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DOES CULPABILITY MATTER?: STATUTORY CONSTRUCTION UNDER 42 U.S.C. § 6928

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I. INTRODUCTION

Commentators¹ and judges² have frequently criticized Supreme Court decisions involving statutory construction. That criticism is especially sharp when the statute to be interpreted involves the requisite *mens rea* to be applied to various elements of a criminal offense.³ Despite the recognition that the Supreme Court's case law is "ad hoc" and confusing, Congress has compounded the problem by enacting new statutes using the same grammatical constructions that produced the "ad hoc" results in the past.⁴ In addition, Congress has consistently refused to enact a general culpability provision which might give guidance to lower

1. See Shirley S. Abrahamson and Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1048 (1991); see also William S. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990); Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 768 (1991); Burt Neuborne, *Background Norms for Federal Statutory Interpretation*, 22 CONN. L. REV. 721, 723-24 (1990); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 384 (1992); Craig W. Dallan, Note, *Interpreting Statutes Faithfully--Not Dynamically*, 1991 B.Y.U. L. REV. 1353, 1353-54; Bruce R. Grace, Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1392-93 (1986).

2. See *Liparota v. United States*, 471 U.S. 419, 434-43 (1985) (White, J., dissenting); see also *Lambert v. California*, 355 U.S. 225, 230-32 (1957) (Frankfurter, J., dissenting).

3. See *Liparota*, 471 U.S. at 434-43 (White, J., dissenting); see also *Lambert*, 355 U.S. at 230-32 (Frankfurter, J., dissenting).

4. See discussion *infra* notes 286-358 and accompanying text.

courts faced with complex federal criminal statutes.⁵

42 U.S.C. § 6928 of the Resource Conservation and Recovery Act⁶ (RCRA or the Act) provides a case study in confusion. In 1980, Congress added stepped up criminal sanctions, making violations of the original 1976 Act felonies rather than misdemeanors, in part to interest the FBI in investigating violations of the act.⁷ The 1980 amendments made violations of the act felonious if the acts were committed knowingly.⁸ During the 1980's, panels of the Third, Ninth, and Eleventh Circuits decided cases raising questions about the scope of the *mens rea* term.⁹ The Third and Ninth Circuits came to opposite conclusions concerning the same subsection of the Act¹⁰ while the Eleventh Circuit interpreted a related subsection in a manner that suggested yet a third approach to the same statutory construction problem.¹¹ More recently, the Fourth and Fifth Circuits have read 42 U.S.C. § 6928 narrowly.¹²

5. See, e.g., S. 1722, 96th Cong., 1st Sess. § 302 (1979) (known as Criminal Code Reform Act of 1979 it contained general culpability provisions, but was never enacted).

6. Resource Conservation and Recovery Act, 42 U.S.C. § 6928 (1992).

7. See Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (codified as amended at 42 U.S.C. § 6928 (1992)); see also The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221, 3256 § 232(a)(3) (codified as amended at 42 U.S.C. § 6928(d) (1992)) (increasing criminal sanctions for conviction under § 6928(d) from \$25,000 to \$50,000 for each day of violation; allowing imprisonment for up to two years rather than one; and increasing maximum punishment for a second conviction under §§ (d)(2) to double the fine or imprisonment term for the first conviction).

8. Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334, 2340 (codified as amended at 42 U.S.C. § 6928 (1992)).

9. United States v. Johnson and Towers, Inc., 741 F.2d 662 (3rd Cir. 1983), cert. denied sub nom. Angel v. United States, 469 U.S. 1208 (1985); United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990); United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986).

10. Johnson & Towers, 741 F.2d at 665; Hoflin, 880 F.2d at 1039.

11. Hayes Int'l, 786 F.2d at 1502.

12. United States v. Dee, 913 F.2d 741, 745 (4th Cir. 1990), cert. denied, 111 St. Ct. 1307 (1990); United States v. Baytank, 934 F.2d 599, 613 (5th Cir. 1991).

In 1989, the Supreme Court denied certiorari in *United States v. Hoflin*,¹³ thereby missing an opportunity to resolve the multi-circuit conflict in an area of increasing prosecutorial interest.¹⁴ In addition, a grant of certiorari would have given the Supreme Court another opportunity to bring order to a recurring problem of statutory construction that has cut across the criminal law for decades. The problem is especially significant now because the Court,¹⁵ Congress,¹⁶ and a wide array of commentators¹⁷ have shown an increased recognition that criminal sanctions should be reserved for culpable individuals. At the same time, Congress and the executive have shown increased political awareness to environmental criminal laws.¹⁸ The proper interpretation of 42 U.S.C. § 6928 presents a sharp conflict between those competing values.

This article reviews the circuit court cases interpreting 42 U.S.C. § 6928 and examines the statute's language and legislative history. Despite the Ninth Circuit's conclusion to the contrary, the language of the act is ambiguous.¹⁹ The best evidence of that fact is the array of cases interpreting similar statutes that come to

13. *Hoflin*, 880 F.2d 1033 (9th Cir. 1989).

14. See Robert I. McMurry and Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1134-45 (1986); see also Paul G. Nittoly, *Environmental Criminal Cases: The Dawn of a New Era*, 21 SETON HALL L. REV. 1125, 1125-26 (1991); Judson W. Starr, *Countering Environmental Crimes*, 13 B. C. ENVTL. AFF. L. REV. 379, 379-84 (1986); Judith Ianelli, Note, *Lessening the Mens Rea Requirement for Hazardous Waste Violations*, 16 VT. L. REV. 419, 426-34 (1991).

15. *Liparota v. United States*, 471 U.S. 419, 425-26 (1985).

16. See 126 CONG. REC. H3367-68 (daily ed. Feb. 20, 1980) (statement of Mr. Madigan).

17. MODEL PENAL CODE § 2.02 commentary at 227-233 (1985); but see MODEL PENAL CODE § 2.05 commentary at 281-84 (allowing for strict liability when the offense is a violation, the penalty for which would only be a fine).

18. See Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L. J. 821, 822-23 (1990); see also Karen M. Hansen, "Knowing" *Environmental Crimes*, 16 WM. MITCHELL L. REV. 987, 987 n.1 (1990); McMurray, *supra* note 14, at 1140-44; Starr, *supra* note 18, at 380-81.

19. See discussion *infra* notes 185-255 and accompanying text.

inconsistent results. Once a statute is found ambiguous, the Supreme Court has held, the lower court should turn to legislative history.²⁰ Therefore, this article examines the legislative history for guidance to the correct interpretation of the Act. This legislative history is unilluminating and demonstrates that Congress reserved to the courts the role of defining the meaning of the language of the act.²¹ In effect, Congress urged the Court to do what it has done in this area before, i.e., to look to Supreme Court cases that have been inconsistent and ad hoc,²² instead of giving clear guidance on how the act ought to be interpreted.

Therefore, this article examines the Supreme Court's general approach to interpreting statutes that contain a "knowing" *mens rea* and attempts to identify how 42 U.S.C. § 6928 might be interpreted consistently with that line of cases. Distinct themes emerge, though, when one examines the relevant precedent. For example, in *United States v. International Minerals & Chemical Corp.*,²³ the Court interpreted a similar provision consistent with a presumption that ignorance of the law is no defense. More recently, however, in *Liparota v. United States*,²⁴ the Court ignored the presumption that ignorance of law is no defense and found more persuasive the argument that criminal conduct must be premised on a finding of culpability.

This article addresses the tension between those two background assumptions of the criminal law and analyzes how they play out in a 42 U.S.C. § 6928 prosecution.²⁵ It argues that in light of clear developments in the criminal law over the past several decades, the claim that ignorance of the law is no defense is grossly exaggerated and is a much less useful guide to interpreting criminal statutes than the abiding notion that criminal

20. *Moskal v. United States*, 498 U.S. 103, 114-15 (1990); see discussion *infra* notes 255-84 and accompanying text.

21. See discussion *infra* notes 286-358 and accompanying text.

22. See discussion *infra* notes 293-365 and accompanying text.

23. *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971).

24. *Liparota v. United States*, 471 U.S. 419, 434 (1985).

25. See discussion *infra* notes 359-93 and accompanying text.

liability should be conditioned on blameworthy conduct.²⁶

In the past, Congress has been unable to codify federal criminal law.²⁷ But in light of its repeated inability to draft clearly worded statutes and to debate coherently the complex problems addressed in federal courts, Congress should attempt the less onerous task of adopting a general culpability provision.²⁸ To demonstrate the soundness of such an enterprise, this article discusses how a provision like Model Penal Code § 2.02 would have made more coherent and principled the lower courts' job in the relevant cases.

Finally, this article challenges the common assumption that strict liability is necessary to protect the environment. Failing to allow a defendant to negate knowledge of a permit requirement may impose criminal liability on a defendant lacking a culpable state of mind.²⁹ In light of the wide array of enforcement devices in modern federal regulatory schemes, the federal government can pursue the legitimate goal of protecting the environment without criminalizing non-culpable offenders.³⁰

II. 42 U.S.C. § 6928 OF THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

Originally enacted in 1976, the Resource Conservation and Recovery Act has been described as the "primary statute regulating hazardous waste."³¹ Congress designed a "cradle-to-grave" system to manage and monitor hazardous waste. Specifically, RCRA regulates the creation, storage, transportation and disposal

26. See discussion *infra* notes 359-93 and accompanying text.

27. See Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 1977 DUKE L. J. 171, 174-82 (1977).

28. See, e.g., S. 1722, 96th Cong., 1st Sess. § 302 (1979) (attempting to provide a general culpability provision in a bill known as the Criminal Code Reform Act of 1979. This bill was never enacted). See discussion *supra* note 5 and accompanying text.

29. See discussion *infra* notes 198-99, 240-47 and accompanying text.

30. See discussion *infra* notes 394-420 and accompanying text.

31. See Starr, *supra* note 14, at 386; see also Fromm, *supra* note 18, at 825-32.

of hazardous waste.³²

The party that creates the hazardous waste must notify the Environmental Protection Agency (EPA) that it has created a hazardous waste. The EPA gives the applicant an identification number for manifesting purposes.³³ "[The] manifest is the form used to identify the quantity, composition, origin, routing and destination of hazardous waste during its transportation from point of generation to the point of disposal, treatment or storage."³⁴ In addition to the manifest system, a facility that "treats, stores or disposes of hazardous waste" must obtain a permit establishing standards for handling hazardous waste.³⁵

RCRA also regulates transporters of hazardous waste.³⁶ The firm that transports the waste to a disposal site is required to sign the manifest.³⁷ It is also required to transport the waste only to a facility that has secured the appropriate permit to dispose of the waste.³⁸ That facility in turn must sign and return a copy of the manifest to the original generator of the hazardous waste.³⁹ Early enforcement efforts under RCRA were primarily civil in large part due to a lack of adequate resources and due to the lack of significant criminal sanctions under the Act.⁴⁰ By the late 1970's federal officials and the public were made aware of "the potential severity of the environmental danger resulting from unscrupulous operators' illegal disposal of hazardous waste."⁴¹ Highly publicized environmental disasters like Love Canal in Niagara Falls, New York, and the Valley of Drums in

32. Fromm, *supra* note 14, at 825.

33. Starr, *supra* note 14, at 385-87.

34. Starr, *supra* note 14, at 386 n.17.

35. Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(2)(A).

36. Starr, *supra* note 14, at 386 (observing that transporters of hazardous waste are also regulated by the Dept. of Transportation).

37. *Id.* at 387.

38. *Id.* at 386.

39. *Id.* at 387.

40. McMurry, *supra* note 14, at 1138.

41. *Id.*

Shepardsville, Kentucky, increased pressure on Congress to act.⁴² During hearings before Congress, for example, one federal official testified that "[w]e do not know where the millions of tons of stuff is going. We feel that the things that have turned up like the Love Canal and Kin-Buc situation are simply the tip of the iceberg. We do not have the capacity at this time really to find out what is actually happening."⁴³

In 1980, Congress amended RCRA,⁴⁴ as a partial response to the increased concern about environmental risks.⁴⁵ The amendments were largely "fine tuning" of RCRA's substantive provisions.⁴⁶ The most significant change effected by the amendments, in keeping with the increased public interest in deterring contamination of the environment, was the increased criminal sanctions for violations of the Act.⁴⁷

RCRA provides for a wide array of enforcement devices, including compliance orders, civil penalties, and injunctive relief.⁴⁸ The 1980 amendments added felony penalties which committed the resources of the Justice Department and the FBI to the detection and prosecution of environmental crimes.⁴⁹ According to Congressman Florio, "[o]ne of the things the Justice Department is very interested in is getting the assistance of the FBI

42. See 126 CONG. REC. H3345, 48 (daily ed. Feb. 20, 1980) (statement of Mr. Florio).

43. 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, 206 (1988).

44. Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (codified as amended at 42 U.S.C. §§ 6901(a)-(d)(1992), 6928(d) (1992)).

45. See Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. § 9601 (1983); see also Harris, *supra* note 43, at 206.

46. Harris, *supra* note 43, at 206.

47. Resource Conservation and Recovery Act of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (codified as amendment at 42 U.S.C. § 6928(d) (1992)); see also Harris, *supra* note 43, at 206-07.

48. 42 U.S.C. § 6928 (1987) (current version at 42 U.S.C. § 6928 (1992)).

49. 126 CONG. REC. H3368 (daily ed. Feb. 20, 1980) (statement of Mr. Mikulski).

in certain instances, especially interstate commerce. The FBI either has an official policy or an unofficial policy of not becoming involved in misdemeanors."⁵⁰ Upgrading the penalty provisions would commit greater FBI resources to "tracking down some of these people."⁵¹

Congress made criminal a variety of acts surrounding the treating, storing, and transporting of hazardous waste. Specifically, 42 U.S.C. § 6928(d) provides:

Any person who --

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under [relevant provisions of federal law] . . .

(2) knowingly treats, stores, or disposes of any [specified] hazardous waste . . .

(A) without a permit under [relevant provisions of federal law]; or

(B) in knowing violation of any material condition or requirement of such permit . . .

shall, upon conviction, be subject to a fine . . . or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both.⁵²

Congress amended the penalty provision in 1984 to increase the fine and to provide for maximum terms of imprisonment "not to exceed two years (five years in the case of a violation of paragraph (1) or (2))."⁵³

Moreover in 42 U.S.C. § 6928(e), Congress added an

50. *Id.* (statement of Mr. Florio).

51. *Id.*

52. 42 U.S.C. § 6928(d) (1992).

53. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221, 3257 § 232(a) (codified as amended at 42 U.S.C. § 6928(d) (1992)).

enhanced criminal provision for a violation of 42 U.S.C. § 6928(d) if the actor not only violated the provisions of 42 U.S.C. § 6928(d), but did so with the knowledge that his violation "places another person in imminent danger of death or serious bodily injury" ⁵⁴ A violation of 42 U.S.C. § 6928(e) can result in imprisonment of up to fifteen years and/or a fine of not more than \$250,000. ⁵⁵

III. THE CONFLICTING VIEWS OF SECTION 6928(d)

42 U.S.C. § 6928(d) has been the subject of dispute in several circuits. The Third, Fourth, Fifth and Ninth Circuits have interpreted the meaning of 42 U.S.C. § 6928(d)(2)(A), making it criminal if a person "knowingly treats, stores, or disposes of any hazardous waste . . . (A) without a permit" ⁵⁶ The Eleventh Circuit has construed 42 U.S.C. § 6928(d)(1), making it a crime for a person to knowingly transport hazardous waste "to a facility which does not have a permit" ⁵⁷ The various circuits have taken inconsistent approaches on the question relating to *mens rea*. Three distinct positions have emerged on what the actor must know or how far down the sentence the knowledge term runs. ⁵⁸

A. *United States v. Johnson & Towers*

In *United States v. Johnson & Towers, Inc.*, ⁵⁹ the corporate

54. 42 U.S.C. § 6928.

55. 42 U.S.C. § 6928(e).

56. 42 U.S.C. § 6928(d)(2)(A). See *United States v. Johnson & Towers, Inc.*, 742 F.2d 662 (3rd Cir. 1984), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985); *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307, 1307-08 (1990); *United States v. Sellers*, 926 F.2d 410, 414-15 (5th Cir. 1991); *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

57. 42 U.S.C. § 6928(d)(2)(A); see *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986).

58. *Liparota v. United States*, 471 U.S. 419, 424-25 n.7 (1985).

59. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3rd Cir. 1984), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985).

defendant owned a facility where its employees repaired large motor vehicles. That activity generated industrial waste governed by RCRA.⁶⁰ Johnson & Towers employees drained waste chemicals into a holding tank, but then pumped the hazardous waste into Parker's Creek, a tributary of the Delaware River. The corporation had neither applied for nor obtained a permit to do, as required by RCRA.⁶¹

A grand jury indicted the corporation and two employees, a foreman and a service manager in the trucking department. The two employees were alleged to have "'managed, supervised and directed a substantial portion of Johnson & Towers' operations . . . including those related to the treatment, storage, and disposal of the hazardous waste and pollutants' and that the chemicals were discharged by 'the defendants and others at their direction.'"⁶²

The district court dismissed the alleged violations of 42 U.S.C. § 6928(d) on the ground that RCRA's criminal provisions apply only to "owners and operators" of a facility.⁶³ The Third Circuit reversed the district court's order and held that 42 U.S.C. § 6928 applied to "any person," including employees.⁶⁴ It did so based on the plain language of the Act and on the view that a more limited application of the Act would undermine RCRA by exempting employees who are responsible for handling regulated material.⁶⁵

Because the court remanded the case for trial on the section 6928(d) violations, it also addressed the *mens rea* question in order to guide the lower court's interpretation of the Act.⁶⁶

As developed in more detail below,⁶⁷ the Third Circuit's interpretation of the *mens rea* term is appropriate in light of the many people who might otherwise be found in violation of the Act without significant culpability. In other words, limiting the term

60. *Id.* at 663-64.

61. *Id.* at 664.

62. *Id.*

63. *Id.*

64. *Id.* at 665.

65. *Id.* at 667.

66. *Id.*

67. See discussion *infra* notes 240-47 and accompanying text.

"person" to owners or operators would have guaranteed that the defendant would be in a position to know about the permit requirement and to make a reasoned business decision about procuring a permit. By expanding the term "person,"⁶⁸ the court left open the possibility that lower echelon employees, acting under orders of supervisors, could be found guilty even though they had no reason to know that a permit was required and that one was not procured.

On the *mens rea* question, the government argued that all it had to prove was that the defendant is a "person," that the defendant handled hazardous material, and that no one had obtained a permit for the disposal or treatment of the waste.⁶⁹

In fact, the government's position was draconian. The key provision, 42 U.S.C. § 6928(d)(2), provides that a person is guilty if he "knowingly treats, stores, or disposes of any hazardous waste"⁷⁰ Under the government's view, the term "knowingly," an adverb, would modify the verbs, "treats, stores, or disposes."⁷¹ Presumably, almost anyone who treated or disposed of a substance would be engaging in conduct of which he was aware. He might not know the nature of the substance, but that would not be required under the government's interpretation of the Act. A second example demonstrates how extreme the government's position was. A defendant might be storing an object without any knowledge of its nature. An employee at a large facility may not know that drums of hazardous waste are stored on the facility at all. But under the government's interpretation of the Act, the defendant would be guilty as soon as he knew that he was storing an object which, coincidentally, turned out to be hazardous waste.

Under the government's view, the sweep of the Act would be broad indeed. In the hypothetical suggested above a large corporation might have any number of employees who had responsibility for storing hazardous waste. They might be aware

68. *Johnson & Towers*, 741 F.2d at 665 (defining "person" to be that as provided in 42 U.S.C. § 6903(15), a broad definition).

69. *Id.* at 667.

70. 42 U.S.C. § 6928(d)(2).

71. *Johnson & Towers*, 742 F.2d at 667.

that something was being stored, but might have no idea what the substance was and might not even have any reason to inquire.

Because the Third Circuit believed the term "knowingly" would be superfluous if it modified only "treats, stores, or disposes," it concluded that "[a]t a minimum, the word 'knowingly' . . . must also encompass knowledge that the waste material is hazardous."⁷²

To that point, the Third Circuit's analysis has not produced significant disagreement.⁷³ What followed though has proved to be the most difficult issue of statutory construction. The lower court had already found that there was no requirement that the actor had to know that he was "acting without a permit or in violation of the law."⁷⁴ Conceding that the Act was a public welfare statute, the court correctly concluded that fact is not dispositive on whether Congress intended to impose a *mens rea* requirement.⁷⁵ Instead, it looked at the parallel provision of the Act, that is, subsection 42 U.S.C. § 6928(d)(2)(B) which specifically provides that a person must knowingly treat hazardous waste "in knowing violation of any material condition . . . of such permit."⁷⁶ It argued that it would be arbitrary to treat violators under subsections (A) and (B) differently. The court reasoned that Congress could not have intended to hold criminally liable those persons who acted when no permit had been obtained irrespective of their knowledge but not those persons who acted in violation of the terms of a permit unless that action was knowing.⁷⁷

Thus, the court concluded that "knowingly" attached to the requirement of having a permit under section 6928(d)(2)(A).

72. *Id.* at 668 (relying on *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563-64 (1943)).

73. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1506 (11th Cir. 1986); *see also* *United States v. Dee*, 912 F.2d 741, 745-46 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1990); *United States v. Sellers*, 926 F.2d 410, 416 (5th Cir. 1991); *United States v. Hoflin*, 880 F.2d 1033, 1039 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

74. *Johnson & Towers*, 741 F.2d at 668 (summarizing the conclusions of the District Court).

75. *Id.* *But see* Hansen, *supra* note 18, at 1004-70.

76. 42 U.S.C. § 6928(d)(2)(B).

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

Specifically, on that reading, the government had to prove more than the fact that the defendant knew that his employer stored or disposed of waste that he knew to be hazardous. It had to prove that the defendant knew that his employer was required to have and did not have a permit.⁷⁸

Johnson & Towers is not without ambiguity. For example, in separate sections of the opinion, the court characterizes its holding in different ways. Thus, when first summarizing its holding, the court stated that an employee "can be subject to criminal prosecution only if [he] knew *or should have known* that there had been no compliance with the permit requirement"⁷⁹ But in concluding, the court stated that the district court must instruct the jury that the defendant must have actual knowledge.⁸⁰ The court also created potential confusion both by holding that the government must show that the defendant knew that a permit was required,⁸¹ but also asserting that "under certain regulatory statutes requiring 'knowing' conduct the government need prove only knowledge of the actions taken and not of the statute forbidding them."⁸²

Especially in light of the court's conclusion that the Act applied to any person who treated, stored, or disposed of hazardous waste, the court's conclusion that the term "knowingly" would attach to all of the material elements of the offense serves as a reasonable limitation on the possible applications of the Act. Specifically one might envision any number of corporate

78. *Id.* at 669. Sloviter, J., writing for the majority, argued that the government's burden was lowered. However, the court characterizes the knowledge requirement differently, *id.* See, e.g., *id.* at 664-65, holding that "should have known" is the standard where defendant is an employee.

79. *Id.* at 665 (emphasis added).

80. *Id.* at 664. The Supreme Court has noted that knowledge requires subjective awareness. See *Turner v. United States*, 396 U.S. 398, 416 n.29 (1970). Not all courts make that distinction; see also *Director of Public Prosecutions v. Smith*, 1961 App. Cas. 290, 327 (1960); ALI, MODEL PENAL CODE § 2.02 commentary at 234 (1985) (discussing *Director of Public Prosecutions v. Smith*, 1961 App. Cas. 290 (1960)).

81. *Johnson & Towers*, 741 F.2d at 669.

82. *Id.* at 669 (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)).

employees who literally treat, store, or dispose of hazardous waste whose conduct is not culpable. For example, a forklift driver who stacks drums of hazardous waste in violation of the law has done nothing blameworthy unless he has reason to know that his conduct violates the law.⁸³ In many instances, the handling of hazardous waste is socially accepted conduct -- for example, Congress has not outlawed generation of hazardous waste. Indeed, Congress has made some treatment and handling of hazardous waste entirely legal as long as it is done within the terms of a permit.⁸⁴

Johnson & Towers' interpretation of 42 U.S.C. § 6928 does require the government to establish individual culpability in that the actor had to be aware that his conduct was in violation of the law. At the same time, the court underscored that, as is often the case in a regulated industry, a jury is entitled to infer that a person in a position of responsibility is in fact aware of regulations and can disbelieve that person's denial of knowledge.⁸⁵

B. United States v. Hayes International Corp.

In *United States v. Hayes International, Corp.*,⁸⁶ the corporate defendant operated an airplane refurbishing plant. The company generated two waste products covered by the Act, jet fuel drained from planes on which work was to be performed, and a mixture of solvents and paint resulting from the cleaning of spray paint guns with solvents.⁸⁷

In 1981, defendant L.H. Beasley, a Hayes International employee, contracted with an employee of Performance Advantage, Inc., a "recycler," to remove the hazardous waste. Performance Advantage agreed to pay Hayes International twenty cents a gallon for the jet fuel and to remove the solvent-paint mix

83. Proponents of strict liability generally recognize that the offender is not culpable, but seek to justify punishment on other utilitarian grounds. See discussion *infra* notes 253-54, 394-401 and accompanying text.

84. 42 U.S.C. § 6925.

85. *Johnson & Towers*, 741 F.2d at 669 (citing *Int'l Minerals*, 402 U.S. at 569).

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

87. *Id.* at 1500.

free of charge.⁸⁸

Jack Hurt, the Performance employee who negotiated the purchase of the jet fuel, apparently told Beasley that he would take away some of the paint waste to determine whether it could be converted into fuel.⁸⁹ He later told Beasley that Performance did not want the waste, but Beasley stood pat on the original deal.⁹⁰

Performance continued to accept the paint waste, but illegally disposed of it. Government officials found about six hundred drums deposited at seven illegal disposal sites in Georgia and Alabama.⁹¹

A grand jury indicted a number of individuals, including Beasley, and the corporate defendant, Hayes International.⁹² Hayes International and Beasley were charged with violating both 42 U.S.C. § 6928(d)(2)(A), making it unlawful to knowingly treat, store, or dispose of hazardous waste without a permit, and 42 U.S.C. § 6928(d)(1), making it unlawful for a person to "knowingly transport[] any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under [other provisions of RCRA]."⁹³ The district court directed a verdict of acquittal on the 42 U.S.C. § 6928(d)(2)(A) charge at the close of the government's case.⁹⁴ It also set aside the jury's verdict on the 42 U.S.C. § 6928(d)(1) count of the indictment and granted a verdict of acquittal.⁹⁵ The Eleventh Circuit reversed the district court's judgment of acquittal.⁹⁶

The issues on appeal related to RCRA's knowledge requirement.⁹⁷ The court addressed whether the term "knowingly" attached to the different elements of 42 U.S.C. § 6928(d)(1). It first found that the statute did not require a showing

88. *Id.* at 1500-01.

89. *Id.*

90. *Id.* at 1506.

91. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1501 (11th Cir. 1986).

92. *Id.*

93. 42 U.S.C. § 6928(d)(1).

94. *Hayes Int'l*, 786 F.2d at 1501 n.2.

95. *Id.* at 1500.

96. *Id.*

97. *Id.* at 1501.

that the defendant knew of the regulations.⁹⁸ But it did hold that the defendant had to know of the "permit status" of the facility to which it transported hazardous waste.⁹⁹ Thus, according to the Eleventh Circuit, to prove a violation of 42 U.S.C. § 6928(d)(1), the government must prove that the "defendant knew what the waste was (here, a mixture of paint and solvent), and that the defendant knew the disposal site had no permit."¹⁰⁰ The government did not have to prove that the defendant knew that a permit was required.¹⁰¹

The Eleventh Circuit began its analysis with the relevant legislative history.¹⁰² As developed in more detail below, the legislative history is singularly unilluminating.¹⁰³ In a joint report of both houses, the Conference Committee had little to say about the *mens rea* required under the Act. The Committee summed up its views as follows:

The state of mind for all criminal violations under [the Act] is "knowing." The conferees have not sought to define "knowing" for offenses under subsection [6928](d); *that process has been left to the courts under general principles.*"¹⁰⁴

The conference report disclaimed that it was defining knowledge.¹⁰⁵ Technically, the problem before the court in *Hayes International* and *Johnson & Towers* is not a question of definition of the term. Instead, it is a question of, in the words of the Supreme Court, how far down the sentence the term

98. *Id.* at 1503.

99. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986).

100. *Id.* at 1505.

101. *Id.* at 1503.

102. *Id.* at 1502.

103. See discussion *infra* notes 256-84 and accompanying text.

104. H.R. Rep. No. 1444, 96th Cong., 2nd Sess. 39 (1980), reprinted in 1980 U.S.C.C.A.N. 5019, 5038 note to § 3008(f) (emphasis added).

105. H.R. Rep. No. 1444, 96th Cong. 2nd Sess. 39, reprinted in 1980 U.S.C.C.A.N. 5019, 5038.

"knowingly" runs.¹⁰⁶ Nonetheless, the best guidance offered by the Conference Committee is that uncertainty about the *mens rea* term should be resolved by resort to general principles.¹⁰⁷

The Eleventh Circuit recognized the difficulty in resorting to the relevant Supreme Court precedent.¹⁰⁸ It reviewed a number of the leading cases on point and placed reliance on *United States v. International Minerals & Chemical Corp.*¹⁰⁹ There, the Supreme Court construed a statute which provided that it was an offense to "knowingly violat[e] a regulation."¹¹⁰ According to the Eleventh Circuit, *International Minerals* "held that knowledge of the regulation was not an element of the offense; the use of "knowingly" in the statute referred only to the defendant's knowledge that the materials being shipped were dangerous."¹¹¹ The court was certainly correct that *International Minerals* was relevant to its inquiry. But as developed in more detail below,¹¹² *International Minerals*' precedential value was eroded by the more recent decision in *Liparota v. United States*,¹¹³ a decision in which the Supreme Court interpreted similar statutory language (making it an offense for a person to "knowingly use . . . [food stamps] in any manner not authorized by . . . the regulations,")¹¹⁴ to require proof that the defendant knew that his conduct was unauthorized.¹¹⁵ The Eleventh Circuit distinguished *Liparota* on linguistic grounds. It found that 7 U.S.C. § 2024(b)(1) made specific reference to "regulations" as an element of the

106. *Liparota v. United States*, 471 U.S. 419, 424-25, n.7 (1985) (quoting WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 27 (1st ed. 1972)).

107. 126 CONG. REC. H3345, 3368 (daily ed. Feb. 20, 1980).

108. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502-03 (11th Cir. 1986).

109. *Id.* at 1502 (quoting *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971)).

110. *Int'l Minerals*, 402 U.S. at 560.

111. *Hayes Int'l*, 786 F.2d at 1502 (quoting *Int'l Minerals*, 402 U.S. at 565).

112. See discussion *infra* note 340-54 and accompanying text.

113. *Liparota v. United States*, 471 U.S. 419 (1985).

114. 7 U.S.C. 2024 (1992).

115. *Liparota*, 471 U.S. at 419.

offense, unlike 42 U.S.C. § 6928 which makes reference to the permit requirement but not to "regulations."¹¹⁶ It also found that, unlike 7 U.S.C. § 2024(b)(1), 42 U.S.C. § 6928(d) is a public welfare statute.¹¹⁷

The court did find that the government must prove that the defendant knew whether the facility had a permit: "the congressional purpose indicates knowledge of the permit status is required. The precise wrong Congress intended to combat through [42 U.S.C. §] 6928(d) was transportation to an unlicensed facility. Removing the knowing requirement from this element would criminalize innocent conduct"¹¹⁸

At this juncture, *Hayes International* deviated from the approach taken by the Third Circuit in *Johnson & Towers*. The Third Circuit specifically required a showing that the defendant knew that the company had to have a permit and that, in fact, it did not have one. The Eleventh Circuit found only that the government had to show that the defendant knew that the company to which hazardous waste was transported did not have a permit, not that it was required to have one.¹¹⁹

The Eleventh Circuit found that criminal liability under RCRA did not require knowledge of the regulation because 42 U.S.C. § 6928(d) is a public welfare statute and, therefore, "it is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of the regulatory provisions."¹²⁰ The Eleventh Circuit insisted, however, that the government must establish that the defendant knew that the facility had no permit. It did so because to hold otherwise would be to criminalize innocent conduct.¹²¹ Its example demonstrates one instance where innocent conduct might be criminalized: "for example, if the defendant reasonably believed that the site had a

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

117. *Id.*

118. *Id.* at 1504.

119. *Id.* at 1504-05.

120. *Id.* at 1503.

121. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986).

permit, but in fact had been misled by the people at the site . . .
 "122

The only way to give coherence to the Eleventh Circuit's position (i.e., that the Act must be read to avoid criminalizing innocent conduct and so must be read to require that a defendant knew that the facility lacked a permit, but that a defendant does not have to know that a permit is required)¹²³ is to engage in the court's presumption that anyone in the business must be aware of the regulations.¹²⁴

In some areas of the law, such a presumption certainly makes sense. For example, the common law's traditional resistance to recognizing ignorance of the law as a defense may at least in part be explained by our unwillingness to believe a suspect's claim that he was unaware that theft or robbery was illegal.¹²⁵ There, an irrebuttable presumption arises that the defendant knew the law would be logical. It is less clear that such a presumption should be, in effect, irrebuttable in the area of environmental law.¹²⁶ The Eleventh Circuit did not give examples of whether innocent conduct might be criminalized if the government need not prove the defendant's knowledge of the permit requirement. But such examples are not hard to come by. In light of the broad meaning of the term "person,"¹²⁷ for example, a recently hired truck driver with little or no training about industry regulations may violate the act by knowingly transporting what he knows to be hazardous waste and when asked, he may know that he has not inquired whether the facility has a permit.¹²⁸ It is doubtful that such a person should be presumed to know that a permit is required. Hence, under the Eleventh Circuit's approach, it is not

122. *Id.* at 1504.

123. *Id.*

124. *Id.* at 1503 (insisting that its reading of RCRA is consistent with fairness, as well as with congressional intent).

125. See *People v. O'Brien*, 31 P. 45 (Cal. 1892); see also GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART*, § 102 at 291 (2d ed. 1961).

126. See discussion *infra* notes 366-90 and accompanying text.

127. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 664-65 (3d Cir. 1984), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985).

128. *Hayes Int'l*, 786 F.2d at 1504 n.6.

hard to conceive of examples in which morally innocent conduct might well be criminalized by holding that knowledge of the permit requirement is not an essential element of the offense.¹²⁹

Both *Johnson & Towers* and *Hayes International* underscored that the government's burden of proof was hardly insurmountable, given the variety of inferences that the jury would be permitted to draw based on, for example, the failure to follow certain procedures.¹³⁰ Proof of knowledge of the requirement of having a permit would be subject to similar proof. For example, the jury would almost certainly be entitled to infer knowledge of the regulation from the fact that a person has a position of responsibility in a regulated company.¹³¹ Instead, the position of the Eleventh Circuit treats knowledge of the regulation as an irrebuttable presumption.¹³² Treating it merely as an inference would not significantly impair environmental interests because the inference would most likely be convincing when the defendant was in a position of control.

C. *United States v. Hoflin*

In *United States v. Hoflin*,¹³³ Douglas Hoflin, the Director of Public Works Department for Ocean Shores in Washington state, was convicted on one count of aiding and abetting the disposal of hazardous waste in violation of 42 U.S.C. §

129. One reason might be that we can trust prosecutor's discretion to avoid bringing charges against non-culpable offenders. See *Lambert v. California*, 355 U.S. 225, 230 (1957) (Frankfurter, J., dissenting). Apart from the questionable merit of that argument generally, it seems especially questionable in this context because of the political interest in using the criminal law to combat environmental degradation. See, e.g., *Fromm*, *supra* note 18, at 822. *Hansen*, *supra* note 18, at 987 n.1.; *McMurry*, *supra* note 14, at 1140-44; *Starr*, *supra* note 14, at 380-81.

130. *Hayes Int'l*, 786 F.2d at 1504-05 n.8.

131. Compare with *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971).

132. *Hayes Int'l*, 786 F.2d at 1502-03.

133. *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

6928(d)(2)(A).¹³⁴ The charge arose out of his responsibility for supervising the community's roads.

During a seven year period, Ocean Shores purchased 3,500 gallons of paint for painting roadways. At one point in 1982, unused paint was stored indoors in one of the department's buildings. The fire marshal ordered that the drums be removed and stored outdoors.¹³⁵

The government's proof at trial amply demonstrated that Hoflin knew that the liquid was flammable. For example, the shipping documents and the drums both indicated that the material was flammable.¹³⁶ For at least one shipment, Hoflin signed the bill of lading which identified the contents as flammable liquid.¹³⁷

Despite that knowledge, Hoflin ordered the public works yard cleaned up and the excess paint buried at the community's sewage treatment plant. The director of the plant warned him that to do so would be in violation of the law.¹³⁸ Hoflin then directed one employee to transport the drums to the treatment plant and another to bury the drums.¹³⁹

The director of the treatment plant reported the incident to an official of the state Department of Ecology, who in turn reported it to the EPA.¹⁴⁰ The EPA's investigation uncovered fourteen drums buried on the premises, ten of which contained liquid.

134. Defendant-Appellant's Opening Brief at 1, *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989) (No. 86-3071), *cert. denied*, 110 S. Ct. 1143 (1990). Hoflin was also charged with a felony violation of 42 U.S.C. § 6928(d)(2)(A) for conspiring with others to dispose of hazardous waste without having obtained a permit from the EPA and convicted of a misdemeanor for violation of 33 U.S.C. § 1319(c)(1) for aiding and abetting the burial of sludge.

135. *Hoflin*, 880 F.2d at 1035 (demonstrating defendant's knowledge of flammability).

136. Brief for the Appellee at 8, *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989) (No. 86-3071), *cert. denied*, 110 S. Ct. 1143 (1990).

137. *Id.* at 7.

138. *Id.* at 9.

139. *Id.*

140. *Id.* at 6-7

Paint had leaked out of several drums and had penetrated the soil.¹⁴¹

Hoflin admitted that he knew that the disposal of hazardous waste was regulated by a permit system under an environmental agency. His defense was based on a claim that he did not know that the traffic paint, especially the solidified paint, was hazardous.¹⁴²

Hoflin appealed his conviction based on the trial court's refusal to give his proposed jury instructions on the necessary elements of 42 U.S.C. § 6928.¹⁴³ He submitted the following jury instruction:

To establish the crime charged, the government must prove four elements beyond a reasonable doubt:

1. That the defendant knowingly disposed of certain material;
2. That he did so knowing the material was "hazardous waste;"
3. That the defendant acted knowing that the burial of these materials required a permit from the Environmental Protection Agency; and
4. That he knew no permit had been obtained.¹⁴⁴

In most details, Hoflin was requesting a jury instruction consistent with the holding in *Johnson & Towers*.¹⁴⁵

The Ninth Circuit rejected Hoflin's claim.¹⁴⁶ It found that the statutory language was unambiguous.¹⁴⁷ It based its

141. Brief for the Appellee at 10, *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989) (No. 86-3071), *cert. denied*, 110 S. Ct. 1143 (1990).

142. *Id.* at 11.

143. *United States v. Hoflin*, 880 F.2d 1033, 1037 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

144. *United States v. Hoflin*, 880 F.2d 1033, 1039 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

145. *Id.* at 1037. The only difference between the instructions requested in *Hoflin* and *Johnson & Towers* is that *Hoflin* added a specific reference to the EPA.

146. *Id.* at 1038.

147. *Id.* at 1037.

argument on the fact that 42 U.S.C. § 6928(d)(2)(A), the offense with which Hoflin was charged, contained the term "knowingly" in subsection (2), but not in subsection (A).¹⁴⁸ By contrast, subsection (2)(B) contains the term "knowing."¹⁴⁹ Thus, if a person is charged under 42 U.S.C. § 6928(d)(2)(B), the government must prove that he knowingly treated a hazardous waste (B) in *knowing* violation of a material condition of a permit. A person who "knowingly" treats a hazardous waste is guilty under subsection (A) merely if the act is done without having obtained a permit. That is, the Ninth Circuit found that neither knowledge of the permit requirement or that of the fact that no permit had been obtained was an element of the offense.¹⁵⁰

The Ninth Circuit found that the Act's language did not support contrary result. "To read the word 'knowingly' at the beginning of section (2) into subsection (A) would be to eviscerate this distinction [between subsections (A) and (B)]. Thus, it is plain that knowledge of the absence of a permit is not an element of the offense defined by subsection (A)."¹⁵¹

The court specifically rejected the Third Circuit's approach in *Johnson & Towers*.¹⁵² It did so largely on its finding that the statute was unambiguous: "Had Congress intended knowledge of the lack of a permit to be an element under subsection (A) it easily could have said so. It specifically inserted a knowledge element in subsection (B), and it did so notwithstanding the 'knowingly' modifier which introduces subsection (2)."¹⁵³ *Johnson & Towers'* approach, according to the Ninth Circuit, would make the knowing term in (B) surplusage.¹⁵⁴

Despite its conclusion that the meaning of the language was plain, the court also found that its reading of the Act was consistent with the underlying purpose of RCRA. It found that the

148. *Id.* at 1037.

149. 42 U.S.C. § 6928(d)(2)(B).

150. *Hoflin*, 880 F.2d at 1038-39.

151. *Id.* at 1037.

152. *Id.* at 1038.

153. *Id.*

154. *Id.*

Act was, in effect, a public welfare measure.¹⁵⁵

Unlike the Third Circuit in *Johnson & Towers*, the Ninth Circuit found that its interpretation, distinguishing between violators charged under subsections (A) and (B), was not illogical. It found rational a distinction between handlers of hazardous waste who had obtained a permit but who were acting in violation of its conditions and those who had not notified the EPA that they were handling hazardous waste at all.¹⁵⁶ In effect, it found a handler of hazardous waste who did not notify the government more culpable because the failure to do so makes it that much more difficult for the agency to perform its obligation.¹⁵⁷

The Ninth Circuit agreed with Hoflin's contention that the government must prove that "the defendant knew the material being disposed of was hazardous."¹⁵⁸ The court found that "knowingly" modified not only "treats, stores, or disposes of," but also hazardous waste.¹⁵⁹ The charge given by the trial court stated that the jury had to find that the defendant "knew the chemical waste had the potential to be harmful to others or to the environment."¹⁶⁰ Although that charge did not state explicitly that the defendant had to know that the substance was hazardous, the court found that the instruction conveyed the idea sufficiently.¹⁶¹

D. *United States v. Dee*

In 1990, the Fourth Circuit followed the lead of the Ninth Circuit in *United States v. Dee*.¹⁶² There, the government charged engineers, civilian employees of the United States Army,

155. *United States v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

156. *Id.* at 1038-39.

157. *Id.*

158. *Id.* at 1039.

159. *Id.*

160. *United States v. Hoflin*, 880 F.2d 1033, 1039 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

161. *Id.*

162. *United States v. Dee*, 912 F.2d 741, 745-46 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1990).

with multiple violations under the RCRA. The defendants headed departments at the Aberdeen Proving Ground in Maryland.¹⁶³ That facility had a RCRA permit, but the defendants permitted the storage of the hazardous waste in an area not covered by the RCRA permit.¹⁶⁴

The Fourth Circuit did not engage in extensive analysis of the statutory construction problem. It rested the decision largely on the now familiar citation to *International Minerals* to the effect that "ignorance of the law is no defense,"¹⁶⁵ and on the Eleventh Circuit's holding in *Hayes International* and the Ninth Circuit's holding in *Hoflin*.¹⁶⁶ As in *Hoflin*, the Fourth Circuit held that the government has to establish only "knowledge of the general hazardous character of the wastes."¹⁶⁷ In *Dee*, the trial court instructed the jury incorrectly that the government had to prove that the defendants knew that the substances were chemicals, not that the chemicals were hazardous. The court found the erroneous instruction harmless.¹⁶⁸

E. United States v. Baytank (Houston), Inc.

In 1991, the Fifth Circuit upheld the conviction of a corporate defendant on two counts of improper storage of hazardous waste in violation of 42 U.S.C. § 6928(d)(2)(A) and reversed the district court's grant of judgments of acquittal in favor of two individual defendants on the two RCRA counts.¹⁶⁹ Baytank, a bulk liquid chemical storage facility, and the individual defendants, an executive vice president and a safety manager,¹⁷⁰ violated 42 U.S.C. § 6928 by storing hazardous waste at Baytank's

163. *Id.* at 743-44.

164. *Id.* at 743.

165. *Id.* at 745 (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)).

166. *Id.*

167. *United States v. Dee*, 912 F. 2d 741, 745 (1990), *cert. denied*, 111 S. Ct. 1307 (1990).

168. *Id.*

169. *United States v. Baytank*, 934 F.2d 599, 602 (4th Cir. 1991).

170. *Id.* at 603.

facility in Seabrook, Texas, a facility without a permit as required by RCRA.

On appeal, Baytank challenged the exclusion of a requested instruction that the jury had to find not only that the EPA had identified the particular waste as hazardous, but also that the defendants knew that fact.¹⁷¹ Consistent with *Hoflin*, the lower court did instruct that the prosecutor had to prove that the defendants knew that the waste was hazardous.¹⁷² In light of that instruction, the Fifth Circuit rejected Baytank's claim that an innocent person might be convicted of a felony under the government's theory of the case.¹⁷³

The Fifth Circuit characterized Baytank's claim as a defense of ignorance of law and relied on *International Minerals'* narrow reading of the *mens rea* requirement in cases involving dangerous substances.¹⁷⁴ It also relied on the result reached in other circuits to support its conclusion that "knowledge" does not attach to the fact that the EPA has classified the substance as hazardous.¹⁷⁵

In relief on *Hayes International*, the court distinguished *Liparota*. The Fifth Circuit found Baytank's proposed interpretation less readily suggested by 42 U.S.C. § 6928's statutory language than the language involved in *Liparota*.¹⁷⁶ The Fifth Circuit also relied on the suggestion in dicta in *Liparota* that offenses involving the community's health and safety are public welfare offenses, in which case the more begrudging statutory analysis in *International Minerals* controls.¹⁷⁷ Finally, it declined to follow *Johnson & Towers'* contrary suggestion that knowledge of the regulations is an essential element of a RCRA offense.¹⁷⁸

Thus after eight years of litigation in several federal circuits,

171. *Id.* at 612.

172. *Id.*

173. *Id.*

174. *United States v. Baytank*, 934 F.2d 599, 602 (4th Cir. 1991).

175. *Id.*, specifically relying on *Hoflin*, *Dee*, and *Hayes Int 'l*.

176. *Id.* at 613.

177. *Id.*

178. *Id.*

three distinct interpretations of 42 U.S.C. § 6928 have emerged. The Fourth and Ninth Circuits interpretation, which is the most restrictive, requires only that the defendant know that the substance is hazardous.¹⁷⁹ The Eleventh Circuit requires no showing of the defendant's knowledge that a permit must be secured, but does require a showing of defendant's knowledge that no permit has been secured.¹⁸⁰ The Third Circuit requires the additional knowledge of the permit requirement.¹⁸¹

IV. THE APPROPRIATE STEPS TO CONSTRUE A STATUTE

All of the courts that have considered the construction of 42 U.S.C. § 6928 have implicitly agreed on the appropriate steps of the court's inquiry.¹⁸² The starting point is the language of the Act. If it is found unambiguous, the court should have no recourse to legislative history.¹⁸³ If the language is ambiguous, then the court may have recourse to the legislative history.¹⁸⁴ If the history is inconclusive, the court should look to background assumptions governing the criminal law.¹⁸⁵ Absent evidence to the contrary, it is reasonable to assume that Congress would act

179. See *United States v. Dee*, 912 F.2d 741, 745 (1990), *cert. denied*, 111 S. Ct. 1307 (1990); *United States v. Hoflin* 880 F.2d 1033, 1038-39 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

180. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504-05 (11th Cir. 1986).

181. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668 (3rd Cir. 1984), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985).

182. See discussion *supra* notes 54-179 and accompanying text.

183. See *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (holding that defendant's act of transporting a willing girl to another state for the purpose of having sexual relations violated the plain meaning of the Mann Act, and therefore was not subject to any alternative interpretation by the Court); see also REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES*, 229-33 (1975); SINGER, NORMAN, 2A *SUTHERLAND STATUTORY CONSTRUCTION* § 46.01 (4th ed., 1992).

184. *Liparota v. United States*, 471 U.S. 419, 424-25 (1985) (researching the legislative history after finding the statute in question to be ambiguous).

185. See *id.* at 427 (applying the doctrine of lenity after finding the congressional purpose unclear).

consistently with those background assumptions.¹⁸⁶

Consistency ends with the general agreement of the relevant steps of inquiry. Thereafter, the various circuits interpreting 42 U.S.C. § 6928 agree upon little.

A. *Is 42 U.S.C § 6928 Unambiguous?*

1. The meaning of "person"

42 U.S.C. § 6928(d)(2) creates two offenses. Subsection (A) makes it an offense if "[a]ny person . . . knowingly treats, stores, or disposes of any [specific] hazardous waste . . . without [having obtained] a permit."¹⁸⁷ Subsection (B) makes it an offense if "any person . . . knowingly treats, stores, or disposes of any [specified] hazardous waste . . . in knowing violation of any material condition or requirement of such permit."¹⁸⁸ Most of the litigation addressing these sections has focused on whether "knowingly" attaches to different elements of the offense, specifically whether it attaches to the fact that the waste was hazardous and to the fact that a permit is required. Since *Johnson & Towers*, the meaning of "person" has received little attention.¹⁸⁹ But in assessing the literal or unambiguous meaning of 42 U.S.C. § 6928, *Johnson & Towers* misconstrued the term "person," leading to some of the uncertainty about the meaning of 42 U.S.C. § 6928(d)(2)(A).

186. See *id.*; see also *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971).

187. 42 U.S.C. § 6928(d)(2)(A).

188. 42 U.S.C. § 6928(d)(2)(B).

189. The meaning of "person" was raised in *United States v. Dee*, 912 F.2d 741, 744 (4th Cir. 1990). The court held that federal employees were "persons" and that sovereign immunity does not apply to individual government employees so as to immunize them from prosecutions from their criminal acts, *id.* at 744. Other defendants prosecuted under 42 U.S.C. § 6928 have not raised this issue. See also *United States v. Sellers*, 926 F.2d 410 (5th Cir. 1991); *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986).

As discussed above,¹⁹⁰ the Third Circuit reversed the district court's order dismissing the indictment in *Johnson & Towers*. The district court found that "person" in 42 U.S.C. § 6928 applied only to "owners and operators" of a facility.¹⁹¹ Instead, the Third Circuit gave a literal interpretation to the term "person," i.e., that it applied to *any* person, including employees. In addition to the plain meaning of the Act, the Third Circuit also found that its reading of the term "person" would further the regulatory goals of the Act.¹⁹²

While an employee is obviously a "person" within the literal meaning of that term, the Third Circuit ignored the context in which the term "person" is used in 42 U.S.C. § 6928. *Johnson & Towers* dealt with employees charged under subsection (2)(A); specifically, the employees were charged with knowingly treating, storing, or disposing of hazardous waste "*without having obtained a permit*" under relevant provisions of federal law.¹⁹³ Apart from whether "knowingly" attaches to the permit requirement,¹⁹⁴ a close reading of subsection (2)(A) denotes that a violator under this subsection is one who had a duty to obtain a permit. The complex nonfinite verb phrase "having obtained" requires a subject, a person who must do the obtaining. This follows from a fundamental rule of grammar that every verb must have a subject. The subject literally would appear to be the person who knowingly treats, stores, or disposes of the hazardous waste -- there is no other person or grammatically possible agent of the action mentioned who could violate subsection (2)(A) other than the one who was supposed to obtain the permit but failed to do so.

Elsewhere in the Act, Congress specified that owners and operators are the people responsible for obtaining the permit.¹⁹⁵ Thus, paraphrased, the plain meaning of subsection (A) would appear to be as follows: A person, who is obligated to obtain a

190. See discussion *supra* notes 57-83 and accompanying text.

191. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 664 (3rd Cir. 1984), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985).

192. *Id.* at 666.

193. *Id.* at 664.

194. *Id.* at 665.

195. 42 U.S.C. § 6925 (1992).

permit, specifically an owner/operator, who fails to do so, is guilty of an offense if he treats, stores, or disposes of any hazardous waste.

The government's argument in *Johnson & Towers* that subsection (d) applies to any person who treats, stores, or disposes of hazardous waste ignores subsection (A)'s requirement that the person must be one who had a duty to obtain a permit.¹⁹⁶ The government's position found support in a statement in the legislative history. In the House Committee's discussion of the Act, it states that "[t]his section also provides for criminal penalties for the person who . . . disposes of any hazardous waste without a permit under this title."¹⁹⁷ That is not the language used by Congress; that interpretation ignores the phrase "without having obtained" and would leave "having obtained" without a subject.

Contrary to the assertion in *Johnson & Towers*,¹⁹⁸ a syntactically correct reading of the Act would not have undercut RCRA's enforcement goals. The term "person" would not be similarly limited in subsection (d)(2)(B) of the Act. That provision, properly read, would apply to any person who knowingly treats, stores, or disposes of hazardous waste in knowing violation of any material condition or requirement of such permit. Subsection (B) would appear to apply to those employees in a position to implement the requirements of the permit.

That reading of the Act is syntactically correct. At first blush, it creates an anomalous result. Subsection (A) would criminalize only operators and owners who failed to get a permit, not their employees. By contrast, once an employer obtained a permit, the Act would criminalize any employee who knowingly violated the permit.¹⁹⁹

The result is in fact not anomalous. Consider the reality of the workplace. Employees are neither required to obtain the permit

196. *Johnson & Towers*, 741 F.2d at 665.

197. H.R. REP. NO. 1491, 94th Cong., 2nd Sess. 30, reprinted in 1976 U.S.C.C.A.N. 6238, 6269.

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

199. See *United States v. Hoflin*, 880 F.2d 1033, 1038-39 (9th Cir. 1989), cert. denied, 110 S. Ct. 1143 (1990) (finding that result anomalous).

nor, presumably, empowered to do so by the law. It seems draconian to impose criminal liability on an employee for continuing to perform the job for which he has been hired when he is powerless to change those conditions. That is especially draconian if, as insisted by the Ninth Circuit, he may be found guilty without even a showing that he knew that there was a permit requirement.²⁰⁰

Once the permit is obtained, employees have a defense if they did not know of the permit's material conditions.²⁰¹ Their criminal liability is only for knowing violations. That liability is hardly draconian; it must be based on a showing of a knowing violation of a material condition or requirement of the permit.

Limiting 42 U.S.C. § 6928(d)(2)(A) liability to those charged with the responsibility of procuring the permit keeps the criminal sanctions within rational limits based on culpable conduct. This is especially true if subsection (d)(2)(A) is read not to require knowledge of the permit requirement. In that context, any number of employees may transport, store, or dispose of hazardous waste for a company that has not secured a permit. Many of them may lack knowledge that there is a permit requirement or that the company is obligated to have one; further, they may be in no position to influence the employer's decision to violate the law.

2. The scope of "knowingly"

42 U.S.C. § 6928(d)(2)(A) provides that a person commits an offense if he knowingly treats, stores or disposes of any hazardous waste without having obtained a permit.²⁰² As often has been the case with federal statutes, courts have to decide

200. *Id.* at 1037; see also *Johnson & Towers*, 741 F.2d at 664-65. While the lower court treated employees as mere accomplices, holding that they could be charged as aiders and abettors under 18 U.S.C. § 2 (1982) without any mention of a *mens rea* requirement, the appellate court allowed prosecution of employees as principal offenders under 42 U.S.C. § 6928, but added the requirement that criminal prosecution is available only if they knew or should have known that there had been no compliance with the permit requirement of 42 U.S.C. § 6925.

201. 42 U.S.C. § 6928(d)(2)(B).

202. 42 U.S.C. § 6928(d)(2)(A).

among competing interpretations of the same language. Specifically, the "knowingly" term may attach to a number of different material elements.

42 U.S.C. § 6928(d)(2)(A) allows four interpretations. First, "knowingly" may only attach to "treats, stores, or disposes." One would be guilty of an offense if the prosecutor demonstrated only that the actor knew that she was treating, storing, or disposing of a substance and that the substance was hazardous and that no permit had been obtained. Second, "knowingly" may attach to the verbs and in addition may attach to the hazardous nature of the substance. That is, a person would be guilty of an offense if the prosecutor demonstrated not only knowledge that one was, for example, disposing of a substance, but also knew that the substance was hazardous. If that were the correct reading of the Act, it would be necessary to demonstrate that no permit was obtained. But the prosecutor would not have to show that the offender knew that the permit had not been obtained or that there was a permit requirement.

Third, "knowingly" may attach to the verbs, to the fact that the substance was hazardous, and to the fact that no permit was obtained, but not to the requirement that a permit be obtained. Fourth, "knowingly" may attach to all of the elements, including the permit requirement. In such a case, the prosecutor would have to demonstrate that the defendant knew that he was, for example, storing what he knew was hazardous waste and that he knew that a permit was required and that no permit had been acquired.

No court to date has adopted the first interpretation, although that was the position argued by the government in *Johnson & Towers*.²⁰³ The Ninth Circuit adopted the second position;²⁰⁴ the Eleventh Circuit in the related context of 42 U.S.C. § 6928(d)(1), in effect, adopted the third approach.²⁰⁵ The Third Circuit adopted the fourth position.²⁰⁶ That suggests that the

203. *Johnson & Towers*, 741 F.2d at 668 (3rd Cir. 1984), cert. denied sub nom. *Angel v. United States*, 469 U.S. 1208 (1985).

204. *Hoflin*, 880 F.2d at 1039.

205. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986).

206. *Johnson & Towers*, 741 F.2d at 664-65.

language is ambiguous. Despite that fact, the Ninth Circuit found the language to be unambiguous.

Initially, the Ninth Circuit's conclusion concerning the scope of the term "knowingly" is supported by traditional rules of grammar. A grammarian would describe the appropriate construction of 42 U.S.C. § 6928(d)(2) as follows: "knowingly" would be a predication adjunct; as such, it would modify all of the requisite features of the predication.²⁰⁷ Because "treat," "store," and "disposes of" are all transitive verbs (i.e., verbs requiring a direct object), the direct object, "waste," is a requisite feature of the predication.²⁰⁸ Additionally, because "hazardous" restricts the meaning of "waste," "hazardous" is also a requisite feature.²⁰⁹ Hence, all of these terms must fall within the scope of "knowingly."

That is not the case with subclauses (A) and (B). They would be sentence adjuncts insofar as they modify the entire independent clause, "Any person . . . waste." They, therefore, do not fall within the scope of the adverb in that clause, "knowingly."²¹⁰

What the Ninth Circuit's approach ignores is that the Supreme Court has not adopted the rules of grammar as the controlling rules for statutory construction. In a number of instances, the Supreme Court has addressed grammatical constructions parallel to that in 42 U.S.C. § 6928 and come to inconsistent results concerning the scope of the "knowingly" term.

In *Morissette v. United States*,²¹¹ the defendant was accused of violating 18 U.S.C. § 641, providing in relevant part that "[w]hoever . . . knowingly converts to his use . . . anything of value of the United States . . ."²¹² is guilty of a crime. In

207. See, e.g., RANDOLF QUIRK ET AL., A COMPREHENSIVE GRAMMAR OF THE ENGLISH LANGUAGE § 8.25, at 504-10 (1985). I am especially appreciative of Dr. Robert Chaim's help with the analysis of this point.

208. *Id.* at 508-10.

209. *Id.* at 508.

210. *Id.* at 511.

211. *Morissette v. United States*, 342 U.S. 246, 248 (1952).

212. 18 U.S.C. § 641 (1951) (current version at 18 U.S.C. § 641 (1992)).

United States v. International Minerals,²¹³ the Court must determine the elements to which "knowingly" attached in 18 U.S.C. § 834, making it an offense for a person to "knowingly violate any . . . regulation" formulated by the Interstate Commerce Commission.²¹⁴ In *United States v. Yermian*,²¹⁵ the Court had to decide whether the government had to prove that the defendant knew that the matter was within the jurisdiction of a federal agency to sustain a conviction under 18 U.S.C. § 1001, which provides that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements. . ."²¹⁶ shall be guilty of an offense. And more recently, the Supreme Court interpreted similar language in *Liparota v. United States*,²¹⁷ where it had to interpret the following language: "Whoever knowingly uses, transfers, acquires, alters, or possesses coupons . . . in any manner not authorized by [the statute] or the regulations"²¹⁸ shall be guilty of a criminal offense.

The language in each of the cited provisions is parallel. In each, the *mens rea* term, "knowingly," is placed near the beginning of the sentence.

If the rules of grammar were controlling, in the case of 18 U.S.C. § 641, for example, the government would have to prove that a defendant knew he was converting something of value, that it had value, and that it was the property of the United States. That would be the case because "knowingly," a predication adjunct, would modify the transitive verb "converts" and its direct object, "anything of value of the United States."²¹⁹

In the case of 18 U.S.C. § 1001, the government would have to prove that a matter was within the jurisdiction of a Department or Agency of the United States, but not have to prove that the

213. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 560 (1971).

214. 18 U.S.C. § 834 (1971) (repealed 1979).

215. *United States v. Yermian*, 468 U.S. 63 (1984).

216. *Id.* at 68 (citing 18 U.S.C. § 1001 (1992)).

217. *Liparota v. United States*, 471 U.S. 419 (1985).

218. 7 U.S.C. § 2024(b)(1) (1985).

219. *See* QUIRK, *supra* note 207, at 509-10.

defendant knew that it was. Instead, it would have to prove only that he was making a statement and that the statement was false. "[I]n any matter within the jurisdiction of any department . . ."²²⁰ is a sentence adjunct²²¹ and would not be within the scope of the *mens rea* terms, "knowingly and willfully."

By contrast, the rules of grammar would require the government to prove not only a knowing act, but knowledge of the regulations in 18 U.S.C. § 834. That is so because, as demonstrated above, the adverb "knowingly" includes within its scope the direct object of the transitive verb.²²² In 18 U.S.C. § 834, "violates" is a transitive verb and "any regulation" is its direct object.²²³

Finally, in the case of 7 U.S.C. § 2024(b)(1), the government would have to prove that the offender knowingly transferred or acquired or possessed what he knew to be coupons. That is so because "coupons" is the direct object of the transitive verbs, hence within the scope of "knowingly." But "in any manner not authorized by [the statute] or the regulations" would be a sentence adjunct and not within the scope of the adverb.²²⁴

Even a cursory review of what the Supreme Court actually held in the relevant cases demonstrates that the Court has not tied statutory construction to the rules of grammar. *Yermian* was decided consistently with the rules of grammar. There, the Court held that the government did not have to prove that the defendant knew that the matter was within the jurisdiction of a federal agency.²²⁵ Although the Court's analysis was consistent with traditional grammatical rules, the Congress, at least according to the dissent's reading of congressional history, did not intend the traditional rules to apply.²²⁶

Other than in *Yermian*, however, the Court's holdings were not consistent with the results based on a close grammatical

220. 18 U.S.C. § 1001 (1992).

221. See QUIRK, *supra* note 207, at 511-12.

222. *Id.* at 508-10.

223. *Id.*

224. *Id.* at 508-14.

225. *United States v. Yermian*, 468 U.S. 63, 68-70 (1984).

226. *Id.* at 76-77 (Rehnquist, J., dissenting).

reading of the statute. In *Morissette*, the Court did hold that the government had to prove that the defendant knew that the property was that of another.²²⁷ But there is no indication in the Court's decision that it would have to prove that an accused knew that the property was the property of the United States. Unlike legal, as opposed to grammatical analysis, that the property belonged to the United States would almost certainly be jurisdictional,²²⁸ not a material element to which a *mens rea* term would attach.

International Minerals and *Liparota* provide a perfect contrast to the Court's statutory construction and the rules of grammar. Whereas rules of grammar would place the regulations within the scope of "knowingly" in *International Minerals*, the Court held that the government had to show only that the defendant knew the nature of the thing shipped.²²⁹ By contrast, in *Liparota*, the Court held that the government had to prove that the defendant knew that he was violating the regulations.²³⁰ Application of the rules of grammar would have produced a contrary result.²³¹

While the Ninth Circuit's construction of 42 U.S.C. § 6928 is consistent with rules of grammar, it is hard to argue that the language of the Act is not ambiguous. Unless courts simply do not understand the rules of grammar, the inconsistent construction given similar syntax demonstrates that the syntax can support different interpretations. The American Law Institute explicitly identified the ambiguity in criminal statutes and drafted Model Penal Code § 2.02(4) to deal with that question.²³² Specifically, the drafters commented that "[s]ubsection [2.02](4) is addressed to a pervasive ambiguity in definitions of offenses that include a culpability requirement, namely, that it is often difficult to determine how many of the elements of the offense the

227. *Morissette v. United States*, 342 U.S. 246, 270 (1952).

228. *See* *United States v. Feola*, 420 U.S. 671, 676 (1975).

229. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563-64 (1971).

230. *Liparota v. United States*, 471 U.S. 419, 434 (1985).

231. *See* discussion *supra* notes 219-21 and accompanying text.

232. MODEL PENAL CODE § 2.02(4) (Prop. Off. Draft 1962).

requirement is meant to modify."²³³

The Model Penal Code solution rejects the rules of grammar. Instead, "[s]ubsection (4) provides that if the definition is not explicit on the point, as by prescribing different kinds of culpability for different elements, the culpability statement will apply to all the elements, unless a contrary purpose plainly appears."²³⁴ Given the specialized use of language in the law, especially in the criminal law, statutory construction can appropriately abandon ordinary rules of grammar when those rules would produce results inconsistent with the underlying premises of the criminal law.²³⁵

The Ninth Circuit found additional textual support for its view that 42 U.S.C. § 6928 was unambiguous in subsections (A) and (B). The Ninth Circuit argued that the inclusion of the *mens rea* term in subsection (B) demonstrated that Congress could easily have included a knowledge element in (A) and that its failure to do so clearly evidenced its intent that knowledge did not attach to the permit requirement.²³⁶ That argument is plausible. But the

233. MODEL PENAL CODE § 2.02 commentary at 228 (1985). See also *id.* at 245. The draftsmen of the Wisconsin Legislature posed the problem in these terms: "When, for example, a statute says that it is unlawful to 'willfully, maliciously, or wantonly destroy, remove, throw down or injure any [property] upon the land of another,' do the words denoting the requirement of intent apply only to the doing of the damage or do they also modify the phrase 'upon the land of another,' thus requiring knowledge or belief that the property is located upon land that belongs to another?"

234. *Id.* at 228. Analyzed under 2.02(4), *Yermian*, *Morissette*, and *Liparota* would be correctly decided. In *Yermian*, placement of the phrase "in any matter . . . would indicate a clear intent not to attach the *mens rea* term to that provision." In *Morissette*, "knowingly" would attach to the status of the property, but not to the ownership by the United States. Presumably under § 1.13(10), the role of the U.S. is jurisdictional. As developed below, in *Liparota*, Justice Brennan was influenced by the Model Penal Code.

235. For example, criminal statutes are usually strictly construed to assure the actor with fair warning what conduct is punishable. See, e.g., *United States v. Bass*, 404 U.S. 336, 348 (1971); *State v. Stockton*, 647 P.2d 21, 24 (Wash. 1982); *DICKERSON*, *supra* note 183, at 209.

236. *United States v. Hoflin*, 880 F.2d 1033, 1037 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

court insisted that rendered the statute unambiguous.²³⁷ In part, it did so because it found meaningful the two categories of defendants created by its reading of the statute. It found a distinction that the legislature would rationally have intended, therefore, not rendering the statute arbitrary or irrational.²³⁸

The Ninth Circuit analyzed the two categories found in 42 U.S.C. § 6928(d) by reference to the general goals of the Act. The Court identified those goals as preventing "the grave danger to people and the environment from hazardous wastes."²³⁹ The millions of tons of waste represent a significant threat to human welfare, but much of the waste is "generated and buried without notice until the damage becomes evident."²⁴⁰ Thus, one of the major goals of the legislation is tracking the hazardous waste from creation through disposal. Defendants under (B) are those who have secured a permit and violate its conditions. They have lessened the EPA's burden by notifying the agency, making the monitoring of the hazardous waste easier. Defendants under (A) are those who have hidden their activity from the EPA, making the Agency's task of monitoring hazardous waste more difficult.²⁴¹

That knowledge is required in subsection (B) is hardly surprising. Without requiring knowledge (or some *mens rea*) that the person is treating, storing, or disposing of hazardous waste inconsistent with a permit would criminalize a good deal of innocent behavior. For example, a person who knows that he is disposing of what he knows to be hazardous waste, but does so in the good faith reasonable belief that he is doing so consistent with the conditions of the permit is hardly blameworthy. The underlying conduct is not *mala in se*. After all, the government

237. *Id.*

238. *Id.* at 1038.

239. *Id.*

240. *Id.*

241. *United States v. Hoflin*, 880 F.2d 1033, 1038-39 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990). There is an element of circularity in the Ninth Circuit's argument. It is supporting its assertion that the act is unambiguous by reference to what Congress might have intended. But if the language is unambiguous, intent becomes irrelevant. Ironically, there is evidence that Congress had no such distinction in mind. See discussion *infra* notes 272-73 and accompanying text.

has not outlawed disposing or treating or storing hazardous waste. It has merely controlled them by a permit system.²⁴²

What is open to question is whether the same might not be said about a violator under subsection (A). For example, one can conceive of any number of people who treat, store, or dispose of what they know to be hazardous waste without knowing of a permit requirement. What about the various employees of the Public Works Department who had responsibility for disposing of the paint drums in *Hoflin*?²⁴³ Or what about a defendant who in fact safely stores hazardous waste but simply is unaware of the permit requirement? Treating, storing, and disposing of hazardous waste is not necessarily criminal activity.²⁴⁴ The creation of hazardous waste has gone on for years and the handling of hazardous waste has sometimes created harm, but not always.²⁴⁵ That is, the underlying conduct is not necessarily criminal. Under the Ninth Circuit's interpretation, those offenders come within the terms of the statute, but their failure to know that there is a permit requirement hardly makes their conduct culpable.

The pivotal premise to the Ninth Circuit's position was the view shared at times by the Supreme Court that "[w]here . . . 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."²⁴⁶ That presumption seems rational and would certainly be a

242. 42 U.S.C. § 6925.

243. See, e.g., *Hoflin*, 880 F.2d at 1035.

244. 42 U.S.C. § 6925 establishes a permit system; it does not outlaw the underlying conduct.

245. See PAUL N. CHEREMISINOFF & FRED ELLERBUSCH, RESOURCE CONSERVATION & RECOVERY ACT, A SPECIAL REPORT 2 (1979) (providing a history of solid waste legislation efforts since 1899); see also EDWARD H. RABIN & MORTIMER D. SCHWARTZ, THE POLLUTION CRISIS: OFFICIAL DOCUMENTS 6-7 (1972) (giving an example of how some pollutants will eventually decompose and diffuse throughout the environment, while others which resist decomposition may be toxic and pose serious health dangers).

246. *Hoflin*, 880 F.2d at 1038 (quoting *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971)).

permissible inference for the jury to draw in many cases.²⁴⁷ People in management positions might well be expected to know that handling of hazardous waste is regulated.²⁴⁸ But there are situations in which that presumption is questionable.²⁴⁹ At a minimum, it suggests that there is no clear break between defendants whose conduct is within (A) as opposed to (B).

At this point, the Ninth Circuit was addressing whether the statute, creating two categories of defendants, is unambiguous. Congress may have wanted to distinguish along the line suggested by the Ninth Circuit. But it is also possible that Congress's lack of parallel syntax in (A) and (B) was the result of legislative oversight.

Neither the Third nor Ninth Circuit looked to the other provisions such as 42 U.S.C. § 6928(a), governing imposition of civil penalties, which presents an interesting contrast to subsection (d). Specifically, under 42 U.S.C. § 6928(a)(1), the Administrator may file a civil action against an offender.²⁵⁰ Initially, the appropriate relief is injunctive. Under 42 U.S.C. § 6928(a)(3), if the offender fails to take corrective action, the court may impose a civil penalty.²⁵¹

In interpreting the criminal provision within the same section

247. The problem with the Ninth Circuit's analysis is that it presumes knowledge irrebuttably, rather than allowing a jury to make an inference. See also *Sandstrom v. Montana*, 442 U.S. 510 (1979) (finding conclusive presumption of intent unconstitutional).

248. See *Hoflin*, 880 F.2d at 1037 (relying on *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 664-65 (3d Cir. 1984), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985)); see also *United States v. Park*, 421 U.S. 658, 673-74 (1975) (holding that the "[g]overnment establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or prompting to correct the violation complained of, and that he failed to do so."); *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943).

249. See discussion *infra* notes 240-43 and accompanying text.

250. 42 U.S.C. § 6928(a)(1).

251. 42 U.S.C. § 6928(a)(3) (requiring violators who fail to take corrective action within time specified by order referred to in (a)(1) and (a)(2) to pay a civil penalty of not more than \$25,000 for each day of continued non-compliance).

of RCRA, a court might compare the treatment of a defendant in a civil proceeding and in a criminal proceeding.²⁵² Under 42 U.S.C. § 6928(a), before the court could impose a civil penalty, the offender would have been put on notice of the violation in the civil action for injunctive relief. Only upon noncompliance would a civil penalty be imposed.²⁵³ Hence, the offender would have been given specific notice of his violation, presumably including the fact that he was storing hazardous waste in violation of the requirement that a permit be acquired. It is anomalous to believe that a person may be a criminal offender, now a felon after the 1980 amendments,²⁵⁴ on a lesser showing than would be required to impose civil liability.

Ordinarily, in considering whether to impose strict liability, legislatures and courts construing legislation consider the degree of difficulty that a prosecutor may face in proving *mens rea*.²⁵⁵ For example, a leading criminal law treatise states that legislatures often create criminal liability without fault "to help the prosecution cope with a situation wherein [a *mens rea*] is hard to prove, making convictions difficult to obtain unless the fault element is omitted. The legislature may think it important to stamp out the harmful conduct in question at all costs, even at the cost of convicting innocent-minded and blameless people."²⁵⁶

Lowering the prosecutor's burden in a prosecution under 42

252. See *Kimes v. Bechtold*, 342 S.E.2d 147, 150 (W. Va. 1986) (quoting syllabus point 3 of *Smith v. State Workmen's Compensation Commissioner*, 219 S.E. 2d 361 (W. Va. 1975) illustrating *in pari materia* rule of statutory construction whereby statutes which relate to same subject matter should be read and applied together so that legislature's intention can be gathered from the whole of enactments. But see *Manchin v. Dunfee*, 327 S.E.2d 710, 713-14 (W. Va. 1984) which limits *in pari materia* to ambiguous statutes only).

253. 42 U.S.C. § 6928(a).

254. See, e.g., *United States v. Sellers*, 926 F.2d 410, 417 (5th Cir. 1991) (upholding defendant's sentence of sixteen concurrent 41 month sentences, based on U.S.S.G. § 2Q1.2(b)(1)(B) and § 2Q1.2(b)(4)).

255. See, e.g., *State v. Dobry*, 250 N.W. 702, 705 (Iowa 1933); *Commonwealth v. Mixer*, 93 N.E. 249, 249-50 (Mass. 1910); *State v. Prince*, 189 P.2d 993, 995 (N.M. 1948); see also discussion in LAFAVE, *supra* note 106, at 242-43.

256. See LAFAVE, *supra* note 106, at 243.

U.S.C. § 6928(d)(2)(A) seems hardly necessary. The government cannot seriously urge that the reading of "knowingly" as extending to that subsection would impose an impossible or unreasonably difficult burden on it.²⁵⁷ It cannot seek the lesser sanction of civil penalties until it has given notice to the offender that his conduct violates a court order.

B. What Did Congress Intend?

On the finding that the statutory language is ambiguous, a court is to turn to the legislative history.²⁵⁸ The legislative history surrounding passage of RCRA's criminal provisions is sparse and unilluminating.²⁵⁹ The House Report contains slightly over a page of text discussing enforcement of RCRA's provisions,²⁶⁰ and says little that bears on the *mens rea* question. First, it observes that the Act provides for a wide array of enforcement mechanisms "so that punishment is related to the offense."²⁶¹ Second, it states that "[m]any times civil penalties are more appropriate and more effective than criminal."²⁶² It

257. See *United States v. Hoflin*, 880 F.2d 1033, 1039 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990) (reaffirming the district court's jury instruction which requires that defendant "knew" that the chemical wastes had the potential to be harmful to others); see also *United States v. Dee*, 912 F.2d 741, 743-44 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1990). But see *id.* at 1038 (quoting *United States v. Int'l Mineral & Chem. Corp.*, 402 U.S. 558, 565 (1971): "Where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

258. See *Liparota v. United States*, 471 U.S. 419, 425 (1985) (Supreme Court interpretation of 7 U.S.C. § 2024(b)(1), limited to the absence of contrary purpose in the language or legislative history of the statute); *United States v. Agrillo-Ladlad*, 675 F.2d 905, 908-09 (7th Cir. 1982); see also *State v. Hooper*, 386 N.E.2d 1348, 1349 (Ohio 1979).

259. See *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502 (11th Cir. 1986).

260. H.R. REP. NO. 1491, 94TH CONG., 2ND SESS. 30, reprinted in 1976 U.S.C.A.N. 6238, 6268-69.

261. *Id.* at 6268.

262. *Id.*

does not specify when that might be the case. It does suggest that the use of criminal sanctions is most appropriate "when there is a *willful* violation of a statute which *seriously harms human health*"²⁶³

After discussing the requirement that the Administrator give notice of the nature of the violation and an opportunity to correct the violation, the report returns to the use of criminal sanctions. But the report largely tracks the statutory language, hardly illuminating how the *mens rea* term should be read: "The use of criminal penalties are sufficiently narrow in that they only apply to those who knowingly transport hazardous waste to a facility which does not have a permit, the actual disposal of hazardous wastes without a permit, or the falsification of documents, all of which are more serious offenses than the other provisions of the hazardous waste title."²⁶⁴

The House Report is hardly conclusive on the proper reading of 42 U.S.C. § 6928(d)(2)(A). But it does offer some support for requiring that the *mens rea* attach to the permit requirement. It emphasizes that the use of criminal sanctions would be appropriate only in narrow circumstances.²⁶⁵ Further, even though violations of the Act were then characterized as misdemeanors, the report underscores that Congress was concerned with principles of proportionality, that the punishment should relate to the offense.²⁶⁶ In true public welfare statutes, the traditional explanation has been that especially in light of the lesser penalties that attach, the governmental interest in enforcement outweighs the concern that someone otherwise blameless might be charged with an offense.²⁶⁷ The overriding need for deterrence and efficient law enforcement compels abandoning notions of culpability and

263. *Id.* (emphasis added).

264. *Id.* at 6269.

265. H.R. REP. NO. 1491, 94th Cong., 2nd Sess. 30, reprinted in 1976 U.S.C.C.A.N. 6238, 6269.

266. *Id.* at 6268.

267. See *State v. Collova*, 255 N.W.2d 581, 585 (Wis. 1977) ("The usual rationale for strict liability statutes is that the public interest is so great that as to warrant the imposition of an absolute standard of care.").

proportionality.²⁶⁸ Here, Congress was not willing to abandon the fault principle. Indeed, as with other modern enforcement schemes, the government has a wide array of sanctions.²⁶⁹ The report demonstrates that enforcement goals did not have to be sacrificed despite the limited use of criminal sanctions. Further, the report demonstrates that even offenders subject to civil penalties would have notice of their violations and an opportunity to correct them. Thus, *civil sanctions were not appropriate without first giving the offender notice of the requirements of the law.*²⁷⁰ Whatever might be said generally about the burden of imposing a requirement that the government prove the defendant's knowledge of the law, that would not appear to be a significant obstacle in RCRA cases, at least where the government chose the lesser sanction of civil penalties.²⁷¹

When Congress chose to increase the criminal sanctions and to make violations of subsection (d) felonies, it again offered little guidance on the *mens rea* question.²⁷² But as with the 1976 report, some inferences might be made from the 1980 report.

The original thirty day notice period was eliminated "to authorize the Administrator to act against violations before a 30-day period has elapsed. This provision is aimed at stopping so-called 'midnight dumping' which may not continue at any location for more than 30 days, and to seek penalties for single

268. See Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 285-86 (1968) (summarizing BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW* (1966)); see also Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73, 84 (1933) (supporting conviction for criminal syndicalism or sedition cases in absence of intent by analogizing to public welfare offenses). But see *Solem v. Helm*, 463 U.S. 277, 303 (1983) (preserving notions of proportionality in criminal sentencing).

269. H.R. REP. NO. 1491, 94th CONG., 2nd Sess. 30, reprinted in 1976 U.S.C.C.A.N. 6238, 6269.

270. *Id.* at 6268-69.

271. But see *United States v. Hoflin*, 880 F.2d 1033, 1038-39 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990).

272. H.R. REP. NO. 1444, 96th CONG., 2nd Sess. 39, reprinted in 1980 U.S.C.C.A.N. 5028, 5038.

occurrences, rather than just continuing offenses."²⁷³

The Joint Conference Report did contain an important discussion about 42 U.S.C. § 6928(d)(2)(B).²⁷⁴ The original act did not contain that provision. Instead, it provided that:

Any person who knowingly --

(1) transports any hazardous waste listed under this subtitle to a facility which does not have a permit . . .

(2) disposes of any hazardous waste listed under this subtitle without having obtained a permit therefor . . .

shall, upon conviction, be subject to a fine of not more than \$25,000 for each day of violation, or to imprisonment not to exceed one year, or both.²⁷⁵

The 1980 amendments were intended, in part, to clarify the law. As stated by the conference report, "[t]he proposed section as amended would eliminate the ambiguity by providing explicit penalties for knowingly failing to comply with a material condition of the permit."²⁷⁶

The legislative history on this point appears to conflict with the Ninth Circuit's understanding of the difference between subsections (A) and (B). The Ninth Circuit found that it was rational to treat two classes of offenders differently, those who notified the EPA of their activities and those who did not.²⁷⁷ The legislative history does not suggest that Congress had that

273. S.R. REP. NO. 172, 96th CONG., 2nd Sess. 4, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5022.

274. H.R. REP. NO. 1444, 96th CONG., 2nd Sess. 39, *reprinted in* 1980 U.S.C.C.A.N. 5028, 5037.

275. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 3008, 90 Stat. 2812 (codified as amended at 42 U.S.C. § 6928 (1992)).

276. H.R. REP. NO. 1444, 96th CONG., 2nd Sess. 36-37, *reprinted in* 1980 U.S.C.C.A.N. 5028, 5036.

277. *United States v. Hoflin*, 880 F.2d 1033, 1038-39 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

distinction in mind. Instead, it intended to clarify an area of uncertainty by making explicit that those who obtain a permit may in fact be prosecuted.²⁷⁸

The only other relevant discussion of *mens rea* is that of the Eleventh Circuit in *Hayes International*: "Congress did not provide any guidance . . . concerning the meaning of 'knowing' in Section 6928(d). Ineed, Congress stated that it had not sought to define 'knowing' for offenses under subsection (d); that process has been left to the courts under general principles."²⁷⁹ By contrast, because Congress was enacting a new crime in subsection (e), knowing endangerment, it did specifically define knowledge for purposes of that subsection.²⁸⁰ It did so by borrowing the definition of knowledge from the proposed Criminal Code Reform Act, S. 1722,²⁸¹ a definition which largely tracks the Model Penal Code definition of knowledge.²⁸²

It is unclear in context whether the conferees meant to address the issue before the courts in *Johnson & Towers* and *Hoflin*, that is, how far down the sentence the *mens rea* term should run. The meaning of knowledge is hardly settled, despite its clearly stated meaning in the Model Penal Code.²⁸³ The reference in the conference report suggests that under subsection (e), the courts should require actual subjective awareness of a risk

278. H.R. REP. NO. 1444, 96th CONG., 2nd Sess. 36-37, reprinted in 1980 U.S.C.C.A.N. 5028, 5036.

279. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502 (11th Cir. 1986) (quoting S. Rep. No. 173, 96th CONG., 2ND SESS. 39, reprinted in 1980 U.S.C.C.A.N. 5028, 5038).

280. Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 23341 § 13(f) (codified as amended at 42 U.S.C. § 6928 (1992)).

281. S. 1722, 96th CONG., 1st Sess. § 302 (1979) (never enacted) ("A person's state of mind is knowing with respect to (1) his conduct if he is aware of the nature of his conduct; (2) an existing circumstance if he is aware or believes that the circumstances exist; (3) a result of his conduct if he is aware or believes that his conduct is substantially certain to cause the result.").

282. MODEL PENAL CODE § 2.02(2)(B) (Proposed Official Draft 1962).

283. MODEL PENAL CODE, § 2.02(2)(B) (Proposed Official Draft 1962).

in defining "knowledge."²⁸⁴ Hence, by implication, all it meant by its statement that the definition of "knowing" would be left to the courts under general principles was that courts would have to decide whether knowledge could be established based on a reasonable person standard.²⁸⁵

Neither in 1976 nor in 1980 did Congress clearly grasp the issue that has divided the circuit courts. At best, it offers some general guidance. It recognized the principle of proportionality and culpability, usually not relevant if the statute creates a public welfare offense.²⁸⁶ Hence, in construing the Act, the court ought to inquire whether the underlying conduct (without knowledge of the permit requirement) would be blameworthy. Further, given the wide array of enforcement devices, Congress recognized that enforcement would not turn only on the availability of criminal sanctions, reducing the risk that liberally construing the knowledge requirement would impair effective enforcement goals and public safety. Beyond that, the congressional history provides no smoking gun.

C. *Background Assumptions of the Criminal Law*

If statutory language and legislative history are inconclusive, the Supreme Court has looked to "background assumption[s] of our criminal law"²⁸⁷ to interpret the relevant statutory provision. To

284. H.R. REP. NO. 1444, 96th CONG., 2nd Sess. 39, *reprinted in* 1980 U.S.C.C.A.N. 5028, 5038.

285. See *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 664-65 (3d Cir. 1984), *cert. denied sub nom. Angel v. United States* 469 U.S. 1208 (1985) (holding that 42 U.S.C. § 6928(d)(2)(A) subjects employees to criminal prosecution only if they knew or should have known that there had been no compliance with the permit requirement of § 6925); see also 126 CONG. REC. H3368 (daily ed. Feb. 20, 1980).

286. See Kadish, *supra* note 268, at 285-86 (summarizing BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW* (1966)); see also Sayre, *supra* note 268, at 55, 73, 84 (supporting conviction for criminal syndicalism or sedition cases in absence of intent by analogizing to public welfare offenses). But see *Solem v. Helm*, 463 U.S. 277, 303 (1983) (preserving notions of proportionality in criminal sentencing).

287. *Liparota v. United States*, 471 U.S. 419, 426 (1985).

do so seems rational based on the assumption that Congress would legislate in light of general principles governing the criminal law.²⁸⁸

Identifying the background assumptions of the criminal law, however, may be no mean feat. While the Supreme Court would appear to rely on traditional principles of the criminal law, examination of three leading cases demonstrates that over time, the Supreme Court has found somewhat different background assumptions to guide their interpretation of ambiguous language.

1. *Morissette v. United States*

*Morissette*²⁸⁹ involved a statute, like 42 U.S.C. § 6928, in which Congress used the term "knowingly" without clearly defining the elements to which it attached. 18 U.S.C. § 641 provides that "[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any . . . thing of value of the United States . . . [s]hall be fined . . . or imprisoned . . . or both."²⁹⁰

Morissette entered a large tract of the government's land where he hoped to hunt for deer. Unsuccessful in his efforts to kill a deer, he hoped to recoup the expenses of his trip by salvaging a large quantity of rusting, spent bomb cases, apparently discarded by the Air Force.²⁹¹ *Morissette* freely admitted his conduct and told an investigator that "he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government."²⁹² The trial court refused to allow *Morissette* to defend on the ground that he

288. See *id.* at 426 (Brennan, J., noting that the failure of Congress to unambiguously indicate intent does not signal a departure from basic assumptions of criminal law, thus inferring that Congress' intent or understanding is that basic rules of criminal law are to be followed); see also *United States v. Agrillo-Ladlad*, 675 F.2d 905, 909-10 (7th Cir. 1982); *State v. Hooper*, 386 N.E.2d 1348, 1349-50 (Ohio 1979); LAFAVE, *supra* note 106, at 75 (use of canons of construction).

289. *Morissette v. United States*, 342 U.S. 246, 248 (1952).

290. 18 U.S.C. § 641.

291. *Morissette*, 342 U.S. at 247.

292. *Id.* at 248.

thought that the property was abandoned and, instead, instructed the jury that "[t]he question on intent is whether or not he intended to take the property."²⁹³

The Supreme Court reversed. The Court framed the issue as the court of appeals had and treated the case as one in which Congress had omitted "any mention of criminal intent."²⁹⁴ The court of appeals had relied on two earlier Supreme Court decisions in which Congress was silent on *mens rea*, in which cases the Supreme Court had found an intent to make the offenses strict liability offenses.²⁹⁵

In light of the explicit reference to the term "knowingly" in 18 U.S.C. § 641, the characterization of the statute as silent on *mens rea* seems odd. More importantly, the Court was not merely content to define the necessary elements of 18 U.S.C. § 641 and to ask whether "knowingly convert" demonstrated an intent to distinguish an innocent converter, liable in tort,²⁹⁶ from a culpable offender, chargeable with a criminal offense.²⁹⁷ Had the Court done so, it would have reached the same result as it did, that Morissette was entitled to defend on the basis of his belief that the property was abandoned. But the decision would have been of minor importance.

Instead, Justice Jackson offered a comprehensive discussion of common law crimes and public welfare statutes and the different presumptions that attach when a court is called upon to determine the *mens rea* in a given offense.²⁹⁸ Given the Court's conclusion that Morissette's offense was not a public welfare statute, the Court's discussion on point is dicta, albeit influential. The distinction between *mala in se* and *mala prohibitum* has been recognized as a basis of determining legislative intent, absent

293. *Id.* at 249.

294. *Id.* at 250.

295. *Id.* at 249-50 (referring to *United States v. Behrman*, 258 U.S. 280 (1922) and *United States v. Balint*, 258 U.S. 250 (1922)).

296. *See Morissette*, 342 U.S. at 270; *see also* Restatement (Second) of Torts § 222A(1) (1976).

297. *Morissette*, 342 U.S. at 270.

298. *Id.* at 270-73.

unambiguous language or clear intent.²⁹⁹

Morissette's discussion of the *mens rea* requirement for common law crimes is consistent with the Court's discussion of the background assumptions of the criminal law today. Justice Jackson asserted that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."³⁰⁰

More troubling was Justice Jackson's discussion of public welfare offenses. He defined broadly instances in which Congress would be presumed to have intended no *mens rea*, despite severe penalties that might attach to the conduct.³⁰¹ He suggested that to impose liability in such cases, while criticized by "responsible and disinterested students of penology"³⁰² was exclusively the province of Congress.³⁰³ For example, he accepted acritically that most often *mala prohibitum* offenses provide for "relatively small" penalties and do "no grave damage to an offender's reputation."³⁰⁴ Despite recognizing that some commentators had expressed misgivings³⁰⁵ about the line between public welfare and traditional common law offenses, Justice Jackson suggested no limits on Congress's power to draw the line or the Court's

299. See LAFAVE, *supra* note 106, at 79. ("Other things being equal, 'statutes' involving morally bad conduct should be construed more strictly than those involving conduct not so bad.").

300. *Morissette*, 342 U.S. at 250; see also MODEL PENAL CODE § 2.02(3) (Proposed Official Draft 1962).

301. *Morissette*, 342 U.S. at 258-59.

302. *Id.* at 254 n.14.

303. *Id.* at 258 (quoting *United States v. Balint*, 258 U.S. 250, 251-52 (1922)); see also *Morissette*, 342 U.S. at 256.

304. *Morissette*, 342 U.S. at 256; see also *United States v. Balint*, 258 U.S. 250, 251 (1922) (subjecting defendant to possible five year sentence under Narcotics Act of December 17, 1914, c. 1, 38 Stat. 785).

305. *Morissette*, 342 U.S. at 256.

willingness to follow that line.³⁰⁶

Morissette established a presumption of congressional intent. But it imposed a presumption in favor of a *mens rea* requirement when the offense was a common law offense. The Court stated that "where 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."³⁰⁷ Under *Morissette's* approach, if a defendant could not demonstrate that the offense had common law origins, then a statute silent on a requisite *mens rea* where no clear congressional intent could otherwise be established, would be read literally to allow imposition of liability without any showing of blameworthiness.³⁰⁸ Otherwise innocent conduct could lead to a felony conviction and a term of imprisonment, apart from *Morissette's* reassurance that penalties associated with *mala prohibitum* offenses are usually relatively small.³⁰⁹

2. *United States v. International Minerals & Chemical Corp.*

In *International Minerals*,³¹⁰ the corporate defendant was charged with shipping sulfuric and hydrofluosilicic acid without a

306. *Id.* at 275 (Jackson, J., writing for the majority, failed to set any limitations on the Court's holding). See also *Solem v. Helm*, 463 U.S. 277, 303 (1983) (reversing a life imprisonment sentence for violation of a seventh non-violent felony due to limitations based upon notions of proportionality and cruel & unusual punishment under the Eighth Amendment); see also *State v. Guminga*, 395 N.W.2d 344, 349 (Minn. 1986) (holding that a statute which imposes vicarious criminal liability on an employer whose employee serves intoxicating liquor to a minor violates due process).

307. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

308. *United States v. Flum*, 518 F.2d 39, 43-44 (8th Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975).

309. *Id.* Compare with *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

310. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971).

proper label that the liquids were corrosive.³¹¹ That was a violation of an Interstate Commerce Commission (ICC) regulation promulgated under 18 U.S.C. § 834(a)³¹² and made a criminal offense under 18 U.S.C. § 834(f) which provided that whoever "knowingly violates any such regulation"³¹³ shall be fined or imprisoned.

The issue before the Court was whether "'knowledge' of the regulation is . . . required."³¹⁴ Initially, the Court rejected the idea that without imposing a requirement of knowledge of the regulation the offense imposed strict liability. After all, argued Justice Douglas, "knowledge of the shipment of the dangerous materials is required."³¹⁵ An accused could defend on the basis that he thought that the liquid shipped was harmless.³¹⁶

International Minerals did not explicitly address whether the Act was ambiguous. But it did address both the legislative history and what might be characterized as the relevant background assumption of the criminal law. In 1960, Congress considered amendments to 18 U.S.C. § 834 and, according to the majority, it demonstrated that Congress did not intend to abandon the general rule that ignorance of the law is no defense.³¹⁷ In fact, despite what would appear to be a plausible reading of the Act,³¹⁸ the Court relied heavily on "the general rule that ignorance of the law is no excuse"³¹⁹

The Court acknowledged *Morissette's* insistence that *mens*

311. *Id.* at 559.

312. 18 U.S.C. § 834(a) (1971) (repealed (1979)).

313. 18 U.S.C. § 834(f) (1971) (repealed (1979)).

314. *Int'l Minerals*, 402 U.S. at 560.

315. *Id.* at 565 (referring to *United States v. Freed*, 401 U.S. 601 (1961), which held that notice attaches to the object); see also *Int'l Minerals*, 402 U.S. at 565.

316. *Id.* at 563-64 ("A person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered.").

317. *Id.* at 563.

318. After all, the explicit language of the Act suggests that one must know of the regulation. See discussion *supra* notes 219-21 and accompanying text.

319. *Int'l Minerals*, 402 U. S. at 562.

rea matters.³²⁰ But the Court focused on what has since often been accepted acritically as a presumption of knowledge. It suggested that in some cases, due process concerns might require knowledge of regulations: "Pencils, dental floss, paper clips may . . . be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require . . . '*mens rea*' as to each ingredient of the offense."³²¹ But the Court distinguished objects that carry with them notice of regulation: "[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."³²² It is not always recognized that relying on the presumption of knowledge, *International Minerals* appears to be addressing the constitutional minimum, not a rule of construction. Although not without ambiguity, the opinion seems to hold the following: the statutory language is ambiguous; the legislative history provides some support that the knowledge term does not attach to the ICC regulations; when in doubt, the Court should look to background assumptions of the criminal law to divine what Congress might have meant and here, the relevant background assumption is that ignorance of the law is no excuse.³²³ Further, but in response to a different argument, the Court seemed to hold that due process may impose some *mens rea* requirement³²⁴ -- for example, in cases involving the possession of otherwise innocent objects. But when the object itself is dangerous, due process does not require that *mens rea* attach to the regulation. In that context, the quoted

320. *Id.* at 564 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

321. *Int'l Minerals*, 402 U.S. at 564-65.

322. *Id.*

323. *See, e.g.* *People v. Marrero*, 507 N.E.2d 1068, 1069 (N.Y. 1987); *Gardner v. People*, 62 N.Y. 299 (1875). *But see* MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962) (allowing mistake of law defense under exceptional circumstances).

324. *Int'l Minerals*, 402 U.S. at 564-65; *see, e.g.* *Lambert v. California*, 355 U.S. 225, 227 (1957).

passage concerning the probability of regulation and the hazardous nature of the offending object is not a rule of construction for statutes like the one involved in *International Minerals*, but part of the holding that Congress had discretion to dispense with *mens rea* with respect to the "regulation" element of the offense.³²⁵

The distinction is significant. The presumption that one must know of the regulations from the nature of the object does not become relevant unless there is a due process challenge. It is not a presumption that bears on legislative intent. Rephrased, it is a question of constitutional power, rather than congressional preference. That becomes important when I argue that Justice Douglas grossly overstated the importance of the maxim that "ignorance of the law is no excuse," and that reliance on other more important background assumptions of the criminal law might have produced a different result in *International Minerals*.³²⁶

3. *Liparota v. United States*

As did *Morissette* and *International Minerals*, *Liparota*³²⁷ involved a statute in which Congress used the term "knowingly," but left for judicial interpretation the decision about whether "knowingly" attached to all of the statutory elements of the offense.³²⁸ As in *International Minerals*, the statute required the government to show that the defendant's conduct violated regulations promulgated under an administrative scheme.³²⁹

Frank Liparota, the co-owner of Moon's Sandwich Shop, purchased food stamps for substantially less than their face value. On one occasion, Liparota paid a Department of Agriculture undercover agent \$150 for \$195 worth of food stamps. Later, he bought \$500 worth of food stamps for \$350, and then \$500 worth

325. By contrast, a statute violates due process if it criminalizes a person for failing to act when her omissions are otherwise innocent. See *Lambert*, 355 U.S. at 229-30.

326. See discussion *infra* notes 359-393 and accompanying text.

327. *Liparota v. United States*, 471 U.S. 419 (1985).

328. *Id.* at 424-25.

329. *Id.* at 419.

of food stamps for \$300.³³⁰ The transaction took place under circumstances that demonstrated Liparota's guilty knowledge.³³¹

Liparota was charged with violating 7 U.S.C. § 2024(b)(1), which provides in relevant part: "[W]hoever knowingly uses, transfers, acquires, alters or possesses coupons . . . in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall . . . be guilty of a felony"³³² The district court rejected Liparota's proposed jury instruction to the effect that the government must prove that "the defendant knowingly did an act which the law forbids, purposely intending to violate the law."³³³ The gist of the district court's instruction on point was that defendant in fact had to have acquired the food stamps in a manner that violated the law; but the only knowledge to be proven was that "the Defendant knowingly and wilfully acquired the food stamps."³³⁴

Justice Brennan noted that different *mens rea* requirements might attach to different elements of an offense and that other *mens rea* classifications exist besides specific and general intent.³³⁵ Given the statutory language in an offense like § 2024 and the failure of Congress to enact legislation similar to the Model Penal Code,³³⁶ those possibilities really do not present themselves to the litigants. That is, the government was not free to argue that, for example, while knowledge attaches to the acquisition element of the offense, the government must only prove that Liparota should have known that his conduct violated the law.³³⁷ If the Court were to so hold, it would be an obvious

330. *Id.* at 421-22.

331. *Id.* at 434 n.17.

332. 7 U.S.C. § 2024(b)(1) (1985) (current version at 7 U.S.C. § 2024).

333. *Liparota v. United States*, 471 U.S. 419, 422 (1985) (quoting On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Joint Appendix at 34, *Liparota v. United States*, 471 U.S. 419 (1985) (No. 84-5108) [hereinafter *Writ*]).

334. *Liparota*, 471 U.S. at 422 (quoting *Writ*, *supra* note 333, at 33).

335. *Id.* at 423-24 n.5.

336. S. 1722, 96th Cong., 1st Sess. § 302 (1979) (never enacted).

337. See generally *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 664-65 (3d Cir. 1984), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985); see also Paul H. Robinson & Jane A. Grall, *Element*

usurpation of Congress' authority to define the elements of an offense.³³⁸

As discussed above, it is late in the day to argue that this statute is unambiguous.³³⁹ Justice Brennan found that either interpretation, that knowledge attached to "authorized by" the law as urged by Liparota or that it attached only to "acquires" as argued by the government, "would accord with ordinary usage."³⁴⁰ In addition, *Liparota* found the legislative history silent on the question of the proper interpretation of the Act.³⁴¹

At that point, the Court had to turn to background assumptions of the criminal law. The core assumption that the Court relied on was that, absent a contrary purpose, *mens rea* should attach to all of the statutory elements.³⁴² *Liparota* found that assumption to be the teaching of *Morrisette*.³⁴³ The Court found a strong presumption in favor of implying a *mens rea* term. That was particularly the case when a contrary reading of the Act might "criminalize a broad range of apparently innocent conduct."³⁴⁴ It disguised cases like *United States v. Yerman*, where the Court limited the *mens rea* term to the falsity of the defendant's statement and refused to attach knowledge to the fact that the defendant was dealing with a federal agency.³⁴⁵ In *Yerman*, on the Court's reading of the applicable statute, the

Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 STAN L. REV. 681 (seeking to emphasize the importance of the Model Penal Code's element analysis).

338. See *Liparota*, 471 U.S. at 423-24 ("Our task is to determine which meaning Congress intended. 'The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.'"); see also *Liparota*, 471 U.S. at 424 n.6 (stating that Congress must act within constitutional restraints).

339. See discussion *supra* notes 200-33 and accompanying text.

340. *Liparota*, 471 U.S. at 424.

341. *Id.* at 423-24.

342. *Id.* at 425.

343. *Id.* at 425-26.

344. *Id.* at 426; see also *id.* at 427 (supporting traditional principles of lenity). But see *id.* at 428 (government's position regarding subsection (E)).

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

government had to demonstrate that an offender was blameworthy.³⁴⁶

The Court addressed two arguments that have importance for an analysis of 42 U.S.C. § 6928. In a footnote, the Court responded to the dissent's argument that it was creating a "mistake of law" defense.³⁴⁷ Justice Brennan argued, in effect, that he was merely interpreting the statutory language consistent with traditional interpretative principles.³⁴⁸ By contrast, the traditional maxim that ignorance of the law is no excuse refers only to the situation in which an accused tries to deny knowledge of the very penal law with which he is charged.³⁴⁹ Hence, Brennan distinguished between an accused charged with receiving stolen goods who cannot claim that he did not know that receipt of stolen goods is illegal, but can defend on the ground that he did not know that the good were stolen.³⁵⁰ That the goods were or were not stolen might turn on what technically is a question of law, such as who is the lawful owner of the property in question.³⁵¹

The government also contended that the statute in question created a public welfare offense, that would, therefore, "consist only of forbidden acts or omissions."³⁵² Had the Court analyzed 7 U.S.C. § 2024 in light of factors identified in *Morissette*, it might have concluded that dealing in paper issued pursuant to a federal entitlements program was not a crime at common law.³⁵³

346. *United States v. Yermian*, 468 U.S. 63, 69 (1984).

347. *Liparota*, 471 U.S. at 425 n.9.

348. *Id.* at 422 (Brennan, J., referring to MODEL PENAL CODE § 2.02 commentary at 131 (Tentative Draft No. 4, 1955)).

349. MODEL PENAL CODE § 2.02(9) (Proposed Official Draft 1962).

350. *Liparota*, 471 U.S. at 425 n.9. *See also* *Regina v. Smith* (David), (1974) 1 All E. R. 632 (defendant was able to defend against a charge of recklessly damaging the property of another by introducing evidence of a good faith belief that the property destroyed was his own).

351. *See Regina*, 1 All E. R. 632, 636; *see also* MODEL PENAL CODE § 2.04(1) (Proposed Official Draft 1962); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 100, at 287 (2d ed. 1961).

352. *Liparota*, 471 U.S. at 432 (quoting *Morissette v. United States*, 342 U.S. 246, 252-53 (1952)).

353. *Morissette*, 342 U.S. at 259-61.

The question surely would have been a close one.³⁵⁴ The Court's response certainly suggests a narrowing of the Court's public welfare offenses analysis. Its response to the assertion that 7 U.S.C. § 2024 created a public welfare offense was brief: "the offense at issue here differs substantially from those 'public welfare offenses' we have previously recognized."³⁵⁵ It limited its public welfare analysis by observing that "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety"³⁵⁶

Liparota's discussion of public welfare offenses is consistent with the disillusionment with strict liability offenses.³⁵⁷ It imposes a limitation on the category of cases where the Court will find public welfare offenses in absence of clear congressional intent to the contrary. While that result is to be applauded, its response to the government's argument can work mischief, as it did in *United States v. Hoflin*.³⁵⁸ In context, the Court seems to have created a presumption that when Congress does regulate subjects that effect "the community's health or safety,"³⁵⁹ it intends to impose strict liability on the offender on the irrebuttable presumption that a person is negligent for failing to know of the regulations. The Court's citation to *International Minerals* is misplaced.³⁶⁰ As discussed above, *International Minerals* created no such presumption.³⁶¹ There, the Court relied on the notice inherent in the possession of dangerous objects in discussing whether due process is violated if no *mens rea* attaches to an element of an offense. By contrast, *International Minerals* suggested that if the defendant is in violation of a regulation of an

354. See also *United States v. Flum*, 518 F.2d 39, 45 (8th Cir. 1975), cert. denied, 423 U.S. 1018 (1975).

355. *Liparota*, 471 U.S. at 432-33.

356. *Id.* at 433.

357. *Id.* at 431-33.

358. *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), cert. denied, 110 S. Ct. 1143 (1990).

359. *Liparota*, 471 U.S. at 433.

360. *Id.*

361. See discussion *supra* notes 321-323 and accompanying text.

otherwise innocent activity due process may be violated "if Congress did not require . . . '*mens rea*' as to each ingredient of the offense."³⁶²

Liparota creates a strong presumption against criminalizing conduct that might otherwise be innocent and in favor of reading liberally any *mens rea* requirement found within a federal statute. But it carelessly suggested a separate category of cases when Congress is regulating otherwise harmful activity. There, without deciding the question, *Liparota* suggests a different presumption concerning congressional intent when a statute regulates dangerous activity. *International Minerals*, the Court's support for that view, hardly justifies its conclusion.

V. SORTING OUT BACKGROUND ASSUMPTIONS OF THE CRIMINAL LAW

Absent plain meaning and clear legislative intent to the contrary, *International Minerals* was unwilling to assume that Congress intended to make knowledge of a particular regulation an element of the offense. It did so in large part because "it is too much to conclude that . . . the House [intended to] carv[e] out an exception to the general rule that ignorance of the law is no excuse."³⁶³ Justice Douglas should have known better.

It was after all Justice Douglas who wrote the Court's opinion in *Lambert v. California*,³⁶⁴ in which the Supreme Court struck down a local ordinance that imposed a registration requirement on any convicted person who remained in Los Angeles for more than five days.³⁶⁵ The Court found that the ordinance violated the due process notice requirement in that it applied to a person "who has no actual knowledge of his duty to register."³⁶⁶ The Court did suggest that nothing in Lambert's circumstances

362. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971).

363. *Id.* at 563.

364. *Lambert v. California*, 355 U.S. 225 (1957).

365. *Id.* at 228-29.

366. *Id.* at 227.

would lead her "to inquire as to the necessity of registration."³⁶⁷ Despite some ominous language in Justice Frankfurter's dissent,³⁶⁸ *Lambert* did not usher in a general defense of ignorance of the law.³⁶⁹ But it stands as one of a number of areas where ignorance of the law is excusable, where an offender's fault for not knowing is so lacking that it is unfair to punish the offender.³⁷⁰

More to the point, however, commentators³⁷¹ and some courts³⁷² have long recognized that the claim that ignorance of the law is no excuse is overstated. The generalization that ignorance of the law is no excuse remains largely true in two classes of cases. First, those cases in which a defendant contends that he was ignorant of the law with which he has been charged;³⁷³ and, second, those cases in which the offender is aware of the law, concludes reasonably and in good faith that it does not apply to him, but guesses wrong.³⁷⁴ On occasion, most

367. *Id.* at 229.

368. *Id.* at 230 (1957) (Frankfurter, J., dissenting).

369. *See Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). *See also Texaco v. Short*, 454 U.S. 516, 537 (1982); *see also United States v. Freed*, 410 U.S. 601, 608 (1971); MODEL PENAL CODE § 2.02(9) (Proposed Official Draft 1962).

370. *See Cox v. Louisiana*, 379 U.S. 559, 566-67 (1965); *see also* MODEL PENAL CODE § 2.04 commentary at 274-75 (1985).

371. MODEL PENAL CODE, § 2.04 commentary at 274-75 (1985); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 689-95 (1976); George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1295-99 (1974); Henry W. Seney, "When Empty Terrors Overawe"--*Our Criminal Law Defenses (Part Two)*, 19 WAYNE L. REV. 1359, 1364-76 (1973).

372. *See, e.g., Liparota v. United States*, 471 U.S. 419, 420 (1985); *Lambert*, 355 U.S. 225 (1957); *United States v. Simpson*, 561 F.2d 53, 61-62 (7th Cir. 1977); *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 827-28 (9th Cir. 1976).

373. *See, e.g., Morgan v. Dist. of Columbia*, 476 A.2d 1128, 1133 (D.C. App. 1984); *United States v. Currier*, 621 F.2d 7, 9-10 (1st Cir. 1980); *State v. Clark*, 346 N.W.2d 510 (Iowa 1984); *State v. Weitzman*, 427 A.2d 3, 6-7 (N.H. 1981).

374. *See* GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 101, at 288-89 (2d ed. 1961).

importantly in regulatory offenses, courts face situations in which the offender seems entirely blameless. Nonetheless, largely based on a utilitarian rationale, courts follow Justice Holmes' argument that "justice to the individual is rightly outweighed by the larger interests on the other side of the scales [the general good]."³⁷⁵

Courts and legislatures have created narrow exceptions to the rule where a defendant has gone beyond merely reading the statute and misconstruing its language.³⁷⁶ For example, the Model Penal Code recognizes five situations in which a defendant has an affirmative defense of proving a reasonable mistake of law;³⁷⁷ it recognizes a claim of inadequate publication of the law;³⁷⁸ it also recognizes four situations in which the defendant has relied on a later determined invalid or erroneous interpretation of the law.³⁷⁹ Again largely for utilitarian policy concerns, the Model Penal Code, like the common law, does not allow a claim that the defendant relied on advice of counsel.³⁸⁰

The categories hardly seem principled. The categories do identify blameless, reasonable actors who are excused because of their mistake concerning the law. But the line falls far short of providing a defense to all blameless actors whose mistake is one

375. See *People v. Marrero*, 507 N.E. 2d 1068, 1069 (N.Y. 1987) (quoting OLIVER W. HOLMES, *THE COMMON LAW* 48 (1881); see also *supra* note 374 at 288-89. But see Immanuel Kant, *The Philosophy Of Law*, in *THE GREAT LEGAL PHILOSOPHERS* 237, 257 (Clarence Morris ed. 1971) ("[o]ne man ought never to be dealt with merely as a means subservient to the purpose of another . . .").

376. See also *Marrero*, 507 N.E.2d at 1069-70 (precluding mistake of law exception despite language of N.Y. Penal Law § 15.20).

377. MODEL PENAL CODE § 2.04(3) (Proposed Official Draft 1962).

378. MODEL PENAL CODE § 2.04(3)(a) (Proposed Official Draft 1962).

379. *Id.* § 2.04(3)(b). See, e.g., *Cox v. Louisiana*, 379 U.S. 559, 568-71 (1965) (allowing an exception to mistake of law rule where defendant reasonably relies on public officer's enforcement of the law); *United States v. Albertini*, 830 F.2d 985, 989-90 (9th Cir. 1987) (allowing an exception to mistake of law rule where defendant reasonably relies on judicial opinion); *Long v. State*, 165 A.2d 489 (1949) (allowing an exception to mistake of law where defendant reasonably relies on legality of divorce proceedings); *State v. Godwin*, 31 S.E. 221 (N.C. 1898) (reasonably relying on a statute later found unconstitutional).

380. MODEL PENAL CODE, § 2.04 commentary at 279-280 (1985).

of law.³⁸¹ *Lambert* demonstrates the kind of ad hoc line that exists in the field. There, a convicted felon, picked up on suspicion of another offense, was charged under a Los Angeles ordinance that required a convicted felon to register with the police if she remained in Los Angeles for a more than five days.³⁸² The Court held that *Lambert's* conviction violated the notice provision of the due process clause.³⁸³

Lambert might have been grounded on the absence of the offender's blameworthiness in failing to know the law. Obviously, *Lambert's* failure to know the unusual provision of law could be distinguished from an offender who claimed ignorance of the law of theft or murder.³⁸⁴ A line based on blameworthiness would have been principled. Had the Court gone that route, any number of defendants would be able to argue that the unusual nature of a particular regulatory crime made their lack of knowledge defensible.³⁸⁵ But the Court stopped far short of such a holding. Instead, it narrowed *Lambert* to situations dealing with crimes involving "conduct that is wholly passive -- mere failure to register."³⁸⁶ Not all omissions were within the Court's holding.³⁸⁷ More importantly, Justice Douglas suggested that a person whose crime involves an act will be put on notice of the possibility that the conduct is unlawful.³⁸⁸

381. See, e.g., *People v. O'Brien* 31 P. 45, 46-47 (Cal. 1892); *Oakland v. Carpentier*, 21 Cal. 642 (1863); *Rex v. Esop*, 173 Eng. Rep. 203 (1836); *Rex v. Bailey*, 168 Eng. Rep. 651 (1800).

382. *Lambert v. California*, 355 U.S. 225, 226 (1957).

383. *Lambert*, 355 U.S. at 227. It is worth noting that defendant was denied an opportunity to defend on lack of knowledge, *id.* at 227.

384. Cf. *Rex v. Esop*, 173 Eng. Rep. 203 (1936) (not allowing an ignorance of the law defense where the act of sodomy was not criminal in the defendant's native country).

385. Henry M. Hart, *The Aims of the Criminal Law*, LAW & CONTEMP. PROBS. 401, 433-36 (1958) (criticizing the *Lambert* decision).

386. *Lambert*, 355 U.S. at 228.

387. *Id.* at 229 (Douglas, J., distinguishing the statute in question from statutes requiring the licensing of businesses); see also *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (involving interstate transport of misbranded drugs); *United States v. Balint*, 258 U.S. 250, 251 (1922) (involving sale of drugs).

388. *Lambert*, 355 U.S. at 228.

Lambert's distinctions have been widely criticized.³⁸⁹ At a minimum, *Lambert* demonstrates the ambivalence of courts in defining the law governing ignorance of the law. It has hardly had a settled course.

Cases like *Liparota*, *International Minerals*, and the cases interpreting 42 U.S.C. § 6928 represent a distinct line of mistake of law cases. Unlike the defendant who claims ignorance of the law with which he is charged or ignorance about its interpretation, the defendant in *Liparota* argued that knowledge of the law was a material element of offense and that his ignorance of the law negated a material element of the offense.³⁹⁰

The common law distinguished between specific and general intent offenses, whereby ignorance of the law was relevant only if the defendant was charged with a specific intent offense.³⁹¹ The most obvious examples, of course, were cases involving good faith mistakes concerning ownership of property in theft and related offenses.³⁹² More recent proposals have abandoned the distinction as unfounded.³⁹³ As described by the Model Penal Code, this class of cases involves a situation in which "[t]he culpability issue is essentially the same for a given offense whatever the abstract classification of the error that is asserted. . .

..³⁹⁴

389. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 424-25 (1978); see also Henry M. Hart, *The Aims of the Criminal Law*, *LAW & CONTEMP. PROBS.* 401, 433-36 (1958).

390. *Liparota v. United States*, 471 U.S. 419, 423 (1985). Compare with MODEL PENAL CODE § 2.04(1) (Proposed Official Draft 1962).

391. See Williams, *supra* note 374, at 294.

392. See, e.g., *State v. Ebbeler*, 223 S.W. 396 (Mo. 1920); *Regina v. Smith (David)*, (1974) 1 All E. R. 632.

393. MODEL PENAL CODE §§ 2.02, 2.04 (Proposed Official Draft 1962) (setting out *mens rea* requirement and allowing a defense when requisite *mens rea* not proven). But see *State v. Woods*, 179 A. 1, 2-3 (Vt. 1935) (holding that a "guilty mind" by defendant not required for conviction).

394. MODEL PENAL CODE, § 2.04 commentary at 270 n.2 (1985). The Model Penal Code's approach should hardly be surprising to a student of the criminal law. It reflects the predominant view that culpability is a necessary condition for punishment. As I have developed elsewhere, commentators of every political persuasion have urged that retribution is the primary justification for punishment. See Michael Vitiello, *Reconsidering*

What emerges in legal commentaries, case law, and codifications like the Model Penal Code, is a general rule that where a *mens rea* term is provided or implied³⁹⁵ it attaches to all material elements of an offense.³⁹⁶ Further, if the material element of the offense involves a question of law, like lawful authority, the *mens rea* term applies equally to that material element. *Liparota* reflects the same understanding of statutory construction. With regard to 42 U.S.C. § 6928, there would appear to be no coherent reason to abandon that traditional understanding. In other words, insofar as the Third Circuit would run the knowledge term all the way to attach to the permit requirement,³⁹⁷ *Johnson & Towers* is entirely consistent with the law governing *mens rea* and mistake of law.

Rehabilitation, 65 TUL. L. REV. 1012 (1991). The Supreme Court has suggested that sentencing a nonculpable offender to a term of imprisonment may be a violation of the Eighth Amendment. *Solem v. Helm*, 463 U.S. 277, 290-94 (1983).

Liparota v. United States is largely consistent with that theme. Justice Brennan argued that culpability is the predominant background assumption of the criminal law. *Liparota*, 471 U.S. 419, 425-26 (1985). When a court must analyze whether a *mens rea* term attaches to a material element, the maxim concerning ignorance of the law is simply inapplicable. Once that point is recognized, the Court should have simply concluded that *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1943), was wrongly decided. As it stands, *Liparota's* analysis, consistent with Model Penal Code §§ 2.02(4) and 2.04(1), and *Liparota's* weak attempt to distinguish *Int'l Minerals* are irreconcilable and can only produce confusion.

395. See MODEL PENAL CODE § 2.02(3) (Proposed Official Draft 1962); see also *Regina v. Smith (David)*, (1974) 1 All E. R. 632.

396. MODEL PENAL CODE § 2.02(4) (Proposed Official Draft 1962); see also *Id.* § 2.04(1) (treating mistake of fact and mistake of law in the same way).

397. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 664-65 (3d Cir. 1984), cert. denied sub nom. *Angel v. United States*, 469 U.S. 1208 (1985). But see *id.* at 664-65 (holding that "knew or should have known" is the standard).

VI. PUBLIC POLICY AND IGNORANCE OF THE LAW

As indicated above, one traditional and strong justification for the general rule that ignorance of the law is no excuse is the utilitarian argument that "justice to the individual is rightly outweighed by the larger interests on the other side of the scales."³⁹⁸ The same kind of utilitarian justification underlies the strict liability requirement in *mala prohibitum* offenses.³⁹⁹ Indeed, the court in *Hoflin* relied on the fact that, despite the presence of a *mens rea* term, 42 U.S.C. § 6928 was a public welfare offense, justifying a narrow construction of the *mens rea* term.⁴⁰⁰ This section discusses whether the competing interests identified by Justice Holmes, justice to the individual and important public interests, can be accommodated without criminalizing an otherwise blameless individual.

Courts have traditionally justified punishment of an offender without allowing an ignorance of the law defense or without a *mens rea* element at all largely on similar grounds. As explained by one state court, "[t]he usual rationale for strict liability statutes is that the public interest is so great as to warrant the imposition of an absolute standard of care"⁴⁰¹ That is especially true in cases, like traffic offenses, where the prosecutor may need to try a large number of offenders without the added and difficult burden of establishing a knowledge or *mens rea* element.⁴⁰² In partial response to the criticism that the result is unjust, some courts have argued that *mala prohibitum* offenses carry minor penalties; in effect, they are civil cases.⁴⁰³ That ignores both the stigma attaching to the criminal charges and the real possibility of imprisonment in some instances. A further argument to support strict liability offenses and to justify disallowing the ignorance of

398. See Holmes, *supra* note 375, at 48.

399. *Morissette v. United States*, 342 U.S. 246, 259-61 (1952).

400. *United States v. Hoflin*, 880 F. 2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

401. *State v. Collova*, 255 N.W. 2d 581, 585 (Wis. 1977).

402. *Commonwealth v. Smith*, 44 N.E. 503, 504 (Mass. 1896) (Holmes, J., writing for the majority).

403. See *Morissette v. United States*, 342 U.S. 246, 256 (1952).

the law defense is that we can trust prosecutors not to proceed and juries not to convict blameless offenders.⁴⁰⁴ With regard to disallowing an ignorance of the law defense, the additional argument has been made that people are aware of the law.⁴⁰⁵

Each of these arguments has been criticized in an ample literature attacking strict liability and the general absence of an ignorance of the law defense.⁴⁰⁶ But whatever efficacy the arguments may have, for example, within the context of regulating traffic offenses,⁴⁰⁷ the arguments appear singularly unpersuasive within the context of federal regulatory schemes.

Congress commonly establishes regulatory schemes with a wide array of enforcement remedies. The pattern varies, but the agency may initially be empowered to negotiate with the regulated entity;⁴⁰⁸ thereafter, it may be able to seek injunctive relief,⁴⁰⁹ attach assets,⁴¹⁰ seek civil or criminal penalties and fines.⁴¹¹ In some instances, especially in cases involving egregious behavior, the agency may be able to seek or have the Justice Department seek a criminal indictment.⁴¹²

The Internal Revenue Code provides an example of the government's power to use a variety of enforcement tools. As with many federal regulatory schemes,⁴¹³ the tax code is

404. See *United States v. Dotterweich*, 320 U.S. 277, 285 (1943); see also *Long v. State*, 65 A.2d 489 (Del. 1989).

405. See, e.g., *Weeks v. State*, 132 So. 870, 871 (Ala. 1931); *Satterfield v. State*, 109 N.W.2d 415, 418 (Neb. 1961).

406. See MODEL PENAL CODE § 2.04 commentary at 274-75 (1985); see also Cass, *supra* note 371, at 689-99; Fletcher, *supra*, note 371, at 1295-99; Seney, *supra* note 371, at 1364-76.

407. Sayre, *supra* note 268, at 87 n.6.

408. 21 U.S.C. § 462 (1972). See also Henry H. Perritt, Jr., *Negotiated Rulemaking and Administrative Law*, 38 ADMIN. L. REV. 471, 471 (1986).

409. Petroleum Marketing Practices Act, 15 U.S.C. § 2805(b)(2) (1992).

410. Internal Revenue Code of 1986, 26 U.S.C. § 6332(d).

411. See *Jackson v. Concord Cas.*, 253 A.2d 793, 800 (N.J. 1969); see also *United States v. Grimaud*, 220 U.S. 506, 517-18 (1911).

412. Commodity Exchange Act, 7 U.S.C. § 13a-1 (1992)

413. For example, the EPA administers 33 U.S.C. § 1321(b)(6) (1987), which provides civil and criminal penalties for polluting waters where the goals of the act, as stated in 33 U.S.C. § 1251(a) (1987), are to "maintain the chemical, physical, and biological integrity of the Nation's waters." Another

designed with a primary objective that is noncriminal, here the collection of revenue.⁴¹⁴ Criminal sanctions are available for tax evaders,⁴¹⁵ largely on utilitarian deterrence grounds. No doubt, like the schemes discussed in *Morissette*, crimes under the Internal Revenue Code would be *mala prohibita*.

Congress has never attempted to define crimes under the code as strict liability offenses. In fact, the Supreme Court has consistently over a sixty year period read the willful element found in Title 26 offenses as to require not only knowledge of fact, but also knowledge of the law.⁴¹⁶ Most recently, for example, the Court reversed a decision by the Seventh Circuit that held that the tax payer could raise a good faith misunderstanding of the law only if the defendant's beliefs were reasonable.⁴¹⁷ Instead, the Court held that the appropriate standard was whether the defendant made a good faith mistake. That was so even though the mistake involved a question of law.⁴¹⁸

*Cheek*⁴¹⁹ and other cases interpreting criminal provisions⁴²⁰ under the tax laws are interesting for a number of reasons. Even if the crime is a misdemeanor, Congress has included a *mens rea* term.⁴²¹ Further, the Court has interpreted that term to allow a good faith claim of ignorance of the law.⁴²² Apart from the interpretative problems, the regulatory goals of the congressional scheme are not impaired by imposing a fault requirement even where, as it is in *Cheek*, a very strict fault

example would be the Insider Trading and Securities Fraud Act of 1988, 15 U.S.C. § 78ff, which provides civil and criminal penalties for violations of the Securities and Exchange Act.

414. Internal Revenue Code of 1986, 26 U.S.C. §§ 1-5801 (1992).

415. Internal Revenue Code of 1986, 26 U.S.C. § 7201 (1992).

416. *United States v. Murdock*, 290 U.S. 389, 395-98 (1933).

417. *Cheek v. United States*, 111 S. Ct. 604, 610-11 (1991).

418. *Id.* at 611.

419. *Id.*

420. See, e.g., *United States v. Pomponio*, 429 U.S. 10 (1976); *United States v. Bishop*, 412 U.S. 346 (1973) (interpreting I.R.C. § 7206-7207); *United States v. Murdock*, 290 U.S. 389 (1933) (interpreting the Revenue Act of 1926, § 1114(a) and the Revenue Act of 1928, § 146).

421. See, e.g., 26 U.S.C. § 7203 (1992).

422. *Cheek v. United States*, 111 S. Ct. 604, 610-11 (1991).

requirement.⁴²³

Much the same can be said about federal environmental laws. Contrary to the presumption of *Morissette*, whereby the Court found less need for a *mens rea* requirement in *mala prohibitum* offenses because of the need for efficient enforcement, the reality of regulatory schemes today demonstrates that the enforcement goals and traditional notions of fault are not incompatible. Hence, what appeared to be the foundation of the distinction in *Morissette*, that abandoning *mens rea* was the only way in which to enforce regulatory goals, is largely contradicted by the facts. Important public policy concerns need not be impaired even if a court or a legislature imposes a fault requirement.⁴²⁴

VII. CONCLUSION

The confusion created by 42 U.S.C. § 6928 requires Supreme Court resolution of this question. Currently, litigants in different circuits receive unequal treatment under the law.

The split among the circuits certainly invites the Supreme

423. *Id.* at 610 (requiring the government in criminal tax cases to prove that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty").

424. *See* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971); *see also* United States v. Johnson & Towers, Inc., 741 F.2d 662, 664-65 (3d Cir. 1984), *cert. denied sub nom.* Angel v. United States, 469 U.S. 1208 (1985). The Court held that "knew or should have known" is the standard. It may be that the problem is setting the appropriate fault standard, although these cases suggest one standard, this is most appropriately the work of the legislature. Legislators, however, do not address this problem often enough. Some commentators have argued that civil enforcement provisions do not provide adequate protection for the environment. *See, e.g.*, Robert A. Milne, Comment, *The Mens Rea Requirements Of The Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFF. L. REV., 307, 318-20 (1988-89). That position ignores other enforcement devices such as injunctive relief and passing on clean up costs. In addition, consistent with Congress's intention, *see, e.g.* H.R. REP. NO. 1491, 94th Cong., 2nd Sess. 30, reprinted in 1976 U.S.C.C.A.N. 6238, 6268, I have argued that criminal sanctions should be reserved for truly blameworthy offenders, and that criminalizing only truly blameworthy people will not impair the legitimate goals of protecting the environment.

Court to grant review.⁴²⁵ This article has argued that the approach taken by the Third Circuit is the correct interpretation of 42 U.S.C. § 6928 and, therefore, should be adopted by the Supreme Court.⁴²⁶ Given the ambiguous language of the Act⁴²⁷ and the uncertain legislative history,⁴²⁸ the Court should analyze 42 U.S.C. § 6928 consistent with *Liparota* and Model Penal Code provisions governing statutory construction.⁴²⁹ The argument to the contrary,⁴³⁰ that to attach knowledge to the permit requirement would create an ignorance of the law defense, misses the mark. The maxim that ignorance of the law is no defense has no application in cases involving statutes where the *mens rea* term attaches to a material element that itself may involve a question of law.⁴³¹

The courts that have given narrow construction to 42 U.S.C. § 6928 have been influenced by the need to protect the environment.⁴³² That goal is obviously critically important. But the Ninth Circuit, for example, assumes acritically that allowing a defendant to demonstrate a lack of knowledge of the permit requirement would impair environmental protection goals.⁴³³

425. Sup. Ct. R. 10.1(a) (1990) ("a petition for writ will be granted "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . .").

426. See discussion *supra* notes 386-93 and accompanying text.

427. See 42 U.S.C. § 6928 (1992).

428. See H.R. REP. NO. 1491, 94th Cong., 2nd Sess., *reprinted in* 1976 U.S.C.C.A.N. 6238; H.R. REP. NO., 1444 96th Cong., 2nd Sess., *reprinted in* 1980 U.S.C.C.A.N. 5028; H.R. REP. NO. 198, 98th Cong., 2nd Sess., *reprinted in* 1984 U.S.C.C.A.N. 5576.

429. See *Liparota v. United States*, 471 U.S. 419 (1985); see also, MODEL PENAL CODE §§ 2.02, 2.04(1) (Proposed Official Draft 1962).

430. See, e.g., *Liparota*, 471 U.S. at 425; see also *United States v. Hoflin*, 880 F.2d 1033, 1037 (9th Cir. 1989), *cert denied*, 110 S. Ct. 1143 (1990).

431. See discussion *supra* notes 386-93 and accompanying text.

432. See *United States v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990) (stating that the Court's conclusion is consistent with the purpose of RCRA where "the overriding concern of RCRA is the grave danger to people and the environment from hazardous wastes").

433. *United States v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

Given the wide array of enforcement mechanisms in the regulatory scheme,⁴³⁴ the environment can be protected without risking the incarceration of an offender whose conduct was not blameworthy.

Review by the Supreme Court of the intercircuit conflict would give it another opportunity to clarify the rules governing statutory construction. As discussed above, the Court's approach is hardly consistent.⁴³⁵ But *Liparota* demonstrated the strong influence of the Model Penal Code's general culpability provisions.⁴³⁶ Justice Brennan's opinion did not adopt those provisions. For example, the Court did not overrule cases like *International Minerals*, cases that would have come out differently under the Code.⁴³⁷ But the actual holding in *Liparota* was consistent with those provisions. In light of Congress's inability to enact coherent criminal law reform,⁴³⁸ engrafting the Code's provisions may be the best way to bring coherence to statutory construction cases involving federal criminal laws.

434. See 42 U.S.C. § 6928 (d)(g)(h) (1992) (prescribing various enforcement provisions).

435. See discussion *supra* notes 209-29 and accompanying text.

436. See *Liparota v. United States*, 471 U.S. 419, 425-28 (1985) (Brennan, J., choosing to have the term "knowingly" apply as a material element of statute where Congress was silent as to what *mens rea* term should apply).

437. See MODEL PENAL CODE § 2.02(4) (Proposed Official Draft 1962). Under this approach, "knowingly" would have attached to the term "regulation." See discussion *supra* notes X-Y and accompanying text.

438. S. 1722, 96th Cong., 1st Sess. § 302 (1979) (never enacted).