THE EROSION OF MENS REA IN ENVIRONMENTAL CRIMINAL PROSECUTIONS

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INTRODUCTION

The basic premise that *mens rea* is required to establish criminal liability is supported by the Latin maxim "*actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty)."[1] The enactment and judicial interpretation of criminal environmental statutes, however, has eroded the traditional requirement of *mens rea*. This article will address the application of the *mens rea* requirement as it relates to individuals and corporations in environmental criminal prosecutions. It posits that the traditional criminal law definitions of *mens rea*, such as "willfully," "purposely" and "knowingly" have been significantly eroded in environmental enforcement statutes. This result is caused by legislative fiat and judicial interpretation and is attributable to society's heightened environmental awareness and attendant emphasis on criminalizing polluters' conduct.

Section I examines early cases which diluted the *mens rea* requirement under the so-called "responsible corporate officer" doctrine in the context of public welfare statutes. Section II evaluates the trends in case law dealing with "knowing" violations of

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[1] W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.4, at 212 (1986). *Mens rea* is defined as a guilty mind or a guilty or wrongful purpose. *Id.* In an effort to classify the degree of *mens rea* existing in common and statutory law, the Model Penal Code has established four groups of crimes based on mental culpability. These groups include crimes requiring purpose, knowledge, recklessness and negligence. MODEL PENAL CODE § 2.02(2) (1962).

environmental criminal statutes. Section III evaluates the *mens rea* required by the dual knowledge requirement found in the knowing endangerment provisions of environmental criminal statutes. The use of the negligence standard in environmental criminal statutes is examined in Section IV. Section V evaluates strict liability provisions in environmental criminal statutes. The doctrine of willful blindness or deliberate ignorance, which has resulted in the further dilution of the *mens rea* requirement, is evaluated in Section VI. Section VII examines the development of the collective knowledge doctrine, which can also diminish the *mens rea* requirement.

I. THE RESPONSIBLE CORPORATE OFFICER DOCTRINE IN THE CONTEXT OF PUBLIC WELFARE STATUTES

The development of regulatory statutes designed to protect the public welfare has resulted in responsible corporate officials being exposed to criminal liability even though they lack personal knowledge and did not personally participate in the illegal act.[2] This is an expansion of the accomplice liability doctrine whereby a criminal defendant must affirmatively participate in the criminal act to be convicted.[3] The impact of the responsible corporate officer doctrine is that it dispenses with the traditional *mens rea* requirement necessary to establish affirmative participation in the commission of the crime.[4]

United States v. Dotterweich[5] is one of the earliest cases addressing a public welfare statute under which traditional standards of *mens rea* were diminished. In upholding the conviction of the company president, Dotterweich,[6] under the criminal provisions of the Federal Food, Drug and Cosmetic Act of 1938 (the Act),[7] the Supreme Court established what has become known as the responsible corporate officer doctrine.[8] Although the district

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2 1 K. BRICKEY, CORPORATE CRIMINAL LIABILITY § 501 (1984).

3 *Id.* at § 509.

4 *Id.* at § 513.

5 320 U.S. 277 (1943).

6 *Id.* at 285. The charges in *Dotterweich* stemmed from activities of Dotterweich and the Buffalo Pharmacal Company, which permitted adulterated or misbranded drugs to be shipped in interstate commerce in violation of the Federal Food, Drug and Cosmetic Act. *Id.* at 279 (citing 21 U.S.C. § 331 (1938)).

7 21 U.S.C. § 331 (1938). The Federal Food, Drug and Cosmetic Act of 1938 prohibits: "[t]he introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded" and makes such conduct punishable as a misdemeanor. *Id.*

8 *Id.* at 284-85.

court acquitted the company, Dotterweich was convicted of shipping misbranded and adulterated drugs in interstate commerce.[9] The court of appeals reversed the conviction, finding that only the corporation fit within the statute's definition of a "person" subject to prosecution.[10] Under this analysis, Dotterweich could be prosecuted only if the company was a counterfeit corporation serving as a screen for Dotterweich.[11] The Supreme Court subsequently granted the government's petition for *certiorari*.[12]

In reversing the court of appeals, the Supreme Court noted that, in promulgating the Act, Congress was extending "the range of its control over illicit and noxious articles" and had "stiffened the penalties for disobedience" to provide stringent protection in areas where the consequences of non-compliance are great.[13] In discussing the rationale for the responsible corporate officer doctrine, the Court stated that:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.[14]

Based upon this analysis, the Court noted that a finding of guilt can be supported anytime a drug is misbranded or adulterated even though there is no conscious fraud.[15] The Court found that the basis for establishing a corporate officer's personal liability depends on whether or not the officer "shares responsibility in the business process."[16] Weighing the hardship of imposing criminal liability on a corporate officer, absent a finding of *mens rea* against the possible harm to the public, the Court found that because the corporate officer is in a position to prevent the harm he should be penalized for failing to do so.[17]

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9 *Id.* at 278.

10 131 F.2d 500, 502-04 (2d Cir. 1942), *rev'd*, 320 U.S. 277 (1943).

11 *Id.* at 503.

12 318 U.S. 753 (1943). The Court granted *certiorari* because the case raised questions of importance in the enforcement of the Act. *Id.* at 279.

13 *Id.* at 280.

14 *Id.* at 280-81 (citing United States v. Balint, 258 U.S. 250 (1922)).

15 *Id.* at 281.

16 *Id.* at 284.

17 *Id.* at 285. The dissent noted that "[i]n the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an

In *United States v. Park*,[18] the United States Supreme Court further developed the responsible corporate officer doctrine by applying the doctrine in the context of a large national corporation.[19] The Court in *Park* sustained the conviction of John Park, the chief executive officer of Acme Markets, Inc. (Acme), for violating the Act[20] by allowing food held for sale by the corporation to be contaminated by rodents.[21] The jury convicted Park based on his position as a corporate officer who failed to adequately perform his duties as the individual with ultimate responsibility for maintaining sanitary conditions.[22] The trial judge dismissed Park's argument that the jury instructions failed to reflect the Supreme Court's decision in *Dotterweich* as well as failing to adequately define the term "responsible relationship."[23]

The court of appeals reversed Park's conviction and remanded for a new trial, finding that the instructions may have given the jury the impression that Park could be convicted absent even a showing of "wrongful action" on his part.[24] The court, relying on its interpretation of *Dotterweich*, indicated that an element of wrongful action still must be shown.[25] The Supreme Court granted *certiorari*[26] "because of an apparent conflict among the Courts of Appeals" regarding the proper standard to be applied when assessing a corporate officer's criminal liability under the Act.[27]

In reversing the court of appeals, the Supreme Court determined that the trial court had not abused its discretion and that "viewed as a whole and in context of the trial, the charge was not misleading and contained an adequate statement of the law to guide

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act in which the accused did not participate and of which he had no personal knowledge." *Id.* at 286 (Murphy, J., dissenting).

18 421 U.S. 658 (1975).

19 *See Park*, 421 U.S. at 660.

20 21 U.S.C. § 331(K) (1970).

21 *Park*, 421 U.S. at 660. Evidence was introduced indicating that Park was notified of the unsanitary conditions in the warehouse by the Food and Drug Administration. On cross-examination Park conceded that he had overall responsibility to insure that the food sold to the public was stored under sanitary conditions. In addition, he indicated that providing for sanitary food storage was a task he delegated to "dependable subordinates". *Id.* at 662-64.

22 *See id.* at 665-66.

23 *Id.* (citing United States v. Dotterweich, 320 U.S. 277 (1943)).

24 United States v. Park, 499 F.2d 839, 841-42 (4th Cir. 1974).

25 *Id.* at 841-42. The court of appeals interpreted *Dotterweich* as dispensing with the need to prove "awareness of wrongdoing", but not with the need to prove "wrongful action" to obtain a conviction under § 331(K) of the Act. *Id.*

26 419 U.S. 922 (1974).

27 *Id.* at 667.

the jury's determination."[28] In reaching this conclusion, the Court relied on *Dotterweich*, noting that the Act imposes greater responsibility on corporate officers because of the act's underlying purpose of protecting the public health.[29] The Court indicated that the Act eliminates the traditional *mens rea* requirement.[30] Moreover, the Court held that the Act imposed a duty on corporate officers to both identify and remedy violations as well as insure that they do not occur.[31]

The Court determined that some measure of blameworthiness can be inferred from the terms "responsible relationship" and "responsible share" as used in the responsible corporate officer doctrine.[32] To establish the required mental state, however, the prosecution need only establish that the officer's position in the corporation granted him the authority and responsibility to prevent or promptly convert a violation.[33] Therefore the Court held that the jury instructions properly allowed the jury to find the defendant guilty if it determined that he was in a position of responsibility concerning the prevention of such violations.[34]

Although *Dotterweich* and *Park* deal with public welfare offenses under the federal food and drug laws, the analyses of the responsible corporate officer doctrine and its effect on the *mens rea* requirement have been applied to environmental criminal cases.[35] This use of the responsible corporate officer doctrine in environmental criminal cases is likely to increase as the government continues to pursue

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28 *Id.* at 675.

29 *Id.* at 672 (citing United States v. Dotterweich, 320 U.S. 277 (1943)).

30 *Id.* at 672-73.

31 *Id.* at 672.

32 *Id.* at 673.

33 *Id.* at 673-74.

34 *Id.* at 674.

35 *See* United States v. Klehman, 397 F.2d 406 (7th Cir. 1986) (prosecution pursuant to the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-74 (1966)); United States v. FMC Corp., 572 F.2d 902, 906-07 (2d Cir. 1978) (*Park*, 421 U.S. 658, and *Dotterweich*, 320 U.S. 277, cited as authority to support the proposition that failure to perform a duty may be basis for liability under the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-11 (1976)); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1130 n.11 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (defendants' arguments that they could not be held individually liable were meritless based on *Dotterweich* and *Park*). *But see* United States v. White, No. CR-90-228 AAM, (E.D. Wash. March 28, 1991). The district court held that a corporate officer must knowingly participate in the violation of RCRA and FIFRA in order to be convicted. 21 Env't Rep. (BNA) 2223-24 (April 12, 1991). The court noted that the responsible officer doctrine could not be applied in cases where criminal intent must be shown. *Id.* Therefore, either actual knowledge of the violation or accomplice liability must be shown to convict under RCRA and FIFRA. *Id.*

its aggressive enforcement program.[36] As a result, environmental prosecutors have a means for reducing the required *mens rea*, to convict corporate officers who do not have actual knowledge of the violation but are in a position to prevent or remedy a violation.

II. KNOWING VIOLATIONS OF ENVIRONMENTAL CRIMINAL STATUTES

In a growing number of cases courts have diluted the traditional *mens rea* requirements by expanding what constitutes "knowing" conduct under public welfare statutes, including environmental criminal laws. The courts, in applying this broader definition of knowledge, have required that a person only have knowledge of actions taken versus actual knowledge of the statute which prohibits those actions.

United States v. International Minerals & Chemical Corp.[37] is illustrative of this judicial trend of expanding the definition of "knowing" conduct under public welfare statutes. The Supreme Court reversed the dismissal of the information, which charged the defendant with knowingly violating the Interstate Commerce Commission (ICC) regulations[38] promulgated pursuant to the U.S. Code of Criminal Justice.[39] In *International Minerals & Chemical Corp.*, the defendant was charged with knowingly violating a regulation that prohibited the shipment of hazardous materials without shipping papers that indicate the hazardous nature of the shipment.[40] The Court held that "knowingly" in the statute pertains only to knowledge that the material shipped was hazardous—not to knowledge of the existence of the regulation.[41] Specifically, the Court noted that "where . . . dangerous or deleterious devices or products or 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 presumed to be aware of the regulation."[42] This expan-

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36 *See* 21 Env't Rep. (BNA) 1534-35 (Dec. 7, 1990); 21 Env't Rep. (BNA) 1564-65 (Dec. 14, 1990).

37 402 U.S. 558 (1971).

38 *Id.* at 565. The defendant allegedly violated 49 C.F.R. § 173.427 (1970).

39 *International Minerals*, 402 U.S. at 559 (citing 18 U.S.C. § 834 (1970)). 18 U.S.C. § 834 (1970) provided in pertinent part that the I.C.C. shall have the authority to "formulate regulations for the safe transportation within the United States of . . . corrosive liquids" and that anyone who "knowingly violates any such regulation" shall be guilty of a crime. 18 U.S.C. § 834(a), (f) (1970).

40 *International Minerals*, 402 U.S. at 559.

41 *Id.* at 562-64.

42 *Id.* at 565. In applying this analysis, the Court relied on its decisions in

sion of the definition of knowing conduct has also been applied to environmental criminal cases.

In *United States v. Johnson & Towers, Inc.*,[43] the Johnson & Towers company and two of its employees were convicted for the illegal disposal of chemicals classified as hazardous waste under the Federal Resource Conservation and Recovery Act (RCRA)[44] and pollutants under the Federal Clean Water Act[45] at its Mt. Laurel, New Jersey plant.[46] The company pumped these chemicals into a trench, which ultimately flowed into a tributary of the Delaware River.[47] The company pled guilty to the charges, but the employees pled not guilty and moved to dismiss the RCRA charge on the grounds that the criminal provision of section 6928(d)(2)(A)[48] applied only to owners and operators of a facility; specifically, the statute applied to those obligated under the statute to obtain a permit.[49] The district court granted the employees' motion[50] and denied the government's motion for reconsideration.[51]

The Court of Appeals for the Third Circuit reversed, holding that section 6928(d)(2)(A) covers employees in addition to owners and operators "who knowingly treat, store or dispose of any hazardous waste, but that the employees can be subject to criminal prosecution only if they knew or should have known that there had been no compliance with the permit requirement of section 6925."[52] In analyzing the Congressional intent behind

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United States v. Freed and United States v. Balint both of which addressed similar *mens rea* issues. *International Minerals*, 402 U.S. at 560-65 (citing *Freed*, 401 U.S. 601 (1971); *Balint*, 258 U.S. 250 (1922)).

43 741 F.2d 662 (3d Cir. 1984).

44 42 U.S.C. §§ 6901-6987 (1982). Specifically, the defendants were charged with disposing of hazardous waste without a permit in violation of RCRA, 42 U.S.C. § 6928(d)(2)(A) (1982).

45 33 U.S.C. §§ 1251-1376 (1982).

46 *Johnson & Towers*, 741 F.2d at 663-64.

47 *Id.* at 664.

48 42 U.S.C. § 6928(d)(2) (1982), a provision of RCRA, provides in pertinent part:

> Any person who . . .
> (2) knowingly treats, stores or disposes of any hazardous waste . . .
> (A) without . . . a permit . . . or
> (B) in knowing violation of any material condition or requirement of such permit . . . shall, upon conviction, be subject to a fine . . . or imprisonment . . . .

Id.

49 *Johnson & Towers*, 741 F.2d at 664.

50 *Id.*

51 *Id.*

52 *Id.* at 664-65. 42 U.S.C. § 6925(a) (1982) requires in pertinent part that

this provision of RCRA, the court noted that "[a]lthough Congress' concern may have been directed primarily at owners and operators of generating facilities, since it imposed upon them in section 6925 the obligation to secure the necessary permit, Congress did not explicitly limit criminal liability for impermissible treatment, storage, or disposal to owners and operators."[53]

The court further noted that it would undermine the purpose of RCRA to limit the application of this section to owners and operators when other employees also bear responsibility for the handling of hazardous waste.[54] The court then addressed the question of the requisite proof necessary for a finding of guilt under section 6928(d)(2)(A).[55] The court found that because a knowing violation of section 6928 (d)(2)(B)[56] is required:

> [i]t is unlikely that Congress could have intended to subject to criminal prosecution those persons who acted when no permit had been obtained irrespective of their knowledge (under subsection (A)), but not those persons who acted in violation of the terms of a permit unless that action was knowing (subsection (B)).[57]

The court thus held that Congress either inadvertently omitted the word "knowing" in section 6928(d)(2)(A) or intended that the term "knowingly" which introduces section 6928(d)(2) would apply to section 6928(d)(2)(A) as well.[58] Therefore, the court held that it was necessary to show that the defendants knew they were acting without a permit.[59] The Court limited its holding by noting that under public welfare statutes the government is required to prove only "knowledge of the actions taken and not knowledge of the statute forbidding them."[60] The court further conditioned its decision by determining that where an industry is highly regulated, such as

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"each person owning or operating a facility for the treatment, storage, or disposal of hazardous waste . . . have a permit . . . ."

53 *Johnson & Towers*, 741 F.2d at 667.

54 *Id.*

55 *Id.* at 667-69.

56 *See supra* note 48 for pertinent text of 42 U.S.C. § 6928(d)(2) (1982).

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

58 *Id.*

59 *Id.* at 668-69.

60 *Id.* at 669 (citing United States v. International Minerals and Chemical Corp., 402 U.S. 558, 563 (1971)). The Court in *International Minerals* noted that "the principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation. . . . [W]e decline to attribute to Congress the inaccurate view that the Act requires proof of knowledge of the law, as well as the facts, and that it intended to endorse that interpretation by retaining the word 'knowingly.' ". *Id.*

the hazardous waste industry, knowledge that Johnson & Towers did not have a permit could be inferred.[61]

In *United States v. Hayes International Corp.*[62] the court specifically addressed the requisite level of knowledge required for a conviction under RCRA.[63] The court held that section 6928(d)(1) of RCRA is a public welfare provision involving a heavily regulated industry and is designed to protect the human health and safety.[64] As a result, the court asserted that knowledge of the regulation is imputed to those who take part in the hazardous waste industry.[65]

In *Hayes*, the company, Hayes International Corp. (Hayes), and one of its employees responsible for disposing of its hazardous waste, Beasley, were convicted for violating RCRA when the disposal facility with whom Hayes had contracted illegally disposed of its hazardous waste.[66] The court held that it was not a defense to claim lack of knowledge of the specific requirements of the regulations.[67]

On appeal, the defendants raised three separate but interrelated arguments.[68] They initially claimed that their violations were not "knowing" because they did not understand the regulations.[69] Secondly, they asserted that they did not have knowledge regarding

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61 *Id.*

62 786 F.2d 1499 (11th Cir. 1986).

63 *Id.* at 1500 (citing 42 U.S.C. § 6928(d)(1) (1982)).

64 *Id.* at 1503.

65 In describing § 6928(d)(1), the court stated that:

> [it is] undeniably a public welfare statute, involving a heavily regulated area with great ramifications for the public health and safety. As the Supreme Court has explained it is completely fair and reasonable to charge those who operate in such areas with knowledge of the regulatory provisions. Indeed, the reasonableness is borne out in this case, for the evidence at trial belied the appellees' profession of ignorance. 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.

Id. at 1503.

66 *Id.* at 1500-01. Hayes contracted with Performance Advantage, Inc. (Performance) to dispose of jet fuel and used solvents generated by Hayes' airplane refurbishing plant. Beasley negotiated the contract with Performance whereby Performance would pay Hayes for the jet fuel and would remove the solvents at no charge. Performance disposed of the used solvents illegally. Hayes and Beasley were subsequently convicted on eight counts of violating RCRA.

67 *Id.* at 1502-03.

68 *Id.* at 1505.

69 *Id.* This mistake of law defense was based on the argument that the defendants had a good faith belief that because the waste was being sent to a recycler, it was exempt from regulation.

the status of the disposal facility permits.[70] Finally, the defendants argued that because they believed the disposal facility was recycling the waste, RCRA had not been knowingly violated.[71]

The court determined that knowledge of the specific RCRA regulations was not required to sustain a conviction and held that "ignorance of the regulatory status is no excuse."[72] In rejecting the mistake of law defense, the court reiterated that because RCRA is a public welfare statute designed to protect the public health and safety, knowledge of the illegality is not an element of the crime.[73] The court concluded that because Hayes operated a heavily regulated business, there was a presumption that the defendants had knowledge of the pertinent regulations.[74]

Rejecting the defendants' argument that the disposal company had the proper permit, the court determined that based on congressional intent knowledge of the permit status is required.[75] The court, however, found that failure of a hazardous waste generator to determine the status of a disposal facility's permit constitutes knowledge sufficient to find a violation of RCRA, and that such knowledge could be proven with circumstantial evidence.[76] Thus, the court upheld the defendants' conviction determining that they knew or should have known that the disposal company did not have the requisite permit.[77] The court concluded that based on negotiations between the parties it could be inferred that the defendants knew the wastes were not being recycled.[78]

In *United States v. Greer*,[79] the court expanded upon the concept established in *Hayes* that knowledge of environmental statutes can be imputed to the defendant. In *Greer*, the defendant was convicted

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70 *Id.* The defendants argued that there was insufficient evidence showing that they knew Performance did not have a permit.

71 *Id.* at 1505-06. The defendants argued that due to a mistake of fact they actually believed the waste was being recycled and therefore, they did not knowingly violate RCRA.

72 *Id.* at 1505.

73 *Id.* at 1503-05.

74 *Id.* at 1504.

75 *Id.*

76 *Id.* In fact, circumstances such as an unusually low price for disposal or other unusual circumstances may be used to infer knowledge of permit status. *Id.*

77 *Id.* at 1505.

78 *Id.* at 1506. The evidence adduced at trial indicated that the original deal between Hayes and Performance specified that Performance would obtain jet fuel and paint solvents from Hayes and recycle them. Performance subsequently indicated that it no longer wanted the paint solvents. The court held that, due to this fact, the jury could infer that Hayes should have known that Performance had no intention of recycling the paint solvents. *Id.*

79 850 F.2d 1447 (11th Cir. 1988).

of knowingly disposing of hazardous waste in violation of RCRA[80] and failing to report the improper disposal in violation of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[81] The conviction was based largely upon circumstantial or inferential evidence.[82] The defendant's motion for judgment of acquittal was granted and the government appealed.[83]

The facts adduced at trial indicated that Greer had previously approved of and encouraged activities at his recycling facility which resulted in dumping of hazardous wastes directly onto the ground.[84] The court thus found that based on Greer's activities, the jury could infer that Greer "knowingly disposed of or caused others to dispose of" waste in violation of RCRA and CERCLA.[85] The court also permitted the jury to infer that Greer, based on his previous experience, knew that dumping of that particular hazardous waste would pose a risk of harm to others or the environment.[86]

In *United States v. Hoflin*,[87] the Court of Appeals for Ninth Circuit rejected the Third Circuit's interpretation of 42 U.S.C. section 6928(d)(2)(A) and (B) in *Johnson & Towers*,[88] by holding that in order to sustain a conviction it is not necessary that the defendant know that a permit is lacking.[89] *Hoflin* ruled that although the criminal penalty provisions generally require some degree of knowledge, section 6928(d)(2)(A) does not require *mens rea* and is essentially a strict liability criminal provision.[90] Consequently, a defendant may be convicted simply by committing the act of discharging a hazardous substance without a permit, irrespective of the defendant's level of knowledge.[91] In *Hoflin*, the defendant appealed his conviction for aiding and abetting in the disposal of hazardous waste without a

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80 42 U.S.C. § 6928(d)(2)(A) (1982).

81 42 U.S.C. § 9603(b)(3) (1982).

82 *Greer*, 850 F.2d at 1451.

83 *Id.* at 1148.

84 *Id.* at 1451. This practice was employed to ensure compliance with Greer's permit. With regard to the incident in question, although Greer did not directly tell one of his employees to dump hazardous chemicals onto the ground, it was alleged that he acquiesced in the decision. The court specifically found that "the jury could infer from the context of the specific discussion [with the employee] that when Greer instructed [the employee] to 'handle' the truckload of waste . . . he effectively ordered him to dump it." *Id.* at 1452.

85 *Id.* at 1452.

86 *Id.*

87 880 F.2d 1033 (9th Cir. 1989).

88 741 F.2d 662 (3d Cir. 1984); *see supra* notes 43-61 for text discussing the *Johnson & Towers* decision.

89 *Hoflin*, 880 F.2d at 1038 (citing 42 U.S.C. § 6928(d)(2)(A), (B) (1982)).

90 *Id.*

91 *Id.*

permit in violation of 42 U.S.C. section 6928(d)(2)(A).[92] The RCRA violation occurred when Hoflin, director of a public works department, caused his subordinates to dispose of drums containing paint by burying them at the city's sewage treatment plant.[93]

On appeal, Hoflin asserted that he was unaware that the city did not have a permit to dispose of the paint. He argued that because knowledge of the city's failure to obtain a permit was a necessary element of the offense charged, the failure to so instruct the jury was reversible error.[94] In reviewing Hoflin's challenge, the court focused upon the specific language of RCRA section 6928(d), which provides in pertinent part:

> Any person who . . .
> (2) *knowingly* treats, stores or disposes of any hazardous waste identified or listed under this subchapter either —
> (A) without having obtained a permit under § 6925 of this title . . . or
> (B) in *knowing* violation of any material condition or requirement of such permit . . . shall, upon conviction be subject to [fines, imprisonment or both].[95]

Hoflin argued that "knowingly" in the above quoted section (2) modifies both subsections (A) and (B).[96] Hoflin asserted that knowledge is an essential element of the crime defined by section 6928(d)(2)(A) and that he therefore could not be convicted without proof that he knew the city had not obtained a permit.[97]

In analyzing the statute, the court stated:

> The absence of the word "knowing" in subsection (A) is in stark contrast to its presence in the immediately following subsection (B). The statute makes a clear distinction between non-permit holders and permit holders, requiring in subsection (B) that the latter knowingly violate a material condition or requirement of the permit. To read the word "knowingly" at the beginning of Section (2) into subsection (A) would be to eviscerate this distinction. Thus, it is plain that knowledge of the absence of a permit is not an element of the offense defined by subsection (A).[98]

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92 *Id.* at 1034 (citing 42 U.S.C. § 6928(d)(2)(A) (1982)).

93 *Hoflin*, 880 F.2d at 1035. Prior to the disposal of the drums, the director of the sewage treatment plant informed Hoflin that burying the drums may jeopardize the plant's National Pollutant Discharge Elimination System (NPDES) permit. Nonetheless, Hoflin ordered employees of his department to bury them. *Id.*

94 *Id.* at 1036.

95 *Id.* (quoting 42 U.S.C. § 6928(d)(2)(A) and (B) (1988) (emphasis added)).

96 *Hoflin*, 880 F.2d at 1036.

97 *Id.* at 1036-37.

98 *Id.* at 1037.

Thus, the court specifically found that the language of the statute was unambiguous.[99] In finding that knowledge is not an element of the offense charged under subsection (B), the court relied upon the apparently clear congressional intent to exclude knowledge from the statutory language.[100] In addition, the court indicated that construing section 6928(d)(2)(A) to not require knowledge is consistent with the highly regulated nature of hazardous waste and the general purpose of RCRA to protect human health and the environment.[101] Therefore, the court held that the defendant could be convicted for a violation of RCRA without having any knowledge that a permit did not exist, provided that he was aware the material was hazardous waste.[102]

In *United States v. Sellers*,[103] the defendant was convicted by a jury of knowingly and willfully disposing of hazardous waste without a permit in violation of section 6928(d)(2)(A) of RCRA.[104] The district court instructed the jury as follows:

> Although the government must prove that the waste disposed of was listed or identified or characterized by the E.P.A. as a hazardous waste, the Government is not required to prove that the Defendant knew that the waste was a hazardous waste within the meaning of the regulations. In other words, the Government need only prove that the Defendant knew what the waste was; that is paint and paint solvent waste . . .[105]

On appeal, the defendant argued that the district court erred in so instructing the jury.[106] The jury instruction requested by the defendant provided that to sustain a conviction, the government must prove that the defendant knew or reasonably should have known that the material was waste as defined by the regulations and that the defendant knew that the waste could be harmful to persons or the environment if disposed of improperly.[107]

In rejecting the defendant's argument, the court of appeals re-

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99 *Id.*

100 *Id.* at 1038.

101 *Id.*

102 *Id.* at 1038-40.

103 926 F.2d 410 (5th Cir. 1991).

104 *Id.* at 412. Sellers was convicted of disposing of sixteen 55-gallon drums of methylethylketone and waste paint on the enbankment of a creek, which eventually flows into the Leaf River in Mississippi. One of the drums was found to be leaking. Sellers was subsequently indicted on sixteen counts of violating 42 U.S.C. § 6928 (d)(2)(A). Sellers was tried by a jury and convicted on all sixteen counts. He was sentenced to 41 months imprisonment and fined nearly $7,000. *Id.* at 412-13.

105 *Id.* at 415.

106 *Id.* at 414-17.

107 *Id.* at 415.

lied on *International Minerals*,[108] finding that the use of the word "knowingly" in section 6928 (d)(2)(A) of RCRA did not extend to knowledge of the regulation, but only to the hazardous nature of the material in question.[109] The court specifically noted, that "although Congress required some *mens rea* by its use of the word knowingly in the 'statute', knowledge of the regulation was not part of this *mens rea* requirement . . . . [w]hen a person knowingly possesses an instrumentality which by its nature is potentially dangerous, he is imputed with the knowledge that it may be regulated by public health legislation."[110]

Sellers represents an expansion of the judicially recognized premise that a jury can, in a prosecution under RCRA, infer guilt from the facts and circumstances of the case. Thus in *Sellers*, the jury was permitted to infer knowledge from the facts of both the hazardous nature of the substance disposed of and the regulations governing disposal.[111] In addition, the court held that the evidence supported a finding that the defendant knew or reasonably should have known that the material he was disposing of was an extremely flammable paint solvent and that improper disposal was potentially dangerous to humans and the environment.[112] Also, the court noted that based upon this knowledge Sellers "no doubt" knew that regulations existed governing the disposal of this substance.[113]

III. KNOWING ENDANGERMENT IN ENVIRONMENTAL CRIMINAL CASES

The recent environmental statutory trend has been to criminalize conduct that places another person "in imminent danger of death or serious bodily injury."[114] This trend is referred to as the doctrine of "knowing endangerment."[115] To be convicted under the knowing endangerment provisions of envi-

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108 402 U.S. 558 (1971); *see supra* notes 37-42 for text addressing the *International Minerals* decision.

109 *Sellers*, 926 F.2d at 415-16.

110 *Id.* (citing United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971)).

111 *Id.* at 415-17.

112 *Id.*

113 *Id.* at 417.

114 *See* 33 U.S.C. § 1319(c)(3) (1988) (criminal penalty under Clean Water Act); 42 U.S.C. § 6928(e) (1988) (criminal penalty under RCRA); Clean Air Act Pub. L. No. 101-549, § 113(c)(5)(A), 104 Stat. 2399, 2676 (1990) (amending 42 U.S.C. § 7413 (1988)); 1990 N.J. Water Pollution Control Act-Enforcement (Clean Water Enforcement Act), ch. 28, § 7(f)(4) (1990) (amending N.J. STAT. ANN. § 58:10A-10 (Supp. 1990)).

115 *See, e.g.*, 33 U.S.C. § 1319(c)(3) (1988); 42 U.S.C. § 6928(e) (1988).

ronmental statutes, the defendant must possess the requisite level of knowledge required to constitute a criminal violation of the statute as well as knowledge at the time of the violation that the illegal conduct places another person in imminent danger of death or serious bodily injury.[116] In enacting the knowing endangerment provisions of RCRA, Congress intended to penalize only those persons who actually knew that their conduct placed another person in imminent danger of death or serious bodily injury.[117] The required knowledge under knowing endangerment provisions may be established through direct or circumstantial evidence, but not by either constructive or vicarious knowledge.[118]

In *United States v. Protex Industries, Inc.*,[119] a corporation was convicted for violating the knowing endangerment section of RCRA,[120] based on conduct that could reasonably be expected to cause serious bodily injury rather than on knowledge that the injury was likely.[121] As part of its business, Protex operated a drum recycling facility that purchased and reconditioned used drums previously containing hazardous chemicals.[122] These drums were cleaned, repainted and subsequently used to store and ship

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116 *See supra* note 102.

117 *See* H. REP. No. 1444, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5028, 5036-38. Because the knowing endangerment provisions of other federal and New Jersey statutes are identical to that in RCRA, it is reasonable to apply the same legislative purpose to those knowing endangerment provisions.

118 *Id.* at 5037.

119 874 F.2d 740 (10th Cir. 1989).

120 42 U.S.C. § 6928(e) (1988) provides:

> (e) Knowing endangerment
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> Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste . . . who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

121 United States v. Protex Indus., 874 F.2d at 741-44. The first conviction of an individual under 42 U.S.C. § 6928(e) occurred in United States v. Tumin, 2 TOXICS L. REP. 1399 (BNA) (E.D.N.Y. 1988). Tumin came under suspicion when it was reported to the Drug Enforcement Administration that he purchased three 55-gallon drums of ethyl ether known to be used in cocaine production. Tumin was subsequently convicted of abandoning the ether in a residential neighborhood in violation of 42 U.S.C. § 6928(e) (1988). The abandonment of the ether was found to create a grave danger of injury to human health and the environment.

122 *Protex Indus.*, 874 F.2d at 741.

products manufactured by Protex.[123] As a result of RCRA violations, Protex was convicted for placing three of its employees in imminent danger of death or serious bodily injury in violation of RCRA's knowing endangerment provision.[124]

Protex appealed this conviction, arguing that its conduct did not place its employees in imminent danger of death or serious bodily injury but rather, subjected the employees to solvent poisoning that is largely reversible and therefore, not "serious."[125] The court rejected this argument in view of evidence that not only had the employees been placed in danger of serious bodily injury, but also that they had suffered serious bodily injury.[126] Protex also challenged the district court's jury instructions, based on the court's definition of "imminent danger" as "the existence of a condition or combination of conditions which could reasonably be expected to cause death or serious bodily injury unless the condition is remedied."[127] Protex argued that the court's substitution of the term "reasonable expectation" for the statutory language of "substantial certainty" rendered the statute unconstitutionally vague as applied.[128] The court noted that the trial court actually instructed the jury with language derived directly from section 6928(f)(1)(C) and that the jury instructions were a foreseeable expansion of the knowing endangerment provision.[129] The court explained that "the 'substantially certain' standard appears to define the *mens rea* necessary for commission of the crime, rather than the degree to which a defendant's conduct must be likely to cause death or serious

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123 *Id.*

124 *Id.* at 741-42. The government contended that employees were subjected to significant solvent exposure without adequate safety precautions. Evidence adduced at trial showed that Protex's safety provisions for its employees were "woefully inadequate to protect the employees against the dangers of toxic chemicals." *Id.* at 742.

125 *Id.* at 742-43.

126 *Id.* at 743.

127 *Id.* at 744.

128 *Id.*

129 *Id.* at 744. 42 U.S.C. § 6928(f)(1) (1988) provides in pertinent part:

> For the purposes of subsection (e) of this section
> (1) A person's state of mind is knowing with respect to —
> (A) his conduct, if he is aware of the nature of his conduct;
> (B) an existing circumstance, if he is aware or believes that the circumstance exists; or
> (C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

bodily injury."[130] Therefore, where a reasonable expectation of harm exists, a defendant should be aware that its conduct is unlawful.[131] Further, the court found that Protex should have known that its conduct was violative of RCRA and that this idea was adequately conveyed to the jury.[132]

United States v. Borowski[133] represents the first knowing endangerment conviction under the Federal Clean Water Act (CWA).[134] Borjohn Optical Technology, Inc. and its president were convicted of violating the CWA's knowing endangerment provision[135] because they ordered employees to dump toxic waste water into the public sewer system, thereby placing the employees in imminent danger of death or serious bodily injury by exposure to these chemicals.[136]

IV. NEGLIGENT VIOLATIONS OF ENVIRONMENTAL CRIMINAL STATUTES

Although environmental statutes generally criminalize only knowing or willful conduct, various environmental statutes also criminalize negligent actions.[137] Thus, the *mens rea* required to sustain a conviction under these statutes is significantly less than that traditionally required.[138] For example, the CWA[139] estab-

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130 *Protex Indus.*, 874 F.2d at 744.

131 *Id.*

132 *Id.* The court stated:

> The gist of the knowing endangerment provision of the RCRA is that a party will be criminally liable if, in violating other provisions of the RCRA, it places others in danger of great harm and it has knowledge of that danger. The district court conveyed this same idea to the jury in its instructions. The court rejected appellant's argument that it could not be aware that its behavior was prohibited by the "knowing endangerment" provision of the RCRA.

Id.

133 5 TOXICS L. REP. 21 (BNA) (D. Mass. 1990).

134 33 U.S.C. §§ 1251-1387 (1988).

135 *Id.* at § 1319(c)(3).

136 *Borowski*, 5 TOXICS L. REP. at 21. The employees were primarily illiterate Polish immigrants. *Id.*

137 *See* 33 U.S.C. § 1319(c)(1) (1988); N.J. STAT. ANN. § 58:10A-10(f) (West 1982 & Supp. 1990) (Water Pollution Control Act); N.J. STAT. ANN. § 13:1E-9(i) (West Supp. 1990) (Solid Waste Management Act). In United States v. Oxford Royal Mushroom Prods., Inc., 487 F. Supp. 852 (E.D. Pa. 1980), the court noted that "the *mens rea* required for negligent conduct and that required for willful conduct cannot be viewed as entirely distinct." *Id.* at 857.

138 As noted in United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985), "the existence of *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." *Id.* at 1123 (quoting Dennis v. United States, 341 U.S. 494, 500 (1951)).

lishes criminal penalties for negligent violations of the Act.[140] The negligence standard under the CWA provides that a person must know or "reasonably should have known" that the pollutant or hazardous substance "could cause personal injury or property damage" or could cause a "treatment works to violate any effluent limitation or condition in any permit . . . ."[141]

One notable case involving the government's use of the negligence standard is *United States v. Frezzo Bros., Inc.*[142] In *Frezzo*, the defendants were convicted of willfully or negligently discharging pollutants from their mushroom composting operation into the navigable waters of the United States without a permit in violation of the CWA.[143] The defendants argued that the government failed to prove the negligent discharges alleged in two of the counts of the indictment.[144] In rejecting the defendant's argument, the Court of Appeals for the Third Circuit determined that there was sufficient evidence for a jury to conclude that the waste water system was inadequate and therefore, negligently maintained by the defendants.[145]

V. STRICT LIABILITY OFFENSES

A minority of environmental statutes are strict liability statutes that do not require *mens rea* to sustain a conviction.[146] Although the prosecution's burden of proof under the strict liability statutes is lower than that under criminal environmental statutes requiring *mens rea*, the strict liability statutes are infrequently used.[147] One possible reason for the failure of prosecutors to use the strict liability provisions is that the penalties provided under these statutes are considerably less stringent

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139 33 U.S.C. §§ 1251-1387 (1988).

140 *Id.* at § 1319(c)(1).

141 *Id.*

142 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

143 *Id.* at 1124-25 (citing 33 U.S.C. §§ 1311(a), 1319(c) (1973)).

144 *Id.* at 1129.

145 *Id.*

146 33 U.S.C. § 406 (1988) (wrongful construction and removal of structures); *Id.* at § 411 (wrongful deposit of refuse, obstruction of navigable waters, use of or injury to harbor improvements); N.J. STAT. ANN. § 13:1E-9(i) (West Supp. 1990) (wrongful transportation of hazardous waste). *See also* W. LAFAVE & A. SCOTT, *supra* note 1, at § 3.4 n.1 (defining strict liability crimes).

147 *See* Comment, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFFALO L. REV. 307, 309 (1988-89) (discussing reluctance to invoke The Rivers and Harbors Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152 (1899) (current version at 33 U.S.C. § 407 (1988)).

than those imposed under statutes requiring *mens rea*.[148] The Department of Justice, however, has applied these strict liability statutes where the government does not possess the requisite proof to convict under statutes requiring some degree of *mens rea*.[149]

Although environmental statutes that criminalize conduct without a showing of *mens rea* are limited and infrequently used, it is important to be aware that these statutes are available to a prosecutor. In the event that the government does not possess evidence to support a showing of knowing or negligent conduct, these strict liability statutes exist as an alternative means to prosecute a person violating environmental statutes.

VI. THE WILLFUL BLINDNESS DELIBERATE IGNORANCE DOCTRINE

The doctrine of willful blindness or deliberate ignorance has created an exception to the requirement that a person have actual knowledge of the material elements of a crime in order to sustain a conviction.[150] The basic premise of this doctrine is that a person possesses sufficient *mens rea* to be convicted of an offense requiring knowledge when he or she becomes aware of the probable existence of a material element of a crime and intentionally fails to make further inquiry.[151] Although there is dispute among commentators, the Court of Appeals for the Ninth Circuit in *United States v. Jewell*[152] determined that a person is equally culpable whether he acts with actual knowledge or willful blindness.[153]

The defendant in *Jewell* was convicted for knowingly violating the Comprehensive Drug Abuse Prevention and Control Act

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148 *See* Comment, *supra* note 147, at 310.

149 In United States v. Marine Shale Processors, Inc., No. 89-60041 (D.C.W. La.1989), Marine Shale pleaded guilty to two violations of the Rivers and Harbors Act and one violation of RCRA. Commentators speculated that the Department of Justice prosecuted under the Rivers and Harbors Act rather than the CWA because the Rivers and Harbors Act does not require a showing of *mens rea*. 20 Env't Rep. (BNA) 640, 641 (August 4, 1989).

150 G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 41, at 126 (2d ed. 1961).

151 *Id.* Professor Williams states that "[i]f the party has his suspicion aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge." *Id.* (citations omitted).

152 532 F.2d 697 (9th Cir. 1976), *cert. denied*, 426 U.S. 951 (1976).

153 *See Jewell*, 535 F.2d at 700. The court stated: "To act 'knowingly,' therefore, it is not necessary to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, 'positive' knowledge is not required." *Id.*

of 1970.[154] On appeal, the defendant challenged the jury instruction that allowed conviction based upon evidence beyond a reasonable doubt that Jewell intentionally avoided learning the truth so as to not acquire positive knowledge of the drugs.[155] The court rejected defendant's argument and affirmed the holding of the district court based on the willful blindness jury instruction.[156] The court held that to limit the definition of knowledge to actual knowledge would result in allowing deliberate ignorance as a defense and thereby sanctioning conscious avoidance of actual knowledge.[157] Additionally, the court noted that the concept of willful blindness has been accepted by numerous circuit courts of appeals as sufficient to establish knowledge.[158]

In addition to gaining the acceptance of the circuit courts, the doctrine of willful blindness or deliberate ignorance is supported by both the Model Penal Code[159] and the federal model jury instructions.[160] A standard jury instruction for the doctrine of willful blindness would allow the jury to infer knowledge if the government could establish beyond a reasonable doubt that the defendant intentionally avoided knowledge.[161]

The general policy considerations underlying environmental criminal statutes also support the doctrine of willful blindness or deliberate ignorance. The goal of environmental statutes is to protect the environment as well as the public health, safety and

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154 *Id.* at 705 (citing 21 U.S.C. § 952(a), 960(a)(1), § 841(a)(1) (1976) (Kennedy, J., dissenting).

155 *Jewell*, 535 F.2d at 698.

156 *Id.* at 699-704. The court determined that the conviction based on willful blindness or deliberate ignorance was consistent with the general purpose of the Drug Control Act. *Id.* at 703.

157 *Id.* at 703.

158 *Id.* at 702-03.

159 MODEL PENAL CODE § 2.02(7) states "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes it does not exist."

160 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.09 (3d ed. 1977).

161 The federal model jury instructions on willful blindness provide:

> 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. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact.
>
> *Id.*

welfare. A strong enforcement mechanism, including criminal penalties, is required to effectuate this goal. The criminal penalty provisions of many environmental statutes often would be frustrated if a defendant was responsible based on only actual knowledge. In allowing the government to establish knowledge through a showing of willful blindness, however, the *mens rea* requirement is further eroded.

Although the doctrine of willful blindness has been accepted as satisfying the requirement for knowledge, the courts have been careful to limit its application.[162] Justice Kennedy's dissent in *Jewell* provides the framework for criticism of the willful blindness doctrine and enumerates factors that should be taken into consideration when applying the doctrine.[163] Justice Kennedy opined that the jury instructions should have incorporated the Model Penal Code's description of willful blindness.[164] He noted that a proper jury instruction based on the Model Penal Code would support a conviction only if there were a high probability that the defendant was aware of a material element of the offense.[165] If the defendant had a subjective belief that the material element did not exist, the jury could not return a conviction.[166] Justice Kennedy concluded that the instruction favorably recognized by the majority could result in a conviction under a statute requiring knowing conduct without determining if the defendant possessed the requisite *mens rea*.[167]

The court further refined the willful blindness doctrine in *United States v. Pacific Hide & Fur Depot, Inc.*[168] The Court in *Pacific Hide* indicated that the government must show that the defend-

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162 *See* United States v. Alvarado, 838 F.2d 311, 314 (9th Cir. 1988) (jury instruction on deliberate avoidance of guilty knowledge is inappropriate when evidence suggests that defendant had actual knowledge); United States v. Kelm, 827 F.2d 1319, 1323-24 (9th Cir. 1987) (deliberate ignorance occurs when defendant purposely avoids learning all facts in order to create a defense); United States v. Ramsey, 785 F.2d 184, 188-91 (7th Cir. 1986) (asserting that jurors should be given instructions in plain language describing the role of intentional avoidance of knowledge); United States v. Bright, 517 F.2d 584 (2d Cir. 1975) (holding that jury instruction in criminal trial for possession of stolen mail was inadequate where court stated that defendant had requisite knowledge if she either "acted with reckless disregard" as to whether checks were stolen or made a "conscious effort to avoid learning the truth").

163 United States v. Jewell, 532 F.2d 697, 705-08 (9th Cir 1976) (Kennedy, J., dissenting).

164 *Id.* at 707.

165 *Id.* at 706-07.

166 *Id.* at 707.

167 *Id.*

168 768 F.2d 1096 (9th Cir. 1985).

ant's conduct included a deliberate attempt to not learn material facts.[169] Because there was no evidence that the defendant's actions reached this level of conduct in *Pacific Hide*, the conviction was reversed.[170]

The defendant in *Pacific Hide* appealed a conviction for the knowing failure to properly manage and dispose of capacitors that contained polychlorinated biphenyls (PCBs) in violation of the Toxic Substances Control Act (TSCA).[171] The jury was instructed that a conviction could be based on an application of the doctrine of willful blindness or deliberate ignorance.[172]

Justice Kennedy, writing for the majority, placed restrictions on the doctrine of willful blindness, limiting its use to specific factual situations.[173] The majority indicated that a willful blindness jury instruction is appropriate only when the defendant's argument is based on a lack of actual knowledge and the evidence adduced at trial indicates that the defendant deliberately endeavored not to determine the relevant facts in an effort to avoid responsibility.[174] Justice Kennedy noted that in the absence of evidence of the defendant's intentional conduct to avoid the truth a "jury might impermissibly infer guilty knowledge on the basis of mere negligence without proof of deliberate avoidance."[175]

The foregoing decision reflects Justice Kennedy's concern that use of a willful blindness instruction in cases involving a de-

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169 *Id.* at 1098.

170 *Id.* at 1098-99.

171 *Id.* at 1097-98. *See* 15 U.S.C. § 2615(b) (1982):

> Any person who knowingly or willfully violates any provision of section 2614 of this title, shall . . . be subject, upon conviction, to a fine of not more than $25,000 for each day of violation, or to imprisonment for not more than one year, or both.

Id.

172 *Pacific Hide*, 768 F.2d at 1098. The jury instruction provided in part:

> [Y]ou may find that any particular defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that the capacitors contained PCBs in concentrations over 50 parts per million and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that the capacitors or transformers contained PCBs in concentrations of 50 PPM, or less, or if you find that the defendant was simply careless.

Id. at 1098.

173 *Id.*

174 *Id.*

175 *Id.* (citing McAllister v. United States, 747 F.2d 1273, 1275-76 (9th Cir. 1984)).

fendant lacking the requisite culpability, may result in conviction under a criminal statute that required knowing conduct. Accordingly, the decision in *Pacific Hide* and Justice Kennedy's dissent in *Jewell* provide articuable standards for the content of a willful blindness instruction.

VII. COLLECTIVE KNOWLEDGE DOCTRINE

The term "person" in criminal environmental statutes has been defined to include corporations.[176] The ability to prosecute a corporation as a "person" under the collective knowledge doctrine has reduced the requisite intent necessary to sustain a conviction under environmental criminal statutes requiring knowing conduct. This doctrine allows the collective knowledge of a corporations' employees, acquired within the scope of their employment, to be imputed to the corporation.[177] Therefore, a corporation can be convicted for a knowing violation even though no one employee has actual knowledge of all elements of the violation.

The court in *United States v. T.I.M.E.-D.C., Inc.*[178] reviewed the doctrine of collective knowledge as it evaluated T.I.M.E.'s criminal liability for knowing violation of the Interstate Commerce Act.[179] In one of the most notable collective knowledge decisions, the court held that a sufficient number of employees possessed the requisite information, the aggregate of which provided the corporation with knowledge that it had violated the statutes.[180]

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176 For example, the Solid Waste Disposal Act defines a person as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, [s]tate, municipality, commission, political subdivision of a [s]tate, or any interstate body." 42 U.S.C. § 6903(15) (1988). Other statutes specifically defining corporations as persons for the purposes of criminal penalties include the Federal Insecticide and Fungicide Rodenticide Act, 7 U.S.C. § 136(b) (1988); Rivers and Harbors Appropriation Act Of 1899, 33 U.S.C. § 406 (1988); Clean Water Act, 33 U.S.C. § 1362(5) (1988); Clean Air Act, 42 U.S.C. § 7602(e) (1988); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(21) (1988); Comprehensive Planning and Community Right to Know Act of 1986, 42 U.S.C. § 11049(7) (1988).

177 *See* 1 K. BRICKEY, CORPORATE CRIMINAL LIABILITY § 4:05 (1984).

178 381 F. Supp. 730 (W.D. Va. 1974).

179 49 U.S.C. § 322(a) (1970). This statute was repealed by Pub. L. 95-473, § 4(b), 92 Stat. 1466 (1978), and Pub. L. 97-449, § 7(b), 96 Stat. 2444 (1983). The government alleged that T.I.M.E. allowed drivers to operate motor vehicles in violation of the Federal Highway Administration Regulations that prohibited fatigued and ill people from driving.

180 *T.I.M.E.*, 381 F. Supp. at 738-39.

The collective knowledge doctrine was once again applied in *United States v. Bank of New England, N.A.*,[181] where the bank was convicted for failing to file reports as required by the Currency Transaction Reporting Act.[182] On appeal, the bank challenged the jury instruction that provided that one of the elements of the crime, the bank's knowledge of the reporting requirements, could be established based on the collective knowledge of the bank's employees.[183] In affirming the instructions, the court of appeals held that a collective knowledge instruction was consistent with existing criminal law as applied to corporations, and that the collective knowledge of a corporations' employees is imputed to the corporation.[184] Therefore, based on the doctrine of collective knowledge, the corporation is liable for its employees' failure to act lawfully.

It is probable that the collective knowledge doctrine will be applied in environmental prosecutions pursuant to the criminal penalty provisions in environmental statutes. Therefore, the collective knowledge doctrine will provide the government with another means for enforcing criminal sanctions when no particular employee of a corporation possesses the requisite *mens rea*.

VIII. CONCLUSION

The prosecution of individuals and corporations for environmental crimes has been increasing steadily in recent years. As a result, the courts have been faced with numerous defenses to these statutes, including the defense that a person did not possess the requisite *mens rea* to sustain a conviction. Although the

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181 821 F.2d 844 (1st Cir. 1987).

182 31 U.S.C. § 5311-22 (1982).

183 *Bank of New England*, 821 F.2d at 844. The jury instruction provided in pertinent part:

> In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all of the employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment. So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find that an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.

Id. at 855.

184 *Id.* at 856.

statutes under which most environmental prosecutions are brought contain *mens rea* requirements, the courts have gradually diluted these requirements. Therefore, under environmental enforcement statutes requiring "willful," "purposeful" or "knowing" conduct, the traditional concept of *mens rea* or "guilty mind" has been significantly eroded to a point that a polluter can be convicted for possessing merely the general intent to commit the prohibited act, rather than the specific intent to violate the statute. Moreover, Congress has indicated its intent to allow criminal penalties for environmental crimes based on negligence or strict liability principles. Finally, the development of the doctrine of willful blindness and collective knowledge have provided a method for convicting persons for environmental crimes when the *mens rea* required to be convicted for common law crimes is not present. This trend is certain to continue in light of the growing public concern for our environment.