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# FAIR WARNING: THE DETERIORATION OF SCIENTER UNDER ENVIRONMENTAL CRIMINAL STATUTES

*M. Diane Barber\**

## I. INTRODUCTION

The recently enacted Clean Air Act<sup>1</sup> (CAA), like other environmental statutes,<sup>2</sup> provides for a regulatory regime to be enforced not only by civil penalties,<sup>3</sup> but by criminal penalties, including incarceration. Congress created two new air pollution crimes under this Act: negligent endangerment<sup>4</sup> and knowing endangerment.<sup>5</sup> Negligent endangerment carries a punishment of a fine or up to one year in prison; knowing endangerment carries a fine or up to fifteen years in prison.

Based on the legislative history it appears that congressional leaders deeply believed that the use of powerful enforcement provisions was crucial to successful implementation of the clean air goals. As Senator John Chafee vehemently declared:

The whole guts of the clean air legislation revolves around the permit and enforcement provisions. If we want to do something about the better health of the citizens of our country, or to improve the environment, the land that we love, and pass it on in better shape to our children and grandchildren, then it is

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1. Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2672 (codified as amended at 42 U.S.C. § 7413 (1988 & Supp. II 1990)).

2. As one commentator has noted:

With respect to criminal enforcement, the government believed that criminal penalties under the Act should be increased in many cases from the misdemeanor level to the felony level to bring the Act into line with other environmental statutes. For these reasons and others, the enforcement title included in the Administration bill was designed to "upgrade" the Act and to ensure that it contained the same kinds of enforcement powers, both civil and criminal, granted to the government under other comparable environmental statutes.

Stephen E. Rody, *Permitting and Enforcement Under the Clean Air Act Amendments of 1990*, 21 ENVTL. L. REP. 10,178, at 10,196 (1991).

3. 42 U.S.C. § 7413(d) (1988 & Supp. II 1990).

4. *Id.* § 7413(c)(4).

5. *Id.* § 7413(c)(5).

absolutely essential that there be strong permit provisions, and that there be strong enforcement provisions in this Bill.<sup>6</sup>

Consequently, in addition to the two new crimes, fines or jail terms may be sought for deliberate inaccuracies in recordkeeping, reporting and monitoring and for deliberate failure to pay fees in violation of the Act.<sup>7</sup> Not surprisingly, Congress intensely debated the breadth of these enforcement provisions.<sup>8</sup> The House Bill specifically prohibited application of section 113 to "de minimis or technical violations, as determined by the Administrator."<sup>9</sup> The Conference Committee deleted this language in an apparent effort not to dilute the enforcement process.<sup>10</sup> The conferees, however, intended "to provide the Administrator with prosecutorial discretion to decide not to seek sanctions under section 113 for de minimis and technical violations in civil and criminal matters."<sup>11</sup>

It is not unusual for Congress to write legislation whereby "penalties serve as effective means of regulation"<sup>12</sup> but which creates difficult enforcement issues that are left to the forbearance of the judicial system. Indeed, as Justice Frankfurter noted in *United States v. Dotterweich*:<sup>13</sup> In such matters "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted."<sup>14</sup> That this approach created discomfort in Congress is consistent with the fury with which Justice Murphy wrote his dissent, attacking such a situation as "precisely what our constitutional system ought to avoid."<sup>15</sup>

Congress also was concerned that the net of criminal liability not sweep in innocent employees, particularly in the onerous new endangerment sections.<sup>16</sup> Amidst criticism by the Department of Justice,<sup>17</sup> House language limiting "person" was eliminated.<sup>18</sup> Instead, the statutory term

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6. 136 CONG. REC. S3175 (daily ed. Mar. 26, 1990) (statement of Sen. Chafee).

7. 42 U.S.C. § 7413(c)(2)-(3).

8. Roady, *supra* note 2, at 10,201.

9. H.R. 3030, 101st Cong., 1st Sess. § 601 (1989).

10. "The Conference Committee concluded that this language could create mischief by affording sources the opportunity to delay enforcement actions merely by demanding that the administrator issue a finding that the alleged violation was not, in fact, de minimis or technical before proceeding with enforcement." Roady, *supra* note 2, at 10,201.

11. H.R. REP. NO. 952, 101st Cong., 2d Sess. 347 (1990) (statement of House Managers).

12. *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943).

13. 320 U.S. 277 (1943).

14. *Id.* at 285; *see also* *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984) (quoting portions of this language), *cert. denied*, 469 U.S. 1208 (1985).

15. *Dotterweich*, 320 U.S. at 292 (Murphy, J., dissenting).

16. 136 CONG. REC. S16,951-52 (daily ed. Oct. 27, 1990) (statement of Sen. Chafee & Sen. Baucus).

17. Roady, *supra* note 2, at 10,202.

18. 136 CONG. REC. S16,952 (daily ed. Oct. 27, 1990).

“knowing and willful” conduct was deemed sufficient protection for the innocent.<sup>19</sup> However, the difficult question of the standard of liability in the employer-employee arena was left unresolved. This was further confused by the Statement of Senate Managers declaring that the government need not prove the accused had specific knowledge of a violation of the Act to establish the element of “knowing and willful”; that the accused knew the action to be generally unlawful would establish that element of the crime.<sup>20</sup> This position of the Managers is consistent with recent court decisions interpreting the scope of “knowingly” under environmental statutes.<sup>21</sup> It nonetheless places trial judges and juries in the precarious situation of finding a “knowing and willful” violation, subject to imprisonment, in the context of blurry criminal statutes. Thus far, this has not troubled the courts, which in interpreting environmental statutes, find support in *Dotterweich*, an early Food and Drug Act case. In that case the Supreme Court stated:

Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing may be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.<sup>22</sup>

As corporate managers throughout the country grapple with looming compliance schedules of the CAA amendments, there is an undercurrent of fear. The notion that officers or employees may face imprisonment for failure to comply with a highly technical regulatory statute has engendered profound confusion as potential violators struggle to understand the applicability of the “knowing and willful” language. Legal commentators have termed the standard of culpability in environmental cases to be “unsettled,” and at best a “hybrid.”<sup>23</sup> Vulnerability to criminal penalties may engender increased statutory compliance, but it may also create pernicious legal havoc if that vulnerability is not treated with the consideration our legal system has repeatedly paid to what Chief

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19. *Id.*

20. *Id.* There is no Statement of House Managers on this point. *But see id.* H3677 (daily ed. Nov. 2, 1990) (statement of Rep. Fields).

21. *See infra* notes 197-291 and accompanying text.

22. *Dotterweich*, 320 U.S. at 284-85.

23. *See infra* note 320.

Justice Marshall so aptly called "the tenderness of the law for the rights of individuals."<sup>24</sup>

This Article examines the origins and growth of public welfare offenses, crimes that generally do not require scienter<sup>25</sup> either statutorily or implicitly. Further, it reviews the application of the public welfare offense doctrine to early environmental crimes. This Article then explores the continued judicial application of that doctrine to recently created criminal environmental statutes that contain a statutory requirement of scienter. Based on an analysis of the latest environmental crimes contained in the CAA, it concludes that continued application of the public welfare offense doctrine to justify regulatory purpose must falter.

Imposition of serious penalties in a congressional attempt to deter environmental crimes stretches the elasticity of that doctrine to a point of near collapse. The judicial interpretation burden that will result from the CAA will overburden the doctrine. Environmental crimes must be recognized as unique, and Congress must provide an appropriate criminal statutory framework. Congress has reshaped criminal environmental violations so that they no longer conform to the traditionally gentle description of public welfare offenses. The law must give fair warning to corporate managers that freedom may be the price for violating the laws. The Constitution mandates this.

## II. MENS REA

### A. *Common-Law Origins*

It is well recognized in Anglo-Saxon law that acts punishable as crimes require proof of mens rea.<sup>26</sup> That requirement sprung naturally from the purpose of early criminal law: maintain the peace by punishing the willful offender.<sup>27</sup> As the Supreme Court has noted, "[h]istorically,

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24. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

25. "The term [scienter] is frequently used to signify the defendant's guilty knowledge." BLACK'S LAW DICTIONARY 1345 (6th ed. 1990).

26. William Blackstone, in his classic commentary, declared that "to constitute a crime against human laws, there must be first, a vicious will." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*21. For a thorough review of the history of early criminal laws, see Jerome Hall, *Prolegomena to a Science of Criminal Law*, 89 U. PA. L. REV. 549 (1941).

27. See Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68 (1933). Professor Sayre states:

The original objective of the criminal law was to keep the peace; and under the strong church influence of the Middle Ages its function was extended to curb moral delinquencies of one kind or another. For those purposes it developed a suitable procedure, requiring proof of moral blameworthiness or a criminal intent.

*Id.*

our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.'<sup>28</sup>

Grounded firmly in common law, this principle was often read into early codified crimes if the statute was silent.<sup>29</sup> Indeed, as Justice Jackson noted in a lengthy review of that subject:

As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.<sup>30</sup>

There was, however, an exception to this time-honored concept. Industrialization and the growth of dense and complex urban centers forced a new form of regulation upon citizens. A group of "offenses punishable without regard to any mental element"<sup>31</sup> developed in England and the United States independently over a period of seventy-five years. Professor Francis Sayre, in his review of this modern trend, termed them "public welfare offenses."<sup>32</sup>

### B. Public Welfare Origins

The need to regulate the sale of liquor and adulterated milk led Massachusetts state courts to uphold convictions under statutes that required no mens rea.<sup>33</sup> Interestingly, in the seminal case of *Common-*

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28. *Morissette v. United States*, 342 U.S. 246, 250 n.4 (1952) (quoting Roscoe Pound, *Introduction to FRANCIS SAYRE, CASES ON CRIMINAL LAW xxxvi-xxxvii* (1927)).

29. *Id.* at 252.

30. *Id.* For a review of mens rea and public welfare offenses, see *id.* at 250-63.

31. Sayre, *supra* note 27, at 56-67. Sayre further notes that prior to this development in the middle of the 19th Century, nuisance cases provided the few instances in which mens rea was not required. *Id.* at 56; see also Jerome Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 986 (1943) (stating that "public welfare offenses" date from middle of last century).

32. Sayre, *supra* note 27, at 56 n.5. "The term 'public welfare offenses' is used to denote the group of police offenses and criminal nuisances, punishable irrespective of the actor's state of mind, which have been developing in England and America." *Id.*

33. See *Commonwealth v. Waite*, 93 Mass. (11 Allen) 264 (1865); *Commonwealth v. Nichols*, 92 Mass. (10 Allen) 199 (1865); *Commonwealth v. Farren*, 91 Mass. (9 Allen) 489 (1864); *Commonwealth v. Boynton*, 84 Mass. (2 Allen) 160 (1861).

In England this movement was evolving simultaneously. The first case, *Regina v. Woodrow*, 153 Eng. Rep. 907 (Ex. 1846), involved the sale of adulterated tobacco. The court remarked upon the difficulty of proving mens rea in such situations, as well as the requirement in matters of public health for persons to be cognizant of the nature of the goods. *Id.* at 912-13. For an extensive review of the development of public welfare offenses in England, see Sayre, *supra* note 27, at 56-62. An early Connecticut case also dealt with the liquor issue. See *Barnes v. State*, 19 Conn. 397 (1849).

*wealth v. Boynton*,<sup>34</sup> the court upheld a conviction and placed the burden of discovering the nature of the suspect material upon the defendant.<sup>35</sup> The court held that "if the defendant purposely sold the liquor, which was in fact intoxicating, *he was bound at his peril to ascertain the nature of the article which he sold.*"<sup>36</sup>

Following these cases, the concept of punishable offenses regardless of criminal intent was widely adopted by other states and incorporated into criminal law treatises.<sup>37</sup> This development is largely attributed to the recognition by legislatures of a duty to protect the public health and welfare in an increasingly complex and congested modern world.<sup>38</sup> It is significant that with the simultaneous recognition by the legal system that society was best protected through regulatory measures punishable as criminal offenses, criminologists were arguing that the limited thrust of the criminal system, the punishment of errant individuals, should be broadened to reflect new views of protecting society as a whole.<sup>39</sup> Indeed, the first thirty years of the century were marked by what Sayre describes as two pronounced movements:

- (1) the shift of emphasis from the protection of individual interests which marked nineteenth century criminal administration to the protection of public and social interests, and
- (2) the growing utilization of the criminal law machinery to enforce, not only the true crimes of the classic law, but also

34. 84 Mass. (2 Allen) 160 (1861).

35. *Id.* at 160.

36. *Id.* (emphasis added). The court specifically reiterated this legal principle in a subsequent liquor case, *Commonwealth v. Goodman*, 97 Mass. 117 (1867). The court upheld a conviction, noting that "a person is bound to know or ascertain at his peril" whether his liquors were intoxicating. *Id.* at 119. This duty to ascertain the facts was extended by the courts to adulterated milk cases as well as various other police-type statutes. *See Sayre, supra* note 27, at 65.

37. *See Sayre, supra* note 27, at 66. *See id.* at 66 n.43 for various state holdings. *See id.* at 66 n.44 for a discussion of the progressive adoption of this principle in two criminal law treatises.

38. *See Morissette v. United States*, 342 U.S. 246, 250-60; *see also Sayre, supra* note 27, at 66-70 (examining transformation of criminal law system and inability of modern courts to effectively handle vast influx of petty offenses if mental state is considered).

39. Sayre, *supra* note 27, at 68. As Professor Sayre noted in 1933:

We are thinking today more of the protection of social and public interests; and coincident with the swinging of the pendulum in the field of legal administration in this direction modern criminologists are teaching that the objective underlying correctional treatment should change from the barren aim of punishing human beings to the fruitful one of protecting social interests.

*Id.*

a new type of twentieth century regulatory measure involving no moral delinquency.<sup>40</sup>

The legal system could embrace these movements because early public welfare offenses did not generally involve imprisonment.<sup>41</sup> Often termed "police regulations" or "police offenses," this group regulated liquor sales, adulterated food and drug sales, narcotic sales, misbranded articles, traffic, motor vehicles and criminal nuisances including injuries to public health and safety.<sup>42</sup> Such crimes were not *mala in se*; they were not true crimes because the act that constituted the offense was not intrinsically wrong.<sup>43</sup> As late as the 1940s, there was hesitation to term public welfare crimes as *mala prohibita*, although some courts advocated that distinction.<sup>44</sup>

### C. "At Peril" Doctrine

It was thus recognized by the courts at the turn of the century that an "at peril" doctrine applied to certain acts regulated by statute for the welfare of the public. Based on what the *Boynton* court termed the "salutary rule" that "every man is presumed to know the law," the courts imposed an affirmative duty on the actor in regulated situations to learn the facts.<sup>45</sup> In the 1909 case of *Shevlin-Carpenter Co. v. Minnesota*,<sup>46</sup> the Supreme Court recognized the "at peril" doctrine as a legitimate extension of police power. The Court noted:

[T]he legislation was in effect an exercise of the police power. . . . Public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them *shall do them at his peril* and will not be heard to plead in defense good faith or ignorance.<sup>47</sup>

Stripped of the defenses of good faith and ignorance, the actor was thereby succinctly "at peril." Mens rea was not to be considered.

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40. *Id.* at 67.

41. *Id.* at 72; see *Morissette*, 342 U.S. at 258.

42. *Morissette*, 342 U.S. at 262 n.20. See Sayre, *supra* note 27, at 84-88 for expanded case listings supporting this position.

43. Crimes *mala in se* have been defined as "intrinsically wrong," while crimes *mala prohibita* are "wrong" only because they are legally prohibited. Hall, *supra* note 26, at 563-64.

44. Hall declares that "in the 'public welfare regulation' analogy, the distinction should be between criminal and non-criminal." *Id.* at 567.

45. *Commonwealth v. Boynton*, 84 Mass. (2 Allen) 160, 160 (1861).

46. 218 U.S. 57 (1909).

47. *Id.* at 70 (emphasis added). *But see* Hall, *supra* note 26, at 569 (criticizing absence of mental state requirement in petty offenses as effectively penalizing innocent).



It is important to note that in England, the first of these public welfare cases was premised on the notion that it was more convenient for the state to bring an action affecting a group of persons in a criminal proceeding rather than place the burden of proof of direct harm on certain individuals in a civil suit.<sup>48</sup> The inherent proof problems of requiring mens rea were recognized as an impediment to effective enforcement. Because the purpose of the action was purportedly not to punish the individual—indeed the penalty was light—no mens rea was required though the form of the suit was criminal. This use of the criminal machinery to control or prohibit certain acts in order to protect the public evolved concurrently with the growth of industrialized America. Courts were cognizant of the inherent proof problems if a knowledge requirement were inferred in such statutes.<sup>49</sup> As the number of automobiles increased, smokestacks proliferated and congestion intensified, the courts became more comfortable upholding such use of the criminal system to enforce protective legislation, particularly because the penalties were light.

Although historically such criminal sanctions did not include lengthy prison terms or heavy fines, by 1921 such penalties did not cause the Supreme Court to pause.<sup>50</sup> In finding that common-law scienter need not be read into an indictment under the Narcotic Act of 1914, the Court in *United States v. Balint*<sup>51</sup> did not take note of the harshness of the penalty. Rather, the primary concern of the Court was to avoid impeding congressional purpose in a public welfare statute by imposing proof requirements:

While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it, there has been a modification of this view in respect to prosecutions

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48. *The Queen v. Stephens*, 1 Q.B. 702, 706 (1866). Judge Mellor essentially espoused the notion that the proceeding was truly civil, although criminal in form. *Id.* at 708-10; see Sayre, *supra* note 27, at 59 n.16. In *Stephens* the court relied on *Regina v. Woodrow*, 153 Eng. Rep. 907 (Ex. 1846), wherein Baron Parke upheld prosecution of a sale of adulterated tobacco, saying:

It is very true that it may produce mischief because an innocent man may suffer from his want of care in not examining the tobacco . . . but the public inconvenience would be much greater if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so.

*Id.* at 916.

49. *United States v. Balint*, 258 U.S. 250, 251-52 (1922).

50. *Id.* The penalty in this case was severe—a fine of up to two thousand dollars, five years in jail, or both. *Id.*

51. 258 U.S. 250 (1922).

under statutes *the purpose of which would be obstructed by such a requirement*. It is a question of legislative intent to be construed by the court.<sup>52</sup>

Violators could avoid liability by pleading lack of knowledge and thereby effectively defeat the objective of the statute to protect the general public interest. Writing for the Court, Chief Justice Taft acknowledged the inherent problems of proving a scienter requirement for such public welfare regulations as well as the possibility of penalizing an innocent actor:

Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing an innocent purchaser to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the *difficulty of proof of knowledge contributed to this conclusion*.<sup>53</sup>

Chief Justice Taft described statutes as regulatory in nature, founded upon the police power, with an emphasis on "the achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*."<sup>54</sup>

This judicial approach was quite consistent with the rationale of the early English cases emphasizing the thrust of the statute as protection of the public, not punishment of the individual. The point of divergence, however, was that Chief Justice Taft took the deliberate step of linking congressionally intended social policy directly to the penalty:

[I]t merely uses a criminal penalty . . . as a means of taxing and restraining the traffic. Its manifest purpose is to require every person dealing in drugs *to ascertain at his peril* whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him.<sup>55</sup>

The reality of the severity of the penalty and the attached social stigma were not addressed by the Court. This cavalier approach to the fate of the innocent actor was bottomed upon an overriding interest in legislative protective policy. Recognizing the proof problems of prosecutors if scienter were applied, the Court substituted the traditional intent re-

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52. *Id.* at 252 (emphasis added) (citations omitted).

53. *Id.* at 254 (emphasis added).

54. *Id.* at 252. In support of that notion, the Court cited a number of cases dealing with violations of general police regulations. *See id.*

55. *Id.* at 254 (emphasis added).

quirement with the "at peril" doctrine. The actor was now subject to an affirmative duty "to find out the facts"<sup>56</sup> or be penalized.

In another case, *United States v. Behrman*,<sup>57</sup> argued and decided on the same days as *Balint*, the Court merely declared that absent a statutory requirement of intent or knowledge, an indictment under a drug regulation need not so charge.<sup>58</sup> Justice Holmes, a noted criminologist, dissented curtly: "It seems to me wrong to construe the statute as creating a crime in this way without a word of warning."<sup>59</sup> The Court appeared determined to champion an innocent public over an innocent actor.<sup>60</sup>

Thus, legislators strove to protect the populace from increasingly common dangerous goods, such as drugs, liquor, motor vehicles and adulterated milk by adopting regulatory measures with generally light penal sanctions. This novel use of the criminal regime continued for the next quarter of a century as a host of regulations were passed. Gone were the days when the criminal system was geared solely toward protection of the individual. It now equally embraced the legislative goal of "social betterment."<sup>61</sup>

#### D. *The Dotterweich Doctrine*

Twenty-two years later, in *United States v. Dotterweich*,<sup>62</sup> the Supreme Court again recognized "a now familiar type of legislation whereby penalties serve as an effective means of regulation."<sup>63</sup> The Court noted the deference it must give to the legislative purpose of protecting a helpless public.<sup>64</sup> The Court specifically recognized that scienter was not required: "Such legislation dispenses with the conventional

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56. *Id.*

57. 258 U.S. 280 (1922).

58. *Id.* at 288.

59. *Id.* at 290.

60. *Id.* at 288.

61. *United States v. Balint*, 258 U.S. 250, 252 (1922).

62. 320 U.S. 277 (1943).

63. *Id.* at 280-81.

64. The Court stated:

The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and *stiffened the penalties for disobedience*. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. *Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words.*

*Id.* at 280 (emphasis added).

requirement for criminal conduct—awareness of some wrongdoing.”<sup>65</sup> In *Dotterweich*, the Supreme Court upheld the conviction of Joseph H. Dotterweich, the president and general manager of Buffalo Pharmacal Company, for the shipment of misbranded drugs under the Federal Food and Drug Act of 1938.<sup>66</sup> The Court upheld the conviction without any evidence of personal guilt on the defendant’s part,<sup>67</sup> thereby subjecting him to criminal misdemeanor penalties.

The Court again returned to the “at peril” doctrine and, in the fact situation of the modern corporation, significantly expanded the doctrine. The “at peril” actor, who had the affirmative duty to ascertain facts, included not only direct actors, but also those who, by virtue of their position in the corporation were deemed responsible. The Court said that the statute, “[i]n the interest of the larger good, . . . puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”<sup>68</sup> In *Dotterweich*, the Court found the offense to be committed by “all who have a responsible share in the furtherance of the transaction which the statute outlaws.”<sup>69</sup> The Court found that Congress intended to include as responsible actors those corporate employees “who have the opportunity of informing themselves of the existence of conditions imposed for protection of consumers before sharing in illicit commerce.”<sup>70</sup> This “class of employees”<sup>71</sup> apparently included corporate officers or employees who had responsibility for transactions that are the subject of public welfare statutes. These class members must arguably inform themselves of existing statutes relevant to that transaction and the facts pertinent to that transaction.

The *Dotterweich* doctrine thus placed corporate employees, by virtue of their position in relation to the regulated transaction, “at peril.” Because the *Balint* Court had already applied the “at peril” doctrine to a regulatory statute with a substantial criminal penalty, corporate employees, under *Dotterweich*, were thus probably liable for similar penalties as long as responsibility could attach through corporate position.

Invoking the “at peril” doctrine,<sup>72</sup> the Court effectively created a more modern doctrine, designed to uphold legislation it deemed neces-

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65. *Id.* at 280-81.

66. 21 U.S.C. §§ 301-392 (1988).

67. *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting).

68. *Id.* at 281.

69. *Id.* at 284.

70. *Id.* at 285.

71. *Id.*

72. *See id.* at 281. The “at hazard” language that Justice Frankfurter used is certainly a reference to the “at peril” doctrine.

sary in a complex world. Assuming that Congress had balanced the rights of the individual against those of the public, the Court appeared to view its role as that of enforcer of the legislative purpose, regardless of the impact upon the individual. "Hardship," said the Court, "there doubtless may be under a statute which thus penalizes the transaction through consciousness of wrongdoing may be totally lacking."<sup>73</sup>

This principle, that knowledge of wrongdoing need not be shown if conduct threatens public safety, obviously pries open the door to abuse of the rights of the individual. Justice Felix Frankfurter warily refused to delineate the affected class, declaring it "too treacherous to define or even to indicate by way of illustration."<sup>74</sup> Conversely, the Court called upon "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries" to determine which individuals would be held responsible under the statute.<sup>75</sup> In a stinging dissent in this five-to-four decision, Justice Murphy declared "that situation is precisely what our constitutional system sought to avoid."<sup>76</sup> Nonetheless, the *Dotterweich* doctrine was destined to lay the foundation for consideration of modern public welfare legislation.<sup>77</sup>

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73. *Id.* at 284. It is also noteworthy that the opinion did not discuss proof problems for enforcement but instead declared legislative purpose sufficient. *Id.* at 282-84.

74. *Id.* at 285.

75. *Id.*

76. *Id.* at 292 (Murphy, J., dissenting). Justice Murphy believed the statute was unclear as to the individual liability of corporate officers. *Id.* (Murphy, J., dissenting). For purposes herein Justice Murphy's statement is relevant:

To erect standards of responsibility is a difficult legislative task and the opinion of this court admits that it is "too treacherous" and a "mischievous futility" for us to engage in such pursuits. But the only alternative is a blind resort to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries." Yet that situation is precisely what our constitutional system sought to avoid. Reliance on the legislature to define crimes and criminals distinguishes our form of jurisprudence from less desirable ones. The legislative power to restrain the liberty and to imperil the good reputation of citizens must not rest upon the variable attitudes and opinions of those charged with the duties of interpreting and enforcing the mandates of the law.

*Id.* at 292-93 (Murphy, J., dissenting).

77. At the time, the *Dotterweich* case met with mixed reviews. One commentator declared:

In the public interest of insuring prudence in the conduct of the business of the Buffalo Pharmacal Co., a majority of the Justices deemed it wise to place a criminal stigma on the defendant; a stigma that is predicated wholly upon chance, for it necessarily follows that in the absence of fraud, participation, acquiescence [sic] or even negligence, the act of adulteration and misbranding was not within *Dotterweich's* power of human control.

Note, *Vicarious Criminal Responsibility*, 19 IND. L.J. 265, 268 (1944); see also Benjamin M. Quigg, Jr., Note, *Constitutional Law—Due Process—Punishment for Acts Done Without Consciousness of Wrongdoing*, 42 MICH. L. REV. 1103, 1110 (1944) (arguing that elimination of knowledge and intent requirements does not violate due process if public welfare justifies elimi-

### E. Mala In Se or Mala Prohibita?

Legal scholars, tracing the history of crimes through Blackstone, have decried what they perceive to be a blurring of the distinction between *mala in se* and *mala prohibita*.<sup>78</sup> Crimes *mala in se* are characterized as differing from crimes *mala prohibita* in certain important respects. First, without criminal intent there is no *mala in se* offense, whereas for *mala prohibita*, no criminal intent need be proven unless the statute so requires.<sup>79</sup> Second, innocence, mistake of fact and a lack of negligence are defenses for *mala in se* crimes but not *mala prohibita* offenses.<sup>80</sup> Third, the proof requirement differs; for *mala in se* crimes, evidence beyond a reasonable doubt is required, while a preponderance of the evidence will suffice for *mala prohibita* offenses.<sup>81</sup> Fourth, the doctrine of vicarious liability applies to *mala prohibita* but not to *mala in se* crimes.<sup>82</sup> Finally, in conspiracy cases, commentators have noted that ignorance of the law is no defense for a crime *mala in se*, yet it bars prosecution for crimes *mala prohibita*, provided the action "would be proper except for the statute."<sup>83</sup> Other scholars have rejected the *mala in se/mala prohibita* paradigm as structurally unsound.<sup>84</sup>

In the early 1900s, the issue arose as to whether violations of statutes or agency regulations resulting in stiff penalties were *mala in se* or *mala prohibita*, so that appropriate judicial procedural steps might be taken. It was apparent that such crimes, unless they contained a statutory mens rea, were *mala prohibita*. This caused great consternation. Courts and commentators at the middle of the Twentieth Century re-

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nation). *But see* Note, *Federal Food, Drug and Cosmetic Act Corporations—Criminal Liability of Officers and Agents*, 12 GEO. WASH. L. REV. 366 (1944) (concluding that officers of corporation are brought within statute only by some act condemned according to settled doctrines of criminal law).

78. *See* Sayre, *supra* note 27, at 70-75, 78-83; Alfred L. Gausewitz, *Criminal Law—Reclassification of Certain Offenses as Civil Instead of Criminal*, 12 WIS. L. REV. 365 (1937); Otto Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615, 636-42 (1942); Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 906 (1939); Roscoe Pound, *The Law of the Land*, 62 AM. L. REV. 174 (1928); W.T.S. Stallybrass, *The Eclipse of Mens Rea*, 52 L.Q. REV. 60, 64-67 (1936).

79. Rollin M. Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832, 835 (1952).

80. *Id.* at 834-39.

81. *Id.* at 836. Perkins points out that this distinction is a result of the court's recognition that *mala prohibita* violators are subject to light penalties: "If the penalty is too extreme to be appropriate for an offense *mala prohibita* the proceeding is criminal in substance as well as in form and proof beyond a reasonable doubt is required for conviction." *Id.* at 836 n.21 (citing *United States v. The Brig Burdett*, 34 U.S. (9 Pet.) 682 (1835)).

82. *Id.* at 835-36 & n.18.

83. *Id.* at 836-37.

84. *Id.* at 842.

fused to term such violations as criminal and avidly sought a better description. One commentator said:

An offense *malum prohibitum* is *not a crime*. This was recognized by Blackstone and others . . . . It is clearly indicated by the persistent search for an appropriate label, such as "public torts," "public welfare offenses," "prohibitory laws," "prohibited acts," "regulatory offenses," "police regulations," "administrative misdemeanors," "quasi-crimes," or "civil offenses."<sup>85</sup>

The underlying premise of this search was the insistence that regulatory laws could create crimes only by specific requirement of intent or criminal negligence.<sup>86</sup> Severe penalties were to be limited to statutory crimes.<sup>87</sup>

Amidst that furor, the Supreme Court addressed a federal agency regulation that provided for stiff fines and imprisonment for knowing violations;<sup>88</sup> within thirty days it considered a federal statute that likewise provided for stiff fines and imprisonment and contained "knowing" language.<sup>89</sup> The differing results of these cases reflect the tension between traditional concepts of crimes and the recognition of the need to protect society.

In *Morissette v. United States*,<sup>90</sup> Justice Jackson, writing for a unanimous Court, held that a showing of criminal intent was required to prove the element of "knowing" in a federal statute prohibiting embezzlement, theft or conversion of government property.<sup>91</sup> Following a careful review of the evolution of "public welfare offenses,"<sup>92</sup> the Court refused "to expand the doctrine of crimes without intent to include those charged here."<sup>93</sup> Embezzlement and theft were recognized by the Court as com-

85. *Id.* at 841-42. Although Perkins published this article in 1952, he did not include a discussion of *Dotterweich*.

86. *Id.* at 848.

87. *Id.*

88. *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952).

89. *Morissette v. United States*, 342 U.S. 246 (1952).

90. 342 U.S. 246 (1952); see also *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 130 (1952) (discussing *Morissette*); Charles R. Desmond, Comment, *Criminal Law—Larceny—Criminal Intent*, 1 BUFF. L. REV. 326 (1952) (same); Donald F. Storm, Comment, *Criminal Law—Scienter as an Element of a Statutory Crime*, Fall U. ILL. L.F. 449 (1952) (same); Note, *Criminal Law—Criminal Intent in Statutory Offenses*, 25 S. CAL. L. REV. 135 (1952) (same); Comment, *Criminal Law—Mens Rea—Requirement in Action for Converting Government Property—Necessity for Criminal Intent*, 5 VAND. L. REV. 828 (1952) (same); Note, *Criminal Law—Mens Rea in Statutory Offenses—Public Welfare Offenses*, 26 TUL. L. REV. 391 (1952) (same).

91. *Morissette*, 342 U.S. at 270-71.

92. *Id.* at 250-63.

93. *Id.* at 260. As Professor Sayre noted:

mon-law *mala in se* crimes historically requiring proof of criminal intent. The Court stated that:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.<sup>94</sup>

Justice Jackson neatly distinguished *United States v. Balint*<sup>95</sup> and *United States v. Behrman*<sup>96</sup> by noting that the statutes at issue in those cases did not contain “knowing” language. The Court rejected the common-law tradition of inferring such language with this declaration:

Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common-law and statutory interpretation by the states may warrant quite contrary inferences than *the same silence in creating an offense new to general law*, for whose definition the courts have no guidance except the Act. Because the offenses before the Court in the *Balint* and *Behrman* cases were of this latter class, we cannot accept them as authority for eliminating intent from offenses incorporated from the common law.<sup>97</sup>

Thus, drug cases, new to general law, need not be accorded common-law requirements of mens rea. The Court related the “abandonment of the ingredient of intent not merely with considerations of expediency in obtaining convictions, nor with the *malum prohibitum* classification of the crimes, but with the peculiar nature and quality of the offense.”<sup>98</sup> But the Court failed to factually distinguish *Dotterweich*, choosing rather to

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It is fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him an opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. If the public danger is widespread or serious the practical situation can be met by shifting to the shoulders of defendant the burden of proving lack of guilty intent. But the traditional requisite of a mens rea as a requisite for criminality still constitutes a necessary and important safeguard for criminal proceedings and except in case of public welfare offenses involving light penalties should be scrupulously maintained.

Sayre, *supra* note 27, at 82-83.

94. *Morissette*, 342 U.S. at 263 (emphasis added).

95. 258 U.S. 250 (1922).

96. 258 U.S. 280 (1922).

97. *Morissette*, 342 U.S. at 262 (emphasis added).

98. *Id.* at 259 (citing *United States v. Dotterweich*, 320 U.S. 277 (1943)).



classify it as an example of the application of "legislation whereby penalties serve as an effective means of regulation."<sup>99</sup>

If *Dotterweich* were to be termed as a *mala prohibita* situation, the doctrines of vicarious liability and no defense of mistake or ignorance were rightfully applied, provided there was no heavy penalty, which historically demanded proof of criminal intent. It is clear Justice Jackson was aware of the *mala prohibita* and *mala in se* doctrines, for he offered *Dotterweich* as a portent of possible harsh results from such regulations, and left open the definition of crimes that require a mental element.<sup>100</sup>

It seems that Justice Jackson was firmly bent on blocking Congress from usurping ancient common-law rights of citizens for the sake of mere expediency:

The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.<sup>101</sup>

A few years later, in *Boyce Motor Lines v. United States*,<sup>102</sup> following an explosion in the Holland Tunnel that injured sixty people, a trucking company was criminally prosecuted for "knowing" violation of an Interstate Commerce Commission regulation on transportation of explosives.<sup>103</sup> Denying a challenge on vagueness grounds, the Court declared that "no more than a reasonable degree of certainty"<sup>104</sup> is demanded by the law for a criminal statute "to give notice of the required conduct to one who would avoid its penalties."<sup>105</sup> The Court found a requirement of culpable intent in the regulation's inclusion of "knowing" and rejected

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99. *Id.* at 259-60.

100. *Id.* at 260.

101. *Id.* at 263.

102. 342 U.S. 337 (1952).

103. *Id.* at 339 n.3; see also *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 130 (1952) (discussing *Boyce Motor Lines*); E.C. Bend, Jr., Comment, *Constitutional Law—Vagueness in the Definition of a Crime*, 7 ARK. L. REV. 135 (1953) (same).

104. *Boyce Motor Lines*, 342 U.S. at 340.

105. *Id.* The Court noted that the regulation provided:

"Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, poisonous gas, shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings."

*Id.* at 338-39 (quoting 49 C.F.R. § 197.1(b) (repealed 1979)).

a claim that the enforcement of the regulation violated due process.<sup>106</sup> The Court also seemed to suggest that such intent is to be proven by a showing of willful neglect.<sup>107</sup>

#### F. Nature of the Action

In *Lambert v. California*,<sup>108</sup> the Supreme Court struck down a regulatory measure that provided for criminal penalties and did not contain a requirement of scienter.<sup>109</sup> Justice Douglas, writing for the majority in this five-to-four decision, recognized "wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."<sup>110</sup> However, he declared the requirement that convicted felons register within five days of arrival in Los Angeles to be too severe, as it provided no opportunity "to avoid the consequences of the law or to defend any prosecution brought under it."<sup>111</sup> Justice Douglas shaped the opinion in terms of due process and fairness.<sup>112</sup> This evoked a vociferous dissent from Justice Frankfurter.<sup>113</sup>

Significantly, the Court chose to look at the nature of the action to determine whether actual knowledge or proof of probability of such knowledge was required. Although the Court did not differentiate *United States v. Balint*<sup>114</sup> and *United States v. Dotterweich*,<sup>115</sup> per se, as dealing with dangerous goods or acts, it offered those holdings as support

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106. *Boyce Motor Lines*, 342 U.S. at 342.

107. *Id.* "It must be shown that the petitioner knew that there was a practicable, safer route through the tunnel, or that petitioner willfully neglected to exercise its duty under the Regulation to inquire into the availability of such an alternative route." *Id.* Justice Jackson, dissenting, pointed out that delivery of the goods was achievable only through use of bridges, viaducts or tunnels. *Id.* at 344. He argued that the agency regulation, which should be held to "considerable precision, . . . prescribe[d] no duty in terms of a degree of care that must be exercised in moving the equipment." *Id.* at 345 (Jackson, J., dissenting).

108. 355 U.S. 225 (1957).

109. *Id.* at 229-30.

110. *Id.* at 228.

111. *Id.* at 229. "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." *Id.* at 229-30.

112. *Id.*

113. *Id.* at 230 (Frankfurter, J., dissenting). Justice Frankfurter, in his dissent, described the majority position as "an isolated deviation from the strong current of precedents—a derelict on the waters of the law." *Id.* at 232 (Frankfurter, J., dissenting). He exclaimed the laws to be "thick with provisions that command that some things not be done and others be done, although persons convicted under such provisions may have had no awareness of what the law required or that what they did was wrongdoing." *Id.* at 230 (Frankfurter, J., dissenting) (citing *United States v. Balint*, 258 U.S. 250 (1922)).

114. 258 U.S. 250 (1922).

115. 320 U.S. 277 (1943).

for the position that passive conduct—failure to register—“is unlike the commission of acts, or *the failure to act under circumstances that should alert the doer to the consequences of his deed.*”<sup>116</sup> This attention to the intrinsic nature of the action is consistent with previous cases.

Indeed, in the next Supreme Court case to deal with intent or knowledge in a regulatory statute, *United States v. Freed*,<sup>117</sup> the Court looked at the nature of the action—possession of hand grenades—and unanimously upheld the Act.<sup>118</sup> The Court noted that *Freed* is “in the category neither of *Lambert*, nor of *Morrisette*, but is closer to *Dotterweich*.”<sup>119</sup> The Act required “no specific intent or knowledge that the hand grenades were unregistered . . . [T]he only knowledge required to be proven was knowledge that the instrument possessed was a firearm.”<sup>120</sup>

In so holding, the Court returned to the “at peril” doctrine of *Balint*:

This is a regulatory measure in the interest of public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous weapons, no less dangerous than the narcotic involved in *United States v. Balint* . . . [The] manifest purpose [of this statute, as with the statute at issue in *Balint*] is to require every person . . . to ascertain at his peril whether that which he sells comes within the inhibition of the statute . . .<sup>121</sup>

## II. THE BOUNDARIES OF “KNOWLEDGE”

### A. *Public Welfare and Scienter*

Public welfare regulations were a part of the legal fabric by 1970.<sup>122</sup> Aimed primarily at regulating dangerous or fundamental goods or their transfer, such regulations required mens rea only if expressly dictated by the regulation itself. Common-law mens rea, proof of criminal intent or

116. *Lambert*, 355 U.S. at 228 (emphasis added).

117. 401 U.S. 601 (1971).

118. *Id.* at 609-10.

119. *Id.* at 609; see *supra* notes 83-89 and accompanying text. *Lambert* may be placed in a category of decisions that emphasize the nature of the act. See, e.g., *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952) (transporting explosives); *United States v. Balint*, 258 U.S. 250 (1922) (narcotics).

120. *Freed*, 401 U.S. at 607.

121. *Id.* at 609.

122. See *infra* notes 158-66 and accompanying text.

criminal negligence, were implied only in those instances in which history commanded it.

Penalties grew more severe. Legislatures, attempting to avoid strict liability, incorporated the word “knowingly” into such statutes.<sup>123</sup> The American judicial system appeared at a potential loggerhead. Public welfare regulations, growing from the restricted roots of *mala prohibita*, now included a scienter requirement. Was that scienter requirement to be interpreted within the realm of *mala in se* crimes, requiring criminal intent and knowledge? Such interpretation would obviously create the long-recognized enforcement and proof problems. Additionally, such clogging of the system might ultimately defeat the purpose of the legislation, to protect the health and safety of the public. The Court found itself weighing the paramount public health and welfare concerns of the legislature against a scienter requirement, which, if read in *mala in se* terms, would be self-defeating. On the contrary, the Court invoked an old doctrine—ignorance of the law is no defense—recognized in both traditional categories, and applied it to “knowing” in a fashion designed to balance obstructive legal concepts.

#### B. Ignorance of the Law and International Minerals

A case involving shipments of sulfuric and hydrofluosilicic acids in violation of Interstate Commerce Commission regulations presented the Court with a public health/scienter dilemma.<sup>124</sup> In *United States v. International Minerals Corp.*,<sup>125</sup> the agency regulation at issue required shipping papers to detail “any hazardous material” being transported.<sup>126</sup> Violations were punishable by fine or imprisonment.<sup>127</sup> The federal statute enabling the agency to so regulate provided penalties for a person who “knowingly violate[d] any such regulation.”<sup>128</sup> The House and Senate, aware of enforcement difficulties under the statute as written, refused to delete the term “knowingly.”<sup>129</sup>

The Supreme Court, cognizant of legislative concern, nonetheless reached a result that, as Justice Stewart pointed out in the dissent, “effec-

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123. See, e.g., *United States v. International Minerals Corp.*, 402 U.S. 558, 562-63 (1971).

124. *Id.* at 558.

125. 402 U.S. 558 (1971).

126. 49 C.F.R. § 173.427 (1991).

127. *Id.*

128. Act of June 25, 1948, ch. 645, § 835, 62 Stat. 683, 739-40 (repealed 1979).

129. This was done in an attempt to eliminate absolute liability for violations given current judicial definitions of “knowing.” See *International Minerals*, 402 U.S. at 566-68 (Stewart, J., dissenting).

tively delete[d] the word knowingly from the law.”<sup>130</sup> Heralding the notion that Congress was certainly not “carving out an exception to the general rule that ignorance of the law is no excuse,”<sup>131</sup> the Court held that a knowing violation of a regulation required knowledge of the regulation. Looking to the nature of the goods, the Court applied the reasoning of the “at peril” doctrine:

[W]here, as here and as in *Balint* and *Freed*, 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.<sup>132</sup>

Presumption of awareness of a criminal statute was not inconsistent with the evolution of public welfare regulations, given the inherent dangerousness of the goods.

What was novel was the Court’s introduction of the concept that the term “knowingly violated the regulation” in public welfare statutes did not require proof of criminal intent or knowledge—elements characteristic of *mala in se* crimes. Moreover, it should be read against a legal *presumption* of knowledge of the existence of a regulation that had previously been applied to justify the exclusion of the scienter requirement. This places an insurmountable proof burden on the accused. The Court so read the term, even though Congress explicitly attempted to eliminate strict liability by including “knowing” in the definition of the crime. The objective of the Court was apparent. It aimed to untie the gordian knot with which Congress wrapped this public welfare legislation. In doing so, the Court created the beginnings of a new standard of scienter in criminal public welfare regulation.

Thus, a public welfare statute in which the legislature inserted a knowledge element was held to require general intent. Public welfare statutes without a requirement of mens rea traditionally had been upheld on the basis that the nature of the goods was such that the actor must not presume regulation and ascertain the facts. The Court now suggested that this presumption of regulation carried forward in a public welfare statute, even where the legislature had inserted a mens rea element.

The knowledge requirement of the statute, under *International Minerals*, appeared to attach to the nature of the goods themselves. This is implicit in the Court’s suggestion that mistake of fact would be a legitimate defense. Thus, a statutory requirement of “knowingly” does not

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130. *Id.* at 568 (Stewart, J., dissenting).

131. *Id.* at 563.

132. *Id.* at 565.

require knowledge of the regulation, but it seems to require knowledge of the dangerous nature of the goods.<sup>133</sup> A person thinking in good faith that he or she was shipping distilled water when in fact he or she was shipping some dangerous acid would not be covered.<sup>134</sup> Those who deal in certain goods act with culpable criminal intent when they unknowingly violate a regulatory statute of which they are deemed to be aware.<sup>135</sup> In cases *mala prohibita* and those involving public welfare regulations, mistake of fact is generally not an available defense though it is a defense to crimes *mala in se*.<sup>136</sup>

Applying the "at peril" presumption of regulation to a statute with a mens rea element placed the actor in the same position as he or she would be under a public welfare statute with no mens rea element. The difference is the suggestion that perhaps good faith or mistake of fact may be a defense, as in *mala in se* crimes. However, the reasonable person may be held to a "should have known" standard concerning the nature of the goods, further limiting the knowledge element.<sup>137</sup> Thus, mens rea seems limited to a defense of mistake of fact. It is not at all clear that, under *International Minerals*, "knowing" created a judicial standard of recognizable mens rea where the nature of the action—such as transfer of dangerous devices, products or waste materials—was subject to public welfare regulation. Thus, under *International Minerals*, the basic proposition of the "at peril" doctrine, that the handlers of dangerous or fundamental goods act at peril in relation thereto, was upheld. Additionally, a statutory requirement of "knowingly" did not require knowledge of the regulation but might include knowledge of the dangerous nature of the goods. No standard of care was discussed as relevant in an interpretation of "knowingly," as "knowingly" was, in reality, not interpreted but effectively deleted. What is clear is that the Court, in the arena of public welfare statutes, will recognize "leeway for the exercise of congressional

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133. Such a requirement would be inconsistent with the Supreme Court's holding in *Smith v. California*, 361 U.S. 147 (1959), in which the Court noted: "[T]he public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors—in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used." *Id.* at 152. Rather, "[h]is ignorance of the character of the food is irrelevant." *Id.*; cf. *United States v. Balint*, 258 U.S. 250, 254 (1922) (holding that preference to protect innocent purchasers of drugs from possible injustices by sellers was implicit in Narcotic Act of 1914).

134. *International Minerals*, 402 U.S. at 563-64.

135. *Id.* (citing *Morissette v. United States*, 342 U.S. 246 (1952), for common-law presumption of need to prove intention).

136. See *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943).

137. This would be consistent with the "willful neglect" standard applied to the knowledge requirement in *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952). See *supra* note 107 and accompanying text.

discretion in applying the reach of mens rea."<sup>138</sup> In this instance, such leeway permits a presumption of knowledge of the regulation itself.

### C. *The Dotterweich Doctrine: Park Extension*

Having recognized the application of the "at peril" doctrine to include those "in responsible relation to a public danger,"<sup>139</sup> the *Dotterweich* Court dispensed with the "conventional requirement for criminal conduct—awareness of some wrongdoing."<sup>140</sup> This doctrine was subsequently applied in a case against the president of a nationwide food chain to uphold his conviction for failure to maintain a rodent-free warehouse in Baltimore. In *United States v. Park*,<sup>141</sup> a criminal prosecution was brought under § 301 of the Federal Food, Drug and Cosmetic Act.<sup>142</sup> The first violation of this statute was a misdemeanor; subsequent violations were felony offenses.<sup>143</sup> Relying heavily on *Dotterweich*, the Supreme Court held that the jury charge need not include the element of "wrongful action."<sup>144</sup> Instead, the Court found that a "responsible relation to the situation" of the warehouse was sufficient.<sup>145</sup> Thus, the conviction of Park for violation of the statute with no showing of criminal intent was upheld solely on the basis of his constructive knowledge of the warehouse condition by virtue of his position as president.

This "responsible relation" or "responsible share,"<sup>146</sup> which creates liability for the corporate employee, is, however, based not on mere position, but on the "authority" respecting the regulated conditions that the employee exercises.<sup>147</sup> The Court described the "measure of culpability" as a consideration of the authority of the corporate agent in relation to

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

139. *Dotterweich*, 320 U.S. at 281.

140. *Id.*

141. 421 U.S. 658 (1974).

142. 21 U.S.C. § 331(k) (1988).

143. The first offense was punishable by a fine of not more than \$1000 or a maximum of one year in prison, and a felony offense was subject to a fine of not more than \$10,000 or a maximum of three years in prison. 21 U.S.C. § 333(a) (1988). Park was fined \$50 for each of five violations. *Park*, 421 U.S. at 666.

144. *Park*, 421 U.S. at 673.

145. *Id.* at 659, 673-76.

146. *Dotterweich*, 320 U.S. at 284-85.

147. *Park*, 421 U.S. at 674. "The rationale of the interpretation given the Act in *Dotterweich*, as holding criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of, has been confirmed in our subsequent cases." *Id.* at 671.

the duties imposed by the statute.<sup>148</sup> Such a corporate employee may raise the defense of “lack of power.”<sup>149</sup>

What is troublesome about *Park* is not the application of the *Dotterweich* Doctrine to the fact situation, but the language that suggests another “positive duty.”<sup>150</sup> Chief Justice Burger declared that under this particular public welfare statute, corporate employees must undertake affirmative steps to prevent violations:

[T]he Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a *duty to implement measures that will insure that violations will not occur*. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.<sup>151</sup>

The extension of the *Dotterweich* Doctrine by *Park* to include a “positive duty” to prevent violations changes considerably the scope of the “at peril” theory upon which it was based. Originating as a legal presumption of knowledge of regulation to be applied when the legislative intent was to require no scienter, the “at peril” doctrine appears to carry additional affirmative duties imposed by the judiciary. Failure to perform these duties may result in proof, or an inference, of guilt. This is particularly worrisome in cases in which the statute itself contains no knowledge requirement or standard of care.

It thus appears that those engaged in certain industries, ranging from the manufacture of food and milk to transporting dangerous materials, act “at peril” by virtue of the nature of the goods in which they deal. This demands learning the facts relating to regulation of the transaction. Additionally, there may be an affirmative duty to prevent violations of applicable regulations by exercising a standard of care not contained in the statute but prescribed by *Park*. Yet, this standard was not deline-

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148. *Id.* at 674.

149. *Id.* at 677. The Court stated:

If such a claim is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government’s ultimate burden of proving beyond a reasonable doubt the defendant’s guilt, including his power, in light of the duty imposed by the Act, to prevent or correct the prohibited condition.

*Id.* at 673.

150. *Id.* at 672.

151. *Id.* (emphasis added).



ated. Such were the parameters of knowledge and its substitute, the "at peril" doctrine, in public welfare offenses.

### III. CRIMINAL PROSECUTION UNDER ENVIRONMENTAL STATUTES AS PUBLIC WELFARE LEGISLATION

#### A. *Origins of Environmental Criminal Prosecution Under the Refuse Act of 1899*

The first congressional legislation aimed specifically at water pollution was passed in 1948.<sup>152</sup> The statute contained no criminal penalty provisions. Written in terms of public nuisance, the government's recourse under the statute was to bring an action to abate the nuisance.<sup>153</sup> Given that cumbersome mechanism,<sup>154</sup> government regulators turned to section 13 of the Rivers and Harbors Act, commonly called the Refuse Act of 1899.<sup>155</sup> That Act made unlawful throwing, discharging or depositing refuse matter in navigable waters of the United States,<sup>156</sup> such actions were punishable by criminal penalties of not more than one year of imprisonment or a fine of no more than \$2500.<sup>157</sup>

In early Refuse Act cases brought against *corporate* defendants, scienter was not required by the courts.<sup>158</sup> Violation of the statute was perceived as simply *malum prohibitum*,<sup>159</sup> requiring no scienter absent

152. Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251-1376 (1988)). For a history of that Act, see Frank J. Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970).

153. 33 U.S.C. § 466a(d)(1) (1948) (omitted as superseded by Pub. L. No. 92-500, 86 Stat. 816 (1972)). For a discussion of the inefficiency of this remedy and the history leading to the 1972 Amendment, see Richard M. Carter, Note, *Federal Enforcement of Individual and Corporate Criminal Liability for Water Pollution*, 10 MEM. ST. U. L. REV. 576, 579-85 (1980).

154. For a discussion of the inadequacy of abatement devices in water pollution cases, see William C. Steffin, Note, *The Refuse Act of 1899: New Tasks for an Old Law*, 22 HASTINGS L.J. 782, 782-84 (1971).

155. Rivers and Harbors Act, ch. 425, § 13, 30 Stat. 1121, 1152 (1899) (codified as amended at 33 U.S.C. § 407 (1988)).

156. *Id.* § 13, 30 Stat. at 1152.

157. 33 U.S.C. § 411 (1988). For a thorough review of the provisions of the Act from a prosecutor's point of view, see James T.B. Tripp & Richard M. Hall, *Federal Enforcement Under the Refuse Act of 1899*, 35 ALB. L. REV. 60 (1970).

158. See, e.g., *United States v. Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill. 1969).

159. *Id.* at 915. "Depositing refuse in navigable waters is the *malum prohibitum* constituting a violation of section 13." *Id.* (footnote omitted). The court noted that even indirect discharges have been held to violate the Act. *Id.* It is also significant that the court, in finding no scienter requirement, specifically delineated this violation as *malum prohibitum* as opposed to *mala in se*. *Id.* at 915 n.3. "[I]n the absence of any statutory or decisional requirement of a showing of scienter in a prosecution brought under a seventy-year old statute, this court finds no basis for reading such a requirement into the Act at this late date." *Id.*

specific statutory requirement or judicial precedent.<sup>160</sup> Individual defendants, facing a possible jail sentence, were held to a different Refuse Act standard. A federal district court held that the prosecution must prove the defendant not only had knowledge of the violation, but had the ability to take steps to remedy the situation.<sup>161</sup>

In 1974 the First Circuit Court of Appeals, noting that courts had historically not required proof of scienter, held a corporate defendant liable under the Act in *United States v. White Fuel Corp.*<sup>162</sup> The court proceeded to link offenses under the Act with public welfare offenses.<sup>163</sup> A due care defense was rejected on the grounds that in the case of corporate defendants, application of such a defense would cripple the Act as an enforcement tool, because it would place the government in a difficult proof position.<sup>164</sup> It is important to note, however, that this court specifically recognized that such a harsh approach was appropriate for a *corporate* defendant that cannot be imprisoned and faces moderate fines.<sup>165</sup> The court declined to "consider to what extent absolute liability would carry over to cases where incarceration [was] a real possibility."<sup>166</sup> This left the requirement of scienter for an individual defendant an open question under the Refuse Act.

The significance of this case in early environmental criminal prosecutions lies in the court's two-pronged approach to statutory application. The *White Fuel* court, determined to keep refuse out of the water, interpreted the Refuse Act as *malum prohibitum*. It refused to accept "generalized due care defenses"<sup>167</sup> based on "industry-wide or commonly accepted standards."<sup>168</sup> Liability was to be predicated "on actual non-compliance rather than either intentions or best efforts."<sup>169</sup> The court was comfortable in so holding because the penalty for the corporate defendant was a moderate fine.<sup>170</sup> To shore up that approach, the court

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160. Two unreported cases are cited by federal prosecutors as further support for that holding. See Tripp & Hall, *supra* note 157, at 75 n.56.

161. See Tripp & Hall, *supra* note 157, at 76. The authors advocate elimination of any scienter requirement on deterrence grounds when corporate officers are individual defendants. *Id.*

162. 498 F.2d 619, 622 (1st Cir. 1974) ("In the seventy-five years since enactment, no court to our knowledge has held that there must be proof of scienter; to the contrary, the Refuse Act has commonly been termed a strict liability statute.").

163. *Id.* (citing *Morissette v. United States*, 342 U.S. 246, 255-56 (1952)).

164. *Id.* at 623.

165. *Id.*

166. *Id.* at 623-24.

167. *Id.* at 623.

168. *Id.*

169. *Id.*

170. *Id.*

connected this *malum prohibitum* Refuse Act provision with public welfare offenses, citing *Morissette* dicta on the legislative policy of not requiring intent in public welfare offenses.<sup>171</sup> But what the court had in fact done is examine the requirement of scienter based upon the nature of the defendant. Because the defendant was a corporation which could not go to jail and could easily pay a fine, *malum prohibitum* principles were deemed appropriate. This same statute, however, applied to an individual who would face a jail term, made the court pause. The statute was thus *malum prohibitum* for a corporation but perhaps not for an individual.<sup>172</sup> The distortion of the traditional criminal framework thus begins with the earliest circuit court cases considering environmental violations as crimes.

It is important to recall that *malum prohibitum* grew out of the need to protect society. Enforced by light penalties, the "at peril" doctrine was consistently applied through the years to handlers of dangerous goods or goods fundamental to society. Such goods, by their nature, initially placed handlers, and later those in responsible relation,<sup>173</sup> on notice of possible ramifications for their actions. The Supreme Court consistently looked to the nature of the goods—drugs, food, firearms, food stamps—to determine whether scienter was required.<sup>174</sup> The court, in determining applicability of the statute, then reviewed the individual's role in relation to the goods, often with a harsh result,<sup>175</sup> but always with a view that the burden of safeguarding the public must be placed affirmatively on responsible parties.

In *White Fuel*, the corporate owner of a tank farm was prosecuted for oil seepage into Boston Harbor from a massive underground accumulation that had formed for over twenty years as a result of common industry practices.<sup>176</sup> This case illustrates the quandary of the court in applying traditional doctrines to novel environmental violations. In the early 1970s, criminal prosecution for violations of federal laws not drafted primarily as criminal statutes for that purpose placed the courts

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171. *Id.* at 622.

172. The court quoted *Morissette*: "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." *Id.* (quoting *Morissette v. United States*, 342 U.S. 246, 256 (1952)). Arguably, in the case of a corporate officer, courts could use this language as a test. They clearly have been reluctant to do so, however, where incarceration was a penalty.

173. See *supra* notes 139-49 and accompanying text.

174. See *supra* notes 33-44 and accompanying text.

175. See *United States v. Park*, 421 U.S. 658, 673-76 (1974).

176. *White Fuel*, 498 F.2d at 621.

in a difficult position.<sup>177</sup> The nature of the conduct charged—permitting seepage into the harbor as a result of a business practice that was in fact being remedied by the corporate owner<sup>178</sup>—was not of the type that traditionally placed the actor at peril. The defendant, a corporation, was thus not on notice that it was acting at peril and, in fact, claimed it acted without negligence.<sup>179</sup> Yet there was seepage, a violation of the Act caused by a corporate defendant.

For public welfare purposes, the court relied on a *malum prohibitum* rationale. The court rejected White Fuel's arguments that prosecutors were required to prove criminal intent or at least a lack of due care on the part of the defendant.<sup>180</sup> The court recited the "benefit to society of having an easily defined, enforceable standard which inspires performance rather than excuses."<sup>181</sup>

The Refuse Act of 1899, lacking a specific scienter requirement, stimulated the invocation of the public welfare offense doctrine for environmental violations. The introduction by Congress in the 1970s of scienter in environmental statutes, coupled with heavier criminal penalties, created legal disarray as courts struggled to determine the applicable scope of scienter within the context of public welfare legislation.

### B. Criminal Sanctions Under Early Environmental Statutes

The Federal Water Pollution Control Act of 1972<sup>182</sup> (FWPCA) contained the first criminal sanctions for negligent and willful violations.<sup>183</sup> "Knowing" false reporting was also subject to criminal penalties.<sup>184</sup> In 1977, in *United States v. Hamel*,<sup>185</sup> the first criminal conviction for willful violation of the Act was upheld against an individual defendant.<sup>186</sup> In that case, Mr. Hamel was held liable for discharge of gasoline under a provision of the Act preventing "discharge of any pollutant."<sup>187</sup> The Court held that although gasoline was not a listed pollutant under the Act, the legislature intended to include any material covered by the Re-

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177. See, e.g., Rivers and Harbors Act § 13.

178. *White Fuel*, 498 F.2d at 621.

179. *Id.*

180. *Id.* at 623. This argument calls for application of a *mala in se* standard.

181. *Id.*

182. 33 U.S.C. §§ 1251-1376 (1988).

183. *Id.* § 1319(c)(1).

184. *Id.* § 1319(c)(2).

185. 551 F.2d 107 (6th Cir. 1977).

186. *Id.* For a review of the history of the criminal sanctions provisions of the statute, see Carter, *supra* note 153, at 585.

187. 33 U.S.C. § 1311(a).

fuse Act.<sup>188</sup> In the context of a criminal statute that required a showing of negligent or willful violation, it is significant that the court refused "to eschew our construction of the Act out of deference to the general rule that penal statutes are strictly and narrowly construed."<sup>189</sup> The court instead chose to adopt "the rule of *Standard Oil* . . . and our own circuit's interpretation of water pollution legislation that it be given a generous rather than a niggardly construction."<sup>190</sup> Notably, however, the Refuse Act cases, contrary to *Hamel*, were brought against corporations.<sup>191</sup> On the issue of scienter, the *Hamel* court merely noted that with the 1972 amendments to the FWPCA, Congress provided a "harsher penalty . . . with the added burden on the government to prove scienter."<sup>192</sup>

The proof of scienter in a criminal FWPCA violation against an individual defendant was later delineated as not requiring the government to prove specific criminal intent by a federal district court.<sup>193</sup> The court based that determination on the nature of the Act, namely that the violation of the false reporting provisions of section 1319(c)(2) was a public welfare offense as opposed to a common-law offense.<sup>194</sup> Although the Clean Water Act cases provided the foundation for many legal principles in environmental law,<sup>195</sup> the issue of scienter has arisen principally

188. *Hamel*, 551 F.2d at 110. The court stated:

It is, of course, true that in hindsight the entire controversy might have been solved by the single addition of the term "petroleum products" to the definition section. We do not, however, read the failure to do so as an intent to exclude these materials from the Act. On the contrary, we conceive the employment of the broad generic terms as an expression of Congressional intent to encompass at a minimum what was covered under the Refuse Act of 1899.

. . . .

The Refuse Act of 1899 is itself a codification of prior legislation. It prohibits the discharge of "any refuse matter . . . other than that flowing from streets and sewers and passing therefrom, in a liquid state, into any navigable water . . . ."

*Id.* (citation omitted).

189. *Id.* at 112.

190. *Id.* In *United States v. Standard Oil Co.*, 384 U.S. 224 (1966), aviation gasoline was held to be refuse under the Refuse Act of 1899. *Id.* at 226.

191. See *supra* notes 146-51 and accompanying text.

192. *Hamel*, 551 F.2d at 113 n.9. The court held that the scienter requirement was met by circumstantial evidence submitted at trial, which showed "Hamel intentionally activated the necessary levers to discharge the gasoline." *Id.* at 109.

193. *United States v. Ouelette*, 8 Env't Rep. Cas. (BNA) 1350, 1351 (E.D. Ark. 1977).

194. *Id.*

195. Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work That Remains*, 59 GEO. WASH. L. REV. 900, 906 (1991); see also *United States v. Distler*, 671 F.2d 954, 955 (6th Cir.) (upholding criminal conviction for discharge of pollutants), *cert. denied*, 454 U.S. 827 (1981); *United States v. Frezzo Bros. Inc.*, 602 F.2d 1123, 1126 (3d Cir. 1979) (holding that government need not exhaust civil

in prosecutions under the Resource Conservation and Recovery Act of 1976 (RCRA).<sup>196</sup>

C. *Knowledge Under the Resource Conservation and Recovery Act*

1. Felony offenses

Passage of the Resource Conservation and Recovery Act<sup>197</sup> created criminal environmental offenses punishable as felonies with fines of up to \$50,000 per day for each violation and imprisonment of two to five years.<sup>198</sup> These offenses were defined in terms of acting "knowingly."<sup>199</sup> Additionally, "knowing endangerment" was added as a more serious offense, punishable by a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both.<sup>200</sup> A corporate defendant was subject to a fine of not more than \$1,000,000.<sup>201</sup> "Knowing endangerment" means the defendant "knows at the time that he thereby places another person in imminent danger of death or serious bodily injury."<sup>202</sup> Such knowledge is to be found in the course of "knowingly" transporting, treating, storing, disposing of or exporting any hazardous waste.<sup>203</sup>

"Person" under the statute has been defined to include owners, operators and employees of a facility.<sup>204</sup> In *United States v. Johnson & Towers, Inc.*,<sup>205</sup> the Third Circuit considered the issue of whether employees who were not in the position to secure a permit should be subject to criminal penalties by handling waste.<sup>206</sup> After a *Dotterweich* review of legislative intent, the *Johnson* court described RCRA as a public welfare statute.<sup>207</sup> As such, the legislative purpose of the Act was reviewed, with the court concluding that RCRA, like the Food and Drug Act, was an attempt to control modern hazards and protect the public, and thus per-

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sanctions before pursuing criminal sanctions), *cert. denied*, 444 U.S. 1074 (1980); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1184 (D. Ariz. 1975) (same).

196. 42 U.S.C. §§ 6901-6989 (1988).

197. *Id.*

198. *Id.* § 6928(d).

199. *Id.*

200. *Id.* § 6928(e).

201. *Id.*

202. *Id.*

203. *Id.*

204. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 664-65 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). The statute defines "person" as "an individual, trust, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 6903(15) (1988).

205. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

206. *Id.* at 665.

207. *Id.* at 668.

mitted an interpretation that would not limit the act.<sup>208</sup> "It would undercut the purpose of the legislation to limit the class of potential defendants to owners and operators where others also bear responsibility for handling regulated materials."<sup>209</sup> It is clear, however, that although the court recognized the overriding public purpose to be served by a broad interpretation of "person" under the statute, it was also concerned with possible overreaching. Accordingly, the court tackled the task of defining the scope of the term "knowingly" as applied to employee-defendants, and merely limited statutory applicability.

The court declared that "knowingly" must include "knowledge that the waste material was hazardous."<sup>210</sup> However, it did not define "hazardous." Next the court determined that each defendant must be found to know that the company was required to have a permit and that each knew the company did not have a permit.<sup>211</sup> Apparently mindful of the proof problems inherent in that approach, the court noted that "our conclusion that 'knowingly' applies to all elements of the offense in section 6928(d)(2)(A) does not impose on the government as difficult a burden as it fears."<sup>212</sup> Indeed, the court found that such knowledge may be inferred from job descriptions and that the jury may be so instructed.<sup>213</sup> This has the effect of shielding the innocent employee who, although he or she handles waste and is thereby traditionally placed at peril, may not be in a position to know about or obtain a permit.

The *Johnson* court accepted RCRA as a public welfare statute as well as the threshold principle of public welfare legislation, that the "statutes . . . are to be construed to effectuate the regulatory purpose."<sup>214</sup> It is significant, however, that the court did not embrace the *International Minerals* notion that knowledge in a public welfare statute means knowledge of the goods, and that a presumption of knowledge of the regulation was to be applied. In an apparent effort to effectuate the purposes of the legislation and simultaneously protect the innocent, the

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208. *Id.*

209. *Id.* at 667. The court reviewed the statutory language of RCRA and rejected the district court's narrow view of the substantive criminal provision. *Id.* In taking that approach, the court relied heavily upon *United States v. Dotterweich*, 320 U.S. 277 (1943).

210. *Johnson & Towers*, 741 F.2d at 668 (citing *United States v. International Minerals Corp.*, 402 U.S. 558 (1970)).

211. *Id.* at 669.

212. *Id.* It is noteworthy, however, that the court classified RCRA as a public welfare statute, which "would be a reasonable basis for reading the statute without any mens rea requirement" if it so chose. *Id.* at 668.

213. *Id.*

214. *Id.* at 666.

court required proof of knowledge of the statutory elements. Yet this proof may be inferred from job responsibility.<sup>215</sup>

This judicially permitted inference of knowledge actually stems not from the statute or legislative history,<sup>216</sup> but rather from the "responsible relation" concept of *Dotterweich* and *Park*. Although guilty knowledge in criminal prosecutions may be proven with circumstantial evidence, the court's determination that such knowledge may be inferred by the jury "as to those individuals who hold the requisite responsible positions with the corporate defendant"<sup>217</sup> introduces elements of the expanded "at peril" doctrine to criminal environmental statutes.

In *United States v. Hayes International Corp.*,<sup>218</sup> a subsequent RCRA case, the court was again concerned with balancing the difficult proof problems inherent in "knowing" violations of a public welfare statute<sup>219</sup> with the regulatory purpose sought to be served. The *Hayes* court declared that requiring the government to prove that the individual defendant employee knew the disposal site had no permit did not create "an unacceptable burden of proof" for the government.<sup>220</sup> The court, as in *Johnson*, found that such knowledge could be inferred from the actions of the defendant.<sup>221</sup> The inference, however, contrary to *Johnson*, arose not from job responsibility, but from the nature of the action.

For transporters of waste, knowledge of permit requirements is an affirmative duty.<sup>222</sup> The *Hayes* court declared that "in this regulatory context a defendant acts knowingly if he *willfully fails to determine the permit status of the facility.*"<sup>223</sup> This duty to learn the facts and assume, based on the nature of the activity, that the activity is regulated is consistent with the "at peril" doctrine and the *International Minerals* approach. The *Hayes* court added the concept that inferences of guilty knowledge may be drawn "from all of the circumstances, including the

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215. *Id.* at 669.

216. Congress did not seek "to define 'knowing' for offenses under subsection (d); that process has been left to the courts under general principles." S. REP. NO. 172, 96th Cong., 2d Sess. 39 (1980), reprinted in 1980 U.S.C.A.N. 5019, 5038.

217. *Johnson & Towers*, 741 F.2d at 670.

218. 786 F.2d 1499 (11th Cir. 1986).

219. The court held that "section 6928(d)(1) is undeniably a public welfare statute, involving a heavily regulated area with great ramifications for the public health and safety." *Id.* at 1503.

220. *Id.* at 1504.

221. *Id.* at 1504-05.

222. The court noted: "As the Supreme Court has explained it is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of the regulatory provisions." *Id.* at 1503.

223. *Id.* at 1504 (emphasis added).



existence of the regulatory scheme."<sup>224</sup> Thus, the *Hayes* court and the *Johnson* court used inferences, drawn from differing elements of the "at peril" doctrine, to facilitate a finding of knowledge in RCRA criminal prosecutions.<sup>225</sup> On the issue of hazardous waste, the court held that the jury must find that the defendant knew "what the waste was."<sup>226</sup> However, knowledge that the waste was a regulated substance was not required.<sup>227</sup>

This requirement to know "what the waste was" was upheld as part of a jury instruction in *United States v. Sellers*.<sup>228</sup> The court further observed that the omission of proof that the disposed-of substance was "potentially hazardous or dangerous to persons or the environment" was not plain error.<sup>229</sup> The court reasoned that "paint and paint solvent waste, by its very nature is potentially dangerous to the environment and to persons."<sup>230</sup> Therefore, the court concluded that "there can be no doubt that Sellers knew . . . that regulations . . . would exist governing the manner of [the waste's] disposal."<sup>231</sup> The Fifth Circuit took notice in a footnote that "RCRA is a regulatory statute intended to protect public health and as such, it should be construed to effectuate its regulatory purpose."<sup>232</sup> Thus, the court did not require specific proof that defendants knew the substance was hazardous. It could be inferred from knowledge of the nature of the goods.<sup>233</sup>

224. *Id.* at 1505. The court suggested that inferences may be drawn when there is no evidence of an assertion of proper licensing, or the circumstances of the transaction—for example, an unusual price—justify the inference. *Id.* at 1504.

225. The *Johnson* court relied on the responsible position of the defendant while the *Hayes* court, following the approach used in *United States v. International Minerals Corp.*, 402 U.S. 558 (1971), applied the traditional presumption of regulation to a public welfare statute with a knowledge element.

226. *Hayes*, 786 F.2d at 1504.

227. *Id.* at 1501 n.1. The court declared that those operating in such areas are charged with knowledge of the regulatory provisions. *Id.* at 1503. It would, thus, be "no defense to claim no knowledge that the paint waste was a hazardous waste within the meaning of the regulations." *Id.*; see also Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821, 828-29 (1990) (stating that courts generally have held that lack of knowledge that waste in question was hazardous is no defense) (citing *United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986)).

228. 926 F.2d 410, 416 (5th Cir. 1991).

229. *Id.* at 417.

230. *Id.*

231. *Id.* The court noted: "Thus, when 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." *Id.* at 416.

232. *Id.* at 416 n.2.

233. In *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991), the court held that "the knowledge element of § 6928(d) does extend to knowledge of the general hazardous character of the wastes." *Id.* at 745. See *United States v. Johnson &*

In *United States v. MacDonald & Watson Waste Oil Co.*,<sup>234</sup> the First Circuit squarely rejected a jury instruction allowing an individual to be found guilty on the basis of his or her status as a responsible corporate officer.<sup>235</sup> Citing *Dotterweich* and *Park* as the “seminal cases regarding the responsible corporate officer doctrine,” the court recognized that “corporate officer liability . . . requires only a finding that the officer had ‘authority with respect to the conditions that formed the basis of the alleged violations.’”<sup>236</sup> The court, however, noting the felony provision of the statute, declared “we know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute.”<sup>237</sup>

However, the court stated that such knowledge could be inferred from “relevant circumstantial evidence including [the defendant’s] responsibilities and activities as a corporate executive,” and further noted that the court “could, had it wished, have elaborated on the extent to which [the defendant’s] responsibilities and duties might lead to a reasonable inference that he knew.”<sup>238</sup> The court was concerned with conviction of a federal crime based on “conclusive or ‘mandatory’ presumptions of knowledge of the facts constituting the offense.”<sup>239</sup> The court firmly recognized: “In a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct circumstantial proof of knowledge.”<sup>240</sup>

The court prohibited use of a presumption of guilt as a substitute for knowledge in a public welfare statute containing a scienter requirement. However, in so doing, it firmly recognized the *Dotterweich/Park* doctrine of “responsible relation” to the prohibited act, and lent further strength to this inferential applicability to criminal environmental statutes.

In *United States v. Hoffin*,<sup>241</sup> the Ninth Circuit Court of Appeals was asked to reverse the conviction of an individual defendant, the Director of Public Works, for RCRA violations on the grounds that the jury had not been instructed that knowledge of a lack of permit was an essen-

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Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). In *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988), the court upheld jury instructions that defendant had to know the waste had potential to harm others in the environment. *Id.* at 1450.

234. 933 F.2d 35 (1st Cir. 1991).

235. *Id.* at 51.

236. *Id.* (quoting *United States v. Dotterweich*, 320 U.S. 277, 277 (1943)).

237. *Id.* at 52.

238. *Id.*

239. *Id.* at 53.

240. *Id.* at 55.

241. 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

tial element of the crime.<sup>242</sup> The court declined to follow *Johnson* and declared that "knowledge of the absence of a permit is not an element of the offense."<sup>243</sup> The court based its interpretation on the language of the statute and noted that it was consistent with the purpose of RCRA.<sup>244</sup> Thus, under the *Hoffin* interpretation, an employee need only "knowingly treat, store, or dispose of any hazardous waste."<sup>245</sup> The Ninth Circuit effectively lifted the shield placed before the lower level employee by the Third Circuit in *Johnson*. The "at peril" doctrine, in effect, applies to *all* handlers of hazardous waste. The knowledge of "hazardous waste" required was reduced by the Ninth Circuit to encompass substances that "had the potential to be harmful to others or to the environment."<sup>246</sup> The public welfare doctrine of placing handlers of certain goods at peril by the nature of the goods they handle was thus clearly invoked despite the congressional mandate of proof of knowledge in cases in which felony penalties result.

Although the circuit court decisions remain at odds regarding knowledge of the permit as a necessary element of the RCRA crime, the general tendency of the courts is discernible. In consistently attempting to effectuate the purpose of the RCRA statute to protect an endangered public from modern hazards, the courts seek a way to interpret "knowingly" broadly, despite increased criminal penalties. Courts, such as those that decided *Hayes* and *Johnson*, do so by use of inference; the *Hoffin* court did so by removing the requirement for knowledge of regulation. The traditional "at peril" doctrine, thus, continues to be applied despite the apparent congressional requirement of intent.

Such a judicial direction is, however, more consistent with purposes advanced for *mala in se* crimes: the punishment of individuals, recognizing the deterrent effect.<sup>247</sup> The "betterment of society" as an accepted criminological goal of public welfare penalties, described by Chief Justice Taft in *United States v. Balint*,<sup>248</sup> does not seem to be the underlying theory of criminal environmental statutes. The theory appears to be deterrence. Thus, the judicial system finds itself in the difficult position of applying the public welfare doctrine to a criminal statutory framework that it was never designed to fit in such a wholesale fashion. The result is

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242. *Id.* at 1037.

243. *Id.* at 1039.

244. *Id.* at 1038.

245. 42 U.S.C. § 6928(d)(2).

246. *Hoffin*, 880 F.2d at 1039. This charge regarding the nature of the waste was also upheld in *United States v. Greer*, 850 F.2d 1447, 1452 (11th Cir. 1988).

247. *See supra* notes 26-32 and accompanying text.

248. 258 U.S. 250, 252 (1922); *see supra* text accompanying note 54.

contrivance; broad findings of “knowledge” based on inference lead to felony convictions. Contrivance in *Hoffin* reached even greater proportions as knowledge of the regulatory scheme was removed as a necessary element. This leaves only the action of the defendant as an element of the crime, effectively creating strict liability regardless of the “knowing” term in the statute.

## 2. Knowing endangerment

The first criminal conviction under the “knowing endangerment” provision of RCRA was upheld against a corporate defendant in *United States v. Protex Industries*.<sup>249</sup> Congress included “Special Rules” in RCRA for interpretation of the knowing endangerment provisions.<sup>250</sup> The *Protex* court ruled that use of the term “reasonably expected to cause death or serious bodily injury” in the jury charge met the requirements of the statute.<sup>251</sup> The court declared: “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.”<sup>252</sup> The court also noted that the statute was not void for vagueness as the “essence of the doctrine is that a potential defendant must have some notice or ‘fair warning’ that the conduct contemplated is forbidden by the criminal law.”<sup>253</sup> The *Protex* court placed the company on probation, requiring

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249. 874 F.2d 740 (10th Cir. 1989).

250. 42 U.S.C. § 6928(f) (1988). The statute provides:

(f) Special Rules

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.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

*Provided*, That in proving the defendant’s possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

*Id.*

251. *Protex*, 874 F.2d at 744.

252. *Id.*

253. *Id.* at 743 (citation omitted).

establishment of a \$950,000 trust fund for endangered employees, payment of \$440,000 in fines, and a \$2,100,000 clean-up of the site.<sup>254</sup>

The standard of scienter to be applied to a corporate defendant under the Special Rules appears to be a somewhat less rigorous standard than that required of the "natural" person. While actual knowledge is required of the natural person,<sup>255</sup> such knowledge is specifically not to be attributed to a natural defendant if possessed by another.<sup>256</sup> Circumstantial evidence, however, may be used to prove actual knowledge on the part of a natural person.<sup>257</sup> It is difficult to reconcile the use of circumstantial evidence—job duties and the existence of a regulation—to support inferences of knowledge with this statutory restriction on the attribution of knowledge to a natural person. The restriction against attribution of knowledge is not written into the statute with respect to the corporate-defendant's state of mind.<sup>258</sup> It is, however, arguable that such inference, consistent with other court interpretation of RCRA knowledge, may be drawn.

Additionally, it must be pointed out that the Special Rules provide use of "circumstantial evidence" to prove actual knowledge.<sup>259</sup> As circumstantial evidence generally creates inference, it may well be that a court, in the case of a natural person as well as a corporate defendant, will allow the jury to draw inferences from the nature of the actions of the handlers of waste consistent with the "at peril" doctrine such that juries will be given more latitude in instructions than is generally allowed in criminal endangerment suits. The *Protex* holding, with its rather generalized approach to the "gist" of RCRA,<sup>260</sup> lends little support to an argument that in an endangerment prosecution the court will lean toward strict requirements of proof of knowledge of all elements of the statute. Indeed, the *Protex* court seems to underscore the notion of public welfare statutes as primarily designed to protect the public, and not to "place others in danger of great harm."<sup>261</sup>

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254. Fromm, *supra* note 227, at 831-32 (citing *United States v. Protex Indus.*, 18 Env't Rep. (BNA) 2353 (D. Colo. Mar. 18, 1988), *aff'd*, 874 F.2d 740 (10th Cir. 1989)).

255. 42 U.S.C. § 6298(f)(2) (1988).

256. *Id.*

257. *Id.*

258. The basis of corporate liability is inference of knowledge based upon employee action, consistent with well-settled corporate liability theory.

259. *See supra* note 250.

260. *Protex*, 874 F.2d at 744.

261. *Id.*

D. "Knowingly" Under the Endangered Species Act

In 1978 Congress amended the Endangered Species Act<sup>262</sup> (ESA) by substituting "knowingly" for "willfully" in prohibiting violation of the Act.<sup>263</sup> The legislative history reveals that Congress intended to make "criminal violations of the act a general rather than a specific intent crime, and subject[] importers and exporters of fish and wildlife and plants to strict liability penalties."<sup>264</sup> Moreover, the committee stated that it did "not intend to make knowledge of the law an element of . . . criminal violations of the Act."<sup>265</sup> Knowledge under this environmental regulatory statute thus requires only a general showing of intent to perform the act—such as shoot a panther<sup>266</sup>—rather than the specific act—to shoot a listed Florida panther. The penalty imposed is a fine of not more than \$25,000 or imprisonment for not more than six months, or both.<sup>267</sup> The Fifth Circuit, in *United States v. Nguyen*,<sup>268</sup> noted that the penalty is a misdemeanor and upheld Congress's right to dispense with a mens rea requirement.<sup>269</sup> The *Nguyen* court looked to the legislative history of the Act to uphold a criminal conviction without proof of specific knowledge.<sup>270</sup>

The judicial interpretation of scienter as requiring no specific knowledge of the regulatory scheme is consistent with the *Hoffin* RCRA decision. Given the more severe penalties applicable in RCRA violations, a general intent proof requirement is more surprising in that context than in the ESA context.

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262. Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified as amended at 16 U.S.C. §§ 1531-1544 (1988)).

263. 16 U.S.C. § 1540(b)(1) (1988).

264. H.R. REP. NO. 1625, 95th Cong., 2d Sess. 26 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9476.

265. H.R. REP. NO. 1804, 95th Cong., 2d Sess. 26 (1978), reprinted in 1978 U.S.C.C.A.N. 9484, 9493.

266. See *United States v. Billie*, 667 F. Supp. 1485, 1492-93 (S.D. Fla. 1987); see also *United States v. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988) (government is required to prove accused knowingly shot animal, not that animal was grizzly bear).

267. 16 U.S.C. § 1540(b)(1).

268. 916 F.2d 1016 (5th Cir. 1990).

269. *Id.* at 1019-20.

270. *Id.* at 1018-19.

*E. The Debate Over Scienter in Migratory Bird Treaty Act*

The Migratory Bird Treaty Act<sup>271</sup> (MBTA), prior to its amendment in 1986,<sup>272</sup> did not contain a requirement of scienter.<sup>273</sup> The absence of a scienter requirement led to opposite holdings by courts considering whether prosecutions under the MBTA violated due process.

In *United States v. Wulff*,<sup>274</sup> the Sixth Circuit dismissed an indictment charging the defendant with selling a necklace made of red-tailed hawk and great-horned owl talons, holding that, absent a requirement of scienter, the criminal provisions of the MBTA violated the defendant's due process rights.<sup>275</sup> Relying partly on Judge, now Justice, Blackmun's opinion in *Holdridge v. United States*,<sup>276</sup> the *Wulff* court concluded that "the elimination of criminal intent does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch [the defendant's reputation]."<sup>277</sup> The court concluded that the MBTA failed both parts of the test.<sup>278</sup> Because "the crime is not one known to the common law,"<sup>279</sup> the court refused to consider that the penalty provisions of the MBTA might contain an implied element of mens rea.

Requested to read scienter into the statute, the court declined on the grounds that "[a]n element of scienter can be read into an otherwise silent statute only where the crime is one borrowed from the common law."<sup>280</sup> This court has, thus, re-examined the underpinnings of the applicability of public welfare regulation, and recalling that it was bot-tomed on light penalties, refused to apply the at peril doctrine.

Citing its "obligation to afford congressional enactments the benefit of all reasonable arguments in favor of constitutionality," the Third Circuit in *United States v. Engler*<sup>281</sup> refused to accept the "government's concession that the absence of a scienter requirement in the felony provi-

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271. Act of July 3, 1918, ch. 128, 40 Stat. 755 (codified as amended at 16 U.S.C. §§ 703-712 (1988 & Supp. II 1990)).

272. Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, § 501, 100 Stat. 3582, 3590 (codified as amended at 16 U.S.C. § 707(b) (1988)).

273. See 16 U.S.C. §§ 703-712. The MBTA provided for felony penalties of imprisonment for not more than two years, or a fine of not more than \$2000, or both, for the sale, barter or offer to sell or barter a migratory bird protected by the statute. *Id.* at § 707(b)(2).

274. 758 F.2d 1121 (6th Cir. 1985).

275. *Id.* at 1125.

276. 282 F.2d 302 (8th Cir. 1960).

277. *Wulff*, 758 F.2d at 1125.

278. *Id.*

279. *Id.* at 1124.

280. *Id.*

281. 806 F.2d 425 (3d Cir. 1986).

sion of the [MBTA] violates the due process clause."<sup>282</sup> The court held that the MBTA penalty provisions did not violate due process because "due process is not violated by the imposition of strict liability as part of a regulatory measure in the interest of public safety."<sup>283</sup> Judge Higginbotham, in his concurrence, not only disagreed with the majority's determination that a violation of the MBTA is a public welfare offense "which the ordinary citizen would recognize as wrong," but suggested, that because the evidence showed that the defendant did indeed possess scienter, the constitutionality of the MBTA need not be passed on.<sup>284</sup>

In *Engler*, exactly what a public welfare offense encompasses became an issue. Judge Higginbotham, in his concurring opinion, looked to the nature of the action prohibited by section 707(b)(2) and declared that it was not a "public welfare offense"<sup>285</sup> because it was not "the 'type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety.'"<sup>286</sup>

Judge Higginbotham also differed with the majority in his discussion of the qualitative severity of a two-year felony penalty.<sup>287</sup> The majority upheld the statute as a permissible congressional "regulatory measure designed to protect the public welfare."<sup>288</sup> As to scienter, the majority found that a public welfare statute need "not specify intent as a necessary element."<sup>289</sup> By contrast, Judge Higginbotham examined the legislative history of the Act and, noting the desire of Congress "to deter commercial exploitation of migratory birds," inferred scienter as a requirement.<sup>290</sup>

This range of approaches to the public welfare doctrine in the context of an environmental criminal statute that is not clearly designed to protect public health and welfare in the traditional sense—the regulation of milk, drugs and food—nonetheless demonstrates the inherent difficulties. Does the court look to the purpose of the legislation generally, the health and safety of the people? Or should the specific purpose of the environmental statute in question be examined, such as migratory bird

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282. *Id.* at 433.

283. *Id.* at 435.

284. *Id.* at 438 (Higginbotham, J., concurring).

285. *Id.* at 439 (Higginbotham, J., concurring).

286. *Id.* at 439 n.4 (Higginbotham, J., concurring).

287. *See id.* at 439.

288. *Id.* at 432.

289. *Id.* at 431 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)).

290. *Id.* at 438 (Higginbotham, J., concurring) (citing S. REP. NO. 1779, 86th Cong., 2d Sess. 1 (1960), reprinted in 1960 U.S.C.C.A.N. 3459, 3460)).



protection? Must the court, if no scienter is required, look to the penalty to determine the need to infer a scienter requirement? Or does the court look to the nature of the prohibited act to determine if it historically required a reading of scienter? Again, the court, in the alternative, may simply look to the nature of the act and the goods involved and declare the "at peril" doctrine to apply.

Congress amended the MBTA in 1986 to require knowing violations before the violator would be subject to criminal liability.<sup>291</sup> The question thus arises, what will "knowingly" encompass in light of other environmental criminal statutes decisions? It would seem that it will require merely a general showing of intent to commit the prohibited act as in ESA cases, rather than a specific intent. Additionally, knowledge of the protected nature of the birds themselves most probably will not be necessary.

#### IV. THE CLEAN AIR AMENDMENTS AND THE PUBLIC WELFARE DOCTRINE

##### A. *The Provisions*

The recently enacted amendments to the Clean Air Act<sup>292</sup> add more confusion to criminal environmental prosecutions. The statute penalizes "any person who knowingly" violates an implementation plan with a fine or a maximum imprisonment of not more than five years, or both.<sup>293</sup> Persons who "knowingly" falsify or fail to make appropriate reports are subject to a fine or imprisonment of not more than two years, or both.<sup>294</sup> Knowing failure to pay fees owed is an offense subject to fine or imprisonment for not more than one year, or both.<sup>295</sup> Negligent release of a hazardous air pollutant into the ambient air thereby "negligently" placing "another person in imminent danger of death or serious bodily injury" is punishable by a fine or imprisonment for not more than one year, or both.<sup>296</sup> "Knowing" release of a hazardous air pollutant, coupled with knowledge "at the time that he thereby places another person in imminent danger of death or serious bodily injury"<sup>297</sup> is punishable by a fine or imprisonment of not more than fifteen years, or both. A corpo-

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291. Emergency Resources Wetlands Act § 501.

292. 42 U.S.C. § 7413 (1988 & Supp. II 1990).

293. *Id.* § 7413(c)(1).

294. *Id.* § 7413(c)(2).

295. *Id.* § 7413(c)(3).

296. *Id.* § 7413(c)(4).

297. *Id.* § 7413(c)(5)(A).

rate defendant is subject to a fine of not more than \$1,000,000 per violation.<sup>298</sup>

As in RCRA, knowledge requires proof of "actual awareness or actual belief possessed,"<sup>299</sup> and "knowledge possessed by a person other than the defendant . . . may not be attributed to the defendant."<sup>300</sup> Additionally, circumstantial evidence, as in RCRA, may be used to prove actual knowledge, including avoidance.<sup>301</sup>

### B. *The Applicable Scope and Use of Scierter*

Problems arise in determining the scope of applicability of the criminal provisions. The provisions are written in terms of "knowing" violations.<sup>302</sup> Yet the applicability of the statute as to "operators" and "persons" is delineated in terms of whether the violations were "knowing and willful."<sup>303</sup> The statute does not contain enforcement provisions for "knowing and willful" violations outside the definitional section qualifying "operator" and "person."

A "person" is specifically defined as including "any responsible corporate officer."<sup>304</sup> An "operator" is defined to include "any person who is senior management personnel or a corporate officer."<sup>305</sup> An "operator" does *not* include: "any person who is a stationary engineer or technician responsible for the operation, maintenance, repair, or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer."<sup>306</sup> That definition of operator apparently applies to "knowing" violations of sections 113(c)(1) through (5). However, in the case of "knowing and willful" violations of the same statute, the exception carved out will not apply; "operator" will not be so limited.<sup>307</sup> Apparently the drafters anticipated charging a defendant with "knowing and willful" violations, although the statute elsewhere contains no such enabling provision.

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298. *Id.*

299. *Id.* § 7413(c)(5)(B)(i). In RCRA such provisions are restricted to "natural persons." *Id.* § 6928(f)(2).

300. *Id.* § 7413(c)(5)(B)(ii).

301. *Id.* § 7413(c)(5)(B). For the relevant text of the RCRA regulation, see *supra* note 250. Note that the provisions defining when a person's state of mind is knowing provided in the RCRA Special Rules are not included in the CAA. See 42 U.S.C. § 6928(f)(1).

302. *Id.* § 7413(c)(1).

303. *Id.* § 7413(h).

304. *Id.* § 7413(c)(6).

305. *Id.* § 7413(h).

306. *Id.*

307. *Id.*

A "person," which includes "any responsible corporate officer,"<sup>308</sup> excludes those who meet a two-pronged test in a "knowing" violation of all sections except negligent endangerment. The test is that a "person" shall not include an employee who is (1) carrying out his or her normal activities *and* (2) is acting under orders from his or her employer.<sup>309</sup> This test would seem to apply to responsible corporate officers as well, offering them some shield. This specifically applies to the endangerment provision in section 113(c)(5), as well as the minor violations of sections 113(c)(1), (2) and (3).

However, if the prosecution is for a "knowing and willful violation," this test does *not* apply.<sup>310</sup> Again, the statutory definitions appear to contemplate two types of criminal liability, "knowing" and "knowing and willful," although there is no provision for the latter.

In negligent endangerment prosecutions, scope is again determined by whether the prosecution is for a "knowing and willful" violation. "Person" is subject to a different test for negligent endangerment application. For a violation of subsection (c)(4), "person" will not include an employee (1) who is carrying out his or her normal activities *and* (2) who is not a part of senior management personnel *or* a corporate officer.<sup>311</sup> This would seem to exclude the application of the exception to responsible corporate officers. The exception is inapplicable to any defendant if it is a "knowing and willful" violation of (c)(4).<sup>312</sup> Because subsection (c)(4) is written only in negligence language, it is difficult to understand how a "knowing and willful" prosecution would lie.

Commentators at this early stage have not yet remarked upon this drafting technique nor indicated prosecutorial difficulties.<sup>313</sup> Legislative history further complicates the matter by including language that to prove "knowing and willful," the government need not establish that the defendant had specific knowledge of a violation of the Act. Knowledge of the action as generally unlawful would suffice.<sup>314</sup>

This history is similar to language contained in the ESA legislative history, but in that instance "willful" was deleted from the statute and replaced by simply "knowingly" to establish general rather than specific

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308. *Id.* § 7413(c)(6).

309. *Id.* § 7413(h).

310. *Id.*

311. *Id.*

312. *Id.*

313. See Roady, *supra* note 2, at 10,201-02 for a discussion of the House and Senate conflicts regarding proposed amendments.

314. 136 CONG. REC. S16,952 (daily ed. Oct. 27, 1990); *see also* Roady, *supra* note 2, at 10,202 (Senate intended to eliminate "acting under orders" defense of employees).

intent.<sup>315</sup> In this instance, general intent is also the apparent goal but the “willfully” language remains in the statute as well. Nonetheless, a showing of general unlawfulness would be consistent with the *Hoffin* RCRA decision.<sup>316</sup> What is troublesome is the meaning of “willful” in the statute.<sup>317</sup>

The technique of drafting the statute in a manner that determines applicable scope by use of the words “knowing” or “knowing and willful,” traditionally employed in the criminal system to differentiate degrees of crime and the appropriate proof burdens for the government, is also worrisome. Courts will be called upon to interpret the CAA within the context of the public welfare doctrine as heretofore applied to criminal environmental statutes. *Scienter*, not a traditional element of the public welfare doctrine, was forcibly annexed thereto by an earnest legislative effort to punish and deter environmental crimes against an innocent citizenry. Already weakened by generalization and inferences, under the CAA “willfully” apparently will be attached to the staggering public welfare doctrine in a fumbling legislative attempt to provide appropriately severe criminal penalties.

Moreover, courts apparently will be asked to uphold “knowing and willful” prosecutions under a criminal environmental statute that contains no language for such violations. Claims to violations of constitutional due process<sup>318</sup> must surely rise from a criminal statute with such a garbled warning of the consequences of prohibited behavior.<sup>319</sup> The mantle of congressional regulatory purpose will not suffice to permit a two-tiered criminal liability scheme under a statute that does not specifically so provide. The public welfare doctrine, already strained, cannot

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315. See *supra* notes 263-64 and accompanying text.

316. See *supra* notes 241-46 and accompanying text.

317. Given the legislative history of the Endangered Species Act on the deletion of “willfully,” one might argue that the statute requires a more specific intent. See *supra* notes 216-17 and accompanying text.

318. See *United States v. Engler*, 806 F.2d 425 (3d Cir. 1986); *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985). These cases are discussed *supra* at notes 274-90 and accompanying text.

319. An analysis of the scope of the corporate officer doctrine under the CAA is beyond the purview of this paper. The leading case on this doctrine as applied to environmental statutes is *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991). For a detailed analysis of *Dee*, see Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After United States v. Dee*, 59 GEO. WASH. L. REV. 862, 871-81 (1991). Additionally, no attempt is made to evaluate necessity defenses indicated as permissible under *United States v. Boldt*, 929 F.2d 35, 38 (1st Cir. 1991), and anticipated by the drafters of the CAA when they included a section covering “[c]oncepts of justification and excuse applicable.” 42 U.S.C. § 7413(c)(5)(D).

serve as a source of legitimacy to an undelineated criminal liability standard, albeit conceived to protect the public weal.

## V. CONCLUSION

Commentators have struggled to define the standard of intent to be applied in environmental criminal prosecutions.<sup>320</sup> These regulatory statutes have been deemed public welfare legislation.<sup>321</sup> However, knowledge was not a part of the public welfare doctrine. Indeed, the doctrine developed through a judicially perceived need to validate congressional efforts to protect the health and well-being of an innocent public. Consistently, the U.S. Supreme Court has recognized that the Constitution requires a reading of scienter only in crimes of common-law origin, rejecting claims to require such a reading into public welfare legislation.

The Supreme Court, from *Balint* to *Park*, has balanced the needs of the public against harsh requirements for persons in a position to prevent harm and effectuate a higher standard of care. The nature of the goods handled has evoked a doctrine of "at peril" ramifications now generally understood by modern society.

As the penalties under such legislation have grown more severe, Congress has sought to protect the constitutionality of the criminal penalties by requiring "knowledge." But is the operative function of "knowledge" in criminal environmental statutes to be the preclusion of constitutional due process challenges? The function of "knowledge" in criminal environmental statutes imposing severe fines, lengthy jail

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320. See Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133 (1986). "[RCRA] statutory standard of liability, then, has been construed essentially as 'knew or should have known;' although similar to a negligence test, it probably requires a more overt or egregious lack of due care similar to a gross negligence test." *Id.* at 1154; see also Barrett & Clarke, *supra* note 319, at 888 (1991) (arguing that knowledge requirement should be interpreted broadly to protect public health); Christopher Harris et al., *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203, 236 (1988) (discussing judicial split of opinion regarding interpretation of knowledge requirement); Truxtun Hare, Comment, *Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act*, 138 U. PA. L. REV. 935, 951 (1990) (discussing expansion of negligence doctrine under responsible corporate officer theory); Robert A. Milne, Note, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Liability in Substance But Not Form*, 37 BUFF. L. REV. 307, 330-31 (1988-89) (noting judicial retreat from strict liability formulation for criminal environmental statutes).

321. See Stephen Herm, Comment, *Criminal Enforcement of Environmental Laws on Federal Facilities*, 59 GEO. WASH. L. REV. 938, 958 n.143 (1991).

sentences and felony stigma must be to give fair warning to potential violators of the consequences of their action.

Public welfare offenses, by their nature, historically put the public on notice of the possibility of penalty as a result of the nature of the goods being handled by the actor. Thus, a statute with the requirement of proof of knowledge of action is arguably contrary to the fundamental basis of a public welfare statute: that no knowledge of the law is required to impose a penalty. Under the public welfare doctrine, scienter is not required. This is exactly the approach the courts have implicitly taken. Generalized proof of knowledge has been accepted in an attempt to penalize the outrageously guilty. As long as one can rely on the discretion of prosecutors and the good sense of juries, perhaps this is an acceptable extension of the public welfare doctrine. However, as an eager Congress rapidly creates more ambitious environmental statutes and more severe penalties for violations, perhaps it is time to pause.<sup>322</sup>

Negligent and knowing endangerment violations of environmental statutes are serious crimes. Such crimes are not unknown to penal codes or the criminal justice system. But they are unknown to the public welfare offense doctrine. Moreover, they are an inappropriate addition to that doctrine by their very nature. As substantial crimes punishable by substantial penalties, they are at odds with the philosophical basis of the public welfare doctrine that condoned lack of scienter largely on the grounds that the penalties were moderate. The purpose of environmental statutes has also undergone considerable change, from mild police regulation to more severe regulation for the betterment of society, and finally to punishment as deterrence. The application of the public welfare doctrine to environmental crimes by importing a requirement of scienter appears at this juncture to have become a legal paradox.

Continued application of the public welfare doctrine to environmental crimes is no longer an appropriate extension of that theory. Congress has created serious environmental crimes, not mere public welfare offenses. Prosecution of environmental crimes should be recognized as such, and concomitant judicial interpretation of the rights of defendants must follow.

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322. Criminal enforcement has been deemed a priority for the next decade. See James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916, 924-26 (1991).

