

Fordham Environmental Law Review

Volume 6, Number 2

2011

Article 7

The Battle Between Mens Rea and the Public Welfare: United States v. Laughlin Finds a Middle Ground

Bruce R. Bryan*

*

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

ARTICLES

THE BATTLE BETWEEN MENS REA AND THE PUBLIC WELFARE: *UNITED STATES v. LAUGHLIN* FINDS A MIDDLE GROUND

BRUCE R. BRYAN*

INTRODUCTION

In recent years, the federal government has dramatically increased the prosecution of environmental crimes.¹ The government has concluded that civil sanctions alone do not deter illegal conduct.²

* B.A., 1977, State University of New York at Stony Brook; J.D., 1980, Fordham University; Adjunct Professor, Syracuse University College of Law. The author represented the appellant before the Second Circuit Court of Appeals in *United States v. Laughlin*, 10 F.3d 961 (2d Cir. 1993), *cert. denied sub nom. Goldman v. United States*, 114 S. Ct. 1649 (1994). This Article is intended to present a balanced discussion of the relevant issues and law. The author gratefully acknowledges the input of Craig A. Benedict, Assistant United States Attorney for the Northern District of New York, who represented the United States in *Laughlin*. The views expressed in this Article are solely those of the author.

1. See Dick Thornburgh, *Criminal Enforcement of Environmental Laws—A National Priority*, 59 GEO. WASH. L. REV. 775, 776 (1991), in which the Attorney General of the United States declared that the policy of the federal government is to promote criminal prosecutions under environmental statutes. "Criminal enforcement of environmental laws is not merely a goal, it is a priority—one that has been developing progressively over the past two decades." *Id.* See also Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 790-91 (1991) (statistical analysis showing sharp increase in investigations and indictments by the Environmental Protection Agency ("EPA") and Department of Justice ("DOJ")); Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 901 (1991) ("[T]he federal government in recent years has dedicated increasing law enforcement resources to the investigation and prosecution of environmental crimes.") See also Pollution Prosecution Act of 1990, Pub. L. No. 101-593, §§ 201-205, 104 Stat. 2962 (1990) (codified at 42 U.S.C. § 4321 (Supp. V 1993)) (requiring, *inter alia*, the EPA to substantially increase investigative resources to more than 200 criminal investigators). See generally Robert A. Milne, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFF. L. REV. 307, 308-309 (1988-89) (advocating increased criminal enforcement of environmental statutes to deter violation of federal environmental statutes); James S. Lynch, *The Criminal Provisions of RCRA: Should Strict Liability Be Applied To Its Permit Requirement?*, 5 ST. JOHN'S J. LEGAL COMMENT. 127, 128 (1989) (reviewing elements of RCRA in context of increasing federal prosecutions).

2. Thornburgh, *supra* note 1, at 775. Waste generating entities treated civil sanctions as a cost of doing business, and passed the cost along to the consumer: "[O]ften it was cheaper to dump industrial wastes illegally, and pay the fines for breaking environmental laws, than to spend money on properly processing wastes. . . . The cost of violating environmental laws seemed to be a small enough price to pay compared to the cost of compliance." *Id.* However, incarceration is a cost that cannot be passed along to the consumer. "[T]he threat of incarceration undoubtedly deters other corporate officials from engaging in or countenancing similar misconduct and causes

Moreover, the government has come to recognize that environmental crimes pose one of the most serious risks of harm to the public at large.³

Two of the most frequently prosecuted environmental crimes are set forth in the Resource Conservation and Recovery Act ("RCRA"),⁴ and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").⁵ Section 6928(d)(2) of RCRA makes it a crime to "knowingly treat[], store[], or dispose[] of any hazardous waste identified or listed" as such under RCRA "without a

them to become more compliance-conscious." Starr, *supra* note 1, at 901; Milne, *supra* note 1, at 308 n.8 ("Civil remedies proved ineffective as a deterrent to corporate polluters.").

3. See Christopher Harris et al., *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203, 205-206 (1988) (quoting HOUSE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, REPORT ON HAZARDOUS WASTE DISPOSAL, 96th Cong., 1st Sess., at 31 (Comm. Print 1979), in which James Moorman, Assistant United States Attorney in charge of Land & Natural Resources, testified before Congress that government did not know the "dimensions" of the problem of hazardous waste:

Moorman's testimony reflected the fact that during the late [1970s] several highly publicized incidents galvanized public opinion into a conviction that the threat to public health was both real and immediate. In the public's mind, places such as the Chemical Control site in Elizabeth, New Jersey, Love Canal in Niagara Falls, New York, the so-called Valley of the Drums in Shepardsville, Kentucky, and the Stringfellow Acid Pits in California had become synonymous with—and the symbols of—corporate America's reckless disregard of public health.

Id. at 206.

Several highly publicized environmental disasters confirmed the scope and gravity of environmental crimes in the United States. See generally Adler & Lord, *supra* note 1, at 782-85; 1990 State/Federal Natural Resource Damage Assessment Plan for the Exxon Valdez Oil Spill (Aug. 1990) (prepared through the cooperation of the State of Alaska, the United States Departments of Agriculture and Interior, the National Oceanic and Atmospheric Administration, and the EPA). See, e.g., United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 549 (W.D.N.Y. 1988) (more than 21,000 tons of waste were deposited in New York's Love Canal area); New York v. General Elec. Co., 592 F. Supp. 291, 293 (N.D.N.Y. 1984) (General Electric disposed of several hundred 55-gallon drums containing hazardous substances near Glens Falls, New York, resulting in extensive environmental damage). See also F. Henry Habicht, II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10478, 10485 n.64 (1987) (Justice Department poll revealed that Americans view environmental crime resulting in death as the seventh most severe crime, ahead of skyjacking and drug smuggling); Daniel Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 10065, 10072 (1985) (suggesting criminal sanctions are especially necessary for corporate crimes because imprisonment and social stigma serve as deterrents to corporate officers).

4. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C. §§ 6901-6986 (1988)).

5. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub. L. No. 96-510, 94 Stat. 2767 (1980), amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in certain sections of the Internal Revenue Code and Titles 10, 29, 33, and 42 of the United States Code).

permit."⁶ Likewise, section 9603(b) of CERCLA makes it a crime for any person "in charge of a facility from which a hazardous substance is released" to fail "to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release," if the release exceeds a specified quantity.⁷ The illegal disposal of a hazardous waste often constitutes a violation of both RCRA and CERCLA, warranting a simultaneous prosecution for such offenses.⁸

Since their enactment, courts have struggled to define the mens rea required for these crimes.⁹ Although section 6928(d)(2) of RCRA contains the term "knowingly," and section 9603(b) of CERCLA contains the term "knowledge," each statute is unclear as to which elements such terms modify.¹⁰ When interpreting these statutes, courts have been influenced by two conflicting legal precepts: (1) as a general rule, conduct is not criminal, unless committed knowingly,¹¹ and (2) statutes designed to protect the public welfare may criminalize in-

6. 42 U.S.C. § 6928(d)(2)(A) (1988 & Supp. V 1993).

7. 42 U.S.C. § 9603(b)(3) (1988 & Supp. V 1993).

8. 42 U.S.C. § 6928(d)(2) (disposal of hazardous waste under RCRA) and 42 U.S.C. § 9603(b) (1988 & Supp. V 1993) (release of hazardous substance under CERCLA). The term "hazardous substance" as used in 42 U.S.C. § 9603(b), includes, among other things, any hazardous waste having the characteristics identified under or listed pursuant to 42 U.S.C. § 6921 (except for any waste controlled by regulations that have been suspended by act of Congress). 42 U.S.C. § 9601(14)(C). The term "release" as used in CERCLA means, among other things, "disposing." 42 U.S.C. § 9601(22). The term "disposal" under CERCLA has the same meaning under RCRA. 42 U.S.C. § 9601(29). Therefore, a "disposal" of "hazardous waste" under § 6928(d)(2) of RCRA will also constitute a "release" of a "hazardous substance" under § 9603(b) of CERCLA. The release must also exceed the reportable quantity designated by CERCLA. See generally *United States v. Laughlin*, 10 F.3d 961 (2d Cir. 1993).

9. See *infra* parts II and III. See generally *United States v. Bailey*, 444 U.S. 394, 403 (1980) ("Few areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime.").

10. See *infra* part II.

11. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("intent generally remains an indispensable element of a criminal offense"); *Morissette v. United States*, 342 U.S. 246, 254 n.14 (1952) (criminal law must require mens rea to be accepted as constitutional); *Dennis v. United States*, 341 U.S. 494, 500 (1951) ("[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence"). See generally WAYNE LAFAVE & AUSTIN SCOTT, *CRIMINAL LAW* § 3.4, at 212 (1986) [hereinafter LAFAVE & SCOTT I]. "Mens rea" is defined as a guilty mind or a wrongful purpose. *Id.* The Model Penal Code has established four groups of crimes based on mental culpability. These groups include crimes requiring purpose, knowledge, recklessness, or negligence. MODEL PENAL CODE § 2.02(2) (1962). This basic tenant of criminal law is sometimes referred to by the Latin maxim "actus not facit reum nisi mens sit rea" (an act does not make a person guilty unless his mind is guilty). *Id.* This principle can be traced to Roman law. Keith A. Onsdorff & James M. Mesnard, *The Responsible Corporate Officer Doctrine In RCRA Criminal Enforcement: What You Don't Know Can Hurt You*, 22 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10099 (1992). The concept was then carried forward into eighteenth-century English common law, and thereupon became firmly rooted in the Anglo-American criminal justice system. *Id.*

nocent conduct.¹² Courts have reached varying conclusions based upon the extent to which one precept is weighed more heavily than the other.¹³

In *United States v. Laughlin*,¹⁴ the Second Circuit Court of Appeals, recently joined the fray by addressing the issue of mens rea under section 6928(d)(2) of RCRA and section 9603(b) of CERCLA.¹⁵ Siding with the majority view,¹⁶ the court held that several elements of such crimes do not require that a defendant possess knowledge of the violated regulations.¹⁷ However, the court also indicated that RCRA requires that the defendant know that the waste being treated, stored, or disposed of poses "a substantial present or potential hazard" to human health or the environment as defined by RCRA.¹⁸ Such interpretation may provide criminal defendants with an important basis to defend prosecutions under RCRA.¹⁹

[T]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

Morissette, 342 U.S. at 250-51 (footnotes omitted).

12. See LAFAVE & SCOTT I, *supra* note 11, § 2.12(d), at 155-56 (discussing constitutionality of strict liability statutes).

The Fifth and Fourteenth Amendments of the U.S. Constitution forbid the federal government and the states from depriving any person of life, liberty, or property without due process of law. U.S. CONST. amends. V & XIV. Offenses requiring no mens rea must bear a substantial relationship to a matter of legitimate public concern so as not to offend due process. See *Smith v. California*, 361 U.S. 147, 152 (1959) ("public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors—in fact an absolute standard. . ."); *United States v. Balint*, 258 U.S. 250 (1922) (federal narcotics statute required no mens rea because of the seriousness of offense); *United States v. Flum*, 518 F.2d 39 (8th Cir.) (court upheld lack of scienter requirement in statute prohibiting boarding or attempting to board aircraft with weapon), *cert. denied*, 423 U.S. 1018 (1975). Cf. *Nigor v. United States*, 4 F.2d 781 (8th Cir. 1925) (court found scienter necessary in statute imposing strict liability on those buying drugs with forged stamps). *But see Liparota v. United States*, 471 U.S. 419 (1985) (strict liability provision struck down in public welfare statute).

13. See *infra* parts II and III.

14. 10 F.3d 961 (2d Cir. 1993), *cert. denied sub nom. Goldman v. United States*, 114 S. Ct. 1649 (1994) (defendants Kenneth Laughlin and John Donnelly pled guilty prior to trial, and did not appeal; defendant Harris Goldman was found guilty at trial, and his conviction was affirmed on appeal).

15. *Id.* at 964-67.

16. *Id.* at 965-66.

17. *Id.* at 966-67.

18. *Id.* at 967 (emphasis in original).

19. See *infra* part IV.

This Article analyzes the extent to which section 6928(d)(2) of RCRA and section 9603(b) of CERCLA contain mens rea elements, particularly in light of the Second Circuit's recent decision in *United States v. Laughlin*. Part I of this Article reviews the historical basis and underlying rationales for the mens rea and public welfare principles. Part II of this Article examines the statutory language, legislative history, underlying objectives, and prior judicial construction of the foregoing sections of RCRA and CERCLA. Part III of this Article examines the arguments made to the Second Circuit Court of Appeals in *United States v. Laughlin* and the decision rendered by the court. Finally, Part IV discusses the ramifications of the Second Circuit's decision in *Laughlin* on future prosecutions under RCRA and CERCLA.

I. THE CONFLICT BETWEEN THE PRINCIPLES OF MENS REA AND THE PUBLIC WELFARE

The principle that an injury is not a crime unless committed by intention is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty (of the normal individual) to choose between good and evil."²⁰ Some commentators trace this principle to early primitive law, in which the acts of children and the insane were excused.²¹ The ancient Greeks advanced the notion that human beings are endowed with free will,

20. *Morissette v. United States*, 342 U.S. 246, 250-51 (1952).

21. Gerhard O. W. Mueller, *Tort, Crime, and the Primitive*, 46 J. CRIM. LAW, CRIMINOLOGY & POL. SCI. 303 (1955-56); RUDOLPH GERBER, THE INSANITY DEFENSE 7-8 (1984).

The ancient Hebrew tribes recognized the difference between intentional and accidental conduct, with children and the insane incapable of committing crimes. "A deaf-mute, an idiot, and a minor are awkward to deal with, as he who injures them is liable [to pay], whereas if they injure others they are exempt." GERBER, *supra*, at 8, 94 n.3 (citing THE BABYLONIA TALMUD, BABA KAMMA 501-502 (Epstein ed., 1935) and THE CODE OF MAIMON, THE BOOK OF TORTS, Book Eleven (Oberman ed., 1954)):

To clash with a deaf mute, an imbecile, or a minor is bad, seeing that if one wounds one of these, he is liable, whereas if they wound others, they are exempt. Even if a deaf-mute becomes normal, or an imbecile becomes sane, or a minor reaches majority, they are not liable for payment inasmuch as they were legally irresponsible when they caused the wound.

Holmes agreed that primitive man recognized the difference between intentional and unintentional conduct, stating that "even a dog distinguishes between being stumbled over and being kicked." OLIVER WENDELL HOLMES, THE COMMON LAW 3 (42d ed. 1948). Likewise, Percy Winfield argued, "No sane human being, ancient or modern, needs any mental education beyond that of general experience to say, '[He or she] did not mean to do this,' and therefore to inflict a lighter penalty or possibly none at all. Mediaeval [sic] man is at least that much removed from a beast." Percy H. Winfield, *The Myth of Absolute Liability*, 42 LAW Q. REV. 37 (1926).

On the other hand, John Wigmore argued that primitive law was governed by strict liability. "The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer." John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 317 (1894).

and are therefore responsible for injuries caused by the "deliberate desire of things in [their] own power."²² The Romans codified the rule that "an act does not make one guilty unless his mind is guilty."²³ In the Middle Ages, the clergy were the judges in the royal courts of England, melding Roman law and Canon law, and declaring that an actor's intent gives moral significance to the act, thereby determining culpability.²⁴ Eighteenth-century English common law required the

Likewise, H. Brunner believed that under primitive Germanic law, an early predecessor of the common law, there was no difference between intentional and unintentional conduct: "The early law knows no such thing as accident, but seeks always for something to make answerable, and determines it, by a scarcely appreciable causation nexus, from the conditions of the harmful result." Wigmore, *supra*, at 319 (translating 2 H. BRUNNER, *DEUTSCHE RECHTSGESCHICHTE* 549 (1906)).

22. GERBER, *supra* note 21, at 8, 94 n.6 (quoting ARISTOTLE, *THE NICOMACHEAN ETHICS* 58 (Ross, trans., 1954)).

Aristotle distinguished between voluntary and involuntary acts, with a voluntary act free from ignorance or compulsion. *Id.* One is morally responsible for an act when, knowing the relevant circumstances, he deliberately commits the act. *Id.* On the other hand, Plato refused to distinguish between voluntary and involuntary acts. However, Plato conceded that intentional injuries warranted greater sanctions than acts of passion. *Id.* at 8 (citing PLATO, *LAWS*, Book IX, at 256 (Taylor, trans., 1931)). Plato also believed that human beings possessed "an element of free choice" that made them responsible for criminal acts. *Id.* (quoting PLATO, *THE REPUBLIC* 350 (Cornford, trans., 1915)). See also Agretelis, *Mens Rea in Plato and Aristotle*, *ISSUES IN CRIMINOLOGY* 19 (1969); GERBER, *supra* note 21, at 8.

23. Known by the Latin maxim "actus non facit reum, nisi mens sit rea." In addition, Justinian's legal code in the sixth century exempted children and the insane as a privileged legal class. GERBER, *supra* note 21, at 8, 94 n.7 (citing JUSTINIAN, *DIGEST*. 48.4.2.).

24. In 1264, Henry de Bracton was named Archdeacon of Barnstaple and Chancellor of Exeter Cathedral. GERBER, *supra* note 21, at 9. In 1265, Bracton became the Chief Judge of the Aulia Regis, England's highest court. *Id.* Bracton wrote *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* (1300), borrowing heavily from early Roman law and reflecting strong ecclesiastical influence. GERBER, *supra* note 21, at 9. Bracton later wrote, "For a crime is not committed unless the will to harm be present. Misdeeds are distinguished by both will and by intention. . . . In misdeeds we look to the will and not the outcome." *Id.* Likewise, Bracton distinguished intentional from accidental homicides. 2 BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 340-42 (G. Woodbine ed. & S. Thorne trans. 1968). See Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 *HASTINGS L.J.* 815, 829-30 (1980).

This same principle was earlier recognized in the *LAWS OF ALFRED* (871-899), which stated:

Let the man who slayeth another wil[l]fully perish by death. Let him who slayeth another . . . unwillingly or unwil[l]fully, as God may have sent him unto his hands, and for who[m] he has not lain in wait, be worthy of his life, and of lawful 'bo[ult],' if he seek asylum. If, however, any one presumptuously and wil[l]fully slay his neighbo[ur] through guile, pluck thou him from my altar, to the end that he may perish by death.

1 ANCIENT LAWS AND INSTITUTES OF ENGLAND 47-49 (B. Thorpe ed., 1840) (quoting *LAWS OF ALFRED* § 13). See also *LEGES HENRICI PRIMI* (L. J. Downer ed., 1972) ("A person is not to be considered guilty unless he has a guilty intention."). Historians, however, believe that the foregoing phrase was not the law of England at the time of King Henry I (1068-1135, son of William the Conqueror), but instead "an exotic transplant from St. Augustine." Winfield, *supra* note 21, at 41. At the very least, the

existence of a "vicious will" for conduct to be criminal.²⁵ With English common law as its bedrock, the United States recognized the mens rea requirement as a time-honored principle of criminal jurisprudence.²⁶ The principle is so strong in American law that the Supreme Court once declared that if Congress wished to depart from that norm, it may do so, but in general must manifest its intention by affirmative instruction.²⁷

The requirement of mens rea focuses on the moral blameworthiness of an individual.²⁸ It justifies severe punishment for knowingly wrongful conduct.²⁹ Additionally, mens rea affords "the rational basis for a . . . substitution of deterrence and reformation in place of retaliation and vengeance as a motivation for public prosecution."³⁰

In contrast, the principle that the State may criminalize innocent conduct to protect the public welfare is based upon the utilitarian concept that the good of the many may outweigh the rights of the few.³¹ The focus is not on the moral blameworthiness of the individual, but rather on the needs of society, and the greater good that may be derived from criminalizing conduct creating a substantial risk to the public at large.³² It has been called a method of social control and crime reduction.³³ Strict criminal liability is claimed by some to deter profit-driven manufacturers from exposing the public to hazardous substances released in the course of the manufacturing process.³⁴

The move toward strict criminal liability first occurred in England in the mid-nineteenth century,³⁵ most likely in response to the evils of the Industrial Revolution, when adulterated or diseased foods wreaked havoc on the populace.³⁶ Despite the presence of such social problems, England embraced the concept only tentatively,³⁷ and the role of strict liability in England has diminished in the twentieth century.³⁸

The United States, by contrast, readily accepted the principle of strict criminal liability in the latter part of the nineteenth century, ap-

LEGES HENRICI PRIMI suggests that such principle was recognized, and perhaps partially implemented, by the Anglo-Saxon period of Henry I. Robinson, *supra*, at 828.

25. *Morissette v. United States*, 342 U.S. 246, 250-51 (1952); Onsdorff & Mesnard, *supra* note 11.

26. *Morissette*, 342 U.S. at 250, 261-63.

27. *Id.*

28. See Richard Singer, *The Resurgence of Mens Rea: III—The Rise And Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989).

29. *Id.* at 404-408.

30. *Morissette*, 342 U.S. at 251.

31. See Singer, *supra* note 28, at 337-38.

32. *Id.*

33. *Id.* at 337.

34. *Id.* at 389.

35. *Id.* at 340-63.

36. Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

37. See Singer, *supra* note 28, at 359-60.

38. *Id.* at 377-79.

plying it, in large part, to the regulation of liquor and for the protection of children.³⁹ Congress also moved to protect a quasi-environmental concern when it enacted the Rivers and Harbors Act of 1899,⁴⁰ which imposed strict criminal liability for the discharge of any "refuse matter" into the navigable waters of the United States.⁴¹ In the twentieth century, the United States enacted several statutes designed to protect the public health, safety, and welfare by criminalizing a broad range of conduct that created serious risks of harm.⁴²

When upholding public welfare statutes, the Supreme Court declared that they were enacted "[i]n the interest of the larger good" and put "the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger."⁴³ The Supreme Court stated that a reasonable person should know that certain substances are subject to stringent public regulation and may seriously threaten the community's health or safety.⁴⁴ As a consequence, Congress could constitutionally criminalize conduct that threatened the public welfare, even if committed unintentionally, if the statute touched "phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection."⁴⁵

The conflict between the requirement of mens rea and the need to protect the public welfare occurs most strikingly in statutes, such as

39. *Id.* at 363.

40. 33 U.S.C. § 407 (1988).

41. Section 13 of the Rivers and Harbors Act of 1899 states, in pertinent part:

[I]t shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment or mill of any kind, any refuse matter of any kind or description whatever . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water . . . whereby navigation shall or may be impeded or obstructed. . . .

33 U.S.C. § 407 (1988).

42. See *Morissette v. United States*, 342 U.S. 246, 253-56 (1952). Public welfare statutes are a congressional response to the Industrial Revolution:

Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure, and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety, and welfare.

Id. at 254.

43. *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943) (citing *United States v. Balint*, 258 U.S. 250 (1922)).

44. *United States v. Park*, 421 U.S. 658, 671 (1975).

45. *Dotterweich*, 320 U.S. at 280-81.

RCRA and CERCLA, that embody both principles.⁴⁶ As discussed below, both RCRA and CERCLA contain mens rea components, and were designed to protect the public welfare.⁴⁷ The battleground between these principles occurs in the interpretation of ambiguous elements of these crimes in which the reach of the mens rea component is uncertain from the language of the statute.⁴⁸ Given such ambiguities, courts have reached varying interpretations, depending upon which principle is weighed more heavily than the other.⁴⁹

II. STATUTORY ANALYSIS OF THE MENS REA ELEMENTS OF RCRA AND CERCLA

The purpose of statutory analysis is to determine the intent of Congress.⁵⁰ Such intent may be revealed from: (1) the statutory language,⁵¹

46. See *United States v. Jones*, 735 F.2d 785, 790 (4th Cir.) (interpreting the "knowing" requirement of the Federal Mine Safety and Health Act of 1969 to mean that "the prosecution must prove generally only that the defendant knowingly committed the offensive act, not that the defendant knowingly violated the law"), *cert. denied*, 469 U.S. 918 (1984). See also *United States v. Udofot*, 711 F.2d 831, 837 (8th Cir.) (holding that "knowing," as used in the Gun Control Act of 1968, 18 U.S.C. § 922(e) (1988), does not require the government to prove that the defendant knew that he was violating the law but only that he knew he was delivering firearms or ammunition), *cert. denied*, 464 U.S. 896 (1983); *United States v. International Mineral & Chem. Corp.*, 402 U.S. 558 (1971), discussed *infra* at note 77 and accompanying text. But see *Liparota v. United States*, 471 U.S. 419 (1985) (holding that government has burden of showing that defendant knew his possession of food stamps was unauthorized by statute or regulation).

47. See *infra* parts II and III.

48. *Id.*

49. *Id.*

50. *United States v. Bailey*, 444 U.S. 394, 406 (1980).

[I]n performing such analysis courts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense. Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates. . . . The administration of the federal system of criminal justice is confided to ordinary mortals, whether they be lawyers, judges, or jurors. This system could easily fall of its own weight if courts or scholars become obsessed with hair-splitting distinctions, either traditional or novel, that Congress neither stated nor implied when it made the conduct criminal.

Id. at 406-407.

51. See *United States v. Turkette*, 452 U.S. 576, 580 (1981) (ascertaining the meaning of a statute requires one to first examine the statutory language); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (statutory interpretation begins with statute's language); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.") (citation omitted).

See also REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 232-33 (1975); 2A CHARLES DALLAS SANDS, *SUTHERLAND STATUTORY CONSTRUCTION* § 46.01 (5th ed. 1992); WILLIAM P. STASKY, *LEGISLATIVE ANALYSIS AND DRAFTING* 76 (2d ed. 1984). Statutory language must be examined in light of the purpose that the legislature had in passing the statute, its legislative history, and the relationship of the statute to other statutes. *Id.* One must go "outside" the four

(2) the legislative history,⁵² and (3) the underlying objectives of the statute.⁵³ Such statutory analysis will be undertaken below.

A. Analysis of Section 6928(d)(2) of RCRA

RCRA section 6928(d) states:

Any person who— . . .

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

(A) without a permit . . . ; or

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

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards . . . shall, upon conviction, be subject to a fine . . . or imprisonment⁵⁴

1. The Language of Section 6928(d)(2) of RCRA

Although section 6928(d)(2) expressly contains a mens rea component,⁵⁵ the statute is unclear as to which phrase or phrases the term

corners of the statute when its meaning is unclear. *Id.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535-38 (1947) (discussing ambiguity of words and necessity to look beyond them).

52. See *Bailey*, 444 U.S. at 406. See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982) (a statute's legislative history "confirms that Congress intended the statute to mean exactly what its plain language says"); *United States v. Clark*, 454 U.S. 555, 561 (1982) ("Although the language of the statute is clear, any lingering doubt as to its proper construction may be resolved by examining the legislative history of the statute. . .").

53. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."). STASKY, *supra* note 50, at 76.

54. 42 U.S.C. § 6928(d) (1988 & Supp. V 1993) (emphasis added).

55. A person acts "knowingly" when the person is aware that "the result is practically certain to follow from his conduct, whatever his desire may be as to that result." *United States v. United States Gypsum Co.*, 438 U.S. 422, 444-45 (1978). See also MODEL PENAL CODE § 2.02(2)(b)(ii) (Proposed Official Draft 1962) [hereinafter MODEL PENAL CODE DRAFT] (a person acts "knowingly" if "he is aware that it is practically certain that his conduct will cause such a result."). Federal courts have long struggled in defining the level of culpability necessary for a particular crime. See NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 123 (1970) [hereinafter WORKING PAPERS]; *Bailey*, 444 U.S. at 394. Courts described certain crimes as requiring either "general intent" or "specific intent." *Id.* at 404-405. Such distinction led to confusion and inconsistent applications of the terms. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 28, at 201-202 (1972) [hereinafter LAFAYE & SCOTT II]. In 1970, the National Commission on Reform of Federal Criminal Laws called for "a new departure" and a "general rethinking of traditional mens rea analysis." WORKING PAPERS, *supra*, at 123. Eventually, workable principles for determining criminal culpability were codified. *Id.* See, e.g., MODEL PENAL CODE DRAFT, *supra*, §§ 2.01-2.02. The American Law Institute codified the MODEL PENAL CODE, which replaced the ambiguous dichotomy between "specific intent" and "general intent" with a hierarchy of culpable states of mind.

“knowingly” modifies.⁵⁶ For example, does the term “knowingly” merely modify the phrase “treats, stores, or disposes,” or does it also modify the terms “hazardous waste,” “identified or listed,” or “without a permit.” Statutes similarly drafted have been held to be linguistically ambiguous.⁵⁷ In similar contexts, courts have had difficulty in determining how far into a sentence the term “knowingly” travels.⁵⁸ A variety of rules of construction are available to courts to use in resolving this ambiguity.⁵⁹ However, courts have also warned against relying too heavily upon punctuation and grammatical structure to discern congressional intent.⁶⁰

Armed with such warning, several linguistic arguments can be made regarding the statutory interpretation of RCRA’s section 6928(d)(2). The most restrictive interpretation is that the term “knowingly” only modifies the phrase “treats, stores, or disposes,” because the term immediately precedes this phrase,⁶¹ and is, to some extent, set off by

Bailey, 444 U.S. at 403-404. The MODEL PENAL CODE identified four levels of culpability, in descending order of gravity: purpose, knowledge, recklessness, and negligence. *Bailey*, 444 U.S. at 404. See LAFAYE & SCOTT II, *supra*, at 194; MODEL PENAL CODE DRAFT, *supra* § 2.02. In general, the term “purpose” roughly corresponds to the common-law concept of “specific intent,” and the term “knowledge” roughly corresponds with the term “general intent.” See MODEL PENAL CODE § 2.02 comments at 125 (Tentative Draft No. 4, 1955); LAFAYE & SCOTT II, *supra* at 201-202.

56. See *infra* notes 57-118 and accompanying text.

57. *United States v. Speech*, 968 F.2d 795, 796 (9th Cir. 1992). See *Liparota v. United States*, 471 U.S. 419, 424-28 (1985) (construing federal statute governing food stamp fraud, which provides that whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by the statute or the regulations “shall be guilty of a criminal offense”).

58. *Speech*, 968 F.2d at 796; *Liparota*, 471 U.S. at 425 n.7. The Supreme Court observed in *Liparota* that “Congress certainly intended by use of the word ‘knowingly’ to require *some* mental state with respect to *some* element of the crime. . . . [B]eyond this, the words themselves provide little guidance.” *Id.* at 424 (emphasis added). The Court resolved the dilemma by holding that proof of a knowing violation requires “a showing that the defendant knew his conduct to be unauthorized by statute or regulations.” *Id.* at 425. It was not necessary to prove that the defendant knew of the specific statute or regulation that was violated. The government must prove that the defendant knew that the conduct was unauthorized or illegal. *Id.* at 433-34.

59. LAFAYE & SCOTT II, *supra* note 54, § 2.2(a), at 104-105. Some dispute whether courts first decide how an ambiguous statute ought to be interpreted, and then apply whatever rules of statutory construction will support the desired interpretation. *Id.* at 105. Others believe that courts first employ the rules of construction, and then reach the result that such rules mandate. *Id.* “Doubtless the truth lies somewhere in between—some judges are apt to do it one way, some the other; some cases lend themselves to one technique, some to the other.” *Id.*

60. *United States v. Laughlin*, 768 F. Supp. 957, 960 (N.D.N.Y. 1991) (“[L]egislative drafters do not always operate with a high degree of linguistic precision.”), *aff’d*, 10 F.3d 961 (2d Cir. 1993), *cert. denied sub nom. Goldman v. United States*, 114 S. Ct. 1649 (1994). See, e.g., *United States v. Morris*, 928 F.2d 504, 507 (2d Cir.) (“[P]unctuation is not necessarily decisive in construing statutes.”) (citations omitted), *cert. denied*; 112 S. Ct. 72 (1991).

61. Such literal construction was rejected by the courts in *United States v. Dee*, 912 F.2d 741, 745-46 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); *United States v. Hoflin*, 880 F.2d 1033, 1039 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); *United*

commas. Punctuation, such as a comma, has been relied on to signal that a term is independent of the language that follows.⁶² On the other hand, courts have also held that the mere placement of a comma does not render text clear and unambiguous.⁶³ In *United States v. Johnson & Towers, Inc.*,⁶⁴ the Third Circuit held that an interpretation that limits application of the term "knowingly" exclusively to the phrase "treats, stores, or disposes" is "overly literal."⁶⁵

A more reasonable interpretation of section 6928(d)(2) is that the term "knowingly" not only modifies the phrase "treats, stores, or disposes," but also modifies the term "hazardous waste." The term "hazardous waste" is the object of the sentence, and stands in direct linguistic relation to the adverb "knowingly."⁶⁶ Courts considering this question have held that a defendant must be aware that the waste was hazardous.⁶⁷ However, the extent of such knowledge remains uncertain. Some circuit courts have held that a defendant need only know that the waste has "a general hazardous character."⁶⁸ Other circuit courts have upheld instructions that the defendant need only

States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). In *Laughlin*, the government recognized that knowledge that the waste was hazardous was part of its proof. *Laughlin*, 768 F. Supp. at 962 n.5. On appeal, the Second Circuit affirmed this proposition. *Laughlin*, 10 F.3d at 966.

62. See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (interpreting the Bankruptcy Code).

63. See *Morris*, 928 F.2d at 507 (government argued that the placement of a comma after the term "authorization" in the computer crime statute limited the extent to which the term "intentionally" modified any succeeding language). *But see United States v. Yermian*, 468 U.S. 63 (1984). No rule of grammar requires that this term be applied to every subsequent phrase in the section. *Id.* at 69 n.6.

64. *Johnson & Towers*, 741 F.2d 662.

65. *Id.* at 667-68. See *supra* note 12 (discussion of strict liability).

66. See *United States v. Hoffin*, 880 F.2d 1033, 1039 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990) ("Subsection (2) applies to anyone who 'knowingly treats, stores or disposes of any hazardous waste . . .'. The term 'knowingly' modifies 'hazardous waste' as well as 'treats, stores or disposes of,' and thus, one who does not know the waste he is disposing of is hazardous cannot violate Section 6928(d)(2)(A).").

67. *United States v. Laughlin*, 10 F.3d 961, 966 (2d Cir. 1993) ("With respect to the mens rea required by Section 6928(d)(2)(A), the Government need prove only that a defendant was aware of his act of disposing of a substance he knew was hazardous . . ."), *cert. denied sub nom. Goldman v. United States*, 114 S. Ct. 1649 (1994); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) ("[I]t was error to instruct the jury that defendants had to know the substances involved were chemicals, without indicating that they also had to know the chemicals were hazardous . . ."); *Hoffin*, 880 F.2d at 1039; *United States v. Heuer*, 4 F.3d 723, 731 (9th Cir. 1993) ("[T]he term 'knowingly' modifies both words in the unpunctuated phrase 'hazardous waste'."), *cert. denied*, 114 S. Ct. 1190 (1994); *United States v. Goldsmith*, 978 F.2d 643, 646 (11th Cir. 1992); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 613 (5th Cir. 1991); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); *Hoffin*, 880 F.2d 1033; *United States v. Greer*, 850 F.2d 1447, 1452 (11th Cir. 1988).

68. See *Goldsmith*, 978 F.2d at 645 ("The government need only prove that a defendant had knowledge of 'the general hazardous character' of the chemical."); *Dee*, 912 F.2d at 745 ("[T]he knowledge element of Section 6928(d) does extend to knowledge of the general hazardous character of the wastes.").

know "that the waste had the potential to be harmful to others or to the environment, or, in other words, it was not an innocuous substance like water."⁶⁹ However, no circuit court prior to the Second Circuit in *Laughlin* addressed whether a trial court should instruct in accordance with the statutory definition of "hazardous waste" under RCRA.⁷⁰

A more troublesome question is whether the term "knowingly" also modifies the term hazardous waste "listed or identified under this subchapter." Stated differently, must a defendant know that the government has "listed or identified" the waste as hazardous? A strong linguistic argument can be made that such a phrase is modified by the term "knowingly." In related contexts, courts have held that a mens rea term modifies the entire adjacent phrase in which such a term is contained.⁷¹ Moreover, this construction is consistent with the fundamental principle that "a statute should not be interpreted so as to render the legislature's language mere surplusage."⁷² Congress did not merely identify the substance as a "hazardous waste," but as a "hazardous waste listed or identified under this subchapter."⁷³ Defendants have argued that a court must instruct that a person know that the waste was "listed or identified" by the EPA as hazardous, because the failure to do so will allow the felony conviction of an "innocent" person.⁷⁴ Despite such seemingly strong arguments, almost every circuit court considering this issue has rejected application of the term "knowingly" to the phrase "listed or identified."⁷⁵ Courts

69. See *Hofin*, 880 F.2d at 1039 ("While these instructions did not use the word 'hazardous,' . . . that did require the jury to find that Hofin disposed of chemical waste which he knew 'had the potential to be harmful to others or to the environment.' This instruction was sufficient."); *Greer*, 850 F.2d 1447.

70. See *infra* part III. In *Baytank*, the Fifth Circuit refused to address this question because it had not been presented for review. *Baytank*, 934 F.2d at 610-11.

71. See *United States v. Morris*, 928 F.2d 504 (2d Cir.), *cert. denied*, 112 S. Ct. 72 (1991) (interpreting mens rea element of statute making intentional access to a computer without authorization a crime).

72. *In re Bellanca Aircraft Corp.*, 850 F.2d 1275, 1280 (8th Cir. 1988). See also *In re Kun*, 868 F.2d 1069, 1071 (9th Cir. 1989), *aff'd on reh'g*, 931 F.2d 897 (1991); 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1984).

73. See 42 U.S.C. § 6928(d)(2).

74. See *Baytank*, 934 F.2d at 612.

75. *United States v. Goldsmith*, 978 F.2d 643, 645 (11th Cir. 1992) ("It is not necessary that the government prove that the defendant knew a chemical waste had been defined as a 'hazardous waste' by the Environmental Protection Agency . . ."); *Baytank*, 934 F.2d at 612 ("We conclude that in the circumstances of this case the court was not required to instruct that the jury must find that the defendant knew the waste had been identified by the EPA regulations as hazardous under the RCRA."); *United States v. Sellers*, 926 F.2d 410, 415 (5th Cir. 1991) ("Although the Government must prove that the waste disposed of was listed or identified or characterized by the E.P.A. as a hazardous waste, the Government is not required to prove that the defendant knew that the waste was a hazardous waste within the meaning of the regulations."); *United States v. Dee*, 912 F.2d at 745 ("[T]he government did not need to prove defendants knew violation of RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as RCRA hazardous wastes."); see *gener-*

have applied the familiar principle that "ignorance of the law is no defense."⁷⁶ Moreover, courts have reasoned that anyone who is aware that he or she possesses dangerous waste material "must be presumed to be aware of the regulation."⁷⁷

Finally, it has been argued that the term "knowingly" modifies the phrase "without a permit."⁷⁸ The terms "knowingly" and "without a permit" are contained in the same sentence.⁷⁹ However, the fact that the phrase "without a permit" is contained in a separate subparagraph indicates an intent by Congress that the term "knowingly" should not travel to subparagraph (A).⁸⁰ More importantly, subparagraphs (B) and (C) of section 6928(d)(2) expressly contain the term "knowing," while subparagraph (A) does not.⁸¹ Such a glaring omission confirms an intent by Congress that a defendant need not possess knowledge of the permit status to be found guilty under section 6928(d)(2)(A).⁸² To

ally United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986) (it is not a defense under 42 U.S.C. § 6928(d)(1) to claim lack of knowledge that the waste was a hazardous waste within the meaning of the regulations). *But see* United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984) ("As a matter of syntax we find it no more awkward to read 'knowingly' as applying to the entire sentence than to read it as modifying only 'treats, stores or disposes.'"), *cert. denied*, 469 U.S. 1208 (1985).

76. *Dee*, 912 F.2d at 745; *Baytank*, 934 F.2d at 612.

77. *Id.*, citing United States v. International Minerals & Chem. Co., 402 U.S. 558, 565 (1971).

78. *See, e.g.*, United States v. Dean, 969 F.2d 187, 191 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1852 (1993); United States v. Hoffin, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); *Johnson & Towers*, 741 F.2d at 667-68.

79. 42 U.S.C. § 6928(d)(2)(A) (1988 & Supp. V 1993).

80. *Id.* However, other courts construing similar statutes have held that the mens rea adverb adjacent to one term also modifies phrases or terms appearing at a later point in the statute, without regard to the punctuation or grammatical structure of the statute. *See* Liparota v. United States, 471 U.S. 419, 426-29 (1985) (construing statute criminalizing food stamp fraud); United States v. Nofziger, 878 F.2d 442, 446-50 (D.C. Cir.) (interpreting government "revolving door" statute), *cert. denied*, 493 U.S. 1003 (1989).

81. 42 U.S.C. § 6928(d)(2)(A), (B), and (C) (1988). *See Hoffin*, 880 F.2d at 1037, which states:

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

But see United States v. Bailey, 444 U.S. 394, 406 n.6 (1980) (noting that congressional omission of mens rea does not necessarily mean that punishment can be imposed without proof of mens rea).

82. Such interpretation is consistent with the rule of construction first enunciated by Judge Learned Hand in *SEC v. Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935), wherein Judge Hand observed that a "striking a change in expression" in two different parts of the same statute indicates 'a deliberate difference of intent.' *Id.* Such

construe the statute otherwise would render the term "knowingly" in subparagraphs (B) and (C) as mere surplusage.⁸³

Most courts considering this question have so held.⁸⁴ Courts have reasoned that the statute was intended to draw a clear distinction between permit holders and non-permit holders, and that to construe the term "knowingly" as modifying the phrase "without a permit" would "eviscerate this distinction."⁸⁵ As a consequence, such courts have held that the statutory language "is plain and the meaning is clear."⁸⁶ However, one court has nonetheless refused to reach such a conclusion, concluding that "[a]s a matter of syntax we find it no more awkward to read 'knowingly' as applying to the entire sentence than to read it as modifying only 'treats, stores, or disposes.'"⁸⁷

When courts are faced with ambiguous criminal statutes, they often resort to the "rule of lenity."⁸⁸ This rule directs courts to interpret an

"striking change" technique may be best employed when comparing two clauses in the same sentence. LAFAYE & SCOTT I, *supra* note 11, § 2.2(g), at 83.

Some may argue that the omission by Congress was "inadvertent." *Johnson & Towers*, 741 F.2d at 668. In *Johnson & Towers*, the court stated that the "[t]reatment, storage or disposal of hazardous waste in violation of any material condition or requirement of a permit must be 'knowing,' since the statute explicitly so states in subsection (B)." *Id.* It is unlikely that Congress intended to criminally prosecute those persons who acted without a permit irrespective of their knowledge (under subsection (A)), but not persons who violated the terms of their permit unless that action was knowing (subsection (B)). Thus, we are led to conclude either that the omission of the word "knowing" in subsection (A) was inadvertent or that "knowingly" which introduces subsection (2), applies to subsection (A). *Id.* See also *United States v. Marvin*, 687 F.2d 1221, 1226 (8th Cir. 1982) (construing similar statute in which the word "knowingly" was inserted in one subsection, but not in another; the court held, "The different placement of the words 'knowingly' and 'knowing' in the two subsections of the statute is too weak a reed to support the argument that Congress intended to displace a time-honored principle of criminal jurisprudence."), *cert. denied*, 460 U.S. 1081 (1983).

83. See SINGER, *supra* note 72.

84. See, e.g., *United States v. Dean*, 969 F.2d 187, 191 (6th Cir. 1992) ("[42 U.S.C. § 6928(d)(2)(A)] does not require that the person charged have known that a permit was required, and that knowledge is not relevant."), *cert. denied*, 113 S. Ct. 1852 (1993); *Hoflin*, 880 F.2d at 1037 (expressly holding that knowledge of lack of permit is not an element of section 6928(d)(2)(A) offense); see also *United States v. Goldsmith*, 978 F.2d 643, 645-46 (11th Cir. 1992) (per curiam) (approving jury instruction that did not require knowledge of the absence of a permit); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990) (government need not prove that defendants knew that violation of RCRA was a crime nor did they need to know of existence of specific regulations or requirements), *cert. denied*, 499 U.S. 919 (1991). But see *Johnson & Towers*, 741 F.2d at 667-68 (stating in dicta that knowledge of the absence of a permit is required for conviction under section 6928(d)(2)(A)).

85. See *Hoflin*, 880 F.2d at 1037.

86. *Id.*, citing *United States v. Patterson*, 820 F.2d 1524, 1526 (9th Cir. 1987); the *Patterson* court, in turn, based its view on statutory language from *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987).

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

88. See *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"). See also *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. United States*

ambiguous statute as requiring knowledge of the essential elements of the crime.⁸⁹ The rule of lenity ensures that individuals are given fair warning of conduct that is deemed to be illegal.⁹⁰ The rule strikes an appropriate balance between the legislature, the prosecutor, and the court.⁹¹ It recognizes that the power to define crimes resides with Congress, and not with the courts.⁹² The rule of lenity is consistent with the fundamental legal principle that conduct is not criminal unless committed knowingly.⁹³ A construction of a statute that eliminates the requirement of knowledge has been generally disfavored.⁹⁴

Given the ambiguity inherent in section 6928(d)(2), courts construing the statute could well have held that the term "knowingly" applies to all elements of the crime.⁹⁵ Nonetheless, the majority of such courts have not so held.⁹⁶ The reasons lie elsewhere.⁹⁷

Gypsum Co., 438 U.S. 422, 437 (1978); *United States v. Bass*, 404 U.S. 336, 347-48 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

89. See, e.g., *Liparota*, 471 U.S. at 427. See also LAFAYE & SCOTT I, *supra* note 11, § 2.2(d), at 78. The rule developed during the nineteenth century in England when hundreds of crimes, many of which were minor, were punishable by death. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 750 (1935). The English courts frequently went to great lengths to find any ambiguity to prevent the imposition of a death sentence when such sentence appeared harsh. *Id.* at 751. Despite the decline in the severity of punishment over the years, the rule nonetheless carried forward to this day. LAFAYE & SCOTT I, *supra* note 11, § 2.2, at 78.

90. *Liparota*, 471 U.S. at 427.

91. See *Bass*, 404 U.S. at 348 ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.").

92. *Id.*

93. See, e.g., *Morissette v. United States*, 342 U.S. 246, 250 (1952).

94. *Liparota*, 471 U.S. at 425; *United States Gypsum Co.*, 438 U.S. at 438, which states, "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." Criminal offenses dispensing with a mens rea requirement have a "generally disfavored status." *Id.* But see *United States v. Bramblett*, 348 U.S. 503, 509-10 (1955), which states:

That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority. But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.

Id. See generally LAFAYE & SCOTT I, *supra* note 11, § 2.2(a), at 75 (discussing use of canons in construing criminal statutes).

95. This assumes, as the author contends, that the statute is sufficiently ambiguous so as to warrant the application of the rule of lenity. At least one court has held with respect to the construction of the term "without a permit" that the statute is unambiguous, the language is plain, and the meaning is clear. If so, statutory construction of this term is at an end. See *Hofin*, 880 F.2d at 1037.

96. See *supra* notes 55-87 and accompanying text (discussion of how courts view "knowingly").

97. See *infra* part II(A)(3).

2. Legislative History of Section 6928(d) of RCRA

The legislative history of RCRA provides very little direct guidance regarding the interpretation of the mens rea component of section 6928(d)(2).⁹⁸ When Congress amended RCRA in 1980, the Conference Committee stated that “[t]he state of mind for all criminal violations under [section 2629] is ‘knowing.’ The conferees have not sought to define ‘knowing’ for offenses under subsection (d); that process has been left to the courts under general principles.”⁹⁹

However, several amendments to section 6928 indicate congressional intent to strengthen, and not weaken, the criminal provisions of the statute.¹⁰⁰ Moreover, in 1984, Congress made several detailed

98. See *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502 (11th Cir. 1986) (“Congress did not provide any guidance, either in the statute or the legislative history, concerning the meaning of ‘knowing’ in section 6928(d).”); *United States v. Laughlin*, 768 F. Supp. 957, 961 (N.D.N.Y. 1991) (“Congress provided little helpful insight. . . .”); see also June F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA after United States v. Dee*, 59 GEO. WASH. L. REV. 862, 871 (1991) (“The legislative history of RCRA gives very little insight into the intent of Congress when it chose ‘knowingly’ as the scienter requirement of section 6928(d).”).

99. H.R. REP. NO. 1444, 96th Cong., 2d Sess. 39 (1980), reprinted in 1980 U.S.C.C.A.N. 5028, 5038. See, e.g., *SEC v. Robert Collier & Co.*, 76 F.2d 939, 941 (2d Cir. 1935), which states:

It is of course true that members [of Congress] who vote upon a bill do not all know, probably very few of them know, what has taken place in committee But courts . . . recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way.

Id.

100. In 1980, Congress increased the penalty for violation of section 6928(d)(2)(A) from a misdemeanor to a felony. See 42 U.S.C. § 6928(d) (1988 & Supp. V 1993); see also *Harris et al.*, *supra* note 3, at 204 n.8 (1980 amendment significant because it established first felony sanctions for federal environmental crime).

In 1980, Congress also made it a crime to knowingly place another person in “imminent danger of death or serious bodily injury.” See 42 U.S.C. § 6928(e) (1988 & Supp. V 1993). The enactment prohibited “[a]ny person who knowingly transports, treats, stores, [or] disposes of . . . any hazardous waste” from knowingly placing another person in “imminent danger of death or serious bodily injury.” *Id.* See *Harris et al.*, *supra* note 3, at 207. The “knowing endangerment” offense became the first of its kind in federal law; its enactment reflects the legislature’s objective of “providing prosecutors with enforcement authority adequate to address the more egregious instances of improper waste disposal” *Id.*

In 1984, Congress made prosecutions for “knowing” endangerment under subparagraph (e) less difficult by repealing the requirement that a defendant must exhibit either “an unjustified and inexcusable disregard for human life, or . . . an extreme indifference for human life” to be convicted. See 42 U.S.C. § 6928(e)(2)(A), (B) (1988 & Supp. V 1993).

See H.R. REP. NO. 198, 98th Cong., 1st Sess., pt. 1, at 55 (1983). Congress believed that these elements had made the crime too difficult to prosecute, causing the “knowing endangerment” provision to be “unnecessarily restrictive.” *Id.* The original statute had caused much confusion, making the statute “unduly restrictive.” See S. REP. NO. 284, 98th Cong., 1st Sess. 46 (1983), reprinted in 1984 U.S.C.C.A.N. 5576, 5607.

changes to the language of section 6928(d)(2), but did not add the term "knowingly" to subparagraph (A).¹⁰¹ Such omission indicates a deliberate intent by Congress to apply a strict liability standard to the phrase "without a permit" contained in subparagraph (A).¹⁰²

3. Underlying Objectives of RCRA

Congress enacted RCRA as a "cradle-to-grave" regulatory scheme for toxic substances, providing "nationwide protection against the dangers of improper hazardous waste disposal."¹⁰³ RCRA provides a "multifaceted approach toward solving the problems associated with the 3-4 billion tons of materials generated each year, the problems resulted from the anticipated 8% annual increase in the volume of such waste."¹⁰⁴ Congress determined that the placement of inadequate controls on hazardous waste management resulted in substantial risks to human health and the environment.¹⁰⁵ Accordingly, Congress intended to assure that hazardous waste management prac-

See Harris et al., supra note 3, at 213 ("reluctance of federal prosecutors to initiate criminal actions" under subsection (e) for "knowing endangerment" caused repeal of "extreme indifference" and "unjustified disregard" elements of crime).

101. *See* 42 U.S.C. § 6928(d) (as amended Nov. 8, 1984, Pub. L. No. 98-616, Title II, Subtitle C, §§ 232-234, Subtitle D, § 245(c), Title IV, § 403(d)(1)-(3), 98 Stat. 3256-3258, 3264, 3272; Oct. 17, 1986, Pub. L. No. 99-499, Title II, § 205(i), 100 Stat. 1703) (subsection (d)(1), inserted "or causes to be transported" and substituted "this subtitle" for "section 3005 (or 3006 in case of a State program)"; subsection (d)(2), in the introductory matter, deleted "either" preceding the dash in subsection (d)(2)(A), deleted "having obtained" following "without," substituted "this subtitle" for "section 3005 (or 3006 in the case of a State program)," substituted subsection (d)(2)(B) for one which read: "in knowing violation of any material condition or requirement of such permit," and added subsection (d)(2)(C)).

102. Such detailed changes to section 6928(d) undermine the argument that the omission of the term "knowingly" in subparagraph (A) was "inadvertent."

103. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249. *See* H.R. REP. NO. 1491, *supra* note 2, at 3. The House Report states:

The overriding concern of the Committee however, is the effect on the population and the environment of the disposal of discarded hazardous wastes—those which by virtue of their composition or longevity are harmful, toxic or lethal. Unless neutralized or otherwise properly managed in their disposal, hazardous wastes present a clear danger to the health and safety of the population and to the quality of the environment.

See also Ann K. Pollack, Note, *The Role of Injunctive Relief and Settlements in Superfund Enforcement*, 68 CORNELL L. REV. 706, 709 n.24 (1983) (suggesting that "commentators have deemed RCRA system a 'cradle-to-grave' statutory scheme because subtitle C of the Act traces hazardous waste from generator, to transporter, to disposal facility").

104. H.R. REP. NO. 1491, *supra* note 102, at 2, *reprinted in* 1976 U.S.C.C.A.N. at 6239.

105. 42 U.S.C. § 6901(b)(5) (1982) ("[H]azardous waste presents, in addition to the problems in association with non-hazardous solid wastes, special dangers to health and requires a greater degree of regulation than does non-hazardous solid wastes.") (language altered in 1984 amendment).

tices are conducted in a manner that protects human health and the environment.¹⁰⁶

RCRA created a system of controls whereby generators of hazardous wastes must keep detailed records identifying the types and quantities of wastes generated.¹⁰⁷ A manifest system also ensures that the regulated waste reaches a properly permitted facility for safe disposal.¹⁰⁸ Those who treat, store, or dispose of hazardous wastes must comply with similar rules.¹⁰⁹ Congress considered such regulations so

106. 42 U.S.C. § 6902(4) (1982) (Congress intended to regulate the "treatment, storage, transportation and disposal of hazardous wastes which have adverse affects on health and the environment.") (language altered in 1984 amendment). Congress, in RCRA itself, found that without careful planning and management of hazardous waste, there is a great danger to human health and the environment. See 42 U.S.C. § 6901(b)(2) (1988 & Supp. V 1993). The post-World War II economy produced large quantities of hazardous waste that the public recognized as a major environmental problem prior to the enactment of RCRA. See J. GORDON ARBUCKLE, ENVIRONMENTAL LAW HANDBOOK 60 (12th ed. 1993). See generally ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW (3d ed. 1991) (discussing overall public concern regarding environmental ruin).

Congress responded to the environmental outcry with various legislation. For a compendium of federal environmental statutes, see 1A FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW (1994 & Supp. June 1994). See, e.g., The Federal Water Pollution Control Act (commonly referred to as The Clean Water Act of 1972), 33 U.S.C. §§ 1251-1376 (1988 & Supp. V 1993) (regulating discharge of pollution into waterway); National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370 (1988 & Supp. V 1993) (establishing national standards for environmental protection). The Clean Air Act, 42 U.S.C. §§ 7401-7626 (1988 & Supp. V 1993) (regulating air pollutants). Congress also targeted the hazardous waste problem directly. See, e.g., Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2654 (1988 & Supp. V 1993) (regulating use and disposal of toxic materials); CERCLA, 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993) (regulating cleanup of hazardous waste damage); Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993) (recognizing breadth of hazardous waste cleanup problem). For a discussion of various methods of national regulation of hazardous substances, see Charles Davis, *Approaches to the Regulation of Hazardous Wastes*, 18 ENVTL. L. 505-35 (1988).

107. 42 U.S.C. § 6922(a)(1) (1988 & Supp. V 1993).

108. *Id.* § 6922(a)(5).

109. *Id.* § 6924. See Ginamarie Alvino, Note, *Landowner Liability Under CERCLA: Is Innocence a Defense?*, 4 ST. JOHN'S J. LEGAL COMMENT. 149, 151 n.11 (1988), citing 1 Donald W. Stever, LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE § 5.01, at 5-6 (1994), which states:

RCRA is designed for the following purposes: 1) to provide a system for tracking and preserving a record of hazardous waste movement from its inception to disposal ("cradle to grave"); 2) to ensure disposal is accomplished so as to prevent escape of hazardous waste into the environment; and 3) to provide an enforcement mechanism to ensure compliance with the regulations.

Id. See also *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666 (3d Cir. 1984) ("Congress enacted RCRA in 1976 as a 'cradle to grave' regulatory scheme for toxic materials. . ."). See generally William L. Rosbe, *RCRA and Regulation of Hazardous and Nonhazardous Solid Wastes—Closing the Circle of Environmental Control*, 35 BUS. LAW. 1519 (1980) (providing an overview of effect of RCRA's implementation).

serious that it enacted both civil and criminal sanctions,¹¹⁰ imposing criminal sanctions on the "most egregious of offenders."¹¹¹

Not surprisingly, almost all courts have concluded that RCRA is a "public welfare statute."¹¹² The statute was designed to protect the public health and the environment from the hazards of toxic wastes.¹¹³ However, section 6928(d)(2) is not a "pure" public welfare statute in the sense that it does not impose strict liability on every element of the crime.¹¹⁴ Rather, it is a hybrid, in that it is a public welfare statute containing a mens rea component.¹¹⁵ Accordingly, one or more of the elements require that the defendant act knowingly.¹¹⁶ Its status as a public welfare statute comes into play when courts are called upon to construe ambiguous statutory terms. This occurs when the scope of the mens rea element is in question.¹¹⁷ In these instances, several courts have narrowly interpreted the reach of the term "knowingly" in section 6928(d)(2), such that the phrases "listed or identified" and "without a permit" are held to impose strict liability.¹¹⁸

110. See H.R. REP. NO. 1491, *supra* note 2, at 30, which states, "Many times civil penalties are more appropriate and more effective than criminal. However, many times when there is a willful violation of a statute which seriously harms human health, criminal penalties may be appropriate."

111. *Id.* H.R. REP. NO. 1491 indicates that only willful violations that seriously affect human health are to be penalized. See also Fike, *supra* note 12, at 189-90 (RCRA's criminal sanctions primarily apply to "most egregious of offenders").

Congress did not intend that criminal provisions be invoked for minor technical violations of the statute. The tougher criminal provisions are:

intended to prevent abuses of the permit system by those who obtain and then knowingly disregard them. It is not aimed at punishing minor or technical variations from permit regulations or conditions if the facility operator is acting responsibly [sic]. The Department of Justice has exercised its prosecutorial discretion responsibly under similar provisions in other statutes and the conferees assume that, in light of the upgrading of the penalties from misdemeanor to felony, similar care will be used in deciding when a particular permit violation may warrant criminal prosecution under this Act.

H.R. CONF. REP. NO. 1444, 96th Cong., 2d Sess. 37, *reprinted in* 1980 U.S.C.C.A.N. 5028, 5036.

112. See *United States v. Hoflin*, 880 F.2d 1033, 1037 (9th Cir. 1989) (RCRA is public welfare statute), *cert. denied*, 493 U.S. 1083 (1990); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986) ("section 6928(d)(1) is undeniably a public welfare statute, involving a heavily regulated area with great ramifications for the public health and safety"); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985) (concluding that RCRA can be classified as a "public welfare statute").

113. See *Hayes*, 786 F.2d at 1503.

114. See *United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (guilt under the Food, Drug and Cosmetic Act of 1938 ("FDCA"), 21 U.S.C. §§ 301-93 (1988) may be imposed "though consciousness of wrongdoing be totally wanting").

115. 42 U.S.C. § 6928(d)(2). See, e.g., *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971) (public welfare statute containing mens rea element). See also J. Manly Parks, *The Public Welfare Rationale: Defining Mens Rea In RCRA*, 18 WM. & MARY J. ENVTL. L. 219, 226 (1993).

116. 42 U.S.C. § 6928(d)(2).

117. See *infra* parts II and III.

118. *Id.*

B. Statutory Analysis of Section 9603(b) of CERCLA

Section 9603(b) of CERCLA provides:

any person— . . .

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to Section 102 of this title [42 U.S.C. section 9602] who fails to notify immediately the appropriate agency of the United States Government as soon as he has *knowledge* of such release or who submits in such a notification any information which he *knows* to be false or misleading . . . shall, upon conviction, be fined . . . or imprisoned . . . or both.¹¹⁹

1. Language of Section 9603(b) of CERCLA

Section 9603(b) makes it a crime for a person in charge of a facility to fail to notify the government of the release of a hazardous substance from the facility “as soon as he has *knowledge* of such release. . . .”¹²⁰ (emphasis added). At a minimum, section 9603(b) requires that a defendant possess knowledge of the existence of a release.¹²¹ However, the question remains as to whether section 9603(b) requires knowledge that the substance released was hazardous.¹²² Moreover, some have argued that a defendant must also know that the hazardous substance was listed or identified as such by the government, and know that the release occurred without a permit.¹²³

The language of section 9603(b) provides some support for the argument that a defendant must know that the substance released was hazardous. The word “such” in the phrase “as soon as he has knowledge of such release” modifies the term “release,” and refers to a release of a hazardous substance.¹²⁴ The phrase could have been alternatively drafted: “as soon as he has knowledge of the release of the hazardous substance.”¹²⁵ Although a literal interpretation of the phrase might limit application of the term “knowledge” to the term “release,” a more reasonable construction also applies the term “knowledge” to the term “hazardous substance.”¹²⁶ When presented with a similar question under RCRA section 6928(d)(2), courts con-

119. 42 U.S.C. § 9603(b) (1988 & Supp. V 1993).

120. *Id.*

121. *Id.*

122. See *United States v. Greer*, 850 F.2d 1447, 1453 (11th Cir. 1988).

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

124. See 42 U.S.C. § 9603(b) (1988 & Supp. V 1993); Roxanne R. Rapson & Scott R. Brown, *Mens Rea Requirements Under CERCLA: Implications For Corporate Directors, Officers And Employees*, 6 SANTA CLARA COMPUTER & HIGH TECH. L.J. 377, 394 (1991).

125. Rapson & Brown, *supra* note 124, at 394.

126. See, e.g., *supra* part II(A)(1).

curred that the term "knowingly" modified the term "hazardous waste."¹²⁷

Furthermore, section 9603(b) of CERCLA makes it a crime for a person in charge of a facility to submit a notice that he or she knows contains false or misleading information.¹²⁸ Specifically, section 9603(b) applies to a person "who fails to notify immediately the appropriate agency of the United States Government as soon as he has *knowledge* of such release or who submits in such a notification any information which he *knows* to be false or misleading"¹²⁹ If a false or misleading notice is submitted, section 9603(b) unambiguously requires knowledge that the information is false or misleading.¹³⁰ Therefore, it is logical to assume that Congress also required knowledge that the substance was hazardous when a defendant fails to notify the government of such release.

There is far less support for the position that a defendant must know that the substance was listed or identified by the government, or that the release occurred without a permit.¹³¹ Section 9603(b) does not contain such language.¹³² It may be argued that such knowledge is required under section 9603(a),¹³³ and that section 9603(b) should therefore be construed in the same manner. Alternatively, a defendant might argue that the statute is ambiguous, and that the rule of lenity should therefore apply. However, the more persuasive position is that the statute is unambiguous, and use of the rule of lenity is not required.

2. Legislative History of Section 9603(b) of CERCLA

The legislative history of CERCLA section 9603(b) is of little assistance in determining the scope of the mens rea component contained therein.¹³⁴ For three years, Congress considered several bills regulating the cleanup of hazardous substances, but the final bill that became law has almost no legislative history.¹³⁵ It was enacted hastily in the closing days of a "lame duck" Congress.¹³⁶

However, the congressional committees that drafted CERCLA were the same committees that worked on the 1980 amendments to

127. *Id.*

128. 42 U.S.C. § 9603(b).

129. *Id.* (emphasis added).

130. *See id.*

131. *See, e.g.,* United States v. Laughlin, 10 F.3d 961 (2d Cir. 1993).

132. *See* 42 U.S.C. § 9603(b).

133. *See id.* § 9603(a).

134. *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

135. *Id.*

136. *Id.*

RCRA.¹³⁷ One of the initial bills dealing with the cleanup of hazardous substances was first introduced as an amendment to RCRA.¹³⁸ In many ways, RCRA and CERCLA are similar, with both addressing the same broad concerns with a complementary regulatory and criminal enforcement scheme.¹³⁹ Although members of Congress appeared to be primarily concerned with the strict liability standards imposed in the civil context, such concern should not be lost when considering the interpretation of the criminal provisions of CERCLA.¹⁴⁰

3. Underlying Objectives of CERCLA

Congress enacted CERCLA to fill gaps left by RCRA.¹⁴¹ CERCLA addresses the problem of existing sites contaminated by hazardous substances.¹⁴² CERCLA also attempts to avoid the consequences of new hazardous waste spills by encouraging early notification and adequate cleanup with governmental oversight.¹⁴³ CERCLA promotes the cleanup of such sites through the creation of a "Superfund" to finance government-sponsored cleanups, and through the authorization of civil actions by private parties to recover cleanup costs from responsible individuals.¹⁴⁴

Under section 9603, Congress addressed this problem through a notification scheme.¹⁴⁵ Section 9603(a) provides, among other things,

137. *Id.* at 2.

138. *Id.* at 35.

139. *Id.*

140. *See id.* at 2.

141. 42 U.S.C. §§ 6901-6992(k); 126 CONG. REC. 30,942 (1980) (Congress was aware that better laws were necessary to stop the illegal disposal and transportation of hazardous substances, particularly by those persons called "midnight dumpers").

142. *See* Richard C. Belthoff, Jr., *Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COLUM. J. ENVTL. L. 141, 142 (1986) (CERCLA was designed to address gaps in RCRA).

143. Grad, *supra* note 134, at 2 ("While deficient in many respects, [CERCLA], together with the hazardous waste subtitle ("Subtitle C") of [RCRA], which was amended and reaffirmed by the same congressional committees during the same session of Congress, form a sufficient authorization to begin the cleanup of old hazardous waste sites and to avoid the consequences of new hazardous waste spills, for the protection of health and the environment.").

144. *See* Prudential Ins. Co. of Am. v. United States Gypsum Co., 711 F. Supp. 1244, 1251 (D.N.J. 1989), which states:

The statute embodies a bifurcated scheme to promote the cleanup of hazardous sites, spills and releases. First, through the creation of Superfund, the federal government is provided with the tools to respond to the growing problems resulting from hazardous waste disposal. Second, the statute also authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation

Id. (citations omitted). *See also* Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1238 (M.D. Pa. 1990).

145. *See* G. Nelson Smith, III, *Waking The Sleeping Giant: The Use Of The Felony Sanctions Under CERCLA To Ensure Compliance With Environmental Laws*, 26 CREIGHTON L. REV. 449, 451-58 (1993).

that any person in charge of a facility, "as soon as he has knowledge of any release [other than a federally permitted release] of a hazardous substance," in excess of a specified quantity, must immediately notify the National Response Center of such release.¹⁴⁶ Section 9603(b) criminalizes the failure to provide such notification, as well as providing notification that is knowingly false or misleading.¹⁴⁷ Congress declared that "the time has come to declare war on toxic waste . . . and unleash a bold, new attack on the hazardous waste sites that threaten the environment of our people."¹⁴⁸

Undoubtedly, Congress was motivated by many of the same concerns that prompted passage of RCRA.¹⁴⁹ In 1980, there was strong public sentiment that hazardous waste posed a serious threat to public health, and that existing laws should be strengthened to protect workers and consumers.¹⁵⁰

The reporting requirements are extremely important under CERCLA.¹⁵¹ Upon immediate notification of the release of a hazardous substance, the government can act quickly to contain the spill and minimize exposure to the public.¹⁵² Notice of the more significant releases was viewed by Congress as an important first step to enabling a prompt governmental response, particularly when those at fault for the release had failed to do so.¹⁵³

Therefore, it is evident that CERCLA is a public welfare statute.¹⁵⁴ As with RCRA, CERCLA was designed to protect the public health and the environment from the hazards of toxic substances.¹⁵⁵ However, as with RCRA, section 9603(b) of CERCLA is a hybrid, being a public welfare statute containing a mens rea component.¹⁵⁶ Where the reach of the mens rea component is ambiguous, courts may be inclined to narrowly interpret such component and will impose strict liability on ambiguous elements of the crime. By so doing, the courts will more fully protect public health and the environment, but place less concern on the moral blameworthiness of individual defendants.

146. 42 U.S.C. § 9603(a).

147. *Id.* § 9603(b).

148. 132 CONG. REC. S14,895 (1986).

149. Smith, *supra* note 145, at 459.

150. 123 CONG. REC. 30,940 (1980).

151. Smith, *supra* note 145, at 461.

152. *United States v. Carr*, 880 F.2d 1550, 1552 (2d Cir. 1989).

153. 126 CONG. REC. 30,933 (1980).

154. *See supra* parts I, II(A)(3).

155. *Id.*

156. *Id.*

III. THE SECOND CIRCUIT'S DECISION IN *UNITED STATES v. LAUGHLIN*

The Court of Appeals for the Second Circuit, in *United States v. Laughlin*,¹⁵⁷ recently addressed the issue of mens rea under section 6928(d)(2) of RCRA and section 9603(b) of CERCLA. *Laughlin* involved a case of a defendant accused of the "midnight dumping" of a highly toxic chemical.¹⁵⁸ On appeal, the defense and the prosecution made numerous arguments on the scope of the mens rea elements.¹⁵⁹ The Second Circuit's decision fully addressed the issues presented, affirming positions held by several other circuit courts, and forging new ground on issues never before addressed.¹⁶⁰

A. *The Facts of Laughlin*

According to the prosecution, at three o'clock in the morning in late June 1987, Harris Goldman entered onto the property of his railroad tie treating company, GCL Tie & Treating, Inc. ("GCL"), in Sidney, New York.¹⁶¹ There, hidden by darkness, Goldman opened the valve on a railroad tanker car containing 20,000 gallons of creosote sludge and contaminated water, releasing the contents onto the ground.¹⁶²

The next morning, as GCL workers reported to work, they observed an enormous pool of creosote sludge and water that had run down the sides of the railroad tracks.¹⁶³ As workers stood back from the fumes trying to figure out what had happened, they witnessed small field animals attempting to cross the tracks but dying instead upon contact with this toxic pool of chemicals.¹⁶⁴ The GCL site had been purchased in 1983 by Goldman and his business partner from the Railcon Corporation, which had also been in the business of treating railroad ties with creosote.¹⁶⁵ The treatment process was designed to render the ties impervious to natural decay due to moisture or insect attack.¹⁶⁶ When functioning properly, the process consisted of placing untreated green ties into a large cylinder. Creosote was added, heated

157. 10 F.3d 961 (2d Cir. 1993), cert. denied sub nom. Goldman v. United States, 114 S. Ct. 1649 (1994).

158. *Id.* at 963 (actually, the dumping occurred at 3 a.m.).

159. *Id.* at 964-66 (RCRA and CERCLA addressed separately).

160. *Id.* at 966-67 (RCRA and CERCLA addressed separately).

161. Brief for Appellee, *United States v. Laughlin*, 10 F.3d 961 (2d Cir. 1993) (No. 93-1100), at 3 (citing Supplemental Joint Appendix 91, 105 [hereinafter S.J.A.]). The facts as described herein are quoted, with permission, from the brief of the United States submitted to the Second Circuit Court of Appeals in *Laughlin*.

162. *Id.* (citing S.J.A. at 91-92).

163. *Id.* (citing S.J.A. at 15-17, 45-46, 64).

164. *Id.* at 4 (citing Joint Appendix 196-208; S.J.A. at 64-65 (the Joint Appendix submitted to the Second Circuit Court of Appeals [hereinafter J.A.])).

165. *Id.* (citing S.J.A. at 102).

166. *Id.* (citing S.J.A. at 3).

to boiling temperature, and a vacuum was applied. Water and natural wood alcohols were drawn out and the creosote penetrated the ties.¹⁶⁷

The water, wood alcohol, and some creosote, collectively referred to in the industry as "boulton water," would vaporize in the cylinder where it was then drawn off and run through condensation coils.¹⁶⁸ This mixture, consisting of up to twenty-five percent creosote,¹⁶⁹ was thereafter placed in a heated evaporation tank. Once in this tank, the creosote would quickly settle to the bottom due to its heavier weight, forming a sludge-like consistency. Heated coils in the evaporation tank would cause the water to boil off so that the remaining creosote sludge could be suctioned out and placed back into storage for reuse in treating additional ties.¹⁷⁰

However, for years GCL had been having serious problems with its treatment process. As a result, excess creosote often spilled out of the normal "closed loop" system.¹⁷¹ With the knowledge of Goldman, supervisors regularly directed workers to dispose of the contaminated creosote by soaking it up with sawdust and dumping it near wetlands located at the edge of the GCL property.¹⁷²

Because GCL had never applied for a RCRA treatment, storage, or disposal ("TSD") permit, neither the New York State Department of Environmental Conservation ("DEC") or the United States Environmental Protection Agency ("EPA") were aware that this site regularly handled—and disposed of—hazardous waste.¹⁷³

After GCL reported a large but accidental creosote spill to the DEC on October 30, 1986, inspectors began making periodic visits, which, pursuant to the DEC's then-existing policy, were announced in advance to ensure that the appropriate GCL managers would be available to answer questions.¹⁷⁴ These pre-announced visits, however, afforded GCL management time to conduct substantial pre-inspection coverups of contaminated soil to prevent discovery of the true condition of the site.¹⁷⁵ Therefore, with the exception of the reported October 30, 1986 spill, no regulatory agency had knowledge of the true condition of the site until well after the time Goldman emptied the railroad tanker car.¹⁷⁶

Throughout 1987, GCL was in poor financial condition.¹⁷⁷ Accordingly, when the boiler developed intermittent problems due to its age

167. *Id.* (citing S.J.A. at 5-6).

168. *Id.* (citing S.J.A. at 5-6).

169. *Id.*

170. *Id.* (citing S.J.A. at 5-7, 78).

171. *Id.* (citing S.J.A. at 67-71).

172. *Id.* (citing S.J.A. at 67-72).

173. *Id.* (citing J.A. at 187-93; S.J.A. at 1, 76, 84, 95-97).

174. *Id.* (citing S.J.A. at 97-98).

175. *Id.* at 6 (citing S.J.A. at 67-68, 98-101).

176. *Id.* (citing S.J.A. at 97).

177. *Id.* (citing S.J.A. at 104, 108).

in June, it was neither repaired nor replaced.¹⁷⁸ The boiler had to function properly, however, to heat the evaporation tank coils to evaporate the water and recover the leftover creosote sludge.¹⁷⁹

Without the boiler working properly, GCL quickly began to run out of storage space for the excess boulton solution.¹⁸⁰ In early June 1987, GCL employees were directed to put this mixture from the already full evaporation tanks into a railroad taker car that had just delivered a shipment of new creosote.¹⁸¹ Thereafter, for the next several weeks this railroad car was used to store the creosote sludge and water generated by normal plant operation.¹⁸²

During this period, Goldman became increasingly upset because GCL was incurring a daily "demurrage" or rental charge for keeping the railroad car beyond its normal return date.¹⁸³ After two weeks had gone by with no resolution of the boiler problems, Goldman met with GCL Vice President of Operations/Plant Manager Kenneth Laughlin and a company consultant. The three discussed possible courses of action.¹⁸⁴ Laughlin outlined their most obvious short-term options: return the railroad car with the creosote sludge and water to Allied Chemical (the creosote manufacturer) for disposal or recycling, or find a hazardous waste hauler to remove the tanker's contents.¹⁸⁵ Goldman, however, had a third, far less expensive, idea: get a sprayer truck and drive along the roads of Sidney, New York, releasing the contents out of the back.¹⁸⁶ The consultant, a county legislator, became very upset and told Goldman that his plan was unacceptable.¹⁸⁷ Laughlin told him that it was illegal.¹⁸⁸

After this discussion, Goldman spoke privately with Laughlin and insisted that his plant manager dump the waste.¹⁸⁹ Laughlin refused.¹⁹⁰ Confronted with the costly alternatives, Goldman decided to do the job himself.¹⁹¹ Before this could happen, however, Laughlin snuck out to the railroad car and plugged the drain hose to try to prevent the dumping.¹⁹²

Unfortunately, Laughlin's efforts failed. After one aborted attempt, Goldman emptied the contents in the middle of the night by

178. *Id.* (citing S.J.A. at 7, 49, 61).

179. *Id.* (citing S.J.A. at 7-8).

180. *Id.* (citing S.J.A. at 8).

181. *Id.* (citing S.J.A. at 8, 62).

182. *Id.* (citing S.J.A. at 8, 11, 38, 62).

183. *Id.* at 7 (citing S.J.A. at 9-10, 34, 41-42, 63).

184. *Id.* (citing S.J.A. at 33-39).

185. *Id.* (citing S.J.A. at 10, 35-36).

186. *Id.* (citing S.J.A. at 10, 35).

187. *Id.* (citing S.J.A. at 10, 36).

188. *Id.* (citing S.J.A. at 35).

189. *Id.* (citing S.J.A. at 12).

190. *Id.*

191. *Id.* (citing S.J.A. at 12, 103).

192. *Id.* (citing S.J.A. at 12).

opening the car's main valve without the hose attachment.¹⁹³ The following morning, Laughlin and Goldman had a heated argument over the dumping. In front of office personnel, Goldman admitted his action, but told Laughlin and others present that they would be fired if the disposal was reported to the government.¹⁹⁴ Goldman ordered his plant manager to arrange for the creosote sludge to be covered up.¹⁹⁵ Laughlin had a local contractor bring in gravel for the approximately seventy-five by forty yard area.¹⁹⁶ No report was ever made to the DEC or EPA, nor was the disposal mentioned during subsequent inspections.¹⁹⁷

Financial conditions at GCL continued to deteriorate, and on August 6, 1987, Railcon exercised its rights under a note that it held from the 1983 sale to remove Goldman from operational control and the Board of Directors.¹⁹⁸ GCL then filed for bankruptcy under Chapter 11.¹⁹⁹ Goldman, however, remained a GCL owner.²⁰⁰

Laughlin informed the president of Railcon of the June 1987 midnight dumping.²⁰¹ In December 1987, Laughlin, at Railcon's direction, arranged for the local contractor to dig up the contaminated soil and add it to the pile already in existence from the October 30, 1986 spill.²⁰² Approximately 520 cubic yards were recovered.²⁰³

In December 1987, most of the GCL workers were laid off.²⁰⁴ Shortly thereafter, Laughlin resigned, and the facility was abandoned except for a small crew that remained to sell off untreated ties.²⁰⁵ By May 1988, this small crew was gone as well, leaving behind a massively contaminated site.²⁰⁶ Nothing was done to dispose of or safeguard the tens of thousands of gallons of creosote left behind.²⁰⁷ Pipes containing creosote broke open in the winter cold and the treatment building flooded with this substance.²⁰⁸ Fifty-five-gallon drums of hydrochloric acid and other hazardous chemicals were abandoned.²⁰⁹ The facility, located directly across the street from a shopping plaza where adolescents congregated, was repeatedly vandalized.²¹⁰

193. *Id.* at 8 (citing S.J.A. at 13-15, 105).

194. *Id.* (citing S.J.A. at 19-20, 43-45).

195. *Id.* (citing S.J.A. at 22-23, 54).

196. *Id.* (citing S.J.A. at 15-16, 22, 23, 56).

197. *Id.* (citing J.A. at 191-93; S.J.A. 1, 97).

198. *Id.* (citing S.J.A. at 47).

199. *Id.* (citing S.J.A. at 57).

200. *Id.* (citing S.J.A. at 51).

201. *Id.* (citing S.J.A. at 27).

202. *Id.* (citing J.A. at 230-33; S.J.A. at 27, 56-59).

203. *Id.* at 9 (citing S.J.A. at 180).

204. *Id.* (citing S.J.A. at 49).

205. *Id.* (citing S.J.A. at 49-50).

206. *Id.* (citing S.J.A. at 40, 48, 49, 52, 99-100).

207. *Id.* (citing S.J.A. at 89).

208. *Id.*

209. *Id.*

210. *Id.* (citing J.A. at 194; S.J.A. at 88-89).

By the summer, the DEC learned that the facility had been deserted and began piecing together the details of the site's true condition. Subsequently, a criminal investigation ensued.²¹¹ After detailed inspections were conducted, the facility was declared a federal Superfund site.²¹² EPA estimates for the cleanup of the contamination were set at \$4,406,336.²¹³ The minimum cost for the cleanup of the railroad car release was set at \$607,868.²¹⁴

Goldman was indicted under 42 U.S.C. § 6928(d)(2) of RCRA and 42 U.S.C. § 9603(b) of CERCLA, and tried before a jury in the Federal District for the Northern District of New York.²¹⁵ Laughlin was also indicted, but pled guilty before trial, and testified against Goldman.²¹⁶ After the close of evidence, the trial court charged that, for a conviction under RCRA, the jury must find:

First, the defendant disposed of or caused others to dispose of creosote sludge on or about the date set forth in the indictment; Second, that pursuant to the Resource Conservation and Recovery Act, the creosote sludge was hazardous; Third, the Defendant knew creosote sludge had a potential to be harmful to others or the environment, or, in other words, it was not a harmless substance like uncontaminated water; Fourth, neither defendant nor GCL had obtained a permit or interim status which authorized the disposal of hazardous waste under the Resource Conservation And Recovery Act.²¹⁷

The court charged that, for a conviction under CERCLA, the jury must find:

(1) that there was a hazardous substance; (2) that it was in an amount equal to or greater than the reportable quantities; (3) that it was released from a facility; (4) that this release was other than a federally permitted release; (5) that defendant was a person in charge of the facility; and (6) that the defendant failed to give immediate notice to the National Response Center as soon as he had knowledge of that release.²¹⁸

Goldman's trial counsel did not preserve certain objections to the foregoing instructions. After deliberation, the jury returned a verdict of guilty against Goldman on both charges. Thereafter, Goldman was sentenced to a term of incarceration of forty-two months.

211. *Id.* (citing S.J.A. at 88).

212. *Id.* (citing S.J.A. at 99).

213. *Id.* (citing J.A. at 310).

214. *Id.*

215. *Id.* at 2.

216. *Id.* at 39.

217. *Id.* at 12 (citing J.A. at 183-84).

218. *Id.* at 28 (citing J.A. at 185-86).

B. *Goldman's Arguments to the Second Circuit*

On appeal, Goldman argued to the Second Circuit Court of Appeals that the instructions by the District Court on the elements of RCRA and CERCLA were erroneous. Specifically, Goldman argued that under RCRA, a person must know that he has disposed of a hazardous waste "identified or listed" under RCRA, and know that the disposal occurred without a permit.²¹⁹ Goldman further argued that under CERCLA, a person must know that the hazardous substance released was listed or identified under CERCLA, and know that the release occurred without a permit.²²⁰

Alternatively, Goldman also argued to the Second Circuit that the District Court had erred when it charged the jury that Goldman need only know that "creosote sludge had a potential to be harmful to the environment and others, or, in other words, it is not a harmless substance like uncontaminated water."²²¹ Among other things, Goldman contended that the District Court's instructions showed variances from the statutory meaning of "hazardous waste" under RCRA.²²² Goldman also argued that under section 9603(b) of CERCLA, the District Court should have instructed that the defendant must know that the chemical was a hazardous substance defined as such under CERCLA. Although the foregoing issues were not preserved in the District Court, Goldman's appellate counsel requested that the Second Circuit address the issues because they involved "plain error."

Goldman contended that the language of the statute supported his construction of the mens rea elements of the crime.²²³ Goldman maintained that in section 6928(d)(2), Congress explicitly used the term "hazardous waste *identified or listed under this sub-chapter*" and that, as a defined term under RCRA, hazardous waste has a specific meaning under the statute.²²⁴ Goldman stated that Congress did not intend that the term "hazardous waste" be interpreted in accordance with common usage.²²⁵ Rather, Congress expressly required construction by reference to the statutory definition.²²⁶ Goldman reasoned that to interpret section 6928(d)(2) otherwise would be to render the words "identified or listed under this subchapter" meaningless, or as mere surplusage.²²⁷

219. Brief of Defendant-Appellant Harris Goldman at 20, *United States v. Laughlin*, 10 F.3d 961 (2d Cir. 1993) (No. 93-1100), *cert. denied sub nom.* *United States v. Goldman*, 114 S. Ct. 1649 (1994) [hereinafter Appellant's Brief].

220. *Id.*

221. *Id.* at 34.

222. *Id.*

223. *Id.* at 22-26.

224. *Id.* at 24.

225. *Id.*

226. *Id.*

227. *Id.* at 24-25.

Goldman further argued that a practical reason existed for the requirement that a person know that the substance is "identified or listed" as a hazardous waste under RCRA.²²⁸ As indicated in the trial testimony of the prosecution's expert on the identification of hazardous wastes and substances,²²⁹ only highly trained individuals with the government have the ability to identify substances as hazardous wastes under 42 U.S.C. § 6903(5).²³⁰ Goldman maintained that Congress intended that a person merely know that a substance is "identified or listed" by the EPA as a hazardous waste, rather than require the person to go through the complex process of attempting to determine whether a particular substance fits the detailed statutory definition of "hazardous waste" or "hazardous substance."²³¹

In addition, Goldman argued, on the basis of the decisions in *Johnson & Towers, Inc.* and *United States v. Hayes International Corp.*, that knowledge of the permit status was required.²³² The fact that Congress had omitted the word "knowingly" from subparagraph (A) was, from Goldman's viewpoint, "too weak a reed to support the argument that Congress intended to displace a time honored rule of criminal jurisprudence" that conduct must be committed knowingly to be criminal.²³³

Moreover, Goldman maintained that the government's interpretation of the statute would criminalize a broad range of innocent conduct.²³⁴ Goldman contended that the "normal purpose of the criminal law is to condemn and punish conduct that society regards as immoral."²³⁵ Goldman stated that Congress must clearly demonstrate its wish that morally innocent conduct be condemned before such construction will be given.²³⁶

Goldman further argued that, to the extent that the statute was ambiguous, the Second Circuit should follow the rule of lenity and interpret the statute in favor of a defendant.²³⁷ Moreover, Goldman maintained that such construction would provide individuals with adequate notice of the conduct declared to be criminal, thereby affording adequate notice and due process under the Constitution.²³⁸

228. *Id.* at 25.

229. *Id.*

230. *Id.*

231. *Id.* at 25-26 (citing *Cheek v. United States*, 498 U.S. 192 (1991) (criminal liability predicated on knowing violation of tax laws, due to complexity of such laws)).

232. *Id.* at 25-26 (citing *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668 (3d Cir. 1984); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986)).

233. *Id.* at 29-31. See *United States v. Marvin*, 687 F.2d 1221, 1226 (8th Cir. 1982).

234. Appellant's Brief at 29-31. See *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. Marvin*, 687 F.2d 1221, 1226-27 (8th Cir. 1982).

235. Appellant's Brief at 30.

236. *Id.*

237. *Id.* at 31-32. See *Liparota v. United States*, 471 U.S. 419 (1985); *Rewis v. United States*, 401 U.S. 808 (1971).

238. Appellant's Brief at 32.

Turning to section 9603(b) of CERCLA, Goldman argued that section 9603(b) requires, as elements of the crime charged, that the person know that the substance has been listed by the government as hazardous, and know that the release occurred without a permit.²³⁹ Goldman contended that the language of the statute supported such interpretation, in that section 9603(b) requires notice "as soon as he has knowledge of such release."²⁴⁰ Goldman reasoned that the term "such release" pertains to the release of a hazardous substance as defined by CERCLA.²⁴¹ Goldman postulated that Congress intended that the person know that the substance is one which has been listed as hazardous by the government under CERCLA, and that a permit existed, before criminal liability may be imposed.²⁴²

Goldman further argued that such interpretation of section 9603(b) is consistent with the general rule that criminal statutes require intentional conduct as a precondition to liability.²⁴³ Likewise, such construction avoids an interpretation of section 9603(b) that would criminalize a broad range of innocent conduct.²⁴⁴ Finally, Goldman contended that, at the very least, section 9603(b) is ambiguous.²⁴⁵ As a consequence, ambiguities must be resolved in favor of lenity.²⁴⁶

C. *The Government's Arguments to the Second Circuit*

In response, the government argued that a plain reading of section 6928(d)(2)(A) should lead to the conclusion that the term "knowingly" does not modify the phrase "without a permit," in that subsections (B) and (C) of section 6928(d)(2) specifically include the modifier "knowingly" and that subsection (A) does not include such modifier.²⁴⁷ The government contended that subsections (B) and (C) are different from subsection (A), because they involve technical regulatory violations.²⁴⁸ In contrast, subsection (A) applies to a much broader class of conduct more likely to be subject to governmental regulation.²⁴⁹ The government further argued that violation of RCRA, a public welfare statute, is a general intent crime.²⁵⁰ The government maintained that such construction is consistent with prior court interpretations of similar statutes.²⁵¹ The government noted

239. *Id.* at 32-34.

240. *Id.* at 33.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 34.

246. *See supra* notes 88-94 and accompanying text.

247. Brief for Appellee, *United States v. Laughlin*, 10 F.3d 961 (2d Cir. 1993) (No. 93-1100), at 13-14 [hereinafter *Appellee's Brief*].

248. *Id.* at 14.

249. *Id.*

250. *Id.* at 15-19.

251. *Id.* at 19.

that a majority of the circuit courts that have considered this issue have held that knowledge of the permit status is not required.²⁵² The government also urged the Second Circuit to reject the analysis of the Third Circuit in *Johnson & Towers*.²⁵³

In response to Goldman's argument that the District Court had erred when it did not instruct the jury that Goldman must know that the waste was "listed or identified" as hazardous, the government argued that a mistake or ignorance of the law is no defense.²⁵⁴ The government reasoned that if such were allowed, the government would find it extremely difficult to protect the public against criminal activities.²⁵⁵

In response to Goldman's arguments that the jury should have been instructed that Goldman must know that the waste was listed as a hazardous substance under CERCLA, or know that the release occurred without a permit, the government likewise argued that CERCLA is a general intent, public welfare statute, and that therefore the government need not prove that the defendant specifically intended to violate the statute.²⁵⁶ The government reasoned that CERCLA was designed to ensure the government's ability to rapidly respond to an illegal hazardous release.²⁵⁷ The government adopted much of its argument and reasoning under RCRA and applied them to CERCLA.²⁵⁸

D. *The Second Circuit's Decision*

The Second Circuit held that under section 6928(d)(2) of RCRA, a person need not know that he or she disposed of a hazardous waste "identified or listed" under RCRA.²⁵⁹ The court indicated that when knowledge is an element of a statute regulating hazardous substances, "the knowledge element is satisfied upon a showing that a defendant was aware that he or she was performing the prescribed acts; knowledge of regulatory requirements is not necessary."²⁶⁰ The court reasoned that given the "presumption of awareness of regulation" stated by the Supreme Court in *United States v. International Minerals & Chemical Corp.*, section 6928(d)(2)(A) should only require that a de-

252. *Id.* at 20-23.

253. *Id.* at 23.

254. *Id.* at 24-27.

255. *Id.* at 26.

256. *Id.* at 27-30.

257. *Id.* at 27-28.

258. *Id.* at 27.

259. *United States v. Laughlin*, 10 F.3d 961, 965 (2d Cir. 1993), *cert. denied sub nom. Goldman v. United States*, 114 S. Ct. 1649 (1994).

260. *Id.*

defendant have a "general awareness" that he [or she] is engaging in the acts prescribed by the statute.²⁶¹

The Second Circuit also determined that under RCRA section 6928(d)(2)(A), a person need not know that the disposal occurred without a permit.²⁶² The court recognized that most other circuit courts addressing this issue are in accord.²⁶³ The Second Circuit stated that its ruling was not only supported by the "presumption of awareness of regulation," but also by the fact that the word "knowingly" is included in subsections (B) and (C) of section 6928(d)(2) "but notably omitted from paragraph (A)"²⁶⁴ The court reiterated that the government need only prove that a defendant "was aware of [his or her] act of disposing of a substance he [or she] knew was hazardous."²⁶⁵

The Second Circuit likewise held that a person need not know that the substance released violated CERCLA.²⁶⁶ Its reasoning under RCRA applied "with equal force" to CERCLA.²⁶⁷ The court declared that CERCLA is a public welfare statute having "a regulatory scheme intended to protect the public health and safety."²⁶⁸ The court noted that the reporting requirement under CERCLA is very important to ensure that the government may "move quickly to check the spread of a hazardous release."²⁶⁹ As a consequence, section 9603(a) does not require knowledge of CERCLA regulations pertaining to the substance.²⁷⁰ Rather, section 9603(a) "demands only that the defendant be aware of his [or her] acts."²⁷¹ However, the court's decision leaves it unclear whether a defendant must know that a substance released was hazardous.²⁷² The court also did not address Goldman's argument that CERCLA required knowledge that the release occurred without a permit, although it may be presumed that the court rejected that argument.²⁷³

Importantly, the Second Circuit agreed with Goldman that a jury should be instructed that, under RCRA, a defendant must know that the substance "posed a substantial present or potential hazard."²⁷⁴ The Second Circuit reasoned that RCRA defined "hazardous waste"

261. *Id.* United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971).

262. *Laughlin* 10 F.3d at 966.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 966-67.

267. *Id.* at 966.

268. *Id.*

269. *Id.*

270. *Id.* at 966-67.

271. *Id.* at 967.

272. *See id.* at 966-67.

273. *See Appellant's Brief* at 32-34.

274. *Laughlin*, 10 F.3d at 967.

as any "solid waste . . . which . . . may . . . pose a *substantial* present or potential hazard to human health or the environment when improperly . . . disposed of."²⁷⁵ The Second Circuit stated that the word "substantial" should be included in jury instructions relating to knowledge of hazardous waste under RCRA.²⁷⁶ The court indicated:

Section 6903(5) clearly provides that before waste will be deemed "hazardous" within the meaning of RCRA, it must present not simply a potential hazard, but a *substantial* potential hazard. The jury should have the benefit of the statutory definition.²⁷⁷

However, the Second Circuit refused to reverse Goldman's conviction because the failure to give such instruction was not plain error.²⁷⁸ The court also did not address whether the District Court should have instructed that a defendant must know that the substance released was hazardous "as defined by CERCLA."²⁷⁹

IV. RAMIFICATIONS OF THE SECOND CIRCUIT'S DECISION IN *UNITED STATES V. LAUGHLIN*

The Second Circuit's decision in *Laughlin* represents a compromise in the battle between the mens rea and public welfare principles as applied to RCRA section 6928(d)(2)(A) and CERCLA section 9603(b).²⁸⁰ The decision fulfills the objectives of RCRA and CERCLA to protect the public health and environment,²⁸¹ but preserves an element of fairness to a criminal defendant by requiring that he generally know that what he or she is doing is wrong.²⁸²

Under section 6928(d)(2)(A) of RCRA, the Second Circuit reaffirmed the position of a majority of circuit courts that the term "knowingly" does not modify the phrases "listed or identified" or "without a permit."²⁸³ The decision puts another nail in the coffin of the Third Circuit's decision in *Johnson & Towers*,²⁸⁴ which has now been so severely eroded as to stand isolated in the scheme of judicial precedent.²⁸⁵ The Second Circuit also provided strong support for the position that the term "knowingly" modifies the term "hazardous waste," virtually ending the debate on how far down the sentence the term "knowingly" travels.²⁸⁶

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *See id.*; Appellant's Brief at 33.

280. *See supra* part I.

281. *See supra* parts II(A)(3) and II(B)(3).

282. *See supra* notes 20-27 and accompanying text.

283. *Laughlin*, 10 F.3d at 964-67.

284. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984).

285. *See Laughlin*, 10 F.3d at 966; Appellee's Brief at 23.

286. *See Laughlin*, 10 F.3d at 967.

The government's ability to prove such environmental crimes is not particularly difficult under the standard set by the Second Circuit.²⁸⁷ Whether a person knows that a substance is "listed or identified," or that a permit existed, are not readily provable, because they are facts primarily within the province of the person's mind.²⁸⁸ However, the fact that a person knows, in general, that a substance is hazardous is easily provable through ordinarily extensive direct or circumstantial evidence.²⁸⁹

Most importantly, the Second Circuit's decision charts a course toward a somewhat more stringent instruction than has been previously used when describing the mens rea element of section 6928(d)(2)(A) of RCRA.²⁹⁰ In the past, many courts have instructed that a defendant must know that the waste "had the potential to be harmful to others or to the environment, or, in other words, it was not a harmless substance like water . . ." ²⁹¹ Such an instruction could give a jury the impression that only trivial or slight harms would qualify.²⁹² The Second Circuit recognized that a more appropriate instruction should include the word "substantial," in that such an instruction would correspond to the statutory definition of "hazardous waste" in RCRA.²⁹³

The Second Circuit implicitly recognized that such an instruction had been improperly adopted from an opinion of the Supreme Court that construed a different environmental statute.²⁹⁴ In *International Minerals*, the Supreme Court had construed the term "knowingly" as used in a statute regulating, among other things, corrosive liquids.²⁹⁵ Section 843(f) of Title 18 of the United States Code stated that who-

287. See Appellee's Brief at 26; *Hamling v. United States*, 418 U.S. 87, 123 (1974) (when construing 18 U.S.C. § 1461 involving the use of the mails for mailing anything unmailable, the Supreme Court stated, "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.").

288. See 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.07 ("The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. . .").

289. See *Laughlin*, 10 F.3d at 962-64.

290. *Id.* at 967.

291. See *supra* notes 67-70 and accompanying text.

292. At oral argument in *Laughlin*, Chief Judge Newman questioned the government whether the omission of the term "substantial" from a jury instruction on the mens rea element of 42 U.S.C. § 6928(d)(2) would permit conviction for slight or trivial harms.

293. *Laughlin*, 10 F.3d at 967.

294. The Second Circuit cited *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971), on five separate instances, stating that its conclusion was supported by the reasoning of the Supreme Court in that case. See *Laughlin*, 10 F.3d at 965-67. At oral argument, appellant's counsel argued that the instruction on the mens rea element had been adapted from *International Minerals*, but that the RCRA definition should control. The Second Circuit agreed. *Id.* at 967.

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

ever “knowingly violates” any Interstate Commerce Regulation related to the safe transportation of “explosives or other dangerous articles,” including “corrosive liquids,” is guilty of a crime.²⁹⁶ In *International Minerals*, the defendant was charged with the unlawful shipment of sulfuric acid.²⁹⁷ Section 831 of Title 18 of the United States Code defined various terms in the statute, but did not define the terms “dangerous articles” or “corrosive liquid.”²⁹⁸ The Supreme Court held, among other things, that the term “knowingly” required only that a defendant be aware that he was shipping sulfuric acid, rather than an innocuous substance, such as distilled water.²⁹⁹

When circuit courts subsequently construed the necessary elements of the crime stated in 42 U.S.C. § 6928(d)(2), they “borrowed” the language of the Supreme Court expressed in *International Minerals*.³⁰⁰ The circuit courts held that a defendant must only know that the substance posed a “potential to be harmful to others or to the environment, or, in other words, it was not an innocuous substance like water.”³⁰¹ The courts apparently did not give consideration to the fact that the statute construed by the Supreme Court in *International Minerals* was dissimilar to section 6928(d)(2) of RCRA.³⁰² Title 18 of the United States Code, section 831, did not define the terms “dangerous articles” or “corrosive liquids,”³⁰³ whereas 42 U.S.C. § 6903 defined the term “hazardous waste.”³⁰⁴ Section 6903(5) of RCRA defines “hazardous waste” as a substance posing a “substantial” potential or present hazard to human health or the environment.³⁰⁵ In further

296. In *International Minerals*, the defendant was charged with unlawful transportation of sulfuric acid and hydrofluorosilicic acid in interstate commerce, and knowing failure to show on the shipping papers the required classification as a corrosive liquid. 18 U.S.C. § 834(a) authorized the Interstate Commerce Commission to promulgate regulations for the safe transportation of corrosive liquids. 18 U.S.C. § 834(f) stated that whoever “knowingly violates any such regulation” has committed a crime. 49 C.F.R. § 173.427 was thereafter promulgated, which stated, “Each shipper offering for transportation any hazardous material subject to the regulations in this chapter, shall describe that article on the shipping paper by the shipping name” *Id.*

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

298. See 18 U.S.C. § 831.

299. Specifically, the Supreme Court stated:

So far as possession, say, of sulfuric acid is concerned the requirement of “*mens rea*” has been made a requirement of the Act as evidenced by the use of the word “knowingly.” 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.

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

300. *Id.*

301. *United States v. Laughlin*, 10 F.3d 961, 965 (2d Cir. 1993), cert. denied sub nom. *Goldman v. United States*, 114 S. Ct. 1649 (1994).

302. Compare 18 U.S.C. 834(f) (1988 & Supp. V 1993) with 42 U.S.C. § 6903 (1988 & Supp. V 1993).

303. See 18 U.S.C. § 831 (1988).

304. 42 U.S.C. § 6903(5) (1988).

305. *Id.*

contrast, the terms "dangerous articles" and "corrosive liquids," as used in 18 U.S.C. § 831, are not the same as, or necessarily analogous to, the term "hazardous waste" as used in section 6928(d)(2)(A) of RCRA.³⁰⁶ Such instruction may impose a greater burden on the prosecution, in that it must deal with the issue of whether the defendant knew that the waste had a "substantial" potential for harm.³⁰⁷ From a defense perspective, such wording opens the door for arguments on the degree to which a defendant knew that the harm might be substantial.³⁰⁸ Whether to focus upon such a standard may depend upon whether the waste is generally known to be very harmful, or whether the waste has more subtle harmful properties not ordinarily within public knowledge.³⁰⁹

Some defendants may argue that the Second Circuit's decision requires that a verbatim instruction be given on the statutory definition of "hazardous waste," together with any ancillary definitions contained therein that are necessary to such instruction.³¹⁰ The purpose of such a tactic would be to confuse the jury with complex statutory language, giving the impression that only individuals with highly specialized training could determine whether a waste is hazardous.³¹¹ On the other hand, the prosecution might focus upon the word "may," as contained in the statutory definition, arguing that anything "may" pose a substantial risk of harm to human health or the environment.³¹²

These arguments miss the essence of what the Second Circuit said in *Laughlin*.³¹³ The court described the mens rea element of RCRA in simple language, ordinarily understandable to the average juror.³¹⁴ The court's decision is in accord with the common understanding of

306. Compare 18 U.S.C. § 831 with 42 U.S.C. § 6903(5).

307. See 42 U.S.C. § 6903(5) (1988). See, e.g., *United States v. Meek*, 998 F.2d 776, 780 (10th Cir. 1993); *United States v. Gould*, 983 F.2d 92, 94 (7th Cir. 1993); *Tennyson v. Brower*, 823 F. Supp. 421, 423 (E.D. Ky. 1993):

308. See *id.*

309. This proposition assumes that a jury may be more inclined to find that a waste poses a substantial harm when the community at large generally knows that such waste has such properties. For example, the community generally knows that asbestos or radioactive waste would pose a substantial harm. See, e.g., 1 DEVITT & BLACKMAR, *supra* note 281, § 8.01.

310. 42 U.S.C. § 6903(5), which defines the term "hazardous waste," contains within its definition certain terms that are further defined under separate subsections. For example, a "hazardous waste" is defined as a "solid waste" having certain characteristics. 42 U.S.C. § 6903(27) defines the term "solid waste."

311. See DEVITT & BLACKMAR, *supra* note 281, § 8.01 (treatise admonishes judges to provide juries with clear and understandable instructions on the law); Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 168 (1988).

312. 42 U.S.C. § 6903(5) (1988).

313. See *United States v. Laughlin*, 10 F.3d 961, 967 (2d Cir. 1993), *cert. denied sub nom. Goldman v. United States*, 114 S. Ct. 1649 (1994).

314. *Id.*

what is a hazardous waste.³¹⁵ A waste is hazardous when, if improperly handled, it poses a serious risk of harm to health or the environment.³¹⁶ Something having a "slight" or "trivial" impact is not commonly included within the scope of that which is considered to be a hazardous waste.³¹⁷ Therefore, it would be improper for a trial court to use the phrase "or, in other words, it is not a harmless substance like distilled water."³¹⁸ A hazardous waste under RCRA is more than a trivial harm.³¹⁹

The court's decision on the mens rea elements of section 9603(b) of CERCLA demonstrates an intent, when possible, to interpret CERCLA in a consistent manner with RCRA.³²⁰ The Second Circuit expressly stated that its analysis under RCRA applied "with equal force" to CERCLA.³²¹ The court recognized that both statutes are, in general, aimed to remedy the same harms.³²² As with RCRA, the Second Circuit refused to broadly interpret section 9603(b) of CERCLA, such that a defendant must have knowledge of CERCLA regulations to be found guilty of such offense.³²³

However, the court's decision leaves unanswered certain important questions.³²⁴ Must a defendant merely know that a release occurred, or also that the substance released was hazardous?³²⁵ If a defendant must know that the substance released was hazardous, must the trial court instruct the jury in accordance with the statutory definition of "hazardous substance" under CERCLA?³²⁶ Based upon the foregoing analysis of RCRA and CERCLA, a strong argument can be made that a defendant must know that the substance released was hazardous, and that the instruction on the term "hazardous substance" should be in accordance with the statutory definition.³²⁷

315. Compare *supra* note 259 (person need not know substance violated RCRA) with note 274 (under RCRA, jury must be instructed that defendant knew substance "posed a substantial present or potential hazard) and notes 266-267 (reasoning applied "with equal force to CERCLA").

316. 42 U.S.C. § 6903(5)(B) (1988) (defining hazardous waste).

317. See *id.*

318. See *supra* note 274 and accompanying text (discussion of jury instructions).

319. See *United States v. Laughlin*, 10 F.3d 961, 967 (2d Cir. 1993), *cert. denied sub nom. Goldman v. United States*, 114 S. Ct. 1649).

320. See *id.* at 966.

321. *Id.*

322. *Id.*

323. *Id.* at 966-67.

324. Appellant's Brief did not request the Second Circuit to address certain questions, and the court chose not to explicitly address others.

325. *Laughlin*, 10 F.3d at 966-67.

326. *Id.*

327. Such argument is consistent with the manner in which the majority of courts have answered analogous questions under section 6928(d)(2) of RCRA.

CONCLUSION

The Second Circuit's decision provides strong guidance for future cases involving the interpretation of section 6928(d)(2)(A) of RCRA and section 9603(b) of CERCLA. The decision achieves a balance between the need to protect the public from serious environmental harms and the desire to treat criminal defendants with an appropriate measure of fairness and justice. The Second Circuit accomplished such a result in a manner that is consistent with the language of the statute, the legislative history, and the underlying purposes of RCRA and CERCLA.