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ELEMENT ANALYSIS APPLIED TO ENVIRONMENTAL CRIMES: WHAT DID THEY KNOW AND WHEN DID THEY KNOW IT?

Rebecca S. Webber

I. INTRODUCTION

At one time, an analysis of the culpability required to convict a violator of an environmental protection statute would have been an academic exercise. The recent surge in the number of prosecutions of environmental crimes, however, has made such an analysis essential. The increasing volume of criminal cases will make criminal penalty provisions more controversial as defendants search for strategies to challenge convictions. It is therefore critical to develop an analytical approach to the interpretation of such criminal provisions.

Synthesizing the environmental criminal cases brought to date provides a rough guideline to the interpretation of criminal penalty provisions. The culpability required for conviction, however, has proven to be as thorny an issue in these cases as it has always been with respect to common law crimes. The fact that most environ-
mental statutes belong in the category of "public welfare" statutes further complicates the issue of culpability. This additional confusion results from courts applying a different set of standards to public welfare statutes than the already chaotic set of standards applied to crimes deriving from common law.

This Comment discusses culpability elements in environmental criminal provisions in order to develop an approach to determine the culpability required for conviction. It focuses on "knowing" requirements because most environmental statutes impose criminal penalties only when conduct is "knowing." This Comment first details the development of public welfare crimes and the case law interpreting that development. The cases chosen will illustrate the difficulty courts have had developing a uniform approach to determining the culpability prescribed by environmental statutes with "knowing" elements. Synthesizing from this case law, the third section of this Comment will suggest a series of analytical guidelines to use in determining an environmental statute's culpability requirement. The approach utilizes element analysis, requiring a determination of the culpability required for each separate element of an offense. Finally, this Comment concludes that, although culpability analysis is likely to continue to be imprecise, use of the approach detailed in Section III will provide uniformity, more thorough analysis, and criminal penalties more closely tailored to violations of environmental statutes.

II. DEVELOPMENT OF PUBLIC WELFARE CRIMES AND CULPABILITY ANALYSIS

A. Traditional Public Welfare Statutes

The earliest criminal laws in America were adopted from English common law. In codifying these common law crimes, states did not

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5 Riesel, supra note 1, at 10067–70. For speculation as to why Congress began adding culpability requirements, see id. at 10067 and see generally Olds, Unkovic, & Lewin, Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts, 17 Duq. L. Rev. 1, 26–30 (1978–79).
6 The issue of culpability has historically been a source of confusion and frustration. See Robinson & Grall, supra note 3, at 686–87, 705. Despite the refinement of culpability analysis provided by the Model Penal Code, the Model Penal Code has been challenged as "seriously flawed, if not entirely unworkable." Id. at 719. Given the continuing dispute over analytical methods, and the difficulty courts have determining culpability, culpability analysis is not likely to develop into a precise science in the near future. This Comment attempts to pave the way for that development.
7 See LAFAVE CRIMINAL LAW, supra note 3, § 2.1(c). Criminal laws adopted from English
always prescribe culpability as an element of the offense. Because a culpable state of mind is a historic and universal component of criminal conduct, however, courts usually read such an element into these statutes.

As social needs changed, lawmakers created new offenses in response. These offenses had no origin in common law but were developed by both Congress and state legislatures to protect the public from rapidly expanding sources of danger and injury. For example, the Industrial Revolution accelerated the number of new regulations needed to protect public health, safety, and welfare. Lawmakers added criminal provisions in order to make the regulations governing these offenses more effective, rather than to punish.

Many of these criminal provisions did not prescribe culpability, imposing strict liability instead as a matter of policy. Those regulatory crimes that imposed strict criminal liability were referred to as “public welfare offenses.” The Supreme Court distinguished these offenses as those in which: the defendant could have avoided the violation by exercising reasonable care; the penalties were “relatively small”; and conviction would not cause serious harm to the defendant’s reputation.

When convicting defendants of public welfare offenses, federal courts emphasized the need to protect the larger good over the need to require criminal intent to protect individuals.

common law have been referred to as offenses malum in se. See generally id. § 1.6(b) (for a comparison of crimes malum in se and crimes malum prohibitum).

“Culpability” is the term used in the Model Penal Code to refer to the range of state of mind requirements in criminal offenses. According to the Model Penal Code, culpability includes purpose, knowledge, recklessness, and negligence. M.P.C. COMMENTS, supra note 3, comment 2. If legislation contains a statement of a particular culpability requirement, or if the legislature has articulated in any way some kind of culpability, the legislature or law is said to have “prescribed” culpability. See MODEL PENAL CODE § 2.02(4) (Proposed Official Draft 1962); M.P.C. COMMENTS, supra note 3, comment 6.

18 Id. at 252.
19 Id. at 251–52.
20 Morissette, 342 U.S. at 259.
21 320 U.S. 277 (1943).
22 Id. at 284.
23 Morissette, 342 U.S. at 259.
24 Dotterweich, 320 U.S. at 281.
26 Strict liability is the general rule with respect to pure food and drug laws:
[t]he distribution of impure or adulterated food for consumption is an act perilous to human life and health, hence, a dangerous act, and cannot be made innocent and harmless by the want of knowledge or by the good faith of the seller; it is the act itself, not the intent, that determines the guilt, and the actual harm to the public is the same in one case as in the other.
35 AM. JUR. 2d Food § 77 (1967).
but imposed strict liability with respect to a third.28 Consequently, the prosecution needed to prove that the defendant knew he possessed certain items and that those items were hand grenades, but not that he knew the grenades were unregistered.29 The Court rationalized that the defendant need not know that the grenades were unregistered because the violation involved was as serious as the food and drug violations in Balint and Dotterweich.30

The Freed decision laid the groundwork for judicial interpretation of regulatory offenses that prescribed culpability as a requirement for criminal conviction. Although the act violated in Freed did not contain a culpability requirement, the act was unlike others previously classified as public welfare statutes because it imposed felony penalties rather than misdemeanor penalties.31 Prior to Freed, public welfare offenses had been defined as regulatory offenses that did not specify intent, imposed relatively small penalties, and caused no grave damage to a defendant's reputation.32 In Freed, however, the Court expanded the category of public welfare statutes to include statutes that imposed felony penalties,33 penalties that have historically not been regarded as relatively small.34

In recognition of this history, and the traditional requirement of culpability for the imposition of criminal penalties, Justice Brennan filed a concurring opinion in Freed in which he argued that element analysis was necessary.35 In his opinion, the level of culpability that must be proved for conviction could not be determined simply by

28 Freed, 401 U.S. at 612 (Brennan, J., concurring).
29 Freed, 401 U.S. 601.
30 Id. at 609.
33 See Freed, 401 U.S. at 609–10.
34 A felony conviction imposes a high penalty and seriously damages a person's reputation. See generally supra note 31.

In Freed, Brennan noted that the government's power to create strict liability crimes is limited to situations

where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting . . . .

Id. at 613 n.4 (quoting Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960)).
categorizing the statute violated as a "regulatory" statute. Rather, the offense must be broken down into its material elements and the level of culpability required determined separately for each element.

According to Brennan's analytical approach, the determination of the culpability requirement for each element of an offense must be based on congressional intent as indicated by legislative history, congressional treatment of case law, constitutional considerations, and any common law background of the crime at issue. Legislative history meant the history specifically dealing with the statute's culpability element as well as history of the entire statute and the purposes that the statute was intended to effectuate. Constitutional issues included the due process concern that persons be on notice that the activity they are engaged in is not likely to be innocent.

Constitutional considerations might affect determination of the culpability requirement in one of two ways. A court may decide to infer such a requirement to ensure protection of due process rights. Alternatively, a court may presume culpability on the assumption that possession of hand grenades is not an innocent act.

This element analysis approach is similar to the approaches taken by the Model Penal Code and by Robinson and Grall in their article on element analysis. MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962); Robinson & Grall, supra note 3. Element analysis must be distinguished from offense analysis. Element analysis involves determining culpability for each element of an offense and the culpability may vary as to each element. See Robinson & Grall, supra note 3, at 687-88. In contrast, offense analysis involves only one state of mind requirement for an entire offense. Id. at 688.

36 Id. at 612-13. Brennan seems to suggest that the majority disagrees with him on this point. The majority is careful, however, to explain that the statute before it is not just a regulatory measure but is an act "premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." Id. at 609. Brennan's treatment of the statute is not much different. Batey, supra note 25, at 177-78 (criticizing Brennan's concurrence in Freed).

37 Freed, 401 U.S. at 613-14 (Brennan, J., concurring). As Brennan explained in Freed, mens rea is not a unitary concept, but may vary as to each element of a crime . . . . To determine the mental element required for conviction, each material element of the offense must be examined and the determination made what level of intent Congress intended the Government to prove, taking into account constitutional considerations.

Id.

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39 See id. at 614.
40 See id. at 616.
41 See id.; see also United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564-65 (1971) ("Pencils, dental floss, paper clips . . . 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."); Smith v. California, 361 U.S. 147, 162 (1959) (Frankfurter, J., concurring) ("the general principle that awareness of what one is doing is a prerequisite for the infliction of punishment").
that the regulated conduct involved an activity or material so likely
to be regulated that notice was ensured. Neither of these ap­
proaches to due process issues would be necessary if the criminal
provisions satisfied the notice requirement by penalizing only “know­
ing” conduct.

Brennan’s analysis used both approaches. He began by pointing
out that the imposition of felony penalties in the statute at issue in
Freed presented a due process issue. Due process concerns have
historically limited strict liability crimes to those crimes that impose
relatively small penalties and do not seriously injure the defendant’s
reputation. According to Brennan, the due process problem could
be avoided by inferring a culpability requirement for two of the
elements of the offense and articulating reasons why knowledge of
the third element could be presumed.

In addition to arguing that culpability should be determined on an
element by element basis, Brennan sought to distinguish himself
further from the majority by suggesting that, under different cir­
cumstances, it might be appropriate to require proof that a defendant
was aware of a fact involving some knowledge of the law. He
explained that requiring knowledge of a fact with a legal element
would not allow ignorance of the law to be a defense. While “the

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42 See Freed, 401 U.S. at 616 (Brennan, J., concurring); see also International Minerals,
402 U.S. at 564–65.
43 Freed, 401 U.S. at 616 (citing Holdridge v. United States, 282 F.2d 302, 310 (8th Cir.
1960)).
44 See id. at 614–16.
45 Presuming that the defendant had knowledge of the third element was proper here given
the nature of the regulated material. See Note, Ignorance of the Law as an Excuse, 86 Colum.
L. Rev. 1392, 1410 (1986). In Brennan’s words, because “the firearms covered by the Act are
major weapons . . . ; deceptive weapons . . . ; and major destructive devices . . . , the
likelihood of governmental regulation of the distribution of such weapons is so great that
anyone must be presumed to be aware of it.” Freed, 401 U.S. at 616.
46 Freed, 401 U.S. at 615. Justice Brennan's reasons for not requiring such proof in this
case are not all that different from the reasons given by the majority. Batey, supra note 25,
at 177.
47 See Freed, 401 U.S. at 615.

In discussing whether the prosecution should prove that the defendant knew of the unre­
istered status of the grenades he possessed, Brennan remarked:

It is true that such a requirement would involve knowledge of law, but it does not
involve “consciousness of wrongdoing” in the sense of knowledge that one's actions
were prohibited or illegal. Rather, the definition of the crime, as written by Congress,
requires proof of circumstances that involve a legal element, namely whether the
grenades were registered in accordance with federal law. The knowledge involved is
solely knowledge of the circumstances that the law had defined as material to the
offense.

Id. Brennan would apply the principle that ignorance of the law is no excuse only when a
defendant was ignorant that conduct was “prohibited or illegal.”
law” implies “consciousness of wrongdoing’ in the sense of knowledge that one’s actions were prohibited or illegal,”47 a fact with a legal element involves legal awareness but not awareness of wrongdoing. According to Brennan’s analysis, then, a fact with a legal element would not come within the scope of the principle that ignorance of the law is no defense.

For example, in Freed, knowledge of the unregistered status of the grenades would require knowledge of law but not necessarily knowledge that the possession of such grenades was illegal.48 Registration of grenades is an activity that would not exist but for the law requiring registration. Knowledge that grenades are registered therefore involves a legal element because recognition that an item is registered requires some familiarity with the law.49 Brennan distinguished such familiarity with the law from knowledge that one’s behavior is illegal.50

Having made this distinction, Brennan then concluded that requiring knowledge that the grenades were unregistered would not implicate the principle that ignorance of the law is no excuse.51 Had the principle applied, requiring culpability would be inappropriate. Absent its application, however, the culpability required for the third element of the offense, the unregistered status of the grenades, would have to be determined solely on the basis of congressional intent.52 In summary, Brennan narrowed the application of the principle that ignorance of the law is no defense by limiting the definition of knowledge of “the law” to knowledge of illegality.

B. Growth of Environmental Protection Statutes and the Resulting Change in Culpability Analysis

As the Supreme Court was deciding Freed, public welfare statutes were undergoing a transformation. In the 1970s, Congress enacted a series of environmental protection statutes that included culpability requirements in their criminal provisions.53 These statutes shared

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47 Id.
48 Id. at 614–15.
49 Id. at 615.
50 Id.; see also supra note 46.
51 See Freed, 401 U.S. at 615–16.
52 Id. at 616.
the public health and safety concerns of the earlier public welfare statutes. They differed from earlier public welfare statutes, however, because, rather than imposing strict liability, they imposed criminal penalties only when conduct was culpable. The addition of a culpability element reflected the common law concern for not criminalizing innocent conduct. As a result, public welfare statutes now included a class of offenses that carried criminal penalties only when conduct was "knowing."

Most environmental crimes fit into this relatively new class of public welfare offenses. Courts interpreting the culpability required for conviction of these crimes must balance two opposing forces. On the one hand, the "knowing" requirements reflect common law tradition and due process concerns that criminal sanctions be imposed only when conduct is motivated by evil intent. On the other hand, the public welfare character of these offenses justifies conviction no matter what the intent of the defendant for the sake of public health, safety, and welfare. The balancing process may require a court to reconcile the strict interpretation of a "knowing" requirement with the public welfare character of the statute. The


R. PERKINS, supra note 3, at 785 n.11; cf. id. at 948 ("The wish to insure against the harsh interpretation reached by some courts has no doubt been responsible for the inclusion of certain special provisions in the bigamy statutes, such as the word 'knowingly'. . . .").

See, e.g., supra note 53.

See McMurray & Ramsey, supra note 1, at 1151; Riesel, supra note 1, at 10067–70.

R. PERKINS, supra note 3, at 785 n.11. See generally LAFAVE CRIMINAL LAW, supra note 3, § 2.12(c)-(d).

See McMurray & Ramsey, supra note 1, at 1151. "In contrast to most criminal statutes, the standard of criminal environmental liability is less stringent, reflecting the legislative concern for protecting the important public interest in environmental safety. Accordingly, they could be liberally read to impose criminal liability without any requirement of intent." Id.

No requirement of intent, however, is not the same as no requirement of culpability. Intent, distinguished by LaFave and Scott as "purpose," is merely one type of culpability. See LAFAVE CRIMINAL LAW, supra note 3, § 3.5, at 216. Culpability is the word used by the Model Penal Code to describe all types of states of mind. See MODEL PENAL CODE § 2.02(1)-(2) (Proposed Official Draft 1962). Purpose is only one of the four categories of mental states that comprise culpability—purposely, knowingly, recklessly, negligently. Id. Thus, a statement that no intent is required does not mean that knowledge, recklessness, or negligence are not required.

For example, the court in United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985), had to reconcile the "'knowing violation' requirement
specific language of environmental statutes and their public policy aims thus combine to produce a hybrid standard regarding culpability.61

The Supreme Court’s 1971 decision in United States v. International Minerals & Chemical Corp.62 provides one of the best examples of the difficulty courts have had developing this hybrid standard.63 In International Minerals, a shipper transported corrosive liquids in violation of regulations requiring that interstate commerce shipping papers show the proper classification of the materials being shipped.64

Unlike the statutes in Balint65 and Freed,66 the statute in International Minerals contained a culpability requirement.67 The statute, the Transportation and Explosives Act, imposed criminal liability on whoever “knowingly violate[d]” any regulation promulgated by the Interstate Commerce Commission (ICC) pursuant to its power with respect to transportation of corrosive liquids.68 Despite the explicit statutory language requiring knowledge that a regulation was being violated, however, the International Minerals Court applied the same approach it had used in Balint and Freed.69 The Court required proof that the defendant knew that he was shipping materials and that those materials were dangerous but did not require proof that the defendant knew of the regulation involved.70

To reach this holding, the International Minerals Court had to address the specific language of the statute. Read literally, the statute in International Minerals required proof that defendants knew that they were violating an ICC regulation, that is, knew that they

with the public welfare character of RCRA.” McMurray & Ramsey, supra note 1, at 1152. Thus, public welfare statutes should not be strictly construed if such a construction would defeat the legislative purpose. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 10, at 72 (1972) [hereinafter LAFAVE HANDBOOK] (citing N.Y.R.R. v. United States, 265 U.S. 41 (1924) (statute promoting railroad safety) and United States v. Kordel, 164 F.2d 913 (7th Cir. 1947) (statute promoting public health)).

61 McMurray & Ramsey, supra note 1, at 1152.
63 The court in United States v. Hayes Int’l Corp. uses International Minerals as an example of the difficulty the Court has had “with statutes in which Congress has created an offense of ‘knowingly violating a regulation.’” 786 F.2d 1499, 1502 (11th Cir. 1986).
64 International Minerals, 402 U.S. at 559.
65 See supra text accompanying notes 17-20.
66 See supra text accompanying notes 26–52.
68 Id.
69 See id. at 565.
70 Id.
were breaking the law. The Court noted that it had rejected the literal interpretation of the "knowingly violates" language in an earlier case by holding that knowledge of the regulation involved was not required. The culpability required by the Court in this earlier case was simply knowledge of the actions regulated, not knowledge that these actions violated any law.

The Court also refused to read the statute literally because requiring proof that defendants knew they were violating a regulation would conflict with the general rule of law that ignorance of the law is no defense. Only ignorance of "facts," as opposed to "the law," would avoid such a conflict. Acknowledging that the legislative history clearly expressed Congress' desire not to impose strict or absolute liability, the *International Minerals* majority refused to attribute more to Congress than a rejection of such liability. Congress' failure to amend the statute despite its awareness of courts that had read the "knowingly violates" language literally did not satisfy the *International Minerals* Court that Congress' silence could be read as acceptance of the literal reading. The majority emphasized that a court may interpret a statute as abandoning a general rule of law only if Congress has clearly endorsed such an interpretation. Congressional silence and congressional reluctance to impose strict or absolute liability does not constitute a sufficient endorsement. As a result, the Court refused to read the "knowingly violates" language literally.

Having rejected a literal reading of the ICC regulation, the Court interpreted "knowingly violates" as a "shorthand designation" for knowingly engaging in any of the acts or omissions prohibited by the ICC regulations. The Court thus began its culpability analysis.

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71 See id. at 562–63. As Justice Stewart argued in dissent, "[o]ther federal courts, faced with the precise issue here presented, have held that the statute means exactly what it says—that the words 'knowingly violates any such regulation' mean no more and no less than 'knowingly violates any such regulation.'" *Id.* at 566 (Stewart, J., dissenting).

72 *Id.* at 560–62 (discussing *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952)).

73 See id. at 561–62.

74 *Id.* at 563.

75 *Id.*

76 See id. at 562–63.

77 See id. at 563.

78 See id. at 562–63.

79 *Id.* at 562. As explained by the Court in *Liparota v. United States*:

Section 2024(b)(1) is an identical statute, except that, instead of detailing the various legal requirements, it incorporates them by proscribing use of coupons 'in any manner not authorized' by law. This shorthand approach to drafting does not transform knowledge of illegality into an element of the crime. As written,
by substituting "violates any such regulation" with the words describing the prohibited behavior. In *International Minerals*, administrative regulations issued by the ICC described the prohibited behavior while the statute imposed the criminal penalties for such behavior. These regulations required shippers to describe on the shipping papers, by the shipping name and classification prescribed, any regulated material offered for transportation.

As a result of the Court's substitution, the Court held that criminal penalties were appropriate whenever a shipper knowingly failed to provide the proper shipping papers for any regulated material offered for transportation. The Court identified three material elements comprising the offense at issue: the shipment of a material, the dangerous nature of the material, and the existence of the regulations requiring certain paperwork for shipment of corrosive liquids. The Court did not discuss whether the violator had to know that the shipping papers existed and were filled out as required by law.

The *International Minerals* Court next had to determine whether the prescribed culpability applied to all material elements of the offense. The determination depended on how many elements of the described offense the word "knowingly" modified. Because the sta-

§ 2024(b)(1) is substantively no different than if it had been broken down into a collection of specific provisions making crimes of particular improper uses.


Id.

Interpreting "knowingly violates any such regulation" as a shorthand designation suggests that the Interstate Commerce Commission (ICC) regulations should be read in the same way as statutes that use the longhand version. For example, RCRA uses the longhand version by punishing anyone who "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 this subchapter . . . ." 42 U.S.C. § 6928(d)(1) (Supp. III 1985).

*See* *International Minerals*, 402 U.S. at 564–65.

*See id.* at 560. The Court did not reach the issue of Brennan's distinction in *Freed* between knowledge of facts with legal elements and knowledge of the law.

Linguistic determinations are a necessary component of statutory interpretation. See, e.g., United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986); United States v. Marvin, 687 F.2d 1221, 1226 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983). For example, as the *Marvin* court commented, "[t]o read 'knowingly' as having nothing to do with the phrase 'in any manner not authorized' is . . . verbally tenable, but it is not the only meaning the words will bear, nor even . . . the more natural one." *Marvin*, 687 F.2d at 1226.

This modification problem is best illustrated by an example cited by the Court in Liparota v. United States: Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does 'knowingly' modify in a sentence from a 'blue sky' law criminal statute punishing one who
tutory language was ambiguous as to which material elements the “knowing” requirement applied, the Court based its determination on the same public policy grounds used to interpret public welfare statutes in the past. Focusing on the need to protect public health and safety, the Court held that the prosecution need only prove knowledge of the first two material elements of the offense, that is, that the accused knew that he was shipping materials and that those materials were dangerous. Because of the dangerousness of the materials involved, the Court held that the “knowing” requirement did not apply to the third element and that knowledge of the third element could be presumed. As a result, the prosecution did not have to prove that the accused was aware of the ICC regulation.

After International Minerals, judicial interpretation of the culpability prescribed by public welfare offenses took several different directions. The responses to International Minerals varied because some courts did not follow the International Minerals analysis carefully or faithfully. Responses also varied because courts, interpreting different statutes, faced statutory language and legislative history not discussed in International Minerals.

In 1978, a California district court in United States v. Corbin Farm Service interpreted the criminal provisions of the Federal Insecti-
The defendants in Corbin had allegedly applied a pesticide in a manner inconsistent with the pesticide's labeling. Such application is unlawful conduct pursuant to section 136j of FIFRA and is subject to criminal penalties under section 136l(b) if defendants "knowingly violate[d]" section 136j. The Corbin court is the only court to have interpreted the "knowingly violates" language in FIFRA's criminal penalty provisions. As a result, the court analogized to cases interpreting other regulatory statutes. Noting that the standard of criminal liability is less stringent in regulatory statutes out of concern for public health and the environment, the Corbin court assumed that all regulatory statutes have the same culpability requirement. The court ignored the different culpability requirements imposed in the cases cited in support of this assumption. In addition, the Corbin court did not acknowledge that different regulatory statutes impose different penalties and contain different culpability language and that these differences determine what culpability requirement is appropriate.

In analogizing to other cases, the Corbin court relied most heavily on International Minerals because FIFRA contained the same "knowingly violates" language as that used in the ICC regulations. Like the International Minerals Court, the Corbin court looked first at the specific language in FIFRA and determined that the "knowingly violates" culpability standard should not be read literally.

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95 See Corbin, 444 F. Supp. at 519 (no relevant case law exists construing this particular statute).
96 See id. at 519 & n.1.
97 See id. at 519–20.
98 All regulatory statutes, however, do not have the same culpability requirement. Greenspun, Criminal Intent Requirements and Defenses in Regulatory Prosecutions, 18 CRIM. L. BULL. 293, 297–98 (July–Aug. 1982) (note differences between statutes sanctioning only knowing conduct and statutes imposing strict liability). Determining that a statute is a regulatory statute does not help decide what level of culpability is appropriate. United States v. Freed, 401 U.S. 601, 612–13 (1971).
99 In contrast to FIFRA, the statutes in Dotterweich and Freed contained no culpability requirements. See United States v. Dotterweich, 320 U.S. 277 (1943) (strict criminal liability); Freed, 401 U.S. 601 (knowledge of two elements required; presumption of knowledge, not strict liability, with respect to a third element).
101 See Corbin, 444 F. Supp. at 519.
contrast to the *International Minerals* Court, however, the *Corbin* court rejected a literal reading without analyzing the legislative history to ensure that Congress did not endorse such an interpretation.\(^{101}\)

The *Corbin* court next had to decide what material elements of the offense were modified by "knowingly violates." The *Corbin* court's assumption that all regulatory statutes have the same culpability requirements led the court to apply the same culpability requirement imposed in *International Minerals*.\(^{102}\) The court did not consider the distinction made in *International Minerals* between statutes regulating "dangerous or deleterious . . . materials" (public welfare statutes) and those regulating more harmless products (non-public welfare statutes).\(^{103}\) In doing so, the court avoided having to determine whether pesticides were sufficiently dangerous or deleterious to justify a culpability requirement appropriate to public welfare statutes.\(^{104}\)

In addition to assuming that FIFRA was a public welfare statute, the *Corbin* court did not analyze what culpability requirement would best serve the aims of FIFRA intended by Congress. Consequently, the regulatory purpose of FIFRA, as illustrated by legislative hist-

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\(^{101}\) Compare id. (court's opinion omits any discussion of legislative history) with *International Minerals*, 402 U.S. at 562–63 (opinion includes detailed discussion of the House and Senate committee reports).


This assumption actually contradicts *International Minerals* which indicated that, depending on the activity regulated, some statutes may require culpability as to every material element whereas, with others, knowledge may be presumed. *International Minerals*, 402 U.S. at 564–65.

\(^{103}\) See *International Minerals*, 402 U.S. at 564–65. This distinction requires a court to determine whether pesticides are so "dangerous or deleterious . . . [that] the probability of regulation is so great that anyone who is aware that he is in possession of them . . . must be presumed to be aware of the regulation." *Id.* Absent such a determination, a court encounters due process problems if it applies a public welfare culpability standard to a statute that is in fact a non-public welfare statute. See *id*.

tory, did not have an impact on what material elements of the offense were modified by "knowingly." The Corbin court did not consider whether the differences in legislative history between FIFRA and the ICC regulations in International Minerals should require two different culpability standards. 106 Noting that the International Minerals Court simply required proof that the defendants in that case knew they were transporting a dangerous liquid, the Corbin court only required proof that the defendants knew they were spraying a pesticide. 106

In contrast, the Third Circuit in United States v. Johnson & Towers 107 reached a different result from International Minerals because different statutory language and legislative history required a greater level of culpability to justify criminal penalties. 108 In Johnson & Towers, two employees of a chemical plant were indicted for violations of the Resource Conservation and Recovery Act (RCRA). 109 Section 6928(d)(2)(A) of RCRA prohibited knowing disposal of hazardous waste without a permit. 110 Acquisition of a permit was governed by a separate provision of RCRA. Because only those persons who owned or operated a hazardous waste facility were

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106 Had the Corbin court looked at FIFRA's legislative history, it might have been less quick to impose criminal liability. Although FIFRA's legislative history noted that civil penalties are a necessary part of a regulatory program, it does not make clear what types of conduct Congress wished to criminalize. See Senate FIFRA Report, supra note 104, at 4019. FIFRA lacks a clear regulatory purpose partly because of the difficulty in balancing society's need for pesticide use against the adverse health effects of pesticides. Lobbying power of agricultural and manufacturing groups also muddies the congressional intent behind FIFRA and has led to the imposition of a variety of economic protections for pesticide manufacturers. See Feldman, supra note 104, at 10132; Kaplan, The Food Chain Gang, Common Cause Magazine, Sept.-Oct. 1987, at 12; see, e.g., 7 U.S.C. §§ 136m (indemnity for suspension of pesticide registrations), 136l(b)(3) (felony penalty for revealing pesticide formulas). Because these protections are a clear priority of FIFRA's criminal sanctions, it is difficult to read FIFRA as a statute whose purpose is to impose serious penalties on violators absent proof of knowledge regarding most or all material elements of an offense.


108 See supra text accompanying notes 89–90.

109 Johnson & Towers, 741 F.2d at 664.

RCRA provides criminal penalties for:

[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 . . .

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter . . .


required to obtain permits, the court first had to determine whether Section 6928(d)(2)(A) applied to employees.

The court held that the defendant employees could be found criminally liable pursuant to Section 6928(d)(2)(A). Like owners and operators, the employees must have known that they were disposing of a hazardous waste to be liable. Unlike owners and operators, employees must also have known that their company was required to obtain a disposal permit but did not in fact have one. As a result, the prosecution had to show that the defendants knew that 1) they were disposing of materials; 2) those materials were hazardous wastes; 3) the facility for which they were disposing those wastes did not have a permit; and 4) the facility was required to have a permit. Knowledge of the third element in this case involved a legal element whereas knowledge of the fourth required the equivalent of knowledge of the statute.

In reaching this holding, the Johnson & Towers court used a culpability analysis similar to the analysis used in International Minerals. The court looked first to the specific language of Section 6928(d)(2)(A). As in International Minerals, the Johnson & Towers court decided that, at a minimum, the prosecution must prove knowledge of the first two elements of the offense, that is, that the defendants knew they were disposing of a material and that the material was hazardous. As is common with penal legislation, the court found that the statutory language did not make clear whether the "knowingly" requirement modified only those two elements or modified the entire sentence describing the offense.

111 Id. § 6925.
112 See Johnson & Towers, 741 F.2d at 664.
113 Id. at 664–65.
114 Id. at 668.
115 Id. at 669. The court also said that employees can be criminally prosecuted only if they "knew or should have known that there had been no compliance with the permit requirement of section 6925." Id. at 665. This remark was unfortunate because it suggests a different culpability requirement than that requiring knowledge that a permit was required but did not in fact exist. In contrast to a "knowing" standard, "should have known" implies that all the prosecution must do is show negligence. Requiring only a showing of negligence when the statute requires "knowledge," however, is legislating on the part of the court. Moreover, negligence is not only an easier burden of proof but it is also considered to be a less appropriate standard for criminal penalties. M.P.C. Comments, supra note 3, comment 3, at 126–27.
116 Johnson & Towers, 741 F.2d at 668.
117 See id. at 668–69. "[A] common ambiguity in penal legislation [is] the statement of a particular culpability requirement in the definition of an offense in such a way that it is unclear whether the requirement applies to all the elements of the offense or only to the element that it immediately introduces." M.P.C. Comments, supra note 3, comment 6.
In response to this ambiguity, the court first pointed out that the provision involved was part of a public welfare statute.\textsuperscript{118} RCRA qualified as a public welfare statute because, "in RCRA, no less than in the Food and Drugs Act, Congress endeavored to control hazards that, 'in the circumstances of modern industrialism, are largely beyond self-protection.'\textsuperscript{119} This recognition guided the court’s construction of Section 6928(d)(2)(A) because, unlike common law offenses, it is appropriate to read a public welfare statute as having no "mens rea requirement."\textsuperscript{120} Such an interpretation is appropriate because public welfare statutes must be construed to effectuate their regulatory purpose.\textsuperscript{121}

To determine the regulatory purpose of Section 6928(d)(2)(A) and RCRA, the \textit{Johnson & Towers} court looked at public policy justifications, congressional intent, and the syntax of Section 6928(d).\textsuperscript{122} The court noted that, while policy concerns might justify imposing no mens rea requirement, the character of the statute at issue made such an interpretation “arbitrary and nonsensical.”\textsuperscript{123} In order to determine whether “knowingly” modified only the first two or all of the elements of the offense, then, the \textit{Johnson & Towers} court balanced the public welfare character of RCRA against what Congress might have intended.\textsuperscript{124}

In performing this balancing test, the \textit{Johnson & Towers} court noted several factors that weighed in favor of requiring a higher

\begin{itemize}
  \item \textsuperscript{118} \textit{Johnson & Towers}, 741 F.2d at 668.
  \item \textsuperscript{119} \textit{Id.} at 667 (citing United States v. Dotterweich, 320 U.S. 277, 280 (1943)).
  \item \textsuperscript{120} \textit{Id.} at 668.
  \item In contrast to public welfare statutes, courts must presume a mens rea requirement for crimes originating in the common law. \textit{See}, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978); Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960); \textit{see also} R. PERKINS, supra note 3, at 785.
  \item Note that mens rea is different from knowledge. Black’s Law Dictionary defines mens rea as “[a] guilty mind; a guilty or wrongful purpose; a criminal intent.” \textsc{Black’s Law Dictionary} 889 (5th ed. 1979). It defines knowledge as simply “[a]cquaintance with fact or truth.” \textit{Id.} at 784. As noted by the majority in \textit{Morissette v. United States}, “[k]nowledge, of course, is not identical with intent . . . .” 342 U.S. 246, 270 (1951); \textit{see also} M.P.C. \textsc{Comments}, supra note 3, comment 3, at 124–25. Despite this distinction, the court in \textit{Johnson & Towers} appears to use mens rea as meaning knowledge of the regulations’ requirements. \textit{See} \textit{Johnson & Towers}, 741 F.2d at 668–69 (the court states that it would be nonsensical not to require mens rea; thus, to avoid a nonsensical result, the court must have thought it was imposing a mens rea requirement by requiring \textit{knowledge} of permit status and the regulations at issue).
  \item \textsuperscript{121} \textit{Johnson & Towers}, 741 F.2d at 666.
  \item \textsuperscript{122} \textit{Id.} at 668–69.
  \item \textsuperscript{123} \textit{Id.} at 668. It is not clear what the court’s understanding of “mens rea” was. \textit{See supra} note 120. That is, even if mens rea is not required, the court was not necessarily saying that the policies behind a public welfare statute justify imposing no \textit{culpability} requirement.
  \item \textsuperscript{124} \textit{See} McMurray & Ramsey, supra note 1, at 1152.
\end{itemize}
culpability standard than the minimum allowed for public welfare statutes. The court considered fairness and statutory consistency, the fact that the defendants were only employees, Congress' concern about the hazards of toxic materials, and the difficulty of the burden of proof on the government. As a result of this weighing process, the court determined that "knowing" modified all elements of the offense, not just the first two. Thus, the culpability requirement was not only higher for employees than for owners and operators but was also higher than the culpability requirement in International Minerals.

Given the Supreme Court's insistence in International Minerals that a court should not require knowledge of the law absent a clear endorsement by Congress, this holding by the Third Circuit appears inconsistent. Though the Johnson & Towers court did not address this problem, it could have justified its holding by stating that it was only requiring knowledge of the regulations, not knowledge of illegality. Citing Brennan in Freed and the Model Penal Code, it could have then argued that only ignorance of illegality is no excuse.

This inconsistency probably stems from the Johnson & Towers court creating a higher culpability standard for employees than that prescribed by the statute for owners and operators. The court decided that the criminal provisions of the statute applied to em-

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125 See Johnson & Towers, 741 F.2d at 668–69.
126 See id. at 664–67.
127 See Johnson & Towers, 741 F.2d at 668–69.
128 See id. at 666–67.
129 See id. at 669.
130 See id. at 668–69.
131 Compare id. (defendants must know that (1) they are disposing a material; (2) the material is hazardous; (3) their employer is required to have a permit for such disposal; and (4) their employer does not have such a permit) with United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971) (defendants simply must know that (1) they are transporting a material; and (2) the material is dangerous).
133 That is, the principle that ignorance of the law is no defense applies only when "the law" means "illegality."
134 See Johnson & Towers, 741 F.2d at 664–65.
ployees, despite language limiting the provisions to "owners and operators."135 As a result of reading the statute to include employees, the court felt the need to adjust the culpability element to provide more protections for employee defendants. By requiring knowledge that the facility did not have a permit but that a permit was required, the court would be less likely to convict innocent employees.136

C. Liparota v. United States: The Modern Definition of a Public Welfare Statute and the Appropriate Culpability

A year after Johnson & Towers, the Supreme Court had an opportunity to clarify its position on the culpability required to impose criminal penalties pursuant to public welfare statutes. In the 1985 case of Liparota v. United States, the federal government brought an action for food stamp fraud.137 Although the action did not involve an environmental protection statute, the Liparota Court refined the definition of public welfare statutes and the culpability requirement appropriate for such statutes by distinguishing the food stamp regulations at issue from public welfare statutes. Because environmental protection laws usually qualify as public welfare statutes, the Liparota Court's holding affects environmental criminal culpability issues.138

In refining the definition of public welfare statutes, the Court distinguished mere regulatory statutes from those regulatory statutes qualifying as public welfare statutes.139 Without rejecting the Johnson & Towers holding that "regulatory statutes . . . are to be construed to effectuate the regulatory purpose,"140 the Liparota Court emphasized that the purposes behind the Food Stamp Act were not compelling enough to justify dropping all culpability requirements.141 Absent public health and safety policy justifications characteristic of public welfare statutes, the Court found no rationale sufficient to overcome the historic requirement of mens rea for criminal offenses,142 the principle that "ambiguity concerning the ambit

135 Id.
136 The court was probably worried about due process. Because the statute seemed to cover only owners and operators, no employee would have been on notice that the law here also applied to them. Nevertheless, the court then ended up reading into the statute twice, not just once.
138 See id. at 432-33.
139 Id.
140 Johnson & Towers, 741 F.2d at 666.
141 See Liparota, 471 U.S. at 426-27.
142 See id. at 425-26.
of criminal statutes should be resolved in favor of lenity," and the reluctance to "criminalize a broad range of apparently innocent conduct" without a clear message from Congress. As a result, the culpability element in a non-public welfare statute should be read to modify all elements of the offense.

In contrast, public welfare statutes regulate such serious threats to public health and safety that their related criminal offenses may properly "depend on no mental element but consist only of forbidden acts or omissions." Alternatively, as in *International Minerals*, the culpability element may be read as modifying only some of the elements of the offense. Whether or not a statute is a public welfare statute thus has an impact on the culpability appropriate for criminal conviction.

Given this impact, the *Liparota* Court created a two-part test to determine whether the statute before it qualified as a public welfare statute. According to this test, a public welfare statute is one that "render[s] criminal a type of conduct that [1] a reasonable person should know is subject to stringent public regulation and [2] may seriously threaten the community's health or safety." The Court based the test on the analysis used in *International Minerals*.

Employing this test, the *Liparota* Court held that the food stamp statute at issue did not qualify as a public welfare statute. The Court noted that, unlike the activity in *International Minerals*, the possession of food stamps was an action the Court believed a person might be surprised to discover was not innocent. Moreover, the fraudulent use of food stamps does not seriously threaten community health or safety. As a result, "knowingly" had to modify all ele-

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143 *Id.* at 427 (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).
144 See *id.* at 426-27.
145 *Id.* at 432 (quoting Morissette v. United States, 342 U.S. 246, 252-53 (1951)).
147 See *Liparota*, 471 U.S. at 432-33.
148 *Id.* at 433.
149 Note how the definition of public welfare statutes has changed since Morissette v. United States, 342 U.S. 246 (1951). In *Morissette*, "[t]he Court defined 'public welfare offenses' as offenses against the authority of the state 'which impair [sic] the efficiency of controls deemed essential to the social order.'" S. ARKIN & J. WING, MENS REA, STATE OF MIND DEFENSES IN CRIMINAL AND CIVIL FRAUD CASES 37 (1985) (citing *Morissette*, 342 U.S. at 255-56). *Liparota*'s two-part test, though a broad standard, limits the scope of the *Morissette* test. *Id.* at 39. Thus, fewer statutes may be read as imposing strict liability.
150 See *Liparota*, 471 U.S. at 433.
151 See *id*.
152 See *id*.
ments of the offense described in the food stamp regulation, thus requiring the prosecution to prove that "the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations."¹⁵⁴

Precisely what the Liparota Court meant by "unauthorized" is not clear. In most of its discussion, the Court referred only to the "knowledge-of-illegality requirement" proposed by the defendants.¹⁵⁵ Throughout its decision, the Court spoke approvingly of arguments supporting such a requirement.¹⁵⁶ Consequently, the Court may have been using the terms "illegal" and "unauthorized" interchangeably.

The Liparota majority disputed the dissent's suggestion that the Court was creating an ignorance of the law defense through its use of "illegal" and "unauthorized."¹⁵⁷ In response to the dissent, the majority distinguished, in a footnote, between knowing that one's action is "illegal" and knowing that it is "unauthorized."¹⁵⁸ In addition, the Court stated that the prosecution must prove that a defendant knew his conduct was unauthorized but that the prosecution could provide such proof by showing that the defendant knew that his conduct was "unauthorized or illegal."¹⁵⁹ Thus, the Court probably intended to require that the defendant knew that his conduct was not authorized by the food stamp regulations, but not that he also knew that his conduct was illegal and subject to criminal penalties.¹⁶⁰ In any case, the prosecution did not have to prove that the defendant had knowledge of the specific regulations involved.¹⁶¹

¹⁵³ See United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986) ("In Liparota, . . . the Court held that 'knowingly' travelled all the way down the sentence.").

¹⁵⁴ Liparota, 471 U.S. at 433.

¹⁵⁵ See id. at 427–28 (rule of lenity supports petitioners' position).

¹⁵⁶ See, e.g., id. at 429, 430.

¹⁵⁷ Id. at 425 n.9.

¹⁵⁸ Id.

¹⁵⁹ It appears that the majority had not thought about the issue until raised by the dissent. The footnote seems to have been added as an afterthought. For example, despite the footnote's distinction between "unauthorized" and "illegal," the text of the opinion following the footnote comments that "the Government must prove knowledge of illegality." Id. at 427–28. Thus, the majority never went back and made the text consistent with its distinction between "unauthorized" and "illegal" in the footnote. Consequently, any suggestion by the Court that it wanted the prosecution to prove knowledge of illegality rather than knowledge of unauthorized conduct might be more inadvertent than intentional.

¹⁶⁰ Id. at 434 (emphasis added).

¹⁶¹ The distinction between "authorized" and "illegal" echoes an argument made by Brennan in his concurrence in Freed and adopted in Liparota. See id. at 425 n.9. In Freed, Brennan remarked on the difference between facts with "legal elements" and knowledge of illegality. See United States v. Freed, 401 U.S. 601, 614–16 (1971); see also supra note 46 and accompanying text.

¹⁶² Liparota, 471 U.S. at 434.
D. Environmental Crimes Since Liparota: No Emergence of a Uniform Culpability Analysis

The extent to which knowledge of regulations should be required was addressed a year later in *United States v. Hayes International Corp.*, a 1986 decision by the 11th Circuit. In *Hayes*, the court determined the culpability prescribed by Section 6928(d)(1) of RCRA. This provision regulated the transportation of hazardous waste as opposed to the treatment, storage, or disposal regulated by the provision at issue in *Johnson & Towers*. Like the provision in *Johnson & Towers*, Section 6928(d)(1) did not make clear whether the "knowingly" requirement modified some or all of the elements of the offense. According to the court, Congress intentionally left the definition and application of "knowing" to the courts to resolve pursuant to general principles. The court sought to discover those general principles by considering the policy behind public welfare statutes, previous Supreme Court cases, congressional purpose, and the practical effect of particular culpability requirements, such as the effect on the prosecution's burden of proof.

The *Hayes* court noted first that certain cases, such as the Supreme Court case of *United States v. Freed*, required no mental element for conviction. In such cases, the lack of a culpability requirement was justified by the status of the regulation involved.

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162 786 F.2d 1499 (11th Cir. 1986). The lack of clarity in *Liparota*’s distinction between “unauthorized” and “illegal” may have had an effect on the *Hayes* decision. The *Hayes* court interpreted *Liparota* as holding that “knowledge of illegality was necessary.” *Id.* at 1503. The court apparently ignored signals given by the *Liparota* Court that only knowledge that conduct was unauthorized was required. See supra notes 157–61 and accompanying text. As a result of this misinterpretation, the *Hayes* court may have decided that knowledge of illegality was the appropriate minimum for a non-public welfare statute such as the food stamp regulation in *Liparota*. If this interpretation is the one used by the *Hayes* court, culpability appropriate for a public welfare statute would range from strict liability to knowledge that one’s conduct is unauthorized. Even if the *Hayes* court did not think in these terms, any case subsequent to *Liparota* might use such an analysis.

163 42 U.S.C. § 6928(d)(1) (Supp. III 1985). Section 6928(d)(1) imposes criminal penalties on “[a]ny 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 . . . .” *Id.*


165 *Hayes*, 786 F.2d at 1503.

166 See *id.* at 1502–04.


168 *Hayes*, 786 F.2d at 1502.
as a public welfare statute. The statute in *Hayes*, like the one in *Freed*, qualified as a public welfare statute because it regulated dangerous materials. A critical difference between the statute in *Freed* and Section 6928(d)(1), however, was that the statute in *Freed* contained no culpability requirement. The existence of such a requirement in Section 6928(d)(1) meant that the *Hayes* court had to balance the public welfare character of RCRA against RCRA’s specific statutory language and the purposes behind Congress’ use of such language.

The *Hayes* court began the balancing process by noting that RCRA’s culpability requirement was affected by the fact that RCRA was a public welfare statute. The court explained that, because the public policy behind such a statute is so compelling, a court may presume that a defendant was aware of the regulations. Prior to analyzing how “knowing” modified the elements of the offense, then, the court made a preliminary decision that, at the very least, defendants could be presumed to be aware of RCRA’s regulations.

To analyze how the culpability element in Section 6928(d)(1) modified the elements of the offense, the *Hayes* court considered how far down the sentence “knowing” should travel. The court approached the issue as a grammatical problem and did not actually break the offense down into its three elements: must the defendants know that (1) they were transporting a waste?; (2) the waste was hazardous?; and (3) the facility to which they were transporting waste did not have a permit? The court’s analytical approach re-

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169 See id.
170 See id. at 1503.
171 *Freed*, 401 U.S. at 607.
172 See *Hayes*, 786 F.2d at 1504. “The Court has had greater difficulty with statutes in which Congress has created an offense of ‘knowingly violating a regulation.’” Id. at 1502.
173 See id. at 1503.
174 See id. at 1502.
175 See id. at 1503.

Awareness of the regulations is a corollary of the third element of the offense at issue in *Hayes*, that is, whether the facility had a permit. See infra note 177 and accompanying text. For example, a defendant would have to be familiar enough with RCRA to recognize a RCRA permit or to know enough to inquire as to its existence.

176 *Hayes*, 786 F.2d at 1503.
177 Section 6928(d)(1) criminalizes the knowing transportation of any hazardous waste to a facility without a permit. See supra note 163.

The analytical approach chosen by the *Hayes* court is more similar to what Robinson and Grall have characterized as “offense analysis” than it is to “element analysis.” See supra note 37. The *Hayes* court used offense analysis when it did not break the offense down into its material elements and did not consider whether separate elements might have different culpability requirements.
quired a determination as to whether the "knowing" requirement applied to all words in Section 6928(d)(1) or only to one or some words immediately following the word "knowing."\textsuperscript{178}

To determine how far along the sentence "knowing" traveled, the \textit{Hayes} court first looked to the congressional purpose of the particular provisions involved.\textsuperscript{179} By enacting Section 6928(d)(1), Congress hoped to prevent the transportation of hazardous waste to unlicensed facilities. The court believed that eliminating the "knowing" requirement would criminalize conduct that Congress had not intended to penalize.\textsuperscript{180}

The \textit{Hayes} court then considered the prosecutorial burden of requiring proof that the defendants knew that the disposal facility did not have a permit, in addition to proof that defendants knew that they were transporting hazardous waste. The court decided that the burden was reasonable relative to the need to prevent criminalizing innocent conduct.\textsuperscript{181} As the court pointed out, the prosecution need only show the defendants' knowledge of the facility's permit status, not that the defendants knew that the law required a permit.\textsuperscript{182} Proof of knowledge of the permit status could be satisfied, moreover, by proof that the defendants knew that they had not inquired about the permit status.\textsuperscript{183} Consequently, the \textit{Hayes} court held that the "knowing" requirement modified all elements of the offense, requir-

\textsuperscript{178} See \textit{Hayes}, 786 F.2d at 1503.

\textsuperscript{179} \textit{Id.} at 1504.

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} See \textit{id.}

\textsuperscript{182} \textit{Id.} at 1504 n.6.

\textsuperscript{183} \textit{Id.} at 1504 n.6. It is hard to imagine transporters being unaware of whether they had made the physical effort to ascertain a facility's permit status. Cf. United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (3d Cir. 1984), \textit{cert. denied}, 469 U.S. 1208 (1985). "[P]rosecution of regular shippers for violations of the regulations could hardly be impeded by the 'knowingly' requirement for triers of fact would have no difficulty whatever in inferring knowledge on the part of those whose business it is to know, despite their protestations to the contrary." \textit{Id.} (citing United States v. International Minerals & Chem. Corp., 402 U.S. 558, 569 (1971) (Stewart, J., dissenting) (emphasis added)). The exception would be transporters who thought somehow that they had inquired when they actually had not. In other words, except for those few who honestly believed they had inquired when they had not, this language criminalizes all transporters who do not check permit status. See \textit{Hayes}, 786 F.2d at 1504 n.6. Of course, if they had checked, discovered no permit existed, and disposed at the facility anyway, they would also be liable. Despite the "knowing" language, then, the court seems to be imposing a presumption of knowledge by creating a duty to inquire.
ing the prosecution to prove that the defendants knew they were transporting a hazardous waste to a facility without a permit.

The holding in *Hayes* was more consistent with the *International Minerals* decision in that it presumed knowledge of the regulations.\(^{184}\) Unlike the *International Minerals* Court, however, the *Hayes* court counted as one of the material elements knowledge of a fact that included a legal element, that is, knowledge that the facility did not have a permit.\(^{185}\) Unlike the *Johnson & Towers* court, the *Hayes* court did not explicitly consider knowledge that a permit was required to be an element of the offense nor did it require proof of such knowledge.\(^{186}\)

In requiring the prosecution to prove that the defendants knew they were transporting a hazardous waste to a facility without a permit, the *Hayes* court joined what appears to be a trend of requiring knowledge of facts containing legal elements. For example, both the *Hayes* and *Johnson & Towers* courts required proof that the defendants knew that a facility had no permit.\(^{187}\) Moreover, Brennan’s distinction between “legal elements” and “consciousness of wrongdoing” in his *Freed* concurrence gained support from a majority of the Court by the time *Liparota* was decided.\(^{188}\) Thus, the courts seem to be overlooking the Model Penal Code’s comment that a legal element should not be a part of the law defining the offense.\(^{189}\) Instead, the courts allow the legal element to be a provision from the same statute as the criminal penalty provisions as long as it is not part of the penal clause itself.\(^{190}\) As a result, courts have been applying culpability requirements to material elements regardless of the source of a legal element.

Nevertheless, no court has suggested that the principle that ignorance of the law is no defense should be abandoned altogether. *Liparota* has gone as far as allowing a defense of ignorance that conduct was unauthorized.\(^{191}\) But even the *Liparota* Court was care-

\(^{184}\) See *Hayes*, 786 F.2d at 1503.

\(^{185}\) See id. at 1505. In contrast, the *International Minerals* Court did not consider as a material element knowledge that the shipping papers weren’t proper.

\(^{186}\) Id. at 1503. The court merely charged defendants with knowledge of the regulatory provisions and determined that it would not be a defense to argue ignorance of those provisions. Id.

\(^{187}\) See id. at 1505; *Johnson & Towers*, 741 F.2d at 669.


\(^{189}\) M.P.C. COMMENTS, supra note 3, comment 11, at 131.

\(^{190}\) See generally R. PERKINS, supra note 3, at 936.

\(^{191}\) *Liparota*, 471 U.S. at 425 n.9.
ful not to create a defense of ignorance of illegality. At the very least, then, it appears that courts agree that the principle is applicable with respect to knowledge of illegality. Thus, a court would not likely interpret a culpability requirement as modifying an element of an offense if such an interpretation resulted in requiring proof that defendants knew their conduct was illegal. Where the courts are less predictable, then, lies in the area between knowledge of illegality and knowledge of a fact with a legal element. Because of this unpredictability, and because the courts have failed to develop a consistent approach to determining culpability, the analytical guidelines suggested by this Comment will assist courts in responding to the increasing volume of environmental criminal cases.

III. AN ANALYTICAL APPROACH TO DETERMINE THE CULPABILITY PRESCRIBED BY ENVIRONMENTAL PROTECTION STATUTES

A variety of overlapping terms and inconsistent interpretations has rendered chaotic most distinctions between different kinds of culpability. Courts interpreting culpability requirements have only added to the confusion. This Comment will propose an analytical approach to provide greater uniformity in determining culpability requirements. By requiring a series of analytical steps, this approach will ensure that courts treat culpability analysis more thoroughly. In addition, using element analysis will encourage clarity and precision, thereby increasing fairness of penalties as well as reducing litigation; will provide greater due process protection for defendants by ensuring more complete notice of criminal provisions and reducing opportunities for arbitrary enforcement; and will tailor penalties more precisely to fit the crimes committed, thus allowing

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192 Id.
193 See LAFAVE CRIMINAL LAW, supra note 3, § 3.4(a)–(c).
194 See R. PERKINS, supra note 3, at 744, 771. Compare United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (where dangerous or deleterious materials are involved, knowledge of the regulations may be presumed) with United States v. Elshenawy, 801 F.2d 856 (6th Cir. 1986) (where the probability of regulation is great, knowledge may be presumed) and United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985) (knowledge of regulations may not be presumed).
195 This Comment focuses on regulatory statutes with knowing requirements rather than statutes with other types of culpability requirements or no culpability requirement at all. This Comment focuses on public welfare statutes in particular because most environmental statutes fall into both categories. See supra note 53 and accompanying text.
courts to feel more comfortable imposing stiffer penalties when necessary. 196

The approach is composed of a series of analytical steps. First, a court should examine the specific language of the statute in order to determine whether the state of mind required for a criminal penalty, if any, may be read literally. Next, a court must determine how this culpability requirement should be applied. The court must first break the offense down into its material elements, one of which will be a culpability element unless the statute imposes strict liability. The court should then consider a number of factors in determining the culpability required for each element of the offense.

The first factor to consider is whether the statute is a public welfare statute. If it is not a public welfare statute, the culpability element generally should modify all the elements of the offense. If it is a public welfare statute, the court should then factor in the legislative history underlying the statute's criminal provisions and, if necessary, the entire statute as well. As a third and final step in considering factors affecting culpability, a court should determine whether it has created some form of an ignorance of the law defense. If it has created such a defense, it should consider eliminating the defense by reducing the number of elements that the culpability element must modify.

A. The Specific Language of the Statute's Criminal Penalty Provisions

A court must first look at the specific language of the statute's relevant criminal provisions. 197 Assuming the statute prescribes a

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196 Arbitrary methods for interpreting culpability are particularly damaging to effective and meaningful enforcement of environmental statutes. Absent egregious conduct motivated by the most evil of intentions, judges are likely to feel uncomfortable handing out criminal penalties of much weight. Though the number of statutes creating strict liability crimes has grown, "the infliction of criminal punishment upon the unaware has long troubled the fair administration of justice." United States v. Freed, 401 U.S. 601, 607 (1971); see also Developments in the Law, supra note 12, at 1241.

Moreover, the typical defendant in an environmental criminal proceeding is a businessperson, respected in the community as successful and upstanding. See Starr, supra note 1, at 388; Wrenn, supra note 1, at 1028. Courts have more difficulty imposing jail sentences on such individuals. Starr, supra note 1, at 388. Courts have especial difficulty because the forbidden behavior "may come very close to what is seen as good corporate practice in the competitive business world." Developments in the Law, supra note 12, at 1235. Finally, the nature of pollution also makes judges hesitant about imposing criminal penalties. Starr, supra note 1, at 388. Because the actual harm may not surface for years, and because the seriousness of the harm is often in its incremental contribution to environmental pollution, the damage caused by a violation may not appear to warrant a criminal penalty. Id.

197 N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.01, at 1–3 (Sands 4th ed.
culpability element, a court must decide whether to interpret the culpability element literally. 198 If the language is plain and can lead to only one interpretation, a court should use that interpretation. 199 A court should ignore the plain meaning of a statute only in order to avoid a harsh or foolish result. 200

Given the historic confusion surrounding interpretation of the word "knowing," however, the language of the culpability element in an environmental protection statute is almost always likely to be ambiguous. Even if a literal reading of the culpability element appeared to have an unmistakably plain meaning, "knowing" has been used in too many different ways to make such a reading appropriate. Rather, the ambiguity inherent in the usage of "knowing" requires, as do statutes that lead to a harsh or foolish result, consideration of the language and design of the statute as a whole.

A court may also ignore the plain meaning of a statute when interpreting a regulatory crime and when the apparent plain meaning of that regulatory statute does not effectuate the regulatory purpose. 201 Unlike crimes originating in common law, regulatory crimes should not necessarily be construed strictly. 202 Thus, if the language of the culpability element is ambiguous, if the plain meaning would lead to a harsh or foolish result, or if the statute is a

198 If the statute prescribes no culpability element, a court must decide if the absence of a culpability element should be interpreted literally, thus imposing strict liability. LAFAVE CRIMINAL LAW, supra note 3, § 3.8(a). Strict liability would not be appropriate if the crime originated from common law. See United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978); Holdridge v. United States, 252 F.2d 302, 310 (8th Cir. 1960); see also Wasserstrom, Strict Liability in the Criminal Law, 12 STAN. L. REV. 731, 735 (1960). In such a case, a court would probably infer a culpability requirement for all material elements of the offense. Strict liability may also be inappropriate depending on the severity of the penalty or the notice provided by the nature of the prohibited conduct. LAFAVE CRIMINAL LAW, supra note 3, § 3.8(a), at 244–45.

199 LAFAVE HANDBOOK, supra note 60, § 10, at 69; LAFAVE CRIMINAL LAW, supra note 3, § 2.2(b).

200 LAFAVE HANDBOOK, supra note 60, § 10, at 69.


regulatory statute, a court should consider the particular statutory language as well as the language and design of the statute as a whole.

Consideration of the language and design of the statute as a whole requires balancing the specific language of the culpability element against the need to effectuate the statute’s regulatory purpose. In determining regulatory purpose, courts often apply a number of statutory interpretation rules and principles. These rules and principles usually narrow the scope of the statute out of concern that statutes give fair warning of what constitutes criminal conduct. The principle that ignorance of the law is no excuse is thus an exception because it expands the area of conduct qualifying for criminal penalties.

For example, in International Minerals the Court chose to interpret "knowingly violates any such regulation" as simply requiring knowledge of certain elements of the offense. The Court refused to read the culpability element as requiring that defendants know that their conduct violated the law because such a reading would conflict with the principle that ignorance of the law is no defense. Because Congress had not clearly endorsed an ignorance of the law defense, the Court chose to ignore the literal interpretation of "knowingly violates" in order to effectuate what it perceived as the purpose of the statute.

See Johnson & Towers, 741 F.2d at 666; LaFave Handbook, supra note 60, § 10, at 69.

Id.

United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971). The dissent in International Minerals did not agree with such a balancing of policy and language, arguing instead that the language should be read literally. See id. at 566 (Stewart, J., dissenting). The dissent believed that such factors should be balanced by Congress rather than by the courts. See id. at 565, 568.

Id. at 563. Congress has sometimes defined a crime to require knowledge that conduct was illegal. See United States v. Freed, 401 U.S. 601, 615 n.6 (1971).

See International Minerals, 402 U.S. at 563. Even if a court determines that a literal interpretation of the statutory language is appropriate, the precise definition of the culpability element may still pose problems. LaFave Criminal Law, supra note 3, § 3.5(b) (failure to distinguish between intent and knowledge). Although the Model Penal Code has attempted to impose uniformity on the definitions of different kinds of culpability, courts and legislatures have not treated culpability elements with the same consistency. See supra notes 193–94 and accompanying text; Robinson & Grall, supra note 3, at 705–06.

For example, the legislative history of RCRA's criminal provisions suggests that different subsections might involve different meanings of the word "knowing." The definition of "knowing" under subsection 3008(d) was left to the courts to define using "general principles." See S. Rep. No. 172, 96th Cong., 2d Sess. 38–39, reprinted in 1980 U.S. Code Cong. & Admin. News 5019, 5037–38 [hereinafter Senate RCRA Report]. The definition of "knowing" under
Although a court may ignore a literal interpretation for the sake of carrying out a statute’s purpose, a court may not ignore the statutory language altogether.\textsuperscript{209} Out of deference to Congress, a court may not determine the requisite culpability without factoring in the culpability language used by Congress. Thus, a court may need to compromise maximum potential protection of public health and safety in the face of language requiring that criminal conduct be “knowing.”\textsuperscript{210} In \textit{International Minerals}, for example, the Court could have achieved the maximum protection possible from violations of corrosive liquid regulations by imposing strict liability.\textsuperscript{211} Given the “knowingly violates” language of the statute, however, the Court was limited to imposing some culpability requirement.\textsuperscript{212} Most environmental statute criminal provisions will require a similar balancing of the statutory language and the statute’s regulatory purpose.

\textbf{B. Modification of the Material Elements of the Offense by the Culpability Element}

Whether a culpability element is interpreted literally or not, a court must determine how many of the material elements of the

\textsuperscript{209} N. SINGER, \textit{supra} note 197, § 45.01, at 1–3; R. DICKERSON, \textit{supra} note 197, at 10–11.

\textsuperscript{210} Absent a “knowing” requirement in a statute, a court could read the statute as imposing strict liability, thus achieving maximum health and safety protection. \textit{See} LAFAVE CRIMINAL LAW, \textit{supra} note 3, § 3.8(a). But, if the statute includes a “knowing” requirement, a court may not impose strict liability because to do so would ignore the expressed intent of Congress. \textit{See} K Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811, 1817 (1988).

\textsuperscript{211} \textit{See} LAFAVE CRIMINAL LAW, \textit{supra} note 3, § 3.8, at 242–43 (may be difficult to get convictions unless the culpability element is omitted).

\textsuperscript{212} \textit{International Minerals}, 402 U.S. at 560 (knowledge of the shipment of dangerous materials is required). As a result, “[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.” \textit{Id.} at 563–64.
offense are modified by the culpability element.\textsuperscript{213} For example, if a statute punishes any person who knowingly transports any hazardous waste to a facility that does not have a permit, what must defendants know to be convicted? Must violators know \textit{(1)} that they are transporting a material to a facility; \textit{(2)} that the material is a hazardous waste; \textit{(3)} that the facility does not have a permit; \textit{(4)} that the facility is required to have a permit; \textit{(5)} that regulations require a permit; and \textit{(6)} that transporting to a facility without a permit is unauthorized or illegal? Or must defendants know only some of these elements?

1. Breakdown of the Offense into its Material Elements

To decide how many of the material elements are modified by the culpability element, a court must first determine what material elements constitute the offense at issue.\textsuperscript{214} The material elements must be separated because culpability may vary as to each element.\textsuperscript{215} The question of the culpability required for conviction must therefore be faced separately with respect to each material element of the offense.\textsuperscript{216}

2. Determination of Which Elements are Modified by the Culpability Element

Once a court has divided the offense into its separate elements, it must decide to which of these elements the culpability requirement applies. Legislation does not often provide a clear answer.\textsuperscript{217} In the
exceptional statute where Congress has articulated precisely how the culpability element should be applied, a court should defer to congressional intent. 218

In the majority of cases, however, courts will need to look at a variety of factors to determine the application of the culpability requirement that Congress intended. 219 The most important of these factors include the seriousness of harm to the public posed by violations of the statute, the legislative history of the statute, and the balance between providing fair warning but not allowing ignorance of the law to be a defense.

a. Public Welfare Offenses

Assuming the application of the culpability requirement is not clear from the statutory language, the first factor a court should use for guidance is whether the statute is a public welfare statute. A public welfare statute is currently one in which “Congress has rendered criminal a type of conduct that [1] a reasonable person should know is subject to stringent public regulation and [2] may seriously threaten the community’s health or safety.” 220 If the statute does not meet this two tier test, 221 or if it is a statute that originates from common law, 222 the culpability requirement should modify all elements of the offense. 223

562 (1971) ("regulations" should be construed as a shorthand designation for conduct that violates the act); Liparota v. United States, 471 U.S. 419, 424–25 (1985) (legislative history contains nothing that would clarify the congressional purpose).

218 LAFAVE CRIMINAL LAW, supra note 3, § 2.2(b) (plain meaning rule); M.P.C. COMMENTS, supra note 3, comment 6 (if a particular kind of culpability has been articulated by Congress, a court is required to use that construction); see Liparota, 471 U.S. at 424 ("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.").

219 The analysis used by the Johnson & Towers court provides a good example of the variety of factors used to determine the application of the culpability element. See supra notes 126–29 and accompanying text.

220 Liparota, 471 U.S. at 433.

221 For example, the statute may be a non-public welfare statute, such as a statute regulating food stamps. Id.


The Model Penal Code employs a similar approach:

(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements
If the statute is a public welfare statute, the court has discretion to apply the culpability requirement to all or just some elements of the offense.\textsuperscript{224} In exercising this discretion, the court must be guided by what Congress intended.\textsuperscript{225} The courts have turned to legislative history for such guidance.

\textit{b. Legislative History of the Criminal Provisions}

In determining how far the culpability element travels in the criminal provisions of a public welfare offense, courts should look first for guidance in the legislative history of those provisions.\textsuperscript{226} Unfortunately, the criminal penalty provisions of environmental protection statutes are often not accompanied by sufficient legislative history to determine the culpability requirement that Congress intended.\textsuperscript{227} For example, the 1980 amendments of RCRA contain an

\begin{quote}
thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

\textsc{Model Penal Code} § 2.02(4) (Proposed Official Draft 1962).

It can be argued that a public welfare statute provides a "contrary purpose." Using this analysis, the culpability element would not have to be applied to all material elements of such a statute.
\end{quote}

\textsuperscript{224} Courts analyzing the culpability prescribed by public welfare statutes have had to decide how many elements of the offense the culpability requirement modified. \textit{See}, e.g., United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984), \textit{cert. denied}, 469 U.S. 1208 (1985); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503-04 (11th Cir. 1986).

\textsuperscript{225} \textit{See} Liparota, 471 U.S. at 424; \textit{Johnson & Towers}, 741 F.2d at 665.

Determination that a statute is a public welfare statute gives a court tremendous discretion. In fact, a court may go so far as only requiring proof that defendants knew they were physically handling a dangerous material. \textit{See} United States v. International Minerals & Chem. Corp., 402 U.S. 558, 560, 565 (1971). When interpreting the culpability requirement of a statute, courts have emphasized the extent of this discretionary power and have then analyzed all the factors that may or may not counsel against exercising those powers to their fullest. For example, the Johnson & Towers court noted that the public welfare character of RCRA would permit reading the statute without any "mens rea requirement" but that other factors counseled against going so far. \textit{See} Johnson & Towers, 741 F.2d at 668-69.

\textsuperscript{226} While the legislative history of the statute as a whole may also be helpful, congressional intent with respect to the specific criminal provisions at issue would seem to provide the most precise guidance. For example, Congress described the culpability it intended to require in the legislative history specific to RCRA's reckless endangerment offense. \textit{See Senate RCRA Report, supra} note 208.

\textsuperscript{227} Unlike the legislative history of RCRA's reckless endangerment offense, the legislative history specific to FIFRA's criminal provisions does not describe the culpability requirement intended by Congress. \textit{See Senate FIFRA Report, supra} note 104, at 4019.

Until the 1980s, environmental criminal penalty provisions weren't controversial enough to attract significant congressional debate because the assumption was that criminal penalties would rarely be appropriate for environmental crimes. \textit{See id.} (civil remedies appropriate means of enforcement as opposed to criminal sanctions). It is likely that the increased enforcement effort by the Department of Justice will cause Congress to provide more legislative
unusually detailed description of the state of mind necessary for knowing endangerment violations pursuant to subsection 3008(e).228 Despite the detail, the conference report does not make clear which material elements "knowingly" should modify.229 Because Congress rarely provides a step-by-step explanation of which elements should be modified by the culpability element, the precise application of the culpability element is usually left to the courts. Absent more specific instruction, courts must choose the interpretation that will effectuate the regulatory purpose of the statute by looking at the legislative history of the statute as a whole.

c. Legislative History of the Entire Statute

The policy concerns motivating the enactment of a piece of environmental legislation provide a powerful influence in a court's determination of the culpability requirement intended by Congress.230 The need to effectuate the statute's purpose will affect how a court applies the culpability element regarding the modification of the elements of an offense by the culpability element. Thus, if requiring knowledge of all elements of an offense would make the government's burden so heavy that the statute became virtually unenforceable, a court should apply the culpability requirement to only some of the elements.

The effect of statutory purpose on a court's application of a culpability requirement is most pronounced when a public welfare statute is involved. The policy behind public welfare statutes is so compelling that courts may, in effect, impose a broader scope of criminal liability than is expressly allowed by the legislative history.231 The presump-

history behind criminal provisions. Until then, courts will usually have to depend on the legislative history of the entire statute for guidance in the application of a culpability element.230 See Senate RCRA Report, supra note 208.

229 For example, when the report explains that the defendant must have "knowingly engaged in conduct which violates certain statutory prohibitions," it is not clear whether the defendant must know that the conduct violated the statute. See id.

230 The statutory purpose plays an important role throughout this analytical approach. For example, the reason that courts even have discretion at this stage to look at legislative history is that the purposes behind public welfare statutes are so compelling. Were the purposes behind the statutes as a whole not so compelling, general principles of criminal law would require a culpability requirement for all elements of the offense. See supra notes 139-44 and accompanying text.

231 For example, the court in United States v. Johnson & Towers, Inc. noted that the fact that RCRA was a public welfare statute would justify reading RCRA without any mens rea requirement. 741 F.2d 662, 668 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985). The less culpability that is required, the broader the scope of a statute and the greater the number of persons qualifying for criminal penalties.
tion with public welfare statutes is that protection of public health and safety is of primary importance and that culpability must be determined in light of that protective purpose.\textsuperscript{232} In contrast, when interpreting statutory crimes originating in common law or regulatory crimes that are not part of a public welfare statute, courts must presume a culpability requirement with respect to all elements of an offense.\textsuperscript{233} In this latter case, regulatory purpose will only have an effect if it is compelling enough to rebut the presumption that proof of culpability is required.\textsuperscript{234}

Courts looking for congressional purpose in a statute’s legislative history have focused on the history’s articulation of the conduct intended to be regulated, the seriousness and extent of that conduct, and the actors Congress targeted for punishment.\textsuperscript{235} Courts may also consider guidance provided by other statutes, the severity of the punishment provided, the defendant’s opportunity to ascertain facts that would affect a decision to engage in the forbidden conduct, the difficulty imposed on the prosecution by requiring proof of a certain mental state, and the number of prosecutions expected.\textsuperscript{236}

For example, the Hayes court considered all of these factors before deciding to apply the “knowing” requirement to all elements of the RCRA offense before it.\textsuperscript{237} The court noted that Congress had created a cradle-to-grave regulatory scheme,\textsuperscript{238} involving a heavily regulated area with great ramifications for public health and safety.\textsuperscript{239} The court also recognized that the statute was intended to prevent transportation of hazardous waste to unlicensed facilities.\textsuperscript{240} Although these factors would justify reading RCRA to make conviction

\textsuperscript{232} See Johnson & Towers, 741 F.2d at 666 (criminal penalties of public health regulatory statutes “are to be construed to effectuate the regulatory purpose”); Morissette v. United States, 342 U.S. 246, 255–56 (1951). For example, the court in United States v. Hayes Int’l Corp. determined the culpability required regarding regulatory provisions in light of the fact that RCRA was a public welfare statute. See 786 F.2d 1499, 1503 (11th Cir. 1986).

\textsuperscript{233} See supra notes 139–44, 222–23 and accompanying text.

\textsuperscript{234} See United States v. Freed, 401 U.S. 601, 616 (1971) (Brennan, J., concurring) (presumption of mens rea rebutted by dangerousness of weapons regulated). The assumption is that the culpability element applies to all material elements unless a “contrary purpose plainly appears.” M.P.C. COMMENTS, supra note 3, comment 6; see Liparota v. United States, 471 U.S. 419, 430 (1985) (policy behind statute not compelling enough to overcome knowledge requirement).

\textsuperscript{235} Hayes, 786 F.2d at 1504.

\textsuperscript{236} LAFAVE CRIMINAL LAW, § 3.8(a), at 244–45.

\textsuperscript{237} See Hayes, 786 F.2d at 1502–04.

\textsuperscript{238} Id. at 1501.

\textsuperscript{239} Id. at 1501, 1503.

\textsuperscript{240} Id. at 1504.
as easy as possible, the court decided to apply the "knowing" requirement to all elements of the offense because of the type of actor targeted by Congress. The court decided that, without such a stringent culpability requirement, innocent conduct would be criminalized contrary to congressional intent. Thus, the statute's purpose affected how the court modified the material elements of the offense with the culpability element.

d. Ignorance of the Law Defense

As a final consideration in the determination of which elements are modified by the culpability element, a court should decide whether requiring knowledge of a particular material element will create a defense of ignorance of the law. Courts go to great lengths to avoid permitting such a defense out of respect for the familiar principle that ignorance of the law is no excuse. While in most cases knowledge of the law should not be an issue, however, there are cases in which not allowing ignorance of the law to be a defense would violate due process. A court will thus have to balance the need to avoid creating such a defense against the need to avoid criminalizing innocent conduct.

To perform this balancing act, a court should consider whether not allowing the defense might encourage arbitrary enforcement, whether the defendant would or could have had notice of the law,

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241 The fewer material elements of an offense modified by a culpability requirement, the easier it is to convict.
242 Hayes, 786 F.2d at 1505.
243 Id. at 1504.
244 In a case such as International Minerals, where reading the language of the offense literally would create a defense of ignorance of the law, this step will be the second time a court addresses the issue. The first time a court considers the issue will be regarding the interpretation of the culpability element. The second time will be regarding the number of elements of the offense that the culpability element should modify.
247 The fear of criminalizing innocent conduct is articulated in Justice Stewart's dissent in International Minerals:

The only real impact of this decision will be upon the casual shipper, who might be any man, woman, or child in the Nation. A person who had never heard of the regulation might make a single shipment of an article covered by it in the course of a lifetime. . . . Yet today's decision holds that a person who does just that is guilty of a criminal offense punishable by a year in prison. This seems to me a perversion of the purpose of criminal law. 402 U.S. at 569 (Stewart, J., dissenting).
and whether ignorance of the law is itself blameworthy.\textsuperscript{248} When conduct is ordinary and unremarkable, a court could consider allowing ignorance of the law to be a defense.\textsuperscript{249} When conduct poses a threat to public health and welfare, however, and is thus serious enough to be prohibited by a public welfare statute, a court should not allow the defense.\textsuperscript{250}

These factors in the balancing process already play a part in courts’ approaches to the ignorance of the law defense.\textsuperscript{251} Rather than articulate this process, though, courts have responded instead by using different meanings of the words “the law” to justify their decisions as to whether a material element should be modified by the culpability requirement.\textsuperscript{252} By arguing that a material element does not involve “the law,” a court can require knowledge of that element while holding that it has not created an ignorance of the law defense.\textsuperscript{253} Thus, Brennan, in both \textit{Freed} and \textit{Liparota}, argued that certain elements were only “legal elements,” the ignorance of which could properly constitute a defense. Similarly, the Court in \textit{International Minerals} pointed out that ignorance of “facts,” as opposed to ignorance of “the law,” could be a proper defense.

Environmental criminal provisions, in particular, illustrate the difficulty of deciding what “the law” means as used in the principle that ignorance of the law is no excuse. Environmental statutes often regulate undesirable activity by using a permit system.\textsuperscript{254} Permits are issued only when conduct meets the standards promulgated by the statute. The existence of the permit is a physical fact that may be ascertained in the same way that shippers determine the fact that they are shipping hazardous waste.\textsuperscript{255} The critical difference between

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  \item \textsuperscript{248} Note, \textit{supra} note 44, at 1413.
  \item \textsuperscript{249} \textit{Id.} at 1410–13; Greenspun, \textit{supra} note 97, at 307–08.
  \item \textsuperscript{250} \textit{International Minerals}, 402 U.S. at 563–65; \textit{Liparota}, 471 U.S. at 433.
  \item \textsuperscript{251} See, e.g., \textit{Liparota}, 471 U.S. at 441 (rule of lenity ensures that criminal statutes provide fair warning); United States v. Hayes Int’l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986) (removing knowing requirement would criminalize innocent conduct).
  \item \textsuperscript{252} Compare \textit{Liparota}, 471 U.S. 419 (ignorance of the law is not a defense when knowledge of “the law” means knowledge of illegality) with \textit{International Minerals}, 402 U.S. 558 (ignorance of the law is not a defense when knowledge of “the law” means knowledge of anything with a legal element). \textit{See also Hayes}, 786 F.2d at 1503 (interpretation of \textit{Liparota} suggested that court was equating knowledge of “illegality” with knowledge of a fact with a “legal element”).
  \item Perhaps these courts chose to mire themselves in vocabulary rather than admit to the fact that they were engaged in balancing because they were afraid of appearing arbitrary. \textit{See} Note, \textit{supra} note 44, at 1413.
  \item \textsuperscript{253} \textit{See Liparota}, 471 U.S. at 425 n.9.
  \item \textsuperscript{255} Determining the type of material that one is transporting may require some amount of
these two facts is that a permit is a fact brought into existence by operation of law. A permit exists only because a law has created it. Knowledge of the law, therefore, may be an integral part of knowledge of a fact.

The knowledge of the law necessary for a person to know that a facility has a permit is not the same as knowledge that one's own behavior is regulated by law or that one's conduct is illegal. Thus, a transporter of hazardous waste may know that a particular facility does not have a permit but may not know that "the law" regulates the transport of waste to such a facility. Even if the transporter knows that taking waste to a facility is regulated by statute, the transporter may not know that "the law" makes such transportation illegal. As the permit example illustrates, knowledge of "the law" may mean anything from recognition of an item created by law to awareness of regulations to knowledge that conduct is illegal. Consequently, the distinction in International Minerals between ignorance of facts and ignorance of the law is, on a practical level, meaningless.

The distinction in Freed and Liparota is equally meaningless. Most importantly, there is no agreement on what is the proper source of a legal element. The Model Penal Code states that the law involved in a "legal element" cannot be the law defining the offense but must be part of some other legal rule.256 For example, theft requires knowledge that property belongs to someone else. Knowledge of property law in such a case is a legal element of a theft offense but is not part of the law defining and prohibiting theft.257

inquiry. It is possible that someone might believe, in good faith, that he or she is transporting distilled water rather than dangerous acid. See United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985). In contrast, the physical act of transporting something would almost always be knowing "since it is not likely that one would treat, store or dispose of waste without knowledge of that action." Id.

256 See M.P.C. COMMENTS, supra note 3, comment 11, at 131. The section cited by Brennan to illustrate his point reads:

It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element. So, for example, it is immaterial in theft, when claim of right is adduced in defense, that the claim involves a legal judgment as to the right of property. It is a defense because knowledge that the property belongs to someone else is a material element of the crime and such knowledge may involve matter of law as well as fact. . . . The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense.


257 M.P.C. COMMENTS, supra note 3, comment 11, at 131.
In contrast, the Liparota Court allowed the legal element to be part of the same statute allegedly violated. The Court held that it was a defense to the federal food stamp fraud statute that one did not know that one's conduct was unauthorized by that statute.258 The Court justified permitting such a defense by labeling as only a legal element knowledge that the use, transfer, or acquisition of food stamps was in a manner unauthorized by statute.259 Because knowledge that conduct was unauthorized constituted only a legal element, ignorance that conduct was unauthorized could be a proper defense.

Environmental statutes complicate the debate over whether ignorance of a legal element may be a defense if that legal element is part of the statute defining the offense. For example, RCRA provides criminal penalties for “[a]ny 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 this subchapter . . . .”260 This definition of a crime includes the legal element of whether a facility physically has a permit pursuant to, for example, section 6925 of RCRA.261 Section 6925, requiring facilities to have permits, is part of the same subchapter of RCRA as the section defining the crime.262 Certainly RCRA defines the criminal offense as well as the conditions attached to the issuance of a permit.263 As a result, the Model Penal Code would not allow ignorance of whether a facility had a proper RCRA permit to be a defense whereas the Liparota Court would.264

The inability to articulate any realistic distinctions between “the law” and “legal elements,” or “the law” and “facts,” makes the

258 Liparota, 471 U.S. at 425.
259 Id. at 425 n.9.
261 Id. § 6925 (permits for treatment, storage, or disposal of hazardous waste).
262 42 U.S.C. § 6928(d)(1) and § 6925 are both part of the subchapter entitled “Hazardous Waste Management,” Id. §§ 6924–6939.
263 See id. §§ 6928, 6925.
264 Perkins suggests that both the legal element and the provision describing the offense may be part of the same law as long as the legal element is not part of the penal clause. See R. Perkins, supra note 3, at 935–36. If an exception is claimed solely on the absence of a required specific intent or other special mental element because of ignorance or mistake of law, the error must relate to some law other than that under which the prosecution itself is brought . . . . [B]oth provisions might appear in the same statute, but the want of knowledge which is admissible in evidence is limited to those clauses which determine who is entitled to vote and where [or who must get a permit], and does not extend to the penal clause itself.

Id.
forthright use of the balancing process suggested in this Comment a more workable alternative. The balancing process is based on the recognition that the principle that ignorance of the law is no defense is more likely to make courts take time to justify their choice of a culpability requirement than affect a court’s choice of which material elements a culpability requirement should modify. Public health and welfare concerns, as well as due process, would therefore be better protected if courts openly engaged in the balancing process rather than struggled to justify decisions with different definitions of “the law.”

IV. CONCLUSION

Environmental statutes originate from a long history of public welfare statutes. Those public welfare statutes have changed over time to include environmental laws that impose criminal penalties and that prescribe culpability as an element of a criminal offense. The changes require incorporation of traditional criminal law theories originating in common law. The result is a class of hybrid statutes whose culpability elements can only be determined by a series of flexible balancing tests. This balancing approach utilizes element analysis, requiring a determination of the culpability required for each separate element of an offense. Although this approach will not transform culpability analysis into a precise science, use of this approach will provide uniformity, a more thorough analysis, and criminal penalties more closely tailored to violations of environmental statutes.