Overcriminalization and the Endangered Species Act: *Mens Rea* and Criminal Convictions for Take

by Jonathan Wood

Jonathan Wood is a staff attorney at the Pacific Legal Foundation.

Summary

The Endangered Species Act (ESA) makes it a crime to "knowingly" take any member of an endangered species. The government has generally interpreted this to require the defendant's knowledge of each of the elements of the offense; however, it has not been consistent in this interpretation. In several cases, it has argued that the defendant need only have knowingly engaged in an act that resulted in take, and that knowledge that a particular species will be taken is unnecessary. This Article argues that the statute requires knowledge of all the facts, including the identity of the species. In other contexts, the U.S. Supreme Court has required knowledge of the facts constituting an offense, for fear of criminalizing apparently innocent, ordinary conduct. The breadth of the ESA's take provision and the number and obscurity of the species subject to it counsel in favor of interpreting the statute consistent with this general rule.

A shepherd is startled from his sleep by the sound of a commotion amongst his flock. Uncertain as to the cause but fearing the worst, he grabs his rifle and heads to his sheep. There is just enough light from the moon to see a predator viciously attacking them. Believing it is a coyote and that the massacre will not be ending any time soon, the shepherd fires and hears a loud cry. He proceeds to check on his flock and the predator, only to discover that it was not a coyote, but a similar-looking Mexican gray wolf.[1] Unfortunately for him, the wolf is protected by the Endangered Species Act (ESA),[2] knowing violations of which are punishable by up to a $50,000 criminal fine, one-year imprisonment, and the loss of any federal grazing rights.[3] Has the shepherd "knowingly" killed the wolf?

Surprisingly, the answer to this question remains unsettled more than 40 years after the ESA was adopted. The U.S. Courts of Appeals for the Fifth and Ninth Circuits have ruled (on analogous facts) that the defendant did knowingly kill the endangered specimen, and accepted the government's argument that the statute allows a conviction when a defendant knowingly engages in an act that takes a protected species, even if he did not know that his actions would affect a particular species.[4] However, when the defendant in *United States v. McKittrick* (the Ninth Circuit case) petitioned the U.S. Supreme Court to hear the case, the government abruptly flip-flopped, proclaiming that this was not a proper interpretation of "knowingly."[5] Subsequently, the U.S. Department of Justice (DOJ) adopted the so-called McKittrick Policy, interpreting the ESA to require proof that the defendant knew all of the facts constituting the

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1. *See* U.S. Fish & Wildlife Serv., *How to Tell the Difference Between Mexican Wolves and Coyotes*, http://www.fws.gov/southwest/es/mexicanwolf/IMWC.cfm (May 16, 2014); *Comparative Image of Red Wolf and Coyote*, http://en.wikipedia.org/wiki/Red_wolf#mediaviewer/File:Canis_rufus_%26_Canis_latrans.jpg (Apr. 9, 2014).
2. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
3. 16 U.S.C. §§1538(a)(1), 1540(b).
4. *See* United States v. McKittrick, 142 F.3d 1170, 28 ELR 21197 (9th Cir. 1998); United States v. Nguyen, 916 F.2d 1016 (5th Cir. 1990). Several district courts have also addressed this question, similarly ruling that knowledge that an action will take a particular species is not required. *See* United States v. St. Onge, 676 F. Supp. 1044, 1045 (D. Mont. 1988); United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987).
5. *See* Brief for United States in Opposition, McKittrick v. United States (No. 98-5406, 525 U.S. 1072 (1999)).

offense, including the identity of the animal.[6] That interpretation has been sharply criticized by U.S. Fish and Wildlife Service (FWS) staffers and challenged by environmental groups as contrary to the Act.[7]

This Article argues that the McKittrick Policy's interpretation is correct—the *mens rea* requirement applies to each element of the offense, including (a) that an act would result in "take" and (b) the identity of the species taken. The Supreme Court has interpreted similarly worded provisions to require knowledge of all the elements of the offense.[8] It has done so to avoid criminalizing blameless conduct, a concern that is particularly strong under the ESA. The definition of "take"[9] is so broad that many wholly innocent activities can inadvertently result in it. In addition, the number of protected species, most of which are unfamiliar to nonexperts, is so large that it is unreasonable to hold people criminally liable for not being able to recognize every single one.

Part I of this Article introduces the presumption that criminal provisions require knowledge of all of the facts constituting an offense. Part II provides a brief background on the ESA and its take prohibition. Part III argues that the general presumption should apply to the ESA, especially in light of the breadth of "take" and the number and obscurity of listed species. Finally, Part IV discusses why policy objections to this interpretation are better addressed through other means.

I. Criminal Statutes Presumptively Require Knowledge of the Facts Constituting the Offense

Every law student learns that, under the common law, crimes are the combination of an evil-meaning mind, a *mens rea*, with an evil-doing hand, an *actus reus*.[10] As the criminal law was codified, courts continued to assume that both were required, even if a statute had no express *mens rea* element.[11] Consequently, any statute that does not state a *mens rea* element will be presumed to require one, absent strong evidence that the omission was intentional.[12]

This presumption protects the blameless from the stigma and severe penalties associated with a conviction.[13] Although in theory prosecutorial discretion could accomplish the same result, reliance on this discretion would raise other, more significant problems.[14] Consequently, courts have insisted that the due process concerns raised by unduly broad criminal laws be addressed in the interpretation of the statute itself.[15]

It has also long been said that ignorance of the law is no excuse.[16] This principle creates a potential conflict, however, where an offense requires proof of circumstances that involve a legal element or consists of activities that no one would suspect might be illegal.[17] With respect to

6. *See* Memorandum from Donna A. Bucella, Dir., U.S. Dep't of Justice Exec. Office of U.S. Attorneys, to All U.S. Attorneys, Re: Knowing Instruction in Endangered Species Cases (Feb. 12, 1999), *available at* http://blog.pacificlegal.org/wp/wp-content/uploads/2016/02/Bucella-memo.pdf [hereinafter Bucella Memo]; Memorandum from John T. Webb, Assistant Chief of the Wildlife and Marine Resources Section, to Readers of *Federal Wildlife Crimes*, Re: Elements of Endangered Species Act Offense Require Proof That Defendant Knew Biological Identity of Animal (undated), *available at* http://blog.pacificlegal.org/wp/wp-content/uploads/2016/02/Webb-memo.pdf [hereinafter Webb Memo].
7. *See* WildEarth Guardians v. U.S. Dep't of Justice, No. 13-cv-392 (3d Amended Complaint, filed Aug. 14, 2015) (D. Ariz.), *available at* http://blog.pacificlegal.org/wp/wp-content/uploads/2015/09/Wildearth-Guardians-Complaint1.pdf; Ed Newcomer et al., *The Endangered Species Act v. The United States Department of Justice: How the Department of Justice Derailed Criminal Prosecutions Under the Endangered Species Act*, 17 Animal L. 251 (2011).
8. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (statute criminalizing "knowing" distribution of sexually explicit materials involving a minor requires prosecutor to prove knowledge of the sexually explicit nature of the materials and involvement of a minor); Liparota v. United States, 471 U.S. 419 (1985) (statute criminalizing "knowing" use of food stamps in a manner not authorized by statute or regulation requires prosecutor to prove knowledge that the use was unauthorized); Morissette v. United States, 342 U.S. 246 (1952) (statute criminalizing the "knowing" conversion of federal property requires prosecutor to prove knowledge that the property belonged to the federal government).
9. 16 U.S.C. §1532(19).
10. *See Morissette*, 342 U.S. at 251-52; *see also* John C. Coffee Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 210-13 (1991); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 692-702 (1983).
11. *See Morissette*, 342 U.S. at 252; Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 87 n.98 (1960).
12. *See Morissette*, 342 U.S. at 252; *see also* Carter v. United States, 530 U.S. 255, 269 (2000).
13. *See* Elonis v. United States, 135 S. Ct. 2001, 2009 (2015); *Morissette*, 342 U.S. at 252.
14. *See* Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting); Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 Law & Comtemp. Probs. 401, 429 (1958) ("A selection for prosecution among equally guilty violators entails not only inequality, but the exercise, necessarily, of an unguided and, hence, unprincipled discretion."); *see also* Dr. John S. Baker Jr. & William J. Haun, *The "*Mens Rea*" Component Within the Issue of the Over-Federalization of Crime*, 14 Engage: J. Federalist Soc'y Prac. Groups 24, 26 (2013); Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* In the Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of the Criminal Law" 44 (Timothy Lynch ed., 2009) ("Under the best circumstances, most targets will be unlucky schmoes who happen to catch the authorities' attention or people the prosecutors or the public think are particularly 'bad.' At worst, a ubiquitous criminal law becomes a loaded gun in the hands of any malevolent prosecutor or aspiring tyrant."); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretations*, 85 Va. L. Rev. 1021, 1058-68 (1999).
15. *See* Labert v. California, 355 U.S. 225, 229-30 (1957); *see generally* Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 Penn. St. L. Rev. 1155 (2005).
16. *See* John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 Am. J. Crim. L. 1, 6-17 (1997).
17. *See* United States v. Freed, 401 U.S. 601, 615 (1971) (Brennan, J., concurring); *see also* Model Penal Code §2.02, cmt. 131 (Tent. Draft No. 4, 1955):

the criminalization of apparently innocent, ordinary conduct, the notion that ignorance of the law is no excuse has been sharply criticized by opponents of overcriminalization.[18] Criticism has been particularly notable with respect to environmental law, because it can criminalize ordinary conduct based on sometimes difficult-to-anticipate environmental impacts.[19] A compelling case can be made that knowledge of the law should be required for such crimes, to ensure that only the truly blameworthy face the prospect of criminal sanctions.[20] The Supreme Court has not definitively resolved this potential conflict. In cases raising this concern, sometimes it has required knowledge of the law[21]; other times it has not.[22]

A. *Courts Presume That Knowledge of the Facts Constituting an Offense Is Required*

Criminal provisions that dispense with any *mens rea* requirement—that is, strict liability offenses—are strongly disfavored.[23] Consequently, the U.S. Congress' omission of a *mens rea* element is usually not a sufficient indication that there is no such requirement.[24] Instead, courts assume that Congress is aware of the background common-law rule requiring *mens rea*.[25] To dispense with any *mens rea* showing, there must be "some indication [other than mere omission] of congressional intent, express or implied," that Congress intended that result.[26]

When faced with a statute that omits any *mens rea* element, the Supreme Court has required at least knowledge of the facts that make the activity an offense.[27] However, the required level of knowledge or intent may vary by the element at issue,[28] depending on the level required "to shield people against punishment for apparently innocent activity."[29]

In *United States v. U.S. Gypsum Co.*,[30] for instance, the Supreme Court construed the Sherman Act's provision criminalizing contracts or conspiracies in restraint of trade.[31] The statute omits any express *mens rea* requirement.[32] Nevertheless, the Court interpreted it to require the defendant's knowledge that its conduct would have anticompetitive effects.[33] The Court based this decision on the rule of lenity[34] and several aspects of the statute. First, the range of behaviors proscribed by the statute is difficult to define and potentially ensnares socially acceptable and economically justifiable business practices based on their anti-competitive effects.[35] Second, the availability of alternative civil penalties and other remedies could accomplish the same end without untethering criminal sanctions from "the generally accepted functions of the criminal law."[36]

Just as courts will presume a *mens rea* is required in an otherwise silent statute, it also assumes that, when Congress expressly includes a state-of-mind element, it

> It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element. . . . The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense.

18. *See* Heritage Foundation, *Legal Issues: Overcriminalization*, http://www.heritage.org/issues/legal/overcriminalization (last visited Apr. 13, 2016); *see also* United States v. Wilson, 159 F.3d 280, 296 (7th Cir. 1998) (Posner, J., dissenting):
> > We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn't mean being able to go to the local law library and read Title 18. It would be preposterous to suppose that someone from Wilson's milieu is able to take advantage of such an opportunity.
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> Hart, *supra* note 14 at 413-14; *cf.* Wiley, *supra* note 14, at 1026-28.
19. *See* Timothy Lynch, *Polluting Our Principles: Environmental Prosectuions and the Bill of Rights*, *in* Go Directly to Jail: The Criminalization of Almost Everything 45-72 (Gene Healy ed., 2004); Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 Fordham Envtl. L.J. 861, 874-76 (1996); *cf.* United States v. Ahmad, 101 F.3d 386, 391, 27 ELR 20557 (5th Cir. 1996).
20. *See* Hart, *supra* note 14, at 413-17; *cf.* Liparota v. United States, 471 U.S. 419, 426-28 (1985).
21. *See Liparota*, 471 U.S. at 426-28.
22. *See* Morissette v. United States, 342 U.S. 246, 271 (1952). Congress has been considering this question as part of a broader overcriminalization reform effort. *See* Matt Apuzzo & Eric Lipton, *Rare White House Accord With Koch Brothers on Sentencing Frays*, N.Y. Times, Nov. 24, 2015.
23. *See* Staples v. United States, 511 U.S. 600, 606 (1994).
24. *See id.* at 605; *see also* United States v. Balint, 258 U.S. 250, 251 (1922).
25. *See Staples*, 511 U.S. at 605; United States v. U.S. Gypsum Co., 438 U.S. 422, 436-37 (1978); *see also* Baker & Haun, *supra* note 14, at 24.
26. *Staples*, 511 U.S. at 606; *see also Gypsum*, 438 U.S. at 438; *Morissette*, 342 U.S. at 263.
27. *See Staples*, 511 U.S. at 620 (Ginsburg, J., concurring).
28. The Supreme Court has looked to the ALI Model Penal Code as a source for guidance on this question. *See Gypsum*, 438 U.S. at 444. Under it, the four options are purpose, knowledge, recklessness, and negligence. *See id*. To date, the Supreme Court has only chosen between the first two in the face of Congress' silence. *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001, 2011 (2015) ("[W]e 'have long been reluctant to infer that a negligence standard was intended in criminal statutes.'") (quoting Rogers v. United States, 422 U.S. 35, 47 (1975) (Marshall, J., concurring)). The distinction between the two is whether the result or effect was the "conscious object" of the defendant's actions or whether the action was "undertaken with knowledge that the proscribed effects would most likely follow." *Gypsum*, 438 U.S. at 444.
29. *Staples*, 511 U.S. at 621-22 (Ginsburg, J., concurring); United States v. Figueroa, 165 F.3d 111, 116 (2d Cir. 1998) ("Absent clear congressional intent to the contrary, statutes defining federal crimes are . . . normally read to contain a mens rea requirement that attaches to enough elements of the crime that together would be sufficient to constitute an act in violation of the law."); *see also* Wiley, *supra* note 14, at 1023.
30. 438 U.S. 422 (1978).
31. *See* 15 U.S.C. §1.
32. *See id*.
33. *Gypsum*, 438 U.S. at 444-46. It chose knowledge over purpose (i.e., willfulness) because that higher standard "would seem . . . both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent." *Id*. at 446.
34. Under the rule of lenity, any ambiguity in a criminal statute must be interpreted in favor of the defendant. *See* Rewis v. United States, 401 U.S. 808, 812 (1971).
35. *See Gypsum*, 438 U.S. at 440-41. The potential breadth of this criminal provision risks substantial overdeterrence. *See id*. at 441:
> > The imposition of criminal liability . . . for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct by shunned by businessmen who chose to be excessively cautious in the fact of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.
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> *Cf.* United States v. Feola, 420 U.S. 671, 682-86 (1975) (federal statute criminalizing assault of federal officers does not require knowledge that the victim was a federal officer); Lazarus, *supra* note 19, at 867.
36. *See Gypsum*, 438 U.S. at 442; Hart, *supra* note 14, at 422-25.

applies to every element of the offense.[37] In *United States v. X-Citement Video, Inc.*, the Supreme Court considered a criminal bar on "knowingly" transporting or shipping a visual depiction of a minor engaging in sexually explicit conduct.[38] Grammatically, "knowingly" could have modified only "transporting or shipping."[39] Nevertheless, the Court held that it must extend to the other elements as well.[40] Again, the Court highlighted the breadth of ordinary, innocent activities potentially subject to the statute if this knowledge were not required.[41]

Similarly, in *Liparota v. United States*, the Supreme Court considered what was required for a conviction for "knowingly" using, transferring, acquiring, altering, or possessing food stamps "in any manner not authorized by [the statute] or regulations."[42] Grammatically, this provision was ambiguous; "knowingly" might only apply to the list of verbs, or it might require knowledge about the manners authorized by the statute or regulations.[43] Noting that anything less than knowledge of the authorized manners would criminalize apparently innocent, ordinary conduct, the Court interpreted the statute to require knowledge of the law.[44] The Court acknowledged policy arguments favoring the contrary interpretation, but refused to assume that this knowledge was not required without clear indication that Congress intended that result.[45]

The Supreme Court has sometimes distinguished knowledge of the facts constituting the offense from knowledge of the law. In *Liparota*, it required knowledge of an action's illegality for a "knowing" conviction.[46] In other cases, it has relied on the principle that ignorance of the law is no excuse to require only knowledge of the facts constituting the elements of the offense.

In *Morissette v. United States*, for instance, the Court considered a federal statute that criminalized the "knowing" conversion of federal property.[47] In that case, a hunter collected several spent bomb casings in a remote, wooded area and sold them, thinking they were abandoned.[48] In prosecuting him for the "knowing" conversion offense, the government argued that the statute did not require him to know that the property he was taking belonged to it.[49] Rather, he would be guilty if he knowingly took property into his possession, if it turned out to belong to the government.[50] The Supreme Court disagreed, reasoning that "knowing conversion" means something different from "knowing possession."[51] It requires "knowledge of the fact, though not necessarily the law, that made the taking a conversion."[52]

B. Narrow Exception for "Public Welfare" Offenses

There is one exception to the presumption that crimes require some criminal intent: the so-called "public welfare" or regulatory offenses.[53] For these offenses, the Supreme Court has not presumed that Congress intended to require knowledge of *all* the facts making the conduct illegal.[54] These offenses exist only in "limited circumstances"[55] involving "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[56] They are offenses that involve the use of unusually harmful or injurious items, where the defendant should know that the nature of the item places him "in responsible relation to the public danger."[57] These items will be sufficiently uncommon that it can be safely assumed that "Congress intended to place the burden on the defendant to 'ascertain at his peril whether [his conduct] comes within the inhibition of the statute.'"[58] Recognizing that public welfare offenses "always entail[ ] some possibility of injustice,"[59] the Court has closely guarded against the doctrine's expansion.

The relatively few cases in which the Supreme Court has recognized public welfare offenses demonstrates the type of exceptionally dangerous activities that fall within the

37. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) ("[T]he presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."); United States v. Ahmad, 101 F.3d 386, 390-91 (5th Cir. 1996).
38. *X-Citement Video*, 513 U.S. at 67-68 (quoting 18 U.S.C. §2252).
39. *Id.* at 80-82 (Scalia, J., dissenting).
40. *Id.* at 72.
41. *Id.* at 69-70, noting that
> a retail druggist who returns an uninspected roll of developed film to a customer "knowingly distributes" a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct. Or, a new resident of an apartment might receive mail for the prior resident and store the mail unopened. If the prior tenant had requested delivery of materials covered by §2252, his residential successor could be prosecuted for "knowing receipt" of such materials. Similarly, a Federal Express courier who delivers a box in which the shipper has declared the contents to be "film" "knowingly transports" such film.
42. 471 U.S. 419, 420 (1985).
43. *Id.* at 424-25.
44. *Id.* at 426-28; *see also id.* at 441 (White, J., dissenting) (criticizing this interpretation as contrary to the "well founded assumption that ignorance of the law is no excuse").
45. *Id.* at 430.
46. *Id.* at 426-28.
47. 342 U.S. 246, 270-71 (1952).
48. *Id.* at 247.
49. *Id.* at 248-49.
50. *Id.*
51. *Id.* at 271.
52. *Id.*
53. *See* Staples v. United States, 511 U.S. 600, 606 (1994); *see generally* Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933).
54. *See Staples*, 511 U.S. at 606.
55. *Id.* at 607; United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978).
56. Liparota v. United States, 471 U.S. 419, 433 (1985); *see also* Morissette v. United States, 342 U.S. 246, 254-56 (1952). For ordinary, innocent activities that *may* have an unknown or unexpected consequence, the assumption that strict liability will achieve an appropriate level of deterrence does not hold. *See Gypsum*, 438 U.S. at 441-42; *see also Morissette*, 342 U.S. at 254-56 (strict liability deters actions that have foreseeable negative consequences where the harm can be avoided through reasonable care).
57. *See Staples*, 511 U.S. at 607 (quoting United States v. Dotterweich, 320 U.S. 277, 281 (1943)); Labert v. California, 355 U.S. 225, 229-30 (1957); *cf.* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564-65 (1971).
58. *See Staples*, 511 U.S. at 607; United States v. Balint, 258 U.S. 250, 254 (1922); *see also* Tyson Lies, *Strict Liability Is for the Birds: A Comparison of Take Under the MBTA and ESA*, 43 Tex. Envtl. L.J. 197, 206 (2013).
59. *See Staples*, 511 U.S. at 634 (Stevens, J., dissenting); *cf.* United States v. Freed, 401 U.S. 601, 608 (1971) (although eliminating a *mens rea* requirement is "a convenient law enforcement technique" that does not justify doing so); *Labert*, 355 U.S. at 229-30.

doctrine's ambit. In *United States v. Freed*, for instance, the Supreme Court held that the federal crime for possessing unregistered hand grenades is a public welfare offense and does not require knowledge that registration is required or that the grenade at issue is unregistered.[60] In *United States v. International Minerals & Chemicals Corp.*, violation of a regulation requiring shippers of hazardous materials to describe the contents in the shipping papers was interpreted as a public welfare offense.[61] As a consequence, a defendant could be convicted even if he did not know that he was required to include a description of the materials in the shipping papers or that the particular description supplied fell short.[62]

Although public welfare offenses do not generally require knowledge of *every* fact constituting the offense, that does not mean that they do not require knowledge of any of those facts. In *Staples v. United States*, the Supreme Court considered whether the government must prove that a defendant knew the facts necessary to make his conduct the sort of uniquely dangerous activity that make it a public welfare offense.[63] The defendant was charged with the possession of an unregistered machine gun.[64] The Court held that the "public welfare" offense rationale could not absolve the government of the obligation to show that the defendant knew the characteristics of the weapon subjecting it to the registration requirement.[65] To hold otherwise, the Court explained, would "criminalize a broad range of apparently innocent conduct."[66] Despite the apparent danger posed by the weapon, the Court was not willing to erode the prosecutor's burden in light of the nation's long tradition of lawful gun ownership.[67]

That an area of the law is subject to pervasive regulation does not mean that its criminal provisions are public welfare offenses.[68] Many facets of ordinary, daily life are subject to pervasive federal, state, and local regulation. As the Supreme Court explained in *Staples*:

> If we were to accept as a general rule the Government's suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates.[69]

In other words, public welfare offenses are limited to activities so uncommon and involving such dangerous items that anyone should know that her actions are not entirely innocent.[70]

The Supreme Court has also noted that it would hesitate to expand the public welfare offense rationale to criminal provisions that carry harsh penalties. The early public welfare offense cases concerned only small fines or short jail sentences.[71] Courts have expressed serious misgivings about whether imprisonment could ever be justified for a public welfare offense.[72] The Supreme Court has suggested that—no matter how dangerous and obscure an activity is—public welfare offenses should not be punishable as felonies.[73]

II. "Knowingly" Taking a Protected Species

A. *The Statutory Prohibition*

To "provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species," Congress

60. *Freed*, 401 U.S. at 609; *see also Staples*, 511 U.S. at 609; *Liparota*, 471 U.S. at 423, n.5.
61. 402 U.S. 558, 559 (1971).
62. *Id.* at 560-65.
63. 511 U.S. 600, 602 (1994). The Court suggested such knowledge was required in *International Minerals*. *See* 402 U.S. 558, 564-65 (1971):
    > Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in *Murdock*, "mens rea" as to each ingredient of the offense. But where, as here and as in *Balint* and *Freed*, dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.

    See also United States v. Freed, 401 U.S. 601, 612-13 (1971) (Brennan, J., concurring).
64. *Staples*, 511 U.S. at 608.
65. *Id.* at 608-16.
66. *Staples*, 511 U.S. at 610; *see also* Liparota v. United States, 471 U.S. 419, 426 (1985); United States v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1996).
67. *Staples*, 511 U.S. at 610-11:
    > [T]hat an item is "dangerous," in some general sense, does not necessarily suggest, as the Government seems to assume, 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.

    Cf. Freed, 401 U.S. at 609.
68. *See Staples*, 511 U.S. at 613.
69. *Id.* at 614.
70. *See id.* at 615-16; Morissette v. United States, 342 U.S. 246, 259-60 (1952).
71. *Staples*, 511 U.S. at 616; *see also* People v. Snowburger, 113 Mich. 86 (1897) (fine of up to $500 or incarceration in county jail); Commonwealth v. Raymond, 97 Mass. 567 (1867) (fine of up to $200 or six months in jail, or both); Commonwealth v. Farren, 91 Mass. 489 (1864) (fine).
72. *See, e.g.*, People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 32-33 (1918) (Cardozo, J.); *id.* at 35 (Crane, J., concurring); *see also Staples*, 511 U.S. at 617.
73. *Staples*, 511 U.S. at 619:
    > We need not adopt such a definitive rule of construction to decide this case, however. Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement.

    See also United States v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1996) (felony penalties for violating the Clean Water Act (CWA) reinforces conclusion that the public welfare offense exception does not apply).

enacted the ESA in 1973.[74] The Supreme Court's seminal case *Tennessee Valley Authority (TVA) v. Hill* interpreted the ESA to make protecting species the "highest" of federal agency priorities.[75] According to the decision, the ESA requires species to be protected "whatever the cost."[76]

Pursuant to the ESA, FWS and the National Marine Fisheries Service list species as either endangered or threatened, triggering protections from both private activities that adversely affect species and federal actions that could jeopardize them.[77] There are approximately 1,500 animal species and 900 plant species listed.[78]

The statute prohibits the "take" of any endangered species.[79] This was one of the ESA's key innovations. Prior federal efforts to protect species focused on government actions and left private activities unregulated.[80] "Take" is capaciously defined to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[81]

The statute provides substantial civil and criminal penalties for anyone who "knowingly" violates any provision, including the take prohibition.[82] The penalties include fines of up to $50,000 and imprisonment for up to one year for each violation, plus the loss of certain types of federal permits.[83] The statute also provides varying civil penalties,[84] including a modest penalty for strict liability violations,[85]and provides that anyone can seek an injunction against take.[86]

The reach of this criminal provision, like the reach of the statute generally, has been controversial.[87] For example, whether the provision includes activities that inadvertently result in harm to a species was controversial and had to be resolved by the Supreme Court. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[88] the timber industry challenged a regulation that interprets take to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[89] The challengers argued that take was limited to direct and intentional applications of force against protected species.[90] If the definition of take could reach their activities—harvesting timber in forests that provide habitat for protected birds—it would have no logical stopping point, but would reach many innocent, ordinary activities.[91]

The Supreme Court rejected the timber industry's arguments (over a sharp dissent).[92] Applying *Chevron* deference, the Court held that the regulation was a reasonable interpretation of a vague statutory term.[93] According to the majority, the regulation is consistent with the ordinary meaning of the word "harm,"[94] gives the term meaning independent of the other parts of the statute's definition of take,[95] and serves *TVA v. Hill*'s holding that the ESA's purpose is to avoid any harm to protected species "whatever the cost."[96] Justice Sandra Day O'Connor filed a concurring opinion, interpreting the regulation to be limited to habitat modification that actually kills or injures an identifiable animal.[97]

Justice Antonin Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, dissented, arguing that the ruling "imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."[98] He argued that "harm" should be inter-

74. 16 U.S.C. §1531(b); *see also* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 178, 8 ELR 20513 (1978) ("'Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?'") (quoting H.R. Rep. No. 93-412, at 4 (1973)).
75. *Tennessee Valley Auth. v. Hill*, 437 U.S. at 194.
76. *Id.* at 184.
77. *See* 16 U.S.C. §1533 (providing for the listing of species); 16 U.S.C. §1536 (requiring federal agencies to proactively protect species and avoid jeopardizing them); 16 U.S.C. §1538 (forbidding the take of endangered species); *see also* 16 U.S.C. §1532(6) (defining endangered); 16 U.S.C. §1532(20) (defining threatened).
78. U.S. Fish & Wildlife Serv., *ECOS: Environmental Conservation Online System*, http://ecos.fws.gov/ecp/ (last visited Oct. 8, 2015) [hereafter ECOS].
79. The statute only forbids the take of endangered species. 16 U.S.C. §1538(a)(1)(B). However, it permits regulations extending this prohibition to threatened species. 16 U.S.C. §1533(d). The agencies charged with protecting these species have jointly issued a regulation extending the prohibition to all threatened species, unless the species is subject to a species-specific regulation. 50 C.F.R. §17.31.
80. *See* Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23, 25-28 (2015).
81. 16 U.S.C. §1532(19).
82. 16 U.S.C. §1540. Prior to 1978, the ESA's criminal provision was limited to "willful" violations. *See* H.R. Rep. No. 95-1625, at 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9476; *see also* United States v. McKittrick, 142 F.3d 1170, 1177, 28 ELR 21197 (9th Cir. 1998). The legislative history explains that "willful" was changed to "knowingly" to make take a general rather than specific intent crime. *See* H.R. Rep. No. 95-1625, at 26.
83. 16 U.S.C. §1540(b).
84. 16 U.S.C. §1540(a).
85. *Id.* ("Any person who otherwise violates any provision of this chapter . . . may be assessed a civil penalty . . . of not more than $500.").
86. 16 U.S.C. §1540(g)(1).
87. The take prohibition's constitutionality has been challenged several times, though only one of those challenges has been successful. People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 57 F. Supp. 3d 1337, 44 ELR 20241 (D. Utah 2014) (the author represented the challengers in this case); *see* Jonathan Wood, *A Federal Crime Against Nature? The Federal Government Cannot Prohibit Harm to All Endangered Species Under the Necessary and Proper Clause*, 29 Tulane Envtl. L.J. 65, 75-85 (2015) (describing those challenges and arguing that the take prohibition is unconstitutional); Michael C. Blumm & George A. Kimbrell, *Clear the Air:* Gonzalez [sic] v. Raich*, the "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 17 Vill. Envtl. L.J. 389 (2006) (arguing that the take prohibition is constitutional). It has also been sharply criticized on policy grounds, particularly its perverse incentives and counterproductivity. *See* Jonathan H. Adler, *Introduction*, *in* Rebuilding the Ark: New Perspectives on Endangered Species Act Reform 1-23 (Jonathan H. Adler ed., 2011).
88. 515 U.S. 687, 25 ELR 21194 (1995).
89. *Id.* at 691-92.
90. *Id.* at 697-98.
91. *Id.* at 699.
92. *Id.* at 701-02; *see id.* at 714-36 (Scalia, J., dissenting).
93. *Sweet Home*, 515 U.S. at 708; *see also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66, 14 ELR 20507 (1984); *but see* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 490-92 (1996); Lazarus, *supra* note 19, at 869-70.
94. *Sweet Home*, 515 U.S. at 697.
95. *Id.* at 697-98.
96. *Id.* at 698-99; *see also* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184, 8 ELR 20513 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").
97. *Sweet Home*, 515 U.S. at 708-14 (O'Connor, J., concurring).
98. *Id.* at 714 (Scalia, J., dissenting).

preted consistent with the operative term "take" and, thus, must be limited to direct, intentional applications of force against an animal.[99]

In *Sweet Home*, both the majority and the dissent addressed the statute's *mens rea* requirement.[100] In fact, the degree to which the knowledge requirement limits the reach of the statute played a prominent role in oral argument. In response to the first question, the deputy solicitor general explained that "knowingly" requires proof that the defendant knew all of the facts constituting the offense—that the act would cause take and what would be taken—but not knowledge that the ESA makes take unlawful.[101] Both the majority and the dissent opinions incorporate this interpretation, although in dicta.[102] Justice Scalia's dissent, for instance, explained that:

> The hunter who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated §1538(a)(1)(B)—not because he does not know that elk are legally protected (that would be knowledge of the law, which is not a requirement . . .), but because he does not know what sort of animal he is shooting. The hunter has nonetheless committed a purposeful taking of protected wildlife, and would therefore be subject to the (lower) strict-liability penalties for the violation.[103]

Despite the suggestion of widespread agreement in the *Sweet Home* dicta, and the oral argument that preceded it, the knowledge required to be guilty of take is anything but clear. In fact, the only courts of appeal to address the question have construed the statute's *mens rea* requirement narrowly.[104] According to these decisions, a defendant need not know the identity of the species being taken (and perhaps not even that her actions will cause take).[105] The matter is further complicated by the fact that DOJ has disclaimed these decisions, adopting a policy that only permits criminal convictions for people who know their actions will cause take and what species will be taken.[106]

B. Lower Courts Have Limited the Knowledge Requirement

Only two circuits have interpreted the ESA's *mens rea* requirement, both ruling contrary to the government's position in *Sweet Home*.[107] Several district courts have also addressed the question.[108] But none of these decisions have been reviewed by the Supreme Court.

In *United States v. Nguyen*, the Fifth Circuit limited the *mens rea* requirement's protections.[109] In that case, a man working on a fishing boat was convicted of illegally possessing and importing a threatened loggerhead sea turtle.[110] He testified that the turtle had been inadvertently caught in a shrimp net and his fellow fishermen persuaded him to let them salvage the edible portions.[111] The jury instructions asked whether the government had adequately proven "(1) 'the defendant knowingly possess[ed] a sea turtle or its parts'; (2) 'the sea turtle was an animal listed as a threatened species of wildlife by the United States'; and (3) 'the animal had been taken either upon the high seas or in the territorial sea of the United States.'"[112] The jury found that it had and the fisherman was convicted.[113]

On appeal, the fisherman argued that the conviction had to be overturned because the jury did not find that he knew the turtle was a loggerhead sea turtle or that it was a threatened species.[114] The Fifth Circuit rejected this argument, though its reasoning is unclear.[115] The court only directly addressed whether knowledge of the species' status under the ESA was required.[116] The court held that such knowledge was not required, basing its reasoning on (1) a 1978 amendment changing the *mens rea* requirement from "willfully" to "knowingly"[117]; (2) *TVA v. Hill*'s holding that the statute's purpose is to protect species

99. *Id.* at 718-21 (Scalia, J., dissenting).
100. *Sweet Home*, 515 U.S. at 701-02 ("[T]o the extent the [D.C. Circuit] read a requirement of intent or purpose into the words used to define 'take,' it ignored §11's express provision that a 'knowin[g]' action is enough to violate the Act."); *id.* at 722 (Scalia, J., dissenting):
> This presumably means that because the reading of [the definition of "take"] advanced here ascribes an element of purposeful injury to the prohibited acts, it makes superfluous (or inexplicable) the more severe penalties provided for a "knowing" violation. That conclusion does not follow, for it is quite possible to take protected wildlife purposefully without doing so knowingly.

101. Transcript of Oral Argument at 5, Babbitt v. Sweet Home Chapter of Cmtys. for Great Oregon, 515 U.S. 687, 25 ELR 21194 (1995). A defendant would not have to know that a species is endangered because
> [t]hat is a question of knowledge of the law which is not ordinarily required. What is required, though, under our interpretation of knowingly, is that the person must know that the conduct in which he is engaging will have the prescribed effect on the protected wildlife. In other words, he must know that there is significant habitat modification for wildlife, and must know that it will impair the behavioral patterns, such as depriving it of food, depriving it of essential shelter.

Id. at 6:
> So here we believe what the person has to know is that his conduct will have the effect on the wildlife, but what—the only thing he doesn't have to know is that the species is listed, and that was what Congress was driving at by changing the *mens rea* requirement from wilful [sic] to knowingly.

102. *Sweet Home*, 515 U.S. at 701-02; *id.* at 722 (Scalia, J., dissenting).
103. *Id.* at 722 (Scalia, J., dissenting).
104. *See* United States v. McKittrick, 142 F.3d 1170, 28 ELR 21197 (9th Cir. 1998); United States v. Nguyen, 916 F.2d 1016 (5th Cir. 1990).
105. *McKittrick*, 142 F.3d at 1177; *Nguyen*, 916 F.2d at 1018-20; *see also* United States v. St. Onge, 676 F. Supp. 1044, 1045 (D. Mont. 1988).
106. *See* Brief for Respondent, McKittrick v. United States, No. 98-5406, 1998 WL 1013214, at *7 (filed Nov. 9, 1998); Bucella Memo, *supra* note 6.
107. *McKittrick*, 142 F.3d at 1177; *Nguyen*, 916 F.2d at 1018-20.
108. *St. Onge*, 676 F. Supp. at 1045; United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987).
109. 916 F.2d 1016 (5th Cir. 1990).
110. *Id.* at 1017-18.
111. *Id.* at 1017.
112. *Id.* at 1017-18.
113. *Id.* at 1018.
114. United States v. Nguyen, 916 F.2d 1016, 1018 (5th Cir. 1990).
115. *Id.* at 1018-20.
116. *Id.* at 1018 ("[I]t is sufficient that Nguyen knew that he was in possession of a turtle. The government was not required to prove that Nguyen knew that this turtle is a threatened species or that it is illegal to transport or import it.").
117. *Id.* at 1018-19. "The purpose of this amendment was to make 'criminal violations of the act a general rather than a specific intent crime. . . .'" *Id.* (quoting H.R. Rep. No. 95-1625, at 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9476). The committee report states that Congress did "not intend to make knowledge *of the law* an element of either civil penalty or criminal

"whatever the cost"[118]; and (3) the fact that the offense is a misdemeanor.[119] Although the opinion does not say so, one assumes that the court rejected the argument that knowledge of the identity of the species taken is required for the same reasons.

In *United States v. McKittrick*, the Ninth Circuit considered the conviction of a man who had shot, decapitated, and skinned an endangered gray wolf.[120] On appeal, the shooter challenged the conviction on several grounds, including that the government had not shown that he knew he was shooting a gray wolf.[121] He claimed that he thought it was a wild dog.[122] Despite the government's representations to the Supreme Court three years earlier in *Sweet Home*, it argued that whether McKittrick knew it was a gray wolf was irrelevant.

The Ninth Circuit sided with the government, holding that a defendant need not know the identity of a taken species to satisfy the "knowing" requirement of the ESA.[123] Instead, the statute "requires only that McKittrick knew he was shooting an animal, and that the animal turned out to be a protected gray wolf."[124] The Ninth Circuit based this conclusion on Congress' decision to reduce the *mens rea* requirement from willful to knowing,[125] legislative history indicating that Congress meant this change to "make[ ] criminal violations of the act a general rather than a specific intent crime,"[126] *Nguyen*,[127] and several district court decisions.[128] Although *McKittrick* clearly holds that knowledge of the species taken is not required, it is ambiguous whether one must know that her actions would cause take.[129]

C. DOJ Adopts the McKittrick Policy

Despite having succeeded in limiting the knowledge requirement in the Fifth and Ninth Circuits, the federal government abruptly abandoned this interpretation when the *McKittrick* defendant petitioned the Supreme Court for certiorari. In its opposition brief, the government disclaimed the Ninth Circuit's reasoning and stated that it would no longer use the jury instruction upheld in that case.[130] Consistent with the government's representations in *Sweet Home*, the brief explained that "knowingly" requires that "the defendant either knew the essential facts or 'willfully neglected to exercise its duty under the Regulation to inquire into' the relevant facts."[131]

Shortly after the Supreme Court denied review in *McKittrick*, a DOJ memorandum was circulated to the U.S. Attorneys, explaining that the *McKittrick* jury instruction is legally inadequate.[132] It went on to direct that "[a]ll Department prosecutors are instructed not to request, and to object to, the use of the knowledge instruction at issue in *McKittrick*."[133]

This was followed by another memorandum explaining that the new policy was based on *Sweet Home* and several other Supreme Court decisions presuming that knowledge requirements in criminal statutes apply to every element of the offense.[134] It went on to state that "[s]imply, the Department of Justice position post-*McKittrick* is that prosecutors must prove that the defendant is aware of the facts that constitute the offense, including the identity of the animal, but need not prove that he knew his conduct violated the law."[135] That memo acknowledged FWS criticism of DOJ's policy,[136] but responded that federal prosecutors had

> been successful satisfying the knowledge requirement under the ESA where the defendant shoots and kills an unidentified listed animal, but later identifies it correctly when he takes unlawful possession of it after the taking. The true "hole" created by the current interpretation of the *mens rea* requirement occurs only when an unidentified animal is killed and left laying. . . . But assessment of

violations of the Act." *See Nguyen*, 916 F.2d at 1019 (quoting H.R. Rep. No. 95-1625, at 26).

118. *Nguyen*, 916 F.2d at 1018; *see also* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184, 8 ELR 20513 (1978).
119. *Nguyen*, 916 F.2d at 1019-20 (noting that take of a threatened species is punishable by up to six months' imprisonment, making it a Class B misdemeanor); 18 U.S.C. §3559(a) (providing that any crime punished by up to one year imprisonment is a misdemeanor).
120. 142 F.3d 1170, 1172, 28 ELR 21197 (9th Cir. 1998). To be more accurate, the conviction was for two counts of take: (1) shooting the wolf; and (2) possessing it by keeping its head and hide as a trophy. *Id*. at 1172-73.
121. *Id*. at 1176-77.
122. *Id*. at 1178.
123. *Id*. at 1177.
124. *Id.*
125. *McKittrick*, 142 F.3d at 1177.
126. *Id.*; H.R. Rep. No. 95-1625, at 26, *reprinted in* 1978 U.S.C.C.A.N. 9453, 9476.
127. *See McKittrick*, 142 F.3d at 1177; *see also* United States v. Nguyen, 916 F.2d 1016, 1017-18 (5th Cir. 1990); United States v. Ivey, 949 F.2d 759, 766 (5th Cir. 1991) (*Ivey* concerned knowledge of the law, not knowledge of the facts, i.e., whether a defendant knew that his act was forbidden under the ESA). The Ninth Circuit also cited the U.S. Court of Appeals for the Eleventh Circuit's decision in *United States v. Grigsby*, 111 F.3d 806, 817 (11th Cir. 1997), though it is not obvious why. *See* United States v. Kokesh, No. 3:13CR48/RV, 2013 WL 6001052, at **3-7 (N.D. Fla. Nov. 12, 2013) (discussing conflict between *McKittrick* and *Grigsby*). *Grigsby* concerned whether a different statute's provision imposing criminal punishment for knowing violations required knowledge that the conduct was illegal. *Grigsby*, 111 F.3d at 819-22. The Eleventh Circuit interpreted the statute to require knowledge that the conduct was illegal, citing concerns with statutory vagueness and the criminalization of ordinary conduct that few would have any reason to suspect was illegal. In contrast to the Ninth Circuit's characterization, *Grigsby*'s reasoning would require knowledge of the facts *and* the law.
128. *See McKittrick*, 142 F.3d at 1177; *see also* United States v. St. Onge, 676 F. Supp. 1044, 1045 (D. Mont. 1988); United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987).
129. *See McKittrick*, 142 F.3d at 1177. By favorably citing *St. Onge*, the Ninth Circuit suggests that knowledge that one's actions will result in take is not required. *See St. Onge*, 676 F. Supp. at 1045. The Ninth Circuit did not clearly resolve this question, however.
130. *See* Brief for Respondent, McKittrick v. United States, No. 98-5406, 1998 WL 1013214, at *7 (filed Nov. 9, 1998) ("Although we defended this instruction in the court of appeals and that court approved it, the Department of Justice does not intend in the future to request the use of this instruction, because it does not adequately explicate the meaning of the term 'knowingly'").
131. *Id*. at *7, n.8.
132. Bucella Memo, *supra* note 6.
133. *Id.*
134. Webb Memo, *supra* note 6.
135. *Id.*
136. *Id.*

modest "strict liability" ESA civil penalties, prosecution by the state, or both remain viable penalties even here.[137]

Subsequently, DOJ began using jury instructions requiring that defendants know the identity of the taken species. The policy appears to have continued to this day, despite criticisms from FWS employees and an environmental group's lawsuit challenging it.[138]

III. The ESA Should Be Construed to Require Knowledge of All Facts Constituting the Offense

The ESA's take prohibition implicates many of the concerns underlying the presumption requiring knowledge of all of the facts constituting an offense. Absent any such knowledge requirement, the breadth of this prohibition would threaten people with punishment for apparently innocent, ordinary activity.[139] Because "take" is defined so broadly, essentially any activity that adversely affects a single member of a protected species or its habitat (including a host of ordinary land use activities) may be criminal.

To guard against the risk of criminalizing apparently innocent conduct, the statute's knowledge requirement must be interpreted to apply to every element of the offense. Specifically, a defendant must know that his actions will result in take and the identity of the species taken. As explained more fully below, unless knowledge of *both* is required, people could be imprisoned for conduct that they had no reason to suspect might be criminal.

A. *The Breadth of "Take" Counsels in Favor of Requiring Knowledge That an Act Will Cause Take*

As the decision in *Sweet Home* demonstrates, the ESA's take prohibition is exceedingly broad.[140] It forbids a host of activities that cause an adverse impact on a member of a protected species, regardless of whether the impact was intentional.[141] Criminal enforcement of this provision threatens to convert many innocent, ordinary activities into federal offenses, punishable by imprisonment.[142] Therefore, it must be limited to cases where the defendant knows that her actions will cause one of the forbidden impacts.[143]

Many ordinary land use activities can cause take. For instance, take can result from cutting down trees that, unbeknownst to the person doing the cutting, serve some biological function for a protected species.[144] It can result from draining a pond or modifying a waterway if the work affects a protected species, possibly even if those impacts occur far downstream.[145] Plowing and other normal farming practices can harm fairy shrimp.[146] Building a single-family home could cause take, too, if it displaces a protected rodent.[147] Development that causes indirect impacts can also cause take, such as commercial development that disturbs spiders living in caves far below the surface.[148]

Few would suspect that such activities could land them behind bars; thus, criminalizing these activities leads to unfair surprises and inequitable results. A property owner who uses his property the same as his neighbors, but has the bad luck to have protected species on his property, can face jail time for doing what most everyone else takes for granted.[149]

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137. *Id.*

138. *See* WildEarth Guardians, *supra* note 7; Newcomer et al., *supra* note 7 (article by current and former FWS officials criticizing the *McKittrick* policy).

139. *See* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L.J. 2407, 2479-80 (1995); *cf.* Staples v. United States, 511 U.S. 600, 621-22 (1994) (Ginsburg, J., concurring) (the intent requirement should be sufficient "to shield people against punishment for apparently innocent activity").

140. The statutory definition expands far beyond the common-law understanding of "take." *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 718-19, 25 ELR 21194 (1995) (Scalia, J., dissenting). This exacerbates the risk of overcriminalization and reduces the likelihood that the statute will give regulated parties reason to think that their activities might be illegal. *See* Hart, *supra* note 14, 424 ("[S]tatutes cannot change the meaning of words and make people stop thinking what they do think when they hear the words spoken.").

141. *See* Lazarus, *supra* note 19, at 868-69.

142. Compare this to the CWA's similarly broad prohibition against discharging any pollutant into a water of the United States, which uses the same "knowingly violates" language in its criminal prohibition. *See* 33 U.S.C. §1319(c)(2)(A). The CWA requires knowledge of the facts constituting the offense (though not that these facts make the conduct illegal). *See* United States v. Ahmad, 101 F.3d 386, 390-91 (5th Cir. 1996); United States v. Weitzenhoff, 35 F.3d 1275, 1298, 24 ELR 21504 (9th Cir. 1994) (Kleinfeld, J., dissenting):

> Hot water, rock, and sand are classified as 'pollutants' by the Clean Water Act. Discharging silt from a stream back into the same stream may amount to discharge of a pollutant. For that matter, so may skipping a stone into a lake. So may a cafeteria worker's pouring hot, stale coffee down the drain.

See also United States v. Hopkins, 53 F.3d 533, 537-41, 25 ELR 21178 (2d Cir. 1995) (knowledge that a discharge is illegal is not required); *Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994) (same); James V. DeLong, *The New "Criminal" Classes: Legal Sanctions and Business Managers*, *in* Go Directly to Jail: The Criminalization of Almost Everything 7-13, 21 (Gene Healy ed., 2004); Lazarus, *supra* note 139, at 2479-80 ("Hardly an activity exists that is not subject to environmental restrictions. The pollutants subject to the federal environmental statutes are not, moreover, confined to those that are especially dangerous.").

143. *But see* David P. Gold, *Wildlife Protection and Public Welfare Doctrine*, 27 Colum. J. Envtl. L. 633, 661-62 (2002) (the possibility that innocuous activities could cause take should be ignored because the author asserts, without explanation or support, that prohibited takes are "undertaken overwhelmingly by professionals or those otherwise on notice of the existence of regulations"); *cf.* Hanousek v. United States, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of cert.) (The CWA's bar on discharging "pollutants" is not a public welfare offense because it imposes criminal liability on "a broad range of ordinary industrial and commercial activities."); Lawrence Friedman & Hamilton Hackney III, *Questions of Intent: Environmental Crimes and "Public Welfare" Offenses*, 10 Vill. Envtl. L.J. 1, 22 (1999).

144. *Sweet Home*, 515 U.S. at 701-02.

145. *See* Transcript, *supra* note 101, at 6; *see also* Aransas Project v. Shaw, 756 F.3d 801, 44 ELR 20146 (5th Cir. 2014).

146. *See* Transcript, *supra* note101, at 8 (plowing can cause take); *see also* Robin Abcarian, *A Land-Use Case That's Enough to Furrow a Farmer's Brow*, L.A. Times, Jan. 15, 2016, *available at* http://www.latimes.com/local/abcarian/la-me-0115-abcarian-farmer-wetlands-20160115-column.html.

147. *See* People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 57 F. Supp. 3d 1337, 44 ELR 20241 (D. Utah 2014).

148. *See* GDF Realty Inv., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003).

149. DeLong, *supra* note 142, at 25:

> Every home builder is in jeopardy from the wetlands and endangered species laws, and nothing in the objective situation will automatically alert him to the degree of danger. If there is no definitive way to tell whether one's property is a wetland, and knowledge and

The take prohibition's overly broad reach is not solely due to its inclusion of adverse modification of habitat. The definition's inclusion of "harassment" also sweeps in a large swath of apparently innocent activities. Getting near a protected species or startling it can be harassment. This would include a wildlife photographer who gets within 50 feet of a protected migratory bird.[150] Buffer zones around species can be quite large. For instance, a federal regulation forbids anyone from getting within 500 yards of a right whale on any vessel.[151] This potentially criminalizes getting within five football fields of a right whale while surfing or paddle boarding.[152] It would be absurd to expect that surfers or paddle boarders know what aquatic life is within five football fields of them at all times, or that they could know this if they had any inclination to find out.

Even the take prohibition's inclusion of traditional forms of take, like "kill" and "capture," ensnares ordinary, innocent activity. It includes people who run over a protected rodent that jumps out in front of their cars[153] or strikes a protected fly or insect with their windshields.[154] A jogger who inadvertently steps on a protected beetle crossing a public jogging path runs afoul of this prohibition. So too would someone whose dog unexpectedly attacks a protected bird while out for a walk.[155] A city worker who captures a protected rodent at an airport, to prevent it from tunneling beneath the runway, and relocates it to a conservation area violates the "capture" prohibition.[156]

Courts construing the ESA's knowledge requirement narrowly have missed this point by focusing only on the unsympathetic facts before them, without addressing the broader ramifications of their rulings.[157] The problem with this narrow focus is that the ESA's *mens rea* requirement does not vary based on the type of take.[158] The same rule applies to all of the apparently innocent activities swept in by the broad definition.

That enforcement cases arise in particularly unsympathetic factual contexts is not surprising. Given the breadth of the prohibition, it is exceedingly unlikely that every violation would ever be noticed, investigated, and prosecuted. Instead, prosecutions will likely focus on people the government views as particularly bad,[159] or people engaged in activities that are opposed by others who can draw attention to them, and boneheaded people who publicize their own violations.[160]

The wide range of activities that result in take demonstrate that it is not a public welfare offense. Like the gun possession at issue in *Staples*, driving, construction, and hunting are all activities that can be dangerous. However, these are all common activities with a long history of people legally undertaking them. Therefore, they cannot be the sort of unusual and uniquely dangerous activities subject to the public welfare offense doctrine.[161]

That violations of the ESA are punishable by one year in prison and tens of thousands of dollars in criminal fines (as a mere misdemeanor) also does not make take a public welfare offense. Although the Supreme Court has emphasized a crime's penalty as an additional factor after deciding whether its reach avoided criminalizing ordinary conduct, as discussed above, several commentators have argued that punishment as a misdemeanor alone is sufficient to avoid the Court's concerns about the public welfare doctrine.

Even if this were a plausible reading of Supreme Court precedent, the ESA would not be a good case for applying such a rule. Because take is defined so broadly, a single act or course of conduct could result in several violations. As the memo adopting the McKittrick Policy explained, even in a case where a shooter truly was mistaken about the identity of a species, he could be prosecuted if he took any further action after learning of the mistake. Similarly, a person who harmed several members of a protected insect with a single act could potentially be prosecuted for several violations. Further, if any activity can be a public welfare offense so long as it is only punishable as a misde-

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intent are irrelevant then even the act of building or buying a home becomes perilous. Virtually everyone is at risk of prosecution.

150. *See* Rene Ebersole, *Too Close for Comfort*, Audubon (June 2015), *available at* https://www.audubon.org/magazine/may-june-2015/too-close-comfort.
151. *See* National Marine Fisheries Serv., *North Atlantic Right Whale Protection*, 62 Fed. Reg. 6729 (1997).
152. *See Approaching Right Whales Will Cost You, Wildlife Officials Warn*, FloridaToday, Mar. 12, 2014, http://www.wtsp.com/story/news/local/florida/2014/03/17/2097218/.
153. *See* Strahan v. Coxe, 127 F.3d 155, 163-64, 28 ELR 20114 (1st Cir. 1997).
154. *Cf.* Friends of Animals v. Clay, No. 14-CV-4071 (2d Cir. 2016) (rejecting challenge to airports taking migratory birds to prevent plane crashes); Baker & Haun, *supra* note 14, at 26 (take includes plane crash resulting from a collision with migratory birds).
155. *Cf.* David Harry, *Feds Want to Slap Scarborough With $12,000 Fine for Death of Protected Bird on Beach*, Bangor Daily News, Sept. 12, 2013, http://bangordailynews.com/2013/09/12/news/portland/feds-want-to-slap-scarborough-with-12000-fine-for-death-of-protected-bird-on-beach/.
156. *See* People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 57 F. Supp. 3d 1337, 44 ELR 20241 (D. Utah 2014).
157. *See* United States v. McKittrick, 142 F.3d 1170, 28 ELR 21197 (9th Cir. 1998); United States v. Nguyen, 916 F.2d 1016 (5th Cir. 1990); United States v. St. Onge, 676 F. Supp. 1044, 1045 (D. Mont. 1988); United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987); *cf.* Gold, *supra* note 143, at 647 (arguing that the ESA's take prohibition should be analyzed as a public welfare offense because hunting is a dangerous, highly regulated activity).
158. *See* 16 U.S.C. §1538(a)(1).
159. Being human, prosecutors might wield their discretion more randomly or nefariously. *See* DeLong, *supra* note 142, at 22 (discussing the prosecution of Ocie Mills, a Florida man who was prosecuted under the CWA for being insolent to federal bureaucrats); *cf.* Juliet Eilperin & Lisa Rein, *EPA Official Who Compared Enforcement to Crucifixion Resigns*, Wash. Post, Apr. 30, 2012 (discussing an EPA official's description of EPA enforcement as

> kind of like how the Romans used to conquer little villages in the Mediterranean. They'd go into a little Turkish town somewhere, they'd find the first five guys they saw, and they would crucify them. And then you know that town was really easy to manage for the next few years. . . . You make examples out of people who are not complying with the law.

160. *See* Kozinski & Tseytlin, *supra* note 14, at 51; *see also* Melissa Chan, *Florida Woman Arrested for Riding Sea Turtle After Damning Photo Goes Viral: Police*, N.Y. Daily News, Sept. 26, 2015, http://www.nydailynews.com/news/national/fla-woman-arrested-riding-sea-turtle-viral-photo-article-1.2375590; Andrew Ford, *Men Who "Cannonballed" Manatee Sentenced*, Florida Today, June 19, 2014, http://www.floridatoday.com/story/news/crime/2014/06/18/men-who-cannonballed-manatee-sentenced/10795763/.
161. Additionally, the public welfare doctrine should be inapplicable to the ESA because that doctrine deals with interpreting statutes that are *silent* about whether *mens rea* is required. *See* Robert D. Daniel, *Environmental Law*, 29 Tex. Tech L. Rev. 631, 638 (1998); *but see* Gold, *supra* note 143, at 633-35.

meanor, the government could easily circumvent *mens rea* requirements by breaking traditional crimes into several constituent acts, all of which are individually punished as misdemeanors.[162] The Supreme Court has never accepted such a far-reaching theory.

B. The Number and Obscurity of Listed Species Counsels in Favor of Requiring Knowledge of the Species Affected

The ESA's knowledge requirement should also extend to the identity of the species taken.[163] There is nothing in the statutory language to justify excluding this element from it. The ESA makes it a crime to "knowingly violate" the statute.[164] There is no grammatical reason to read this to require knowledge of some elements but not others. Nor is knowledge that something will be taken sufficient to avoid criminalizing apparently innocent, ordinary conduct. Due to the wide variety of obscure species protected by the ESA, the only way to avoid unjust results is to require knowledge of the species affected.

Among the approximately 1,500 species protected by the ESA's take prohibition are dozens of insects, spiders, rodents, and small birds.[165] All but the most popular and charismatic of these species are unknown to lay people. Even experts are unlikely to know, much less recognize, all of them. The statute impliedly recognizes this by allowing species to be listed if they so closely resemble protected species that expert enforcement officers have difficulty distinguishing them.[166]

Given the practical impossibility that lay people could become familiar with all of these species, it is unreasonable to treat ordinary and apparently innocent activities that affect them as criminal. People who do not know the identity of an affected species have little reason to suspect they could face criminal punishment. Instead, they are in the same position as the druggist, apartment tenant, and FedEx courier that the Supreme Court was concerned in *X-Citement Video* could unknowingly distribute or receive sexually explicit media.[167]

Many ordinary, innocent activities are undertaken with the knowledge that they may affect some living thing or its habitat. Anyone who builds a home knows that the land could be a stopping point for migratory birds and is almost certainly home for a wide variety of insects, if not rodents and other animals. Anyone who has ever hand-washed a car knows that driving inevitably harms insects unfortunate enough to cross the car's path. Even hunting, though perhaps more dangerous, is an ordinary, innocent activity when you believe you are shooting legal prey.[168]

The only way to avoid this problem is to require knowledge of the particular species affected. Arguably, knowledge of the species' peril or protected status is necessary. A person whose use of her property affects a waterway should not be punished if she does not know that the waterway contains "a particular frog or whatever."[169] But if she knows the species of frog is there but has no reason to think that it is at risk of extinction or protected by the ESA, why would she think that her activities are anything other than ordinary and innocent? True though this may be, there is a distinction between requiring knowledge of the facts constituting the offense and requiring knowledge of the law.[170] As the next section explains, Congress has expressly indicated that knowledge of the law is not required.

C. The Statute and Legislative History Provide No Basis for Limiting the Knowledge Requirement

Critics of the McKittrick Policy point out that Congress amended the ESA in 1978 to lower the *mens rea* requirement from "willfully" to "knowingly."[171] They argue that this amendment would have no effect if knowledge must be shown for all the facts constituting the offense.[172] They find support in legislative history indicating that the criminal provision is "a general rather than a specific intent crime."[173]

This argument misses the mark for several reasons. First, interpreting the knowledge requirement to apply to each element of the offense does not conflate the knowledge requirement with willfulness. A willful violation occurs when a person's conscious objective is to cause the forbidden result.[174] A knowing violation, on the other hand,

162. *Cf.* Wiley, *supra* note 14, at 1061-62 (there has been a substantial growth in criminalizing ancillary activities related to traditional crimes or steps in a crime).

163. *Cf.* United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994); United States v. Ahmad, 101 F.3d 386, 390 (5th Cir. 1996) ("To [limit 'knowingly' to only certain elements of a Clean Water Act violation] would require an explanation as to why some elements should be treated differently from others.").

164. 16 U.S.C. §1540.

165. *See* ECOS, *supra* note 76.

166. 16 U.S.C. §1533(e).

167. *X-Citement Video*, 513 U.S. at 69.

168. *See* Baker & Haun, *supra* note 14, at 27:

> While general intent crimes have a traceable lineage to the common law, the concept only works when the *actus reus* itself, when done intentionally, is deemed to be morally blameworthy, *e.g.*, battery. Here, unless simple hunting for legitimate prey, for example, is considered an action manifesting a morally blameworthy state of mind, the "knowingly" requirement [as interpreted in *McKittrick*] does not work as a culpable *mens rea*.

169. *See* Transcript, *supra* note 101, at 6; Lazarus, *supra* note 19, at 872-73.

170. *Cf.* Hart, *supra* note 14, at 418 ("Absent exceptional circumstances, in other words, ignorance of the criminality of the conduct (act or omission) which is forbidden ought not to be a defense. *Per contra*, ignorance of the facts ought to be.").

171. *See* Newcomer et al., *supra* note 7, at 258-60; *see also* H.R. Rep. No. 95-1625, at 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9476.

172. *See* Newcomer et al., *supra* note 7, at 259-60; *cf.* Stone v. INS, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

173. *See* Newcomer et al., *supra* note 7, at 259-60; H.R. Rep. No. 95-1625, at 26; *cf.* Randall S. Abate & Dayna E. Mancuso, *It's All About What You Know: The Specific Intent Standard Should Govern "Knowing" Violations of the Clean Water Act*, 9 N.Y.U. Envtl. L.J. 304, 304-05 (2001) (explaining the distinction between specific and general intent crimes); *see also* Katherine R. Tromble, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodolgy for Interpretation*, 52 Vand. L. Rev. 521, 538 (1999) (criticizing *Laparota* because "'[w]illfully,' not 'knowingly,' requires knowledge of the law").

174. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978); *cf.* Bryan Garner, Garner's Dictionary of Legal Usage 948 (3d ed. 2011) ("will-

occurs when a person acts knowing that a result will or is very likely to occur.[175] In the take context, this difference can be demonstrated by "incidental" takes—takes that occur as an unintended result of otherwise lawful activity.[176] If the person knows that his actions will incidentally take a protected species, he could be convicted for knowingly causing that take. However, the violation would not be willful.

Second, reliance on legislative history is often dicey but, for what it's worth, it reinforces the McKittrick Policy. In changing the *mens rea* requirement, the legislative history explains, Congress did "not intend to make knowledge *of the law* an element of either civil penalties or criminal violations. . . ."[177] In relying on this legislative history, critics of the McKittrick Policy's interpretation conflate knowledge of the law with knowledge of the facts constituting the offense.[178] Rather than indicating that Congress did not want to require knowledge of those facts, the legislative history suggests that it intended the statute to be interpreted as the Court interpreted the similarly worded statute in *International Minerals & Chemicals Corp.*[179] and as Justice Lewis Powell would have interpreted the statute at issue in *Liparota*.[180] If it had not indicated that knowledge of the law was not an element, courts could have interpreted "knowingly violates" to require knowledge of unlawfulness.[181]

Moreover, Congress similarly amended the Clean Water Act (CWA) to change its *mens rea* requirement from "willfully" to "knowingly"[182] but the CWA has nonetheless been construed to require knowledge of each element of the offense.[183] Like the ESA, if the CWA's knowledge requirement was interpreted more narrowly, a host of ordinary, apparently innocent activities would be swept up within it.[184]

IV. Policy Concerns About This Interpretation Are Better Addressed Through Other Means

Opponents of the McKittrick Policy raise several policy concerns about the interpretation. For instance, they argue that it allows the guilty to *falsely* claim ignorance where there are two (or more) similar-looking species, rewards bad actors who avoid learning how their activities affect species, and that strict liability is more consistent with *TVA v. Hill*'s holding that the ESA requires species to be protected "whatever the cost."[185] Each of these arguments has some amount of rhetorical force, but they do not justify reducing the ESA's *mens rea* requirement. Instead, the statute provides other avenues to address each concern.

It is true that the guilty can seek the McKittrick Policy's protection by, for instance, falsely claiming ignorance. Of course, the same is true of any substantive or procedural requirement to protect the innocent from criminal punishment. We gladly accept this risk, however, because of the well-accepted principle that "it is better that ten guilty persons escape than that one innocent suffer."[186] Eroding the *mens rea* requirement reverses Blackstone's formulation, exposing countless innocent people to criminal punishment to make it easier to convict the relatively fewer guilty who might otherwise escape punishment. It would be better to mitigate this concern through other means.

The ESA allows the government to list species that: (A) so closely resemble a listed species that enforcement personnel would have substantial difficulty differentiating them[187]; (B) this difficulty is a threat to the listed species[188]; and (C) treating the look-alike species as if they were listed would substantially facilitate the enforcement of the statute.[189] Regulating the take of look-alike species is a reasonable way to address the McKittrick Policy's opponents' concerns, without the consequences of eroding the statute's *mens rea* requirement.

It would only apply to those species that are so similar in appearance that a trained enforcement officer would have trouble distinguishing them, without exposing every layperson who cannot reasonably be expected to know every critter or creepy-crawly covered by the Act to crimi-

ful" is often used ambiguously).

175. *See Gypsom*, 438 U.S. at 444; Black's Law Dictionary 888 (8th ed. 1999).
176. *Cf.* 16 U.S.C. §1539(a)(1)(B) (authorizing permits for incidental take).
177. H.R. Conf. Rep. No. 95-1804, at 26, *reprinted in* 1978 U.S.C.C.A.N. 9484, 9493; *see* United States v. Ivey, 949 F.2d 759, 766 (5th Cir. 1991).
178. *See* Newcomer et al., *supra* note 7, at 258-59; *see also* Lazarus, *supra* note 19, at 877-78.
179. *See* 402 U.S. 558, 562 (1971); *see also* Lazarus, *supra* note 19, at 877-78.
180. 471 U.S. 419, 443 (1985) (Powell, J., dissenting):
> I would read [the statute] to require awareness of only the relevant aspects of one's conduct rendering it illegal, not the fact of illegality. This reading does not abandon the "background assumption" of *mens rea* by creating a strict-liability offense, and is consistent with the equally important background assumption that ignorance of the law is not a defense.

181. *See* Liparota v. United States, 471 U.S. 419, 426-28 (1985).
182. *See* H.R. Conf. Rep. No. 99-1004, at 138 (1986); *see also* United States v. Weitzenhoff, 35 F.3d 1275, 1283-84, 24 ELR 21504 (9th Cir. 1993).
183. *See* United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996).
184. *See* Hanousek v. United States, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of cert.).
185. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184, 8 ELR 20513 (1978); Heather Kathryn Ross, *From Cecil to Echo, Slaughter of Endangered Animals Stampedes On*, EarthJustice Blog (Aug. 5, 2015), http://earthjustice.org/blog/2015-august/from-cecil-to-echo-slaughter-of-endangered-animals-stampedes-on ("You can get a 'Get out of jail free card' by saying the magic words. Those are 'I thought it was coyote.'"); Press Release, WildEarth Guardians, Groups Sue U.S. for Failure to Prosecute Under the Endangered Species Act (July 23, 2015), *available at* http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=8579&news_iv_ctrl=1194#.VrvY0dD-09lM; Julie Cart, *U.S. Sued Over Policy on Killing Endangered Wildlife*, L.A. Times, May 29, 2013, *available at* http://articles.latimes.com/2013/may/29/local/la-me-0530-endangered-species-lawsuit-20130530; *see also* Jim Yuskavitch, In Wolf Country: The Power and Politics of Reintroduction 61 (2015).
186. 4 William Blackstone, Commentaries *713.
187. 16 U.S.C. §1533(e). To determine whether enforcement personnel would have substantial difficulty differentiating two species, courts do not presume that enforcement personnel will have an expert knowledge of a species' characteristics. *See* Illinois Commercial Fishing Ass'n v. Salazar, 867 F. Supp. 2d 108, 114-15 (D.D.C. 2012).
188. 16 U.S.C. §1533(e). The ability of poachers to feign ignorance justifies finding that the difficulty distinguishing two species is a threat to the species. *See Illinois Commercial Fishing*, 867 F. Supp. 2d at 116.
189. 16 U.S.C. §1533(e); *see Illinois Commercial Fishing*, 867 F. Supp. 2d at 117-18.

nal punishment.[190] And it would allow the government to tailor the extent to which it expands the reach of the ESA by not only stating which look-alike species will be subject to its protections, but also limiting that effect to only certain types of take or potential (more knowledgeable, one hopes) defendants.[191] Such regulations better comport with basic notions of fairness and due process by explicitly setting out who is subject to the restrictions and which of their activities may violate them. Finally, it would be more narrowly tailored, expanding the reach of the ESA only where necessary to protect species.

Requiring knowledge of an act's consequence for a particular species could encourage ignorance. But this too could be addressed without eroding the *mens rea* requirement.[192] The government (and interested private groups) can educate the public about endangered species and the consequences of their actions for them.[193] There are declining marginal returns to such education campaigns; for instance, it would not be worthwhile to make everyone in the world aware of what California tiger salamanders look like from a speeding car on the off-chance that they might drive through California someday.[194] However, those people who are most likely to engage in actions that have significant effects on a species could be identified and educated. Anyone who does not have the requisite knowledge could be subjected to the modest strict liability civil sanction.[195]

The concern that people might resist efforts to educate them also has a ready solution. Anyone can seek an injunction against activities that cause take.[196] These injunctions, unlike the criminal provisions, do not require proof that the person knows that her actions will cause take of a particular species.[197] However, once an injunction is sought (even if unsuccessful), the defendant would likely be unable to claim ignorance if he ultimately proceeds with his actions and takes a protected species.[198]

Finally, the ESA's general policy, as interpreted in *TVA v. Hill*, to protect species "whatever the cost" does not require the erosion of the statute's *mens rea* requirement. When the Supreme Court expressed this understanding of the statute, it meant only that the mandatory duties imposed under the statute could not be avoided by citing countervailing factors, especially the fiscal and economic consequences of protecting species.[199] It did not say that statutory and constitutional limits on the government's authority must be cast aside if they interfere with the statute's broad species-protection goals.[200] The blind pursuit of one policy objective, to the exclusion of all other concerns, is unreasonable, especially in the criminal context.[201] As the Supreme Court explained in *Morissette*, the presumption cannot be ignored simply because a statute's broad purposes may be furthered by eliminating a *mens rea* requirement.[202]

Thus, *TVA v. Hill* should not lightly be assumed to erode the *mens rea* requirement. Since the statute expressly provides for strict liability violations, it would be inconsistent with congressional intent to subject the same acts to the higher criminal penalties by eliminating the knowledge requirement—that is, allowing conviction on a strict liability basis.[203]

V. Conclusion

The Supreme Court has recognized that the ESA's take prohibition is sweepingly broad and ensnares many activities that have unintended consequences for species. To reduce the harshness of enforcing this prohibition through the criminal law, the statute's express *mens rea* require-

190. 16 U.S.C. §1533(e). For example, if coyotes are sufficiently similar to Mexican gray wolves that regulation of their takes was justified, a person who thought he was shooting a coyote could be convicted. That person would have "knowingly" attempted to shoot a coyote, which would be a criminal violation. 16 U.S.C. §§1532(19), 1538, 1540(a). But a lay person who steps on a Valley Elderberry Longhorn Beetle and has no idea what distinguishes it from any other insect likely could not be convicted**,** because knowledgeable enforcement officers should know what distinguishes this species from other, dissimilar bugs.

191. *See Illinois Commercial Fishing*, 867 F. Supp. 2d at 118-19 (upholding regulation prohibiting the take of a look-alike species "associated with or related to a commercial fishing activity").

192. *See* Lazarus, *supra* note 19, at 873-74.

193. *See* Wiley, *supra* note 14, at 1154.

194. *Cf.* U.S. Dep't of Transp., *Wildlife-Vehicle Collision Reduction Study: Report to Congress* 57-108 (2008), *available at* https://www.fhwa.dot.gov/publications/research/safety/08034/08034.pdf (discussing impacts of vehicle collisions on wildlife, particularly endangered species, and methods to mitigate them); Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 Iowa L. Rev. 363, 369-70 (1984) (discussing diminishing marginal returns).

195. 16 U.S.C. §1540(a)(1).

196. 16 U.S.C. §1540(g)(1)(A) (authorizing any person to sue to enjoin anyone from taking any action that would violate any provision of the statute or regulations adopted pursuant to it).

197. *See id.* In fact, the government relied on this distinction in *Sweet Home*. *See* Transcript, *supra* note 101, at 23-24 ("[F]or an injunctive action you don't need to prove knowledge, and there's no reason why Congress would have wanted to show knowledge.").

198. *See id.* at 54-55 (explaining that an injunctive suit would give the potential defendant knowledge that would subject him to criminal liability if he proceeds).

199. *See* National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669-71, 37 ELR 20153 (2007); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184, 8 ELR 20513 (1978).

200. *See Home Builders*, 551 U.S. at 671:

> *TVA v. Hill* thus supports the position . . . that the ESA's no-jeopardy mandate applies to every discretionary agency action—regardless of the expense or burden its application might impose. But that case did not speak to the question whether [it] applies to *non*-discretionary actions, like the one at issue here.

But see United States v. Ivey, 949 F.2d 759, 766 (5th Cir. 1991) ("[C]riminal provisions attached to regulatory statutes [including the ESA] should be construed to effectuate their regulatory purpose.").

201. *See* Hart, *supra* note 14, at 401 ("Social purposes can never be single or simple, or held unqualifiedly to the exclusion of all other social purposes; and an effort to make them so can result only in the sacrifice of other values which also are important.").

202. *See* Morissette v. United States 342 U.S. 246, 259 (1952).

203. That a "knowing" violation is distinct from strict liability is evident from the civil penalties section's distinction between the two types of violations (and substantially different penalties for each). 16 U.S.C. §1540(a)(1). The criminal violations section tracks the language of the civil penalties section *except* that the strict liability sentence is omitted, suggesting that Congress consciously decided to impose no criminal sanction on a strict liability basis. *Compare id.* ("Any person who knowingly violates . . . any provision of this chapter"), *with* 16 U.S.C. §1540(b)(1) ("Any person who knowingly violates any provision of this chapter"); *see also* 16 U.S.C. §1540(a)(1) (providing a $500 civil penalty for strict liability violations).

ment should be interpreted to apply to every element of the offense. Only those who know that their activities will cause take, and know the particular species that will be taken, should face the prospect of substantial jail time and large criminal fines. Anything less will unjustly subject people to criminal punishment for ordinary, apparently innocent acts.