The Rule of Lenity and Environmental Crime

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For the last twenty-five years, explosive growth in environmental law has marked the legal landscape. As Americans came to recognize the dangers posed by a spoiled environment, Congress passed increasingly stringent environmental statutes. Notably, the greater availability and use of criminal sanctions has played a prominent role in the effort to protect the environment. Proponents of criminal enforcement hope the increased deterrence associated with criminal sanctions will convince polluters to treat environmental laws as more than just a cost of doing business.¹

In the last several years, however, civil libertarians and strict constructionists have raised objections to the current enforcement scheme.² They question why such stringent criminal environmental provisions should be exempt from the traditional interpretive rules for criminal laws. Environmental laws have enjoyed broad interpretation and weakened culpability requirements because of their status as public welfare statutes. However, the current scope and severity of such laws give many people pause.³ Those troubled by the opportunity for injustice in lower standards of liability and greater penalties for violations suggest that the rule of lenity should apply to environmental crime. The rule of lenity calls for courts to read ambiguous criminal statutes

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¹ B.A. 1995 Illinois Wesleyan University, J.D. Candidate 1998 University of Chicago.
³ Oliver, Investor’s Business Daily at A1 (cited in note 2); Kevin Gaynor, A System: Spinning Out of Control, Envir F 28 (May-June 1990); Paul Kamena, Environmental Protection of Enforcement Overkill?, Envir F 29 (May-June 1990).
narrowly, giving the benefit of any interpretive doubt to defendants. The significant ambiguity in many environmental statutes only increases the importance of applying the rule of lenity.

This Comment defends applying the rule of lenity to environmental crime. It describes the essential characteristics of criminal environmental law, focusing on its harshness and breadth. It then discusses the rule of lenity, its justifications, and its traditional exceptions. Finally, this Comment concludes that the severity and scope of criminal environmental law demand application of the rule of lenity.

I. INCREASING CRIMINAL ENFORCEMENT

A. Legislative and Prosecutorial Efforts

The availability and scope of criminal sanctions for environmental law violations have increased significantly in recent years. Almost all environmental statutes contained criminal provisions when enacted, but enforcement was less than vigorous and penalties were rather mild. In the 1980s and early 1990s Congress significantly enhanced criminal provisions in the nation's environmental laws. It introduced new, more serious

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4 Norman Singer, Sutherland Statutory Construction § 59.03 at 102 (Clark Boardman Callaghan 5th ed 1992) ("Sutherland").


6 Resource Conservation and Recovery Act, 42 USC § 6928(d), (e) (1994), amended by Hazardous and Solid Waste Amendments of 1984, Pub L No 98-616, 98 Stat 3221, 3256-57 (doubling maximum penalties for minor violations to $50,000 and 2 years imprisonment, increasing maximum fine and sentence for a knowing violation of substantive requirement from $25,000 and 2 years to $50,000 and 5 years, and introducing knowing endangerment provision carrying maximum penalties of $250,000 ($1 million for organizations) and 15 years imprisonment); Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC § 9603(b)(3), (d)(2) (1994), amended by Superfund Amendments and Reauthorization Act of 1986, Pub L No 99-499, 100 Stat 1613, 1632-33 (increasing maximum penalties to 3 years imprisonment (5 years for second or subsequent offense) and a fine in accordance with Title 18 up from 1 year and $10,000 or $20,000); Clean Water Act, 33 USC § 1319(c) (1994), amended by Water Quality Act of 1987, Pub L No 100-4, 101 Stat 7, 42-45 (replacing willful violation carrying maximum penalties of $25,000 per day of violation and 1 year imprisonment with offense levels for negligent violations with same maximum penalties, knowing violations with maximum penalties of $50,000 and 3 years imprisonment and knowing endangerment with maximum penalties of $250,000 and 15 years imprisonment, penalties for all to be doubled upon subsequent offenses); Clean Air Act, 42 USC § 7413(c) (1994), amended by Clean Air Act Amendments of 1990, Pub L No 101-549, 104 Stat 2399, 2675-77 (increasing fines pursuant to Title 18 and imprisonment from 2 to 5 years for knowing violations and from 6 months to 2 years
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crimes and stiffened penalties across the board. Now, most violations are felonies with accordingly significant fines and prison sentences. Congress also enacted a pair of laws that bestowed greater resources and powers on the EPA to enforce environmental laws criminally. Furthermore, the Federal Sentencing Guidelines, enacted in 1987, contain specific provisions for environmental crimes and make prison sentences considerably more likely.

To make matters worse for potential defendants, the notorious ambiguity of environmental statutes leaves significant discretion to courts, prosecutors, and bureaucrats to resolve textual uncertainty. Perhaps the most consistent ambiguity relates to the scienter requirement for a "knowing violation." Does such a requirement demand that a perpetrator know she is violating an environmental statute or merely that she know the nature of her conduct? Other ambiguities pervade environmental law as well. Is a human being a "point source" under the Clean Water Act? Do wetlands or temporary ponds qualify as "navigable waters" for regulatory purposes?

for false statements and creating offenses for knowing endangerment with fines pursuant to Title 18 ($1 million maximum for organizations) and maximum imprisonment of 15 years and negligent endangerment with a fine under Title 18 and maximum imprisonment of 1 year. See also Brickey, Crossroads at 6, 10 (cited in note 1); Carr, Liability at 19 (cited in note 5).

See note 6.

See note 6; Richard Lazarus, Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law, 83 Georgetown L J 2407, 2447 (1995); Kelley and Voisin, Trends at 21, 27-29 (cited in note 5); Carr, Liability at 19 (cited in note 5).


United States Sentencing Commission, Guidelines Manual § 2Q at 191 (Nov 1994); Kelley and Voisin, Trends at 27-29 (cited in note 5); Carr, Liability at 13-14 (cited in note 5); Deeb, 2 SC Envir L J at 177-82 (cited in note 9). Guidelines for organizations are in the process of being developed. Carr, Liability at 353-470 App B-H (cited in note 5).

See text accompanying notes 89-93.


See United States v Plaza Health Laboratories, Inc., 3 F3d 643 (2d Cir 1993).

See Leslie Salt Co. v United States, 55 F3d 1388 (9th Cir 1995); United States v
In addition, administrative agencies responsible for environmental laws have stepped up enforcement. They have begun to exercise both administrative and prosecutorial discretion. For instance, the Justice Department's Environmental Crimes Section and the EPA's Criminal Enforcement Division have both grown in size and importance since the mid-1980s. Additionally, some local U.S. Attorney's Offices have begun to initiate prosecutions and some have even formed their own environmental crime units. In a similar fashion, the states have also devoted more attention to prosecuting environmental crimes, often at the urging of or in partnership with the federal government. Consequently, prosecutions have increased in both number and diversity, subjecting a wide array of individuals and corporations to criminal penalties.

B. Judicial Innovations

The courts, too, have done their part to enhance criminal environmental law. The responsible corporate officer doctrine allows the government to prosecute "responsible corporate agents" for the strict liability crimes of the corporation. The

Mills, 817 F Supp 1546 (N D Fla 1993).

Kelley and Voisin, Trends at 23-27 (cited in note 5); Carr, Liability at 5 (cited in note 5). In 1993, the EPA referred 140 cases to the Justice Department, resulting in 76 successful prosecutions and 135 convictions, up from 65, 32, and 65, respectively, in 1990 and 20, 7, and 11, respectively, in 1982. Furthermore, in 1993, defendants were sentenced to 892 months in prison, served 876 months and were sentenced to probation for 3,240 months up from 278, 185, and 1,284 months respectively in 1988. Finally, while not all statistics are available for 1994 and 1995 there was an all-time high 256 referrals in 1995, indicating that the trend continues. Kathleen Maguire and Ann L. Pastore, eds, Sourcebook of Criminal Justice Statistics, 1995 533 (GPO 1996).


Kelley and Voisin, Trends at 25 (cited in note 5).

Id at 25. The federal government has established training programs and allowed only states with adequate criminal provisions to have permitting authority under the Clean Air Act. Carr, Liability at 10-12 (cited in note 5). Local prosecutions rose from 381 in 1990 to 882 in only the first six months of 1992, representing a 417 percent increase in prosecutions. Department of Justice, Environmental Crime Prosecution: Results of a National Survey 3-4 (1994).

Carr, Liability at 12-13 (cited in note 5).

Id at 14-16, 32-33, 113-14.

United States v Park, 421 US 658, 670-73 (1975); Ellen Podgor, White Collar Crime
government can also prosecute a corporate officer for corporate crimes if the officer both has direct responsibility in the corporate scheme for the illegal conduct and knew the conduct was occurring.  

Judicial innovations also make convicting a corporation easier. Courts will employ an aggregate intent or collective knowledge standard to assess corporate liability. Under such a standard, one person does not need to have the requisite mens rea and perform the actus reus; instead, it is sufficient to show that one employee had the mens rea while another performed the actus reus. Traditional standards of respondeat superior also reduce the difficulty of convicting a corporate entity by making the company liable for those actions of employees that are within the scope of their duties and that benefit the company.  

Furthermore, courts typically classify environmental law violations as public welfare offenses, warranting a reduced knowledge standard. Contrary to traditional criminal law interpretation, courts presume public welfare offenses carry strict liability. Even when the legislature imposes a knowledge requirement, courts often limit the scope and weaken the demands of such a requirement. Most courts faced with the typical "knowing violation" statutory language will not require proof that the defendant knew he was violating the law. Furthermore,


Podgor, Nutshell § 3.07 at 50 (cited in note 21); Kelley and Voisin, Trends at 29-30 (cited in note 5); Carr, Liability at 129-31 (cited in note 5). See also United States v MacDonald & Watson Waste Oil Co., 953 F2d 35, 50-55 (1st Cir 1991).  

United States v Bank of New England, NA, 821 F2d 844, 856 (1st Cir 1987); Podgor, Nutshell § 3.03 at 45-46 (cited in note 21); Kelley and Voisin, Trends at 31 (cited in note 5).  

Self, 2 F3d at 1089; Weitzohenhoff, 35 F3d at 1283-86; United States v Hayes International Corp., 786 F2d 1499, 1503 (11th Cir 1986); Carr, Liability at 134 n 166 (cited in note 5); Lazarus, 83 Georgetown L J at 2473-76 (cited in note 8); Comment, 8 Tulane Envrir L J at 273-80 (cited in note 21); Comment, Statutory Interpretation of the Clean Water Act Section 1319(c)(2)/(A)'s Knowledge Requirement: Reconciling the Needs of Environmental and Criminal Law, 23 Ecol L Q 447, 459-62 (1996).  


United States v Johnson & Towers, Inc., 741 F2d 662, 669 (3rd Cir 1984); Carr, Liability at 132 (cited in note 5); Comment, 37 Buff L Rev at 329-35 (cited in note 12).  

The Supreme Court, for example, has interpreted the phrase "knowing violation" to
prosecutors may prove knowledge circumstantially by reference to the position, responsibilities, and actions of a defendant.\textsuperscript{50}

Courts also use the remedial purpose doctrine to interpret environmental laws liberally.\textsuperscript{31} Under this canon of interpretation, courts broadly construe statutes that seek to redress societal problems so as to effectuate that purpose.\textsuperscript{32} Thus, courts will generally read statutory ambiguities in environmental laws in favor of the government.

Finally, because environmental laws are administrative laws,\textsuperscript{33} courts give wide latitude to administrative agencies in interpreting and implementing environmental statutes.\textsuperscript{34} Criminal enforcement relies on these agency interpretations because many provisions simply criminalize any violation of the statute committed with the proper mental state or causing sufficient damage.\textsuperscript{35} The deference courts afford agencies expedites the process of defining criminal environmental law standards and preserves agency flexibility to address unanticipated prosecutorial needs.

Cumulatively, the legal doctrine and enforcement resources associated with criminal environmental law provide the government with a set of legal tools considerably more severe and far-reaching than those available in almost any other area of law. In this legal context, is it appropriate to exempt environmental crime from the traditional restraints on criminal law? Or are

\textsuperscript{50} See note 6; Lazarus, 83 Georgetown L J at 2448-49 (cited in note 8).
\textsuperscript{30} Johnson & Towers, 741 F2d at 669-70; Hayes International, 786 F2d at 1504; Podgor, Nutshell § 3.05 at 50-51 (cited in note 21).
\textsuperscript{31} Johnson & Towers, 741 F2d at 666. See also Blake Watson, Liberal Construction of CERCLA under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?, 20 Harv Envir L Rev 199, 201-2 (1996).
\textsuperscript{33} Because Congress has charged the EPA and other environmental with implementation of environmental statutes, those laws are considered administrative. Alfred Aman and William Mayton, Administrative Law 1 (West 1992). An administrative agency typically promulgates and enforces regulations pursuant to a statutory directive. EPA involvement in criminal enforcement of environmental laws is limited to investigation and referral to the Justice Department, which has the responsibility for criminal prosecutions. Nevertheless, the EPA initiates investigations and develops the regulations upon which many prosecutions are based. William Rodgers, Jr., 2 Environmental Law § 4.40 at 604 (West 1986 & Supp 1996); Lazarus, 83 Georgetown L J at 2460 (cited in note 8).
\textsuperscript{34} Chevron, U.S.A., Inc. v Natural Resources Defense Council, 467 US 837, 842-43 (1984) (courts should defer to agency interpretations of ambiguous statutes).
\textsuperscript{35} See note 6; Lazarus, 83 Georgetown L J at 2448-49 (cited in note 8).
those restraints merely empty formalities without present-day significance?

II. THE RULE OF LENITY

A. The Doctrine

The rule of lenity is a traditional canon of statutory construction in the criminal law calling on courts to construe ambiguous penal statutes narrowly. Although originally a device to lessen the severity of punishment, the modern formulation of the rule promotes several quasi-constitutional norms.

First, the rule protects due process rights by assuring that potential defendants have fair notice of the law. The rule thus disfavors vague or ambiguous statutes, as well as interpretations that expand the scope of a criminal statute beyond its plain meaning. The idea is that it is unfair to convict a defendant of a crime without first giving her warning of the relevant legal rules and her susceptibility to prosecution. The due process demand for notice also rests on the need for predictability. Individuals should be able to anticipate what is illegal so they can conform their behavior appropriately.

The rule of lenity also limits judicial discretion to supplement or create criminal law. By guaranteeing that legislatures make the laws, the rule furthers separation of powers values. Judicial modesty recognizes the institutional competence of the legislature in appropriately addressing problems too complex, nuanced, or expansive for judicial resolution. The rule of lenity

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37 Eskridge and Frickey, Legislation at 656 (cited in note 36). Despite being aban-
doned as the rationale for lenity, severity remains a relevant consideration when and how to apply the rule of lenity. See text accompanying notes 62-65, 69-76; Singer, Sutherland § 59.03 at 103 (cited in note 36).

38 Singer, Sutherland § 59.03 at 103-4 (cited in note 36); Note, 29 Harv CR-CL L Rev at 202-13 (cited in note 36).

39 This is not to say the rule of lenity forecloses the availability of discretionary stan-
dards. The rule of lenity is only concerned with ambiguity and its consequences, one of which can be excessive discretion.


41 Singer, Sutherland § 59.03 at 104-5 (cited in note 36); Note, 29 Harv CR-CL L Rev at 202-12 (cited in note 36).
also respects the singular importance of full and democratic deliberation in the creation of the criminal law.\textsuperscript{42} 

In addition to these quasi-constitutional justifications, the rule of lenity offers several other pragmatic benefits. The rule furthers good law-making by forcing the legislature to be specific and clear.\textsuperscript{43} Consequently, legislatures cannot rely on the judiciary to resolve contentious or unexamined issues. If the legislature wants to criminalize an activity, it must do so itself. The rule also assures consistent interpretation by preventing courts faced with ambiguous statutes from rendering multiple, differing interpretations.\textsuperscript{44} Because ambiguity serves as a grant of discretion to courts to fill in statutory gaps, and numerous jurisdictions face the same statutes, differing interpretations are inevitable.\textsuperscript{45} Both uniformity and consistency suffer.

By disfavoring ambiguity, the rule reduces opportunities for selective and arbitrary enforcement.\textsuperscript{46} Ambiguity grants discretion to enforcement agencies,\textsuperscript{47} opening the possibility for overzealous or biased prosecutorial decisionmaking.\textsuperscript{48} Furthermore, restricting ambiguity helps the criminal law retain its deterrent effect,\textsuperscript{49} as well as its sanction and validity in the public eye.\textsuperscript{50} Deterrence is only possible when potential violators are aware of what is prohibited. Moreover, ambiguity can make the enforcement of criminal environmental law seem arbitrary. Such a perception undermines that aspect of deterrence which relies on public sanction by failing to convey the fairness expected of government action.


\textsuperscript{43} Singer, Sutherland § 59.03 at 103-04 (cited in note 36); Note, 29 Harv CR-CL L Rev at 209 (cited in note 36).

\textsuperscript{44} Note, 29 Harv CR-CL L Rev at 209-10 (cited in note 36).


\textsuperscript{46} Singer, Sutherland § 59.03 at 104 (cited in note 36); Comment, Statutory Interpretation of the Clean Water Act Section 1319(c)(2)(A)'s Knowledge Requirement: Reconciling the Needs of Environmental and Criminal Law, 23 Ecol L Q 447, 487-89 (1996).

\textsuperscript{47} Kahan, 110 Harv L Rev at 479-81 (cited in note 45).

\textsuperscript{48} Id at 486-87.


B. Application to Criminal Environmental Law

Courts disagree on whether the rule of lenity should play a role in the interpretation of public welfare statutes. Parties litigating the issue appeal to one of two lines of cases. Those seeking to maintain the public welfare exception to the rule of lenity for environmental crimes start with *United States v International Minerals & Chemical Corp.* In *International Minerals*, the Court refused to require knowledge of illegality for a conviction under Interstate Commerce Commission shipping regulations. The Court held that defendants should be presumed to know of applicable regulations when they deal with "deleterious devices or products or obnoxious waste materials." echoing an earlier Court’s similar admonition to those who stand in a "responsible relation to public danger."

Later rulings expanded on the *International Minerals* analysis in the environmental crime context, largely concluding that it would be inappropriate to construe public welfare statutes narrowly. In *United States v Self*, the Tenth Circuit found precedent in favor of a narrow construction inapposite because "RCRA is a public welfare statute which was designed 'to protect human health and the environment.'" Courts typically interpret such statutes broadly, in line with the remedial purpose doctrine. According to the Third Circuit, "[C]riminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are to be construed to effectuate the regulatory purpose." Most courts have adopted this analysis and thereby avoid employing the rule of lenity in environmental crime cases.

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51 Courts also disagree over the timing for application of the rule of lenity in statutory interpretation. Justice Scalia suggests that the rule of lenity is an important background principle in construing criminal laws and should be invoked any time statutory ambiguity appears. The prevailing view, however, holds that a court should apply the rule only as a last resort, after it has exhausted all other tools of statutory interpretation, including an inquiry into legislative intent. See *United States v R.L.C.*, 503 US 291 (1992); Singer, Sutherland § 59.04 at 118 (cited in note 36); Lisa Sachs, *Strict Construction of the Rule of Lenity in the Interpretation of Environmental Crimes*, 5 NYU Envir L J 600, 618-21 (1996).  
53 Id at 565.  
55 2 F3d 1071, 1091 (10th Cir 1993), quoting 42 USC § 6924(a) (1994).  
57 Weitzenhoff, 35 F3d at 1283-86; *United States v MacDonald & Watson Waste Oil Co.*, 933 F2d 35, 49-50 (1st Cir 1991); *United States v Baytank*, 934 F2d 599, 613 (5th Cir 1991); *United States v Hayes International Corp.*, 786 F2d 1499, 1503 (11th Cir 1986).
On the other hand, those seeking to invoke the rule of lenity can look to United States v Liparota and Staples v United States. Although not addressing environmental crimes, these cases provide clarification on the proper interpretation of ambiguity in public welfare statutes. The Liparota Court strictly construed the knowledge requirement in a food stamp statute partly based on rule of lenity concerns about statutes that "criminalize a broad range of apparently innocent conduct." Although this decision broke with the traditional refusal to apply the rule to public welfare offenses, the Court restricted the scope of its decision by distinguishing selling food stamps from activities people know are subject to stringent regulation and may harm community health or safety.

Recently, Staples v United States suggested that lenity may also be appropriate for broadly sweeping, felony-level regulatory crimes. The Staples Court held that, in the face of congressional silence, the National Firearms Act required knowledge of the characteristics of a firearm that brought it within the definition of a machine gun and subjected an offender to a ten-year prison sentence. Writing for the majority, Justice Thomas traced the history of the public welfare offense doctrine, citing numerous authorities for the proposition that crimes carrying stiff penalties must have a criminal intent requirement because they cannot fall within the public welfare offense exception. Thomas emphasized, "In rehearsing the characteristics of the public welfare offense, we, too, have included in our consideration the punishments imposed and have noted that 'penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.'"

Furthermore, the opinion echoed the Liparota Court's concern with criminalizing otherwise innocent behavior. "We are reluctant to impute [a] purpose to Congress where, as here, it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regula-

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60 471 US at 426.
61 Id at 432-33.
63 Id at 619-20.
64 Id at 616-18.
65 Id at 617-18, quoting Morissette v United States, 342 US 246, 256 (1952).
Fair notice thus is an essential element of criminal enforcement.

Justice Thomas also responded to the claim that extensive regulation puts potential violators on notice, answering that "regulation in itself is not sufficient to place gun ownership in the category of [public welfare offenses]." The government regulates many areas of life extensively, but as implicitly recognized in Liparota, which dealt with the overwhelmingly regulated area of food stamps, more is required. Likewise, the dangerousness of an item or substance is not enough to put an individual on notice. "[T]hat an item is 'dangerous' in some general sense, does not necessarily suggest . . . that it is not also entirely innocent. Even dangerous items can in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation."

Staples thus reinterpreted the public welfare offense doctrine with a realistic eye toward the expansiveness of regulation and the pervasiveness of dangerous items, substances, and activities. Thomas shifted the doctrine's focus from the easily satisfied dangerousness and regulation standards toward a more discriminating inquiry into a criminal provision's scope (the extent to which it criminalizes otherwise innocent conduct) and severity (the harshness of its penalties).

One possible implication, adopted by some judges, is that the scope and severity of current criminal environmental provisions call for courts to apply the rule of lenity and disregard the public welfare offense doctrine. Foremost among the cases applying the rule of lenity is United States v Plaza Health Laboratories, Inc., involving a dispute over whether a human being is a "point source" under the Clean Water Act ("CWA"). In holding that the CWA's ambiguity on the question required application of the rule of lenity, the Second Circuit "view[ed] with skepticism the government's contention that [it] should broadly construe the greatly magnified penal provisions of the CWA based upon [Riv-

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66 511 US at 615-16.
67 Id at 613.
68 Id at 611.
69 In addition to the cases discussed below, see United States v Standard Oil Co., 384 US 224, 230-37 (1966) (Harlan dissenting).
70 3 F3d 643 (2d Cir 1993).
71 Id at 647-49.
ers and Harbors Act) cases that did so in the context of strict-liability and misdemeanor penalties.\textsuperscript{72}

The First Circuit has also applied the rule of lenity to environmental criminal statutes. In \textit{United States v Borowski}, the government attempted to use the CWA to prosecute an employer for exposing his employees to dangerous substances at a point of discharge.\textsuperscript{73} The First Circuit ruled that such an expansive interpretation of ambiguous provisions relating to who is protected by the CWA would violate the rule of lenity.\textsuperscript{74}

The most analytically robust defense of the rule of lenity's applicability to environmental crime comes from five judges on the Ninth Circuit in a dissent from a rejection of a petition for rehearing en banc.\textsuperscript{75} Despite the fact that judges rarely grant a petition for rehearing, even when they believe a decision to be wrong,\textsuperscript{76} a significant portion of the Ninth Circuit wanted to rehear a case involving a prosecution under the CWA for exceeding a discharge permit. The dissenters, relying largely on \textit{Staples}, argued that a felony prosecution for transgressing a permit limit both imposes stiff penalties and criminalizes innocent conduct such that the rule of lenity should invalidate a conviction based on an ambiguous knowledge standard.\textsuperscript{77} Likewise, in distinguishing \textit{International Minerals}, the dissenters found it particularly persuasive that the CWA is not limited to "dangerous or deleterious devices or products or obnoxious waste materials" and that this case involved a felony rather than a misdemeanor.\textsuperscript{78}

It is clear that ample judicial disagreement exists over what role the rule of lenity should play in the interpretation of criminal environmental provisions. Principled resolution requires determining whether the justifications for the rule of lenity resonate in the environmental context.

\textsuperscript{72} Id at 648.
\textsuperscript{73} 977 F2d 27 (1st Cir 1992).
\textsuperscript{74} Id at 31-32.
\textsuperscript{75} \textit{United States v Weitzenhoff}, 35 F3d 1275, 1293-99 (9th Cir 1993) (Kleinfeld dissenting).
\textsuperscript{76} Id at 1293.
\textsuperscript{77} Id at 1296-97.
\textsuperscript{78} Id at 1298.
III. SHOULD THE RULE OF LENITY APPLY TO ENVIRONMENTAL CRIME?

A. The Case for Applying the Rule of Lenity


The rule of lenity should be applied to criminal provisions in environmental statutes. The increased severity and scope of criminal liability in the nation’s environmental law make the analogy between environmental and criminal law persuasive. Penalties and prosecutions under criminal environmental provisions resemble those traditionally associated with criminal law. Criminal enforcement usually involves felony prosecution and is available for most regulatory violations. Thus, application of the rule of lenity to environmental crime follows recent Supreme Court jurisprudence denying that dangerousness or regulation are the hallmarks of a public welfare offense, and asserting instead that severity and scope distinguish offenses subject to traditional criminal protections.

Furthermore, many regulatory violations that give rise to criminal liability involve otherwise innocent conduct. Most violations of environmental law involve exceeding permit limits, disposing of innocuous materials, or altering or improving one’s property. In criminal law, such acts are mala prohibita, wrong merely because they are prohibited, as opposed to mala in se, inherently wrong. Traditionally, mala prohibita crimes had stricter standards of liability than mala in se crimes and “particularly required” application of the rule of lenity, because

79 See text accompanying notes 5-20.
80 See text accompanying notes 58-68.
82 See, for example, United States v Weitzenhoff, 35 F3d 1275, 1281-82 (9th Cir 1993).
83 See, for example, United States v Pozsgai, 757 F Supp 21, 21-22 (E D Pa 1991).
84 See, for example, United States v Mills, 817 F Supp 1546, 1548-49 (N D Fla 1993).
85 Whether or in what proportion environmental crimes are mala prohibita is open to debate. However, such a discussion is beyond the scope of the current Comment. Therefore, I will accept the traditional distinction that characterizes most environmental law violations as mala prohibita because such acts were not crimes at common law, any human injuries are typically diffuse and attenuated, and traditional standards of morality are not implicated. See Wayne R. LaFave and Austin W. Scott, Criminal Law § 1.6 at 33 (West 2d ed 1986).
87 Norman Singer, Sutherland Statutory Construction § 59.04 at 118-19 (Clark
people could not be presumed to know their conduct was illegal. Similarly, potentially liable parties need adequate notice of provisions in environmental statutes that carry criminal penalties because such statutes often criminalize otherwise innocent conduct.\footnote{88}

In addition, environmental statutes are notoriously ambiguous.\footnote{89} Congressional deal-making and sloppy statute writing have rendered portions of America's environmental law largely unintelligible.\footnote{90} Furthermore, EPA regulation often fails to adequately clarify the statutory framework. In fact, poorly drafted or inconsistent EPA regulations occasionally introduce significant uncertainty.\footnote{91} Moreover, the multiple sources of interpretation in a criminal/administrative bureaucracy, ranging from the local prosecutor to formal federal rulemaking, exacerbate regulatory confusion.\footnote{92} The well-documented and pervasive role of interest group politics in environmental statute writing and rulemaking pulls the process in multiple and often conflicting directions, adding further ambiguity.\footnote{93} Under such circumstances, statutory interpretation becomes a Herculean task for a judge, much less a private citizen. It runs contrary to basic notions of fairness to invoke serious criminal sanctions in the face of such ambiguity.

Other characteristics of environmental law exacerbate interpretive difficulties. Environmental law is aspirational.\footnote{94} It often codifies collective desires for a particular state of environmental

\footnote{91} Lazarus, 83 Georgetown L J at 2437-38 (cited in note 89) (describing \textit{United States v Self}, 2 F3d 1071 (10th Cir 1993), where the court had to parse four conflicting regulatory preambles).
\footnote{94} Brickey, \textit{Crossroads} at 11-13 (cited in note 81); Lazarus, 83 Georgetown L J at 2424-26 (cited in note 89).
quality with little or no reference to the harsh consequences such standards necessitate. Ultimately, this dissonance results in either unattainable standards, intentional underenforcement, or both. A statutory scheme divorced from reality and an enforcement strategy that consciously disregards the statutory scheme both pose significant interpretive problems.

Likewise, environmental law’s dynamic nature complicates the interpretive task. The politicization of environmental law keeps it subject to constantly changing political and social forces not typically encountered with traditional criminal law. Powerful interest groups on both sides of every debate constantly raise new issues and exert formidable pressure on lawmakers. Additionally, the law’s scientific basis places it at the mercy of tentative principles, shifting consensus, and new discoveries. Interpreting statutes that are in a “constant state of flux” is bound to be difficult and is antithetical to the demands of certainty and predictability in the criminal law.

Environmental law is also considerably complex. Highly specialized technical language pervades the relevant statutes and regulations. When only the most learned experts can make sense of statutory provisions, the burden on judges, not to mention potential violators, to make perfectly accurate judgments may be too great.

Finally, environmental law is obscure. Many important provisions are buried in mountains of regulations. Furthermore, many requirements are published in memos, preambles, and other informal publications, a practice that subverts the notice and comment process and creates an “underground environmental law.” Interpreting such a morass of overlapping and occasionally conflicting statutes, regulations, and policy statements asks too much in the criminal context.

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95 Brickey, Crossroads at 13 (cited in note 81).
97 See note 93.
98 Lazarus, 83 Georgetown L J at 2427 (cited in note 89).
100 Kevin Gaynor, A System Spinning Out of Control, Envir F 28-29 (May-June 1990); Lazarus, 83 Georgetown L J at 2436-39 (cited in note 89) (“EPA regulations are merely the most formal and visible peaks in a vast range of underground and fragmented agency guidance on the meaning of relevant federal statutory and regulatory provisions.”).
101 Brickey, Crossroads at 15 (cited in note 81).
2. Rule of lenity concerns.

All of the generally applicable rationales behind the rule of lenity apply with at least equal force to criminal environmental law. It is fundamentally unfair to convict someone without first assuring that they have adequate notice of the law’s demands. As indicated above, the environmental law’s pervasive ambiguity and criminalization of otherwise innocent conduct only serve to emphasize the need for fairness. Additionally, judicial interpretation of ambiguous criminal statutes undermines the traditionally high standards of democratic legitimacy expected of laws carrying criminal sanctions. This point applies with extra force to environmental law, where the law’s complexity challenges judicial competence to resolve statutory ambiguity and the law’s broad scope demands clear political ratification.

Furthermore, allowing ambiguity to pervade criminal environmental law diminishes the validity and sanction of those laws in the public eye. Considering the twenty-year struggle to elevate environmental degradation to a serious legal and ethical transgression worthy of public condemnation, any backsliding would be particularly harmful. Deterrence also suffers from ambiguity. When even conscientious parties have difficulty ascertaining what the law requires of them, parties will both over and under comply. In addition, application of the rule of lenity will help reduce the notorious ambiguity in environmental law by requiring Congress and administrative agencies to develop clear and specific laws or regulations.

Restricting judicial interpretation of ambiguity also helps assure consistent interpretation, a result of particular importance to the nationwide actors often targeted for prosecution in

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102 See text accompanying notes 38-40.
103 See text accompanying notes 89-93 (ambiguity) and text accompanying notes 81-88 (otherwise innocent conduct).
104 See text accompanying notes 41-42.
105 See text accompanying note 99.
106 See text accompanying note 50.
108 See text accompanying note 49.
109 See text accompanying notes 89-93 (ambiguity) and text accompanying note 43 (clear and specific laws).
110 See text accompanying note 44.
criminal environmental law. Finally, ambiguity permits selective and arbitrary enforcement. In the environmental realm, where enforcement is committed to agencies accustomed to administering civil provisions with nearly unfettered discretion, protection from overzealous, unpredictable, and politically motivated prosecutions is necessary. Likewise, the dearth of government officials with expertise in both environmental and criminal law exacerbates the incoherence of prosecutorial decisionmaking.

B. Possible Objections

Critics can raise three objections to the contention that the rule of lenity should apply to environmental crime. The first counterargument rests on precedent. The Supreme Court has never explicitly applied the rule of lenity to environmental crime and only a few other courts have done so. Furthermore, regardless of severity or scope, environmental laws are the prototypical public welfare statutes and numerous cases hold as much.

Nevertheless, Supreme Court precedent on criminal statutory interpretation suggests that, given the proper case, the Court would apply the rule of lenity in the environmental crime realm. The reasoning of the Liparota-Staples line of cases is particularly persuasive with respect to criminal environmental law. Penalties are increasingly severe and criminal provisions reach more and more innocent behavior. Furthermore, despite the fact that traditional environmental crimes are the prototypical public welfare offenses, changed circumstances make blind application of the public welfare exception anachronistic. The original regulatory crimes examined by the Court were narrowly defined misdemeanors, not broadly cast felonies.

111 See text accompanying notes 46-48.
112 Lazarus, 83 Georgetown L J at 2460 (cited in note 89) (describing EPA autonomy over administrative remedies and significant control over civil remedies).
114 Lazarus, 83 Geo L J at 2462 (cited in note 89).
115 See text accompanying notes 52-57.
116 Id.
117 See text accompanying notes 58-68.
A second objection argues that the rule of lenity stands in the way of effective and aggressive enforcement of environmental laws.\textsuperscript{119} On this view, application of the rule of lenity would eliminate administrative and judicial flexibility needed to deal with loopholes and other problems not adequately addressed by the statute, in the name of criminals who destroy the environment, perhaps irreparably. Giving such people the benefit of the doubt fails to appreciate the seriousness of environmental degradation.

This objection suffers from an unrealistic, binary view of available strategies. Application of the rule of lenity does not open the flood gates and leave the environment unprotected. To the contrary, the government retains significant civil and administrative enforcement powers,\textsuperscript{120} not to mention the availability of citizen suits\textsuperscript{121} and private causes of action. In addition, the rule of lenity does not foreclose criminal enforcement. It only requires Congress and administrative agencies to write less ambiguous laws and regulations. In fact, application of the rule of lenity will have no effect on the many clear and specific laws and regulations. Even when it does have an effect, the rule may only require more from the government in the way of proof, such as in the scienter cases.\textsuperscript{122} Finally, although threats to the environment demand great vigilance, threats to long-standing liberties deserve at least equal vigilance.

Third, one could assert that the rule of lenity's demand for unambiguous statutes is impractical and too costly.\textsuperscript{123} Eliminating ambiguity is often impossible, especially ex ante. Issues may be too contentious or unforeseeable. Furthermore, remedying ambiguity is costly in terms of the resources that must be devoted to finding and clarifying ambiguous text and mediating policy dis-

\textsuperscript{119} Kahan, 1994 S Ct Rev at 406-12 (cited in note 88).
\textsuperscript{120} Resource Conservation and Recovery Act, 42 USC § 6928(c), (g) (1994) (violation of compliance order, civil penalties); Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC § 9609 (civil awards and penalties) (1994); Clean Water Act, 33 USC § 1319(b), (d) (1994) (civil action, civil penalties); Clean Air Act, 42 USC § 7413(b), (d) (1994) (civil judicial, civil administrative). But see Crandon v United States, 494 US 152 (1990) (holding that the rule of lenity applies to provisions carrying civil penalties where the standard of conduct is found in a criminal statute).
\textsuperscript{122} Staples, 511 US at 616 n 11. See note 26.
agreements. Additionally, striking down ambiguous criminal provisions while raising the cost of replacing them would leave significant gaps in an enforcement scheme.

In response to this argument, it must first be asked, what it means for good lawmaking to be too costly or impractical. Such statements typically mean that society is not sufficiently concerned with the downside of easier and cheaper lawmaking. Perhaps the potential harm to the environment justifies cheaper lawmaking, but should traditional criminal law standards be discarded without considering the rights of those within the broad scope of criminal environmental law? Furthermore, shifting lawmaking responsibility to administrative agencies is entirely consistent with lenity, provided agencies understand their grant of discretion to be administrative (implementing and enforcing congressional judgments), rather than legislative (making their own judgments). Finally, an accounting of the costs of good lawmaking must consider the costs of adjudication. In addition to the obvious cost to the government and private parties in constantly litigating ambiguity, the costs of uncertainty, error, over-deterrence, and private interpretation are important.

CONCLUSION

In recent years, the government has increasingly employed criminal sanctions to enforce environmental laws. As a result, current criminal environmental law is of unprecedented scope and severity. In light of the considerable ambiguity characteristic of environmental law, courts, lawmakers, and citizens should be particularly attentive to the law’s increased harshness and breadth. Concerns should only be sharpened by environmental law’s obscure, complex, aspirational, and dynamic nature, its reliance on administrative agency definition and implementation, and its tendency to criminalize otherwise innocent behavior.

For courts, the traditional rule of lenity, requiring ambiguous penal statutes to be construed narrowly, provides a set of principles that ensure the fairness and legitimacy of these laws. Fur-

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thermore, restricting ambiguity increases the effectiveness of deterrence, encourages the development of clear and specific standards, furthers consistent interpretation, and restricts opportunities for selective or arbitrary enforcement. Thus, notwithstanding the fact that courts have not commonly applied the rule to public welfare offenses, the current state of criminal environmental law demands application of the rule of lenity.