fundamental purposes. The deterrence rationale was also especially strong in the endangered species context where the harm at stake — the extinction of a species — is the paradigmatic example of an irreversible environmental effect that can be effectively redressed only by prevention in the first instance. Once the species is gone, there is no turning the clock back.

Yet, Justice O'Connor appears to have appreciated the implications of any resulting expansion of criminal sanctions. For, if one were to presume that Congress had not intended to expand criminal sanctions beyond those supported by notions of moral culpability, doubt might be cast on the government's expansive statutory construction. In the absence of criminal sanctions, the government's

24. Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 80 (1933); Coffee, *Reflections on the Disappearing Distinction*, *supra* note 18, at 193; see also Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 444 (1963).

construction might well be reasonable; however, given the presence of criminal sanctions for violations of the prohibition on "taking," the Court must take care to ensure against possible overreaching of the criminal sanction (or at least not acquiesce too quickly to the notion that such was Congress' intent). Such an overreaching becomes a greater possibility in moving from the direct application of force against the species to the potentially more causally attenuated harm of habitat modification or degradation.

The harm may be the same — which might support the deterrence function of criminal sanctions — but the moral culpability of the underlying conduct may be somewhat less. The extension of the statute to habitat modification or degradation dramatically expands those potentially subject to criminal prosecution. Those directly applying force to a species are likely to be fully aware of the consequences of their actions. There are no comparable assurances in the broader category of persons who modify habitat in a manner that harms a species. The further removed "cause" is from "effect," the less likely the actor will be aware of those effects. Broadening the scope of activities risks sweeping into the regulatory ambit individuals less sophisticated about their activities.

The legal context within which the tension between the morality and deterrence function was raised in *Sweet Home* is also significant: not a classic criminal law case, but instead a civil action challenging the validity of an administrative agency regulation as a matter of statutory construction. Justice O'Connor's questions highlighted the relationship between questions of statutory construction and the inclusion of dual civil/criminal enforcement schemes. An intriguing issue of statutory construction is implicated; whether *Chevron* deference applies when the agency construction of the statute at issue subjects an individual to severe criminal sanction. *Chevron* and its progeny in the Court do not address this issue.²⁵ The judicial mantra is simply that statutory ambiguity warrants deference, so long as the construction is reasonable.²⁶ But it is not so clear that the deference mantra applies with equal force when a criminal sanction is implicated, since historically a competing can-

25. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

26. *Id.* at 844.

on of statutory construction (the "rule of lenity") has supported statutory ambiguities being read in favor of the criminal defendant and not the government.²⁷

The *Chevron* issue lurked mostly behind the scenes in *Sweet Home*. The possibility of the Court deciding the issue unfavorably to the federal government made seeking Supreme Court review much less attractive. Although the *environmental* stakes in *Sweet Home* were huge — leading the Secretary of the Interior to press for the filing of a petition for a writ of certiorari — the government had much to lose if the Court were to jettison *Chevron* deference whenever a federal regulatory scheme is subject to possible criminal sanction. The vast majority of federal regulatory schemes, including virtually all of the environmental regulatory programs, include just such a criminal enforcement dimension.²⁸

Fortunately for the government, which decided to take that risk by taking *Sweet Home* to the Court, the plaintiffs in the case never fully pressed this submerged aspect of the *Chevron* issue and inadequately briefed it.²⁹ The Court, as a result, largely sidestepped the issue with an ultimately vague footnote stating "[w]e have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."³⁰ However, the Court has previously made suggestions to that effect:

It is true . . . that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another

27. *See, e.g.*, *Ratzlaf v. United States*, 114 S. Ct. 655, 663 (1994) (citing *Hughey v. United States*, 495 U.S. 411, 422 (1990) ("lenity principles demand resolution of ambiguities in criminal statutes in favor of the defendant")); *United States v. Bass*, 404 U.S. 336, 347 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity") (citations omitted).

28. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7413(c)(1) (1994); Clean Water Act, 33 U.S.C. §1908(a) (1994); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b), (d) (1994); Resource Conservation and Recovery Act, 42 U.S.C. § 6928(b)-(d) (1994). *See also*, DONALD CARR ET AL., *ENVIRONMENTAL CRIMINAL LIABILITY* (1995); CHRISTOPHER HARRIS ET AL., *ENVIRONMENTAL CRIMES* (1992).

29. Brief for Respondents at 25, *Sweet Home*, 115 S. Ct. 2407 (No. 94-859).

30. *Sweet Home*, 115 S. Ct. at 2416 n.18.

for the Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases [I]t would do violence to the well-established principle that penal statutes are to be construed strictly.³¹

The government should be able to persuade the Court that the criminal dimension to a regulatory scheme does not deprive the appropriate administrative agency of the right to *Chevron* deference in a case challenging the validity of an agency regulation on statutory construction grounds. Rule of lenity concerns could be sufficiently redressed in other ways. Rather than require that the statute itself be free of ambiguity, the policies furthered by the rule of lenity might instead be satisfied by clearly drafted agency regulations that are the product of notice and comment rulemaking and free of indeterminacy and obscurity.³² Only in the absence of the agency taking the opportunity to clarify any statutory ambiguity would the rule of lenity, in effect, "trump" *Chevron* and render inappropriate judicial deference to the agency regarding the meaning of an agency regulation subject to possible criminal prosecution.³³

Regardless of my own inclinations, the issue remains open in the aftermath of *Sweet Home*, and Justice O'Connor's questions remain very much alive for the government in future cases. They identify an underlying tension in environmental crime between defining such crime in terms of moral culpability or, instead, extending it much further to promote regulatory deterrence. They also demonstrate how these same problems may bear on a fundamental issue of administrative law that the Court will likely face

31. *Federal Communications Commission v. Am. Broadcasting Co., Inc.*, 347 U.S. 284, 296 (1954). None of the briefs before the Court, including many amicus briefs, appear to have cited to this case.

32. *Cf. General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); *Chem. Waste Management Inc. v. EPA*, 869 F.2d 1526, 1534-35 (D.C. Cir. 1989); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 392 (8th Cir. 1987); *see Lazarus, Reforming Environmental Criminal Law*, *supra* note 15, at 2526-29.

33. *See Ann Crady, Administrative Agency Interpretation of Ambiguous Statutes with Criminal Penalties: Should the Rule of Lenity or Chevron Defense Apply?* (May 1996) (unpublished student manuscript on file with author).

more directly in the future, perhaps in an environmental crime case.

II. THE CENTRALITY OF MENS REA IN DEFINING ENVIRONMENTAL CRIME

The *Sweet Home* oral argument colloquy also illustrates the central role of mens rea in defining which environmental violations warrant criminal sanction. The choice of a mens rea — purposefully, knowingly, recklessly, negligently, or none at all (strict liability)³⁴ — necessarily implicates the tension already discussed between the deterrence and moral culpability functions of criminal law.³⁵ In the model of criminal law dominated by notions of moral culpability, mens rea is the defining element. Mens rea determines whether the conduct is subject to moral condemnation.³⁶ Mens rea also determines whether an individual is subject to society's most severe punishment: incarceration, with loss of liberty, and even loss of life in the most reprehensible circumstances.

The harm caused is relevant, but only to the extent that the individual subject to criminal prosecution desired or at least was aware that she was causing or creating the risk of such harm. Causation of harm, by itself, is not enough to trigger criminal sanction absent the accompanying culpable mens rea. The tie-in between mens rea and the resulting harm is one of the fundamental dividing lines between an otherwise blurry boundary between tort compensation schemes and criminal law.³⁷

That is why Justice O'Connor wanted to know precisely what "[m]ust a person know" to be subject to criminal prosecution under the Endangered Species Act.³⁸ She inquired whether the government must prove that a person "know that a particular

34. MODEL PENAL CODE §§ 2.02(2)(a)(i), 2.02(2)(b)(ii), 2.02(c), 2.02(2)(d) (1962).

35. See *supra* part I.

36. Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 982-87 (1932); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 637.

37. Coffee, *supra* note 18, at 193.

38. *Sweet Home* Oral Argument Transcript, *supra* note 9, at 4-7.

animal was endangered.”³⁹ Aware of the heightened significance of mens rea for determining moral culpability if Section 9 of the Act were construed to extend to habitat modification, she further posed the question whether the government agreed that “if you drained a pond on your property, you’d have to know that there is a particular frog or whatever . . . in the water . . . before you could be [convicted of a criminal violation of Section 9].”⁴⁰

The deterrence function of environmental crime, however, is another reason why it was so important for the government to stress that a person “need not know that” a species is endangered or even “at risk” for conviction under the Act.⁴¹ The government lawyer noted that “Congress specifically amended the act in 1978 to change the scienter from “wilfully” to “knowingly”, to change it from a specific intent crime to a general intent crime.”⁴² According to the government, the significance of this congressional shift was that a defendant need not know that a particular animal is endangered because “[t]hat is a question of knowledge of the law which is not ordinarily required” for general intent crimes.⁴³

Why is this more relaxed mens rea element important for the government’s deterrence objectives? One reason might be the government is concerned that it may not be able to prove the facts necessary to establish beyond a reasonable doubt a more demanding mens rea. Subjective knowledge and individual purpose are inherently difficult to establish. The best source for evidence of the requisite culpable knowledge and purpose is inevitably the very individual — the defendant — who may be expected to deny its existence.

Relaxing mens rea therefore can dramatically improve the prosecutor’s chance of success. This is true for crime in general. Indeed, it is especially so for environmental crime, at least where those violating environmental regulations are large corporations where individuals making decisions may seek to remain willfully ignorant. There are, to be sure, evidentiary doctrines and methods

39. *Id.* at 5.

40. *Id.* at 6-7.

41. *Id.* at 4-5.

42. *Id.* at 5.

43. *Id.*

of circumstantial proof that prosecutors have effectively used to overcome such cognitive and institutional barriers to proof of mens rea.⁴⁴ It should not be surprising, however, that prosecutors would prefer to avoid the burden of such proof altogether.

Thus, mens rea becomes the central subject in a tug of war. Moral culpability and deterrence pull in opposite directions; ultimately an equilibrium between the two is struck. It is the precise location of that point of equilibrium — now and in the future — that is the subject of the third lesson of the *Sweet Home* colloquy.

III. THE INSTABILITY IN CURRENT MENS REA DOCTRINE IN ENVIRONMENTAL CRIME

To date, the federal government has largely prevailed in its efforts to reduce its evidentiary burden in demonstrating that a particular defendant possesses a mens rea sufficiently culpable to warrant a felony sanction.⁴⁵ The lower courts have generally acquiesced in the government's contention that the Supreme Court's decision in *United States v. International Minerals and Chemical Corp.*⁴⁶ warrants interpreting the "knowingly violates" language of various environmental felony provisions as requiring proof neither of the defendant's knowledge of the relevant law nor of all the relevant facts that render the defendant's conduct a felony.⁴⁷

44. *Liparota v. United States*, 471 U.S. 419, 434 (1985) (commenting on ability of government to prove by circumstantial evidence defendant's knowledge of conduct's culpability); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 55 (1st Cir. 1991) (willful blindness instruction).

45. See, e.g., *United States v. Laughlin*, 10 F.3d 961 (2d Cir. 1993), cert. denied *Goldman v. United States*, 114 S. Ct. 1649 (1994).

46. 402 U.S. 558 (1971).

47. *United States v. Hopkins*, 53 F.3d 533, 537, 540 (2d Cir. 1995), cert. denied, 116 S. Ct. 773 (1996); *United States v. Wagner*, 29 F.3d 264, 266 (7th Cir. 1994); *United States v. Laughlin*, 10 F.3d 961, 965 (2d Cir. 1993), cert. denied *Goldman v. United States*, 114 S. Ct. 1649 (1994); *United States v. Self*, 2 F.3d 1071, 1090-91 (10th Cir. 1993); *United States v. Weitzenhoff*, 1 F.3d 1523, 1529-30 (9th Cir. 1993), amended, 35 F.3d 1275, 1284-85 (1994), cert. denied, 115 S. Ct. 939 (1995); *United States v. Dean*, 969 F.2d 187, 191-92 (6th Cir. 1992), cert. denied, 113 S. Ct. 1852 (1993); *United States v. Baytank (Houston)*, 934 F.2d 599, 612 (5th Cir. 1991); *United States v. Buckley*, 934 F.2d 84, 88-89 (6th Cir. 1991); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502-03 (11th

There are reasons to question both these conclusions in their application to felony sanctions, which were not at issue in *International Minerals*, but are present in most of the federal environmental criminal provisions. Indeed, even apart from the absence of a felony sanction, *International Minerals* provides virtually no support for a diminished mens rea with respect to the facts that a defendant must know. Quite the opposite is true. A close reading of *International Minerals* makes plain that the Court carefully avoided any such holding.⁴⁸

The *Sweet Home* colloquy is significant in this respect as well. It reveals Justice O'Connor's awareness of the signs of fissure underlying the facade of settled lower court precedent relying on *International Minerals*. Justice O'Connor asked the government lawyer in *Sweet Home* how he could square his response that the government need not prove that the defendant must know that the species was endangered or even "at risk" with the Court's recent ruling (just a few weeks earlier) in *United States v. X-Citement Video*.⁴⁹ In *X-Citement Video*, the Court construed "knowingly violates" language in a federal criminal pornography statute⁵⁰ to require that the government prove that the defendant knew that the performer was a minor. Justice O'Connor's question brought into focus the clear parallel. If "knowingly" in the pornography law meant that the defendant must know that the performer was a minor, then "knowingly" in the Endangered Species Act should mean that the defendant must know that the species was endangered. When confronted with the government's response that the defendant need not know the law, the Justice converted her question into one asking whether the government must at least prove knowledge of the fact that the species is "at risk," wholly apart from its formal designation as an "endangered species."⁵¹

Cir. 1986); *United States v. Corbin Farm Servs.*, 444 F. Supp. 510, 519-20 (E.D.Cal.), *aff'd*, 578 F.2d 259 (9th Cir. 1978); see Lazarus, *Reforming Environmental Criminal Law*, *supra* note 15, at 2574-76.

48. Lazarus, *Reforming Environmental Criminal Law*, *supra* note 15, at 2476-84.

49. *Sweet Home* Oral Argument Transcript, *supra* note 9, at 5-6; see *United States v. X-Citement Video*, 115 S. Ct. 464 (1994).

50. 18 U.S.C. § 2252(a)(1), (2) (1994).

51. *Sweet Home* Oral Argument Transcript, *supra* note 9, at 5.

The significance of the invocation of *X-Citement Video* in the *Sweet Home* oral argument extends far beyond the criminal law case. Unlike environmental lawyers, criminal lawyers and Supreme Court watchers were not at all surprised by the questions regarding mens rea. The Court has in recent years been increasingly concerned with the construction of the mens rea element in the definition of federal crimes. The Court has granted review in a surprisingly large number of criminal cases raising such issues.⁵² Moreover, a majority of the Court has repeatedly construed the relevant statutory language in a manner that requires the government to make stronger showings of the defendant's individual culpability.⁵³ While none of these previous cases has involved federal environmental law, the relevance of this emerging precedent to environmental law's criminal dimension is direct and perhaps even immediate.

The Court's decision in *Staples v. United States*⁵⁴ is illustrative. In *Staples*, the Court held that the government must prove the defendant's knowledge of all the facts material to the offense, including that the firearm was "fully automatic."⁵⁵ The Court questioned the propriety of applying the so-called public welfare offense rationale in felony prosecutions.⁵⁶ The principle of statutory construction expressed by the public welfare offense doctrine has served as the precedential bedrock within *International Minerals* for almost all of the lower court cases upholding the government's contention that the government need prove the defendant's knowledge of only minimal facts for criminal conviction in environmental cases.⁵⁷ However, there is a discernible

52. See, e.g., *Cheek v. United States*, 498 U.S. 192 (1991); *Posters "N" Things, Ltd. v. United States*, 114 S. Ct. 1747 (1994); *Ratzlaf v. United States*, 114 S. Ct. 655 (1994); *Staples v. United States*, 114 S. Ct. 1793 (1994); *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994).

53. William N. Eskridge, Jr. & Phillip P. Frickey, *The Supreme Court — 1993 Term Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 69-71 (1994).

54. 114 S. Ct. 1793 (1994).

55. *Id.* at 1795.

56. *Id.* at 1804.

57. *United States v. Hopkins*, 53 F.3d 533, 537 (2d Cir. 1995), cert. denied, 116 S. Ct. 773 (1996); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 613 (5th Cir. 1991); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1503

chasm between, on the one side, the Court's reasoning in cases like *Staples* and *X-Citement Video*, and, on the other side, lower court environmental cases sustaining diminished mens rea in environmental felony prosecutions. The Supreme Court seems ready, when presented with an appropriate environmental felony prosecution, to require the government to demonstrate the defendant's knowledge of far more of those material facts that define the elements of an offense than the lower courts have required in recent years.

The questions asked at oral argument in *Sweet Home* are not, however, the sole indicia of instability in current case law. The substance of the government's responses to those questions underscored the tenuousness of the government's position. When asked if the government must show that the defendant knows that the species is endangered, the government answered in the negative, relying on the notion that ignorance of the law is not a defense.⁵⁸ Such an answer has strong, although somewhat criticized, precedential support.⁵⁹ Strictly speaking, as the Supreme Court has explained, the "ignorance of the law" maxim does not apply where the legal status of a particular fact is made an element of the offense.⁶⁰

The tenuousness of the government's position is most evident, however, in its response to the question whether the defendant must know that the species is "at risk."⁶¹ The government answered in the negative, equating knowledge of that fact with knowledge of the law.⁶² But whether a species is "at risk" is decidedly *not* a question of law. It is a question of fact. Moreover, since it is a fact determinative of whether a species is endangered, more traditional approaches to criminal law would require the government to prove the defendant's knowledge of that fact to establish the defendant's culpability. The government, however, blurred the distinction between law and fact in its re-

(11th Cir. 1986).

58. *Sweet Home* Oral Argument Transcript, *supra* note 9, at 4-5.

59. Lazarus, *Reforming Environmental Criminal Law*, *supra* note 15, at 2478-84.

60. *Liparota v. United States*, 471 U.S. 419, 425 n.9 (1985).

61. *Sweet Home* Oral Argument Transcript, *supra* note 9, at 5.

62. *Id.*

sponse, perhaps for tactical purposes. Regardless of the government's strategy here, just that kind of blurring has been successful in prompting many lower courts — under the guise of “ignorance of the law is not a defense” — to uphold jury instructions that, in effect, transgress the parallel notion that “ignorance of the facts” may be a defense.⁶³

Perhaps aware of that tension, the government ultimately seemed to acknowledge in its responses that the prosecution would have to prove the defendant's knowledge of at least some of the relevant facts. Justice O'Connor asked whether in prosecuting an individual for “taking” a species of frog by “drain[ing] a pond on [the defendant's] property, you'd have to know that there is a *particular* frog or whatever . . . in the water.”⁶⁴ The government agreed that such proof would be necessary.⁶⁵ The government's response, which seems entirely consistent with traditional norms of criminal culpability contrasts sharply, however, with the government's position in the lower courts. There, for example, the government has argued that in an endangered species prosecution for “taking” a grizzly bear, the government need not prove the defendant's knowledge that the bear was a grizzly bear or even a bear. All that would be required is proof that the defendant knew that he was harming an animal. No knowledge of the “particular” animal would be necessary. Significantly, the lower courts have agreed.⁶⁶

The *Sweet Home* colloquy may represent the dawning of a debate likely to occur in the near future regarding mens rea in environmental crime. Justice O'Connor's questions preview the concerns the Court will have. That debate is unlikely to arise, however, in an Endangered Species Act case. Notwithstanding anecdotes to the contrary,⁶⁷ criminal prosecutions under the En-

63. Lazarus, *Reforming Environmental Criminal Law*, *supra* note 15, at 2471-73, 2476-77.

64. *Sweet Home* Oral Argument Transcript, *supra* note 9, at 6 (emphasis added).

65. *Id.*

66. See, e.g., *United States v. St. Onge*, 676 F. Supp. 1044 (W.D. Mo. 1988); *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985); *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

67. Compare Mark Arax, *Immigrant Farmer's Woes Galvanize Conserva-*

dangered Species Act are fairly rare. In addition, the government's argument in favor of diminished mens rea is strongest under the Endangered Species Act because of the irremediable stakes in those cases — which make the need for deterrence that much more compelling — and because the associated sanctions are generally only misdemeanors,⁶⁸ and not felonies.

The confrontation over mens rea in the Supreme Court is instead most likely to arise in a felony prosecution brought pursuant to the Clean Water Act, Resource Conservation and Recovery Act, or perhaps even the Clean Air Act. It is becoming increasingly difficult to square the government's theories of diminished mens rea in its prosecutions under those laws with the relevant statutory language and emerging Supreme Court criminal law precedent. One can readily perceive the potential for liberal and conservative judicial thinking to unite in a rejection of the government's fairly expansive view of criminal culpability.⁶⁹ There are already discernible signs of some lower court judges appreciating the relationship between the Court's recent precedent and environmental crime.⁷⁰ In addition, debate has begun in Congress regarding mens rea in environmental law,⁷¹ though there appears to be a risk of overreaction in that lawmaking forum.

tives—Environment: Growers, Politicians Rally in Support of Man Accused of Violating Endangered Species Act, L.A. TIMES, June 10, 1994, at A1:1 and Kenneth Howe, *Angry Farmers Rally Against A Rat*, S.F. CHRON., Aug. 30, 1994, at B1 (documenting farmer protest over conviction of man for killing rodent while tilling field) with Jon Margolis, *Simple Tale of Federal Meddling Is Not So Simple*, CHI. TRIB., July 4, 1994, at 11 (describing factual distortions in immigrant farmer anecdote).

68. 16 U.S.C. § 1540(b)(1) (1994).

69. Lazarus, *Reforming Environmental Criminal Law*, *supra* note 15, at 2484 n.332, 2528-29.

70. See *United States v. Weitzenhoff*, 35 F.3d 1275, 1293-99 (9th Cir. 1994) (dissent from denial of rehearing *en banc*) (Kleinfeld, J., joined by Kozinski, Nelson, Reinhardt, and Trott, dissenting).

71. See S. 343, 104TH CONG., 1st Sess. Sec. 5(c)(2) (1995).

IV. CONCLUSION

There are strong moral overtones to environmental law, and deservedly so. Yet, the same moral justifications that warrant the emergence of environmental crime also supply limits on its legitimate scope. By failing to respect or even appearing to neglect those bounds, we risk no less than the erosion of the underlying substantive environmental protection standards themselves. So while the environmental community and federal government celebrate their important win in *Sweet Home*, they should take heed not to overlook in that celebration the significant warning raised at oral argument regarding the proper scope of environmental crime. Otherwise, the present victory may become the unwitting antecedent of a far greater loss.