Mindless Guilt: Negative Aspects of State Environmental Prosecutions Using the Public Welfare Exception

Aaron F. Kass
MINDLESS GUILT: NEGATIVE ASPECTS OF STATE ENVIRONMENTAL PROSECUTIONS USING THE PUBLIC WELFARE EXCEPTION

AARON F. KASS

INTRODUCTION

"[T]o constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will."¹ Sir William Blackstone thus believed not only that both elements were essential, but that the "vicious will" was the more critical element.² In its more modern form, "a criminal conviction [typically] does require both an act and criminal or wrongful intent."³ For centuries, it has been the rule that in order for one to be held responsible for a crime, to be convicted of that crime, and subsequently to have one's liberty taken away, the act and intent elements must both be present; neither alone will suffice.⁴

Today, however, the modern environmental law and enforcement apparatus has found a way around this traditional requirement by taking advantage of the far-reaching public welfare doctrine.⁵ Under this doctrine, public welfare statutes "often dispense with the intent requirement imposing, instead, absolute liability. Absolute liability is imposed in these types of statutes because the proscribed conduct is subject to stringent

² Id.
⁴ See BLACKSTONE, supra note 1, at 21.
⁵ CSX Transp., Inc., 653 A.2d at 1331 (citation omitted).
public regulation and may seriously threaten the community's health or safety.”

“Absolute liability”, in effect, “means that liability is imposed without a mens rea.”

Under the doctrine of “absolute liability”, a showing of mens rea is not required if “the offense is not of a character that warrants 'singling out [individual] wrongdoers for the purpose of punishment or correction'” and “the penalties imposed for the offense are minimal.”

The impact of the public welfare exception on everyday citizens at the state level is potentially enormous and should not be ignored by policymakers or the judiciary. Using the public welfare exception is undesirable as a matter of public policy, particularly at the state level. The positive impact the exception may have on environmental law and its enforcement, by giving prosecutors an easier route to conviction, is overshadowed by the negative impact of eliminating the mens rea requirement.

Even if, for argument’s sake, the public welfare exception did not offend state public policy, the manner in which it is implemented is faulty. While some states apply the exception correctly, others do not, ignoring the requirement that, typically,

---

6 Id. at 1331.
7 Id.
9 Id. (quoting Francis B. Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55, 72 (1933)).
10 Shaw, supra note 8, at 344.
11 See generally George Flynn, Getting Wasted: Local Officials Say They Are Only After Compliance and Cleanups; Critics Claim Otherwise, HOUSTON PRESS, Jan. 31, 2002, available at http://www.houstonpress.com/issues/2002-01-31/news/sidebar.html. Flynn discusses the plight of “a man named David who had just worked his way up from being homeless. He volunteered to help his friend restore his car after it was flooded in Tropical Storm Allison,” and “spilled . . . less than a quart,” of “auto fluid” and was charged with a “violation of the used oil act,” a Texas law that could have landed David in prison for possibly twenty years. Id. David’s plight is discussed further in Part V.
12 See infra Part V.
13 See infra Parts II-III.
14 See infra Part III.
“the penalties imposed for the offense are minimal.”\textsuperscript{15} Although Minnesota, Ohio, Alabama, and Alaska, for example, apply the exception correctly with regard to imposing penalties,\textsuperscript{16} Washington, Pennsylvania, and Texas apply the exception incorrectly, permitting exorbitant penalties and excessive prosecutorial discretion.\textsuperscript{17} Given the discord between the states, the possibility that the exception will be applied regardless of the penalty’s severity cannot be ignored at the expense of individual citizens.\textsuperscript{18}

Even though the public welfare exception is implemented in other areas of law, such as in statutory rape cases, it should not be permitted in environmental criminal law and enforcement.\textsuperscript{19} Making the Earth’s environment cleaner and safer is a laudable goal, but it should not come at the expense of the mens rea requirement.

This Note will focus entirely on the criminal law aspects of the public welfare exception and the resulting strict liability imposed. The tort law concept of strict liability, clearly established in American jurisprudence,\textsuperscript{20} is outside the scope of this Note.

Part I defines the public welfare exception and examines some of its most basic problems. Part II examines the arguments in favor of the public welfare exception and attempts to rebut them. Part III examines how some states and the federal government apply the exception incorrectly through inordinate penalties. Part IV examines how some states apply the exception correctly. Finally, Part V concludes that, given the negative aspects of the exception and its inconsistent application, it must be eliminated in the environmental criminal law context.

\textsuperscript{15} Shaw, \textit{supra} note 8, at 344; see also infra Part III.
\textsuperscript{16} See infra Part IV.A-D.
\textsuperscript{17} See infra Part III.A-C.
\textsuperscript{18} See infra Part V.
\textsuperscript{19} See infra Part II.C.
\textsuperscript{20} See GREGOR I. MCGREGOR, \textit{ENVIRONMENTAL LAW AND ENFORCEMENT} 97-98 (1994) (noting that by 1868 Massachusetts held that “an individual who constructs and maintains an underground vault for manure, located so close to his neighbor’s land that it contaminates his neighbor’s well and cellar, is liable \textit{[in tort]} without further proof of negligence”) (citing Ball v. Nye, 99 Mass. 582 (1868)).
I. DEFINING THE PUBLIC WELFARE EXCEPTION AND EXAMINING ITS PROBLEMS

A. The Public Welfare Exception Defined

A "guilty mind" is traditionally required for criminal culpability. This is because "criminal law . . . focuses on the defendant's morally culpable mental state." Generally, criminal acts alone are only one aspect of a prosecutor's case and are insufficient to prove that a defendant committed a particular crime. Prosecutors must also demonstrate the requisite mens rea.

The public welfare exception vitiates this traditional requirement of mens rea. The exception, as applied in the environmental criminal law area, gives prosecutors an easier case to prove. In order to help prosecutors convict environmental criminals, states allow prosecutors to simply prove the act without having to prove the defendant's mental state; this is simply because prosecutors may have a hard time proving the mental state of those accused of environmental crimes. "Often this statutory crime has been created in order to help the prosecution cope with a situation wherein intention, knowledge, recklessness or negligence is hard to prove, making convictions difficult to obtain unless the fault element is omitted."

This raises the question of whether convicting individuals and possibly imposing harsh prison sentences is supposed to be easy. Simply because the prosecutor may not be able to prove his or her case does not necessarily mean that the rules should change

---

21 State v. Hazelwood, 946 P.2d 875, 880 (Alaska 1997) ("The rule that a criminal offense exists at the intersection of a guilty act and guilty mind is commonly viewed as the bedrock of criminal common law.").
22 Shaw, supra note 8, at 341.
23 See Hazelwood, 946 P.2d at 880.
25 See id.
26 See id.
27 Id.
to make it easier, even if the laudable goal is to protect the environment.\textsuperscript{28} Although eliminating the mens rea requirement is an enticing proposition for proponents of tougher environmental protection, the notion must be examined with greater scrutiny.

The law, even without the public welfare exception, provides for prosecutorial flexibility with various "gradations in mental states"\textsuperscript{29} corresponding to various degrees of punishment.\textsuperscript{30} In the typical case, though, prosecutors still must prove at least one of these mental states in order to prevail. "[N]ow [state law] recognizes limited exceptions to a rule once characterized as admitting no compromise."\textsuperscript{31}

\textbf{B. Uses and Rationale for the Public Welfare Exception}

The public welfare exception is used in many different capacities to protect the environment on the state level.\textsuperscript{32} It is used to regulate waste transportation,\textsuperscript{33} building size,\textsuperscript{34} oil discharge,\textsuperscript{35} commercial fishing,\textsuperscript{36} and hunting.\textsuperscript{37} These are just a few of the many applications of the public welfare exception in state environmental prosecutions. The exception is wide-ranging, encompassing a multitude of activities in jurisdictions across the United States.\textsuperscript{38}

\textsuperscript{28} See infra Part V.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} See infra Parts III-IV.
\textsuperscript{34} See State v. Arkell, 657 N.W.2d 883 (Minn. Ct. App. 2003).
\textsuperscript{35} See State v. Hazelwood, 946 P.2d 875, 880 (Alaska 1997); Flynn, supra note 11.
\textsuperscript{38} See infra Parts III-IV.
The rationale behind the exception is that certain social "controls" must be maintained, a goal that can be satisfied by imposing criminal sanctions. Specifically,

[a] violation of a public-welfare statute impairs the efficiency of controls deemed essential to the social order as presently constituted. . . . [W]hatever the intent of the violator, the injury is the same. . . . Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.

This rationale was primarily the State's "response to the . . . industrial revolution." At that time, "[t]he increased number of people exposed to injury due to new technologies, traffic, the congestion of cities, the overcrowding of quarters, and the wide distribution of goods . . . led to increasingly numerous and detailed regulations . . . ." Given the consequences of the industrial revolution and its impact on the environment, it is not surprising that many states adopted environmental laws and that many of these laws include criminal public welfare components.

The impact of the public welfare exception is quite dramatic. Despite the good faith efforts of some defendants to obey the law,

39 Arkell, 657 N.W.2d at 888.
40 Id.
41 Kelly A. Swanson, Case Notes, Recent Decisions of the Minnesota Supreme Court: Criminal Law: Mens Rea Alive and Well: Limiting Public Welfare Offenses—In Re C.R.M., 28 WM. MITCHELL L. REV. 1265, 1267 (2002). See also Morrisette v. United States, 342 U.S. 246, 254-55 (1952) (noting that the industrial revolution led to certain "dangers" and, as a result, "[s]uch dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries," and "[w]hile many of these duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions").
42 Swanson, supra note 41, at 1267-68.
43 See generally id. For example, the "new technologies" and "traffic" mentioned above would require oil to run, along with detailed plans for waste disposal. Both oil and waste disposal are the subjects of two state environmental laws which use the public welfare exception, which are discussed infra in Part III.
a court will ignore such efforts and inflict punishment if the public welfare exception applies. However, this is at odds with the general purpose of criminal law, which is simply to protect society from "bad people." By eliminating the mens rea requirement, and allowing criminal punishment regardless of attempts to comply with the law, it is unlikely that society will only punish "bad people." For a number of reasons, this is an unacceptable consequence.

One reason is that the public welfare exception goes against the grain of history. "Western civilized nations have long looked to the wrongdoer's mind to determine both the propriety and the grading of punishment. . . . This is the criminal law's mantra." Examining "the wrongdoer's mind" is a requirement as old as the ancient Romans and Greeks. "In his dialogues in Laws, Plato attempt[ed] to construct an ideal criminal code. . . . [and created a] gradation of crimes based upon levels of intent." Plato, although not an absolute authority, should at least be recognized as highly persuasive through his historical contributions to the field of philosophy.

---

44 See Commonwealth v. Sanico, Inc., 830 A.2d 621, 624 (Pa. Commw. Ct. 2003) (discussing a waste transportation statute under which a "bonafide effort" to "ensure compliance with the statute and its regulations" is irrelevant because "you either are in compliance or not. And you're responsible at all times to be in compliance with that regulation.") (internal citation omitted) (emphasis in original). See also State v. Arkell, 657 N.W.2d 883, 885 (Minn. Ct. App. 2003) (discussing a building code statute that conferred liability upon the defendant even though he reported problems to the project managers, who neglected to address the problems).

45 LAFAVE, supra note 24, § 5.5.

46 Id.

47 See generally Flynn, supra note 11 and accompanying text (providing a clear example of the possible negative impacts of a public welfare statute on a homeless man trying to help his friend fix his car).


49 Id. at 489.

50 See id. at 490.

51 Id. (quoting A.E. Taylor, Introduction, in PLATO, THE LAWS OF PLATO, xlix-1 (A.E. Taylor trans., 1934)). "What the legislator has to ask himself is whether the agent of the beneficial or detrimental act is acting with a rightful spirit and in a rightful manner." Id. at 490.
C. Limitations of the Public Welfare Exception

The public welfare exception does not cover all offenses. Rather, it applies only to a particular sort of offense, determined by various factors such as "the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct . . . the harshness of the penalty . . . [and] the seriousness of the harm to the public." A major problem is that these factors are very fluid and open to a large degree of interpretation. They are also quite broad and do not offer much definitive guidance to courts.

Another factor often used to differentiate public welfare crimes from other crimes is that public welfare crimes are generally considered "mala prohibita" instead of "mala in se." Crimes which are "mala prohibita" are "not patently immoral," but are "wrong because [they are] . . . prohibited. . . . [W]hen conduct is penalized only because of a legislative mandate, then the nature of the proscription derives solely from that mandate." Crimes categorized as "mala in se" are generally "[c]ommon law crimes, which by their nature are wrongful, requir[ing] scienter because moral culpability is inherent to the offense."

To distinguish the two concepts, "mala prohibita" crimes are deemed wrong through legislative decree, whereas "mala in se" crimes are wrong "by their nature" because they are naturally immoral. It is therefore acceptable to have no mens rea

52 State v. Bash, 925 P.2d 978, 983 (Wash. 1996) (citing 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.8, at 341-44 (1986)).
53 Richard Singer & Douglas Husak, Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer, 2 BUFF. CRIM. L. REV. 859, 902 (1999) ("[N]o satisfactory criterion is available to identify a given offense as 'regulatory' or 'public welfare.'").
54 Id.
56 Id.
57 Id.
58 See id.
requirement for the former, because the state is not actually declaring them morally wrong, but wrong as a matter of necessity. Because “mala prohibita” crimes are not prohibited because they are morally wrong, it is not necessary to prove the actor had a specific, immoral state of mind; it is only necessary to prove that the act occurred. A problem arises with this distinction, however, because it is possible that a particular crime may be characterized as both “mala in se” and “mala prohibita.”

Given the impact of the public welfare exception, which alleviates one element a prosecutor bears the burden of proving, one must ask why a more concrete definition of public welfare crimes cannot be established, and why a more exact balance cannot be achieved. “Ideally, this would include only ‘a specialized type of regulatory offense involving a social injury so direct and widespread[,] and a penalty so light that in such exceptional cases courts could safely override the interests of innocent individual defendants and punish without proof of any guilty intent.’” The problem is that legislatures and courts, in trying to achieve this “ideal,” may in fact settle for quite less and allow that ideal to fall by the wayside.

\[\text{See id.}\]
\[\text{See id.}\]
\[\text{State v. Hazelwood, 946 P.2d 875, 882 (Alaska 1997); see also Shaw, supra note 8, at 345.}\]

[M]ost crimes have both malum in se and malum prohibitum qualities. For example, if a person discharges a pollutant into a sewer system without a permit, he or she is in violation of a regulatory provision of the CWA [Clean Water Act]. This is clearly a malum prohibitum crime. However, depending on the risk associated with the discharge and society’s perception of the moral wrong involved with the act, the violation may also be a malum in se crime.

\[\text{Id. (citation omitted).}\]
\[\text{Shaw, supra note 8, at 344 (quoting Sayre, supra note 9, at 68).}\]
\[\text{See Sayre, supra note 9, at 68.}\]
\[\text{See infra Part III.}\]
D. The Penalty Aspect in Detail

Although the factors mentioned above can be confusing, the penalty is at least quantifiable. Courts in various states have not only had a hard time interpreting the requirement that “penalties imposed for the offense are minimal,” but seemingly ignore the requirement and impose the public welfare exception regardless of the penalty.

For example, in State v. Arkell, a Minnesota court ruled that the defendant was guilty of violating a state building code and sentenced him to ten days in jail. This was a relatively “minimal” consequence. A contrasting example is State v. Mertens, where a Washington court ruled that the defendant was guilty of violating a state commercial fishing statute, which set the “maximum confinement . . . at five years and the maximum fine at $10,000.” Compared to the penalty in Arkell, this was not a “minimal consequence.” Because both of these crimes were categorized as public welfare offenses, but the penalties for each were so different (ten days versus five years), these cases illustrate the inconsistency with which the public welfare exception is applied between different states. Other examples depicting the different interpretations of the public welfare exception are discussed later in this Note.

Advocates of the public welfare exception may argue that even if the potential penalties are higher than those normally accepted

---

65 See infra Part III.
66 Shaw, supra note 8, at 344.
67 See infra Part III.
68 657 N.W.2d 883, 886 (Minn. Ct. App. 2003). In fact, on appeal, the Minnesota Supreme Court reversed the lower court’s decision, invalidating the ruling altogether and stating that the public welfare exception should not have been invoked at all. State v. Arkell, 627 N.W.2d 564 (Minn. 2003).
69 Arkell, 657 N.W.2d at 886.
70 Shaw, supra note 8, at 344.
72 Shaw, supra note 8, at 344.
73 See Arkell, 657 N.W.2d at 887-88. See also Mertens, 64 P.3d at 637.
74 See infra Parts III-IV.
for the application of the exception, as in *Mertens*, judges will fix the problem at sentencing and impose a more reasonable penalty.\(^{75}\)

In all criminal prosecutions, it is possible that a particular judge will not sentence a particular defendant to the maximum applicable penalty. In the public welfare area, it is also possible that a particular judge will fix the “problem” and only sentence the defendant to a small penalty. The grace of the judge is not, however, the only protection upon which a defendant should have to rely.\(^{76}\) This cannot be the solution to inordinate penalties because it lacks consistency, long-term effect, and depends solely upon the will of individual judges.\(^{77}\)

Advocates of the public welfare exception may also argue that prosecutors will help to fix the problem by using their “discretion” during sentencing.\(^ {78}\) As was the case with judges, prosecutorial discretion cannot, however, be the ultimate safeguard against unjust imprisonment upon which a defendant should have to rely.

---

\(^{75}\) *MARY CLIFFORD, ENVIRONMENTAL CRIME: ENFORCEMENT, POLICY, AND SOCIAL RESPONSIBILITY* 240 (1998). In a particular environmental criminal prosecution, “although the plant manager faced up to nine years in jail and a fine of $65,000, the judge fined him $5,000 and sentenced him to two years’ probation.” *Id.* (citations omitted).

\(^{76}\) *But see* Flynn, *supra* note 11. The judge did in fact exercise a large deal of discretion for the benefit of the defendant. However, there still remains the question of whether the defendant should have had to rely upon such discretion.

\(^{77}\) *See generally* Richard Frase, *Panel Remarks: Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS L.J. 425, 431 (2000). The original goals of sentencing guidelines were “to reduce sentencing discretion and its resulting disparities” because “[u]nregulated discretion . . . produced unjust disparities in the treatment of equally serious cases.” *Id.* Frase also noted that “[s]tudies were done which showed that when you gave a sentencing file to a group of judges they proposed very different sentences; it was not just that ‘each case is different.’” *Id.*

\(^{78}\) *LAFAVE, supra* note 24, § 5.5 (noting that “prosecuting officials [will use] . . . their broad discretion to prosecute or not to prosecute” when faced with decisions relating to the public welfare exception). *See* McGREGOR, *supra* note 20, at 106. “Although many environmental statutes support the theory of strict liability, violations which are truly accidental may not support criminal prosecution . . . The prosecutor always will consider the violator’s motive.” *Id.*
The Model Penal Code provides a clear solution:

[The Model Penal Code would permit strict liability only for “offenses which constitute violations”;\textsuperscript{79} violations under the Code are not crimes, may be punished only by a fine, forfeiture or other civil penalty, and may not give rise to any disability or legal disadvantage based on conviction of a criminal offense.\textsuperscript{80}]

States that are currently ignoring the penalty requirement of the public welfare exception should adopt the Model Penal Code view, and, if they decline to do so, should disregard the public welfare exception entirely.\textsuperscript{81}

E. Long Term Impacts: Insurance and the Environment

Use of the public welfare exception has both individual\textsuperscript{82} and societal consequences. The first societal consequence is the potential for rising insurance premiums.\textsuperscript{83} Insurance companies feel the impact of strict liability, which “requir[es] that insureds pay premiums that are proportional to the risks of loss those participants bring with them.”\textsuperscript{84} It is currently an issue in the European Union, which is considering legislation that would increase the use of strict liability theories in prosecuting environmental crimes in Europe.\textsuperscript{85} The Financial Times reported

\textsuperscript{79} LAFAVE, supra note 24, § 5.5(c) (discussing MODEL PENAL CODE § 2.05(1)(a) (1985)).
\textsuperscript{80} Id. § 5.5(c) (discussing MODEL PENAL CODE § 1.04(5) (2003)).
\textsuperscript{81} But see id. § 5.5(c). “Reforms along these lines have seldom been adopted.” Id.
\textsuperscript{82} This Note has already discussed the individual consequences: imprisonment without the prosecution proving mens rea and imprisonment without regard to the penalty. See supra Parts I.A, I.D.
\textsuperscript{85} See Houlder, supra note 83, at 17.
"unease among insurers, which think that the directive could cause chaos by insisting on mandatory environmental insurance."\textsuperscript{86}

The proposed legislation would allow prosecution on a strict liability basis and, as a consequence, require "compulsory insurance or a dedicated fund"\textsuperscript{87} to make sure that those convicted could not simply plead insolvency. The impact on individual citizens could be potentially far-reaching: "[i]nsurers acknowledge that many companies—mostly small and medium-sized businesses—could be faced with very high premiums or even find it impossible to get insurance at all."\textsuperscript{88}

Four months later, in March 2003, this issue was still "gaining ground"\textsuperscript{89} in the European Union. Although at the time there was "no [longer any] intention of introducing compulsory insurance for small businesses,"\textsuperscript{90} the effects of strict liability could not be ignored. Even without mandatory insurance for small companies, there was still a significant possibility that strict liability penalties would cause "increases in employers' liability premiums."\textsuperscript{91} Such increases in liability insurance have the potential to hinder employers' ability to hire more employees, forcing them instead to pay off their rising insurance premiums.\textsuperscript{92}

Although the issue of rising insurance premiums is not a direct effect of the public welfare exception on the individual, its indirect impact cannot be understated. Even if an individual employee is not prosecuted under this proposed European Union legislation, employers may be forced to forego hiring in order to pay their rising insurance premiums, which would cause higher unemployment.\textsuperscript{93}

\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Ronald Gribben, Green Cover Bids Gain Ground. Euro-MPs Are Warming To the Principle of Environmental Insurance, But Small Companies Should Escape, DAILY TELEGRAPH, Mar. 31, 2003, at 33.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} See id.
\textsuperscript{93} See Gribben, supra note 89; Houlder, supra note 83.
Although "[t]he general rule is that insuring against criminal liability is against public policy, therefore insurance policies that attempt to do so are void and unenforceable . . . there are limited exceptions to this public policy."\textsuperscript{94} Specifically, insurance can be obtained to protect "against strict liability and negligent violations of criminal law."\textsuperscript{95} Although this Note is primarily concerned with the impact of strict liability on environmental criminal penalties, the indirect impact that strict liability crimes have on insurance premiums should not be ignored.

The second potential societal consequence of the public welfare exception, though also an indirect effect, is the potential harm to the environment.\textsuperscript{96} "A key factor in the quality of environmental management is the quality of the people in control of its management . . . . The possibility of criminal sanctions for permit violations, without any proof that the defendant knew of the violation, deters the most capable people from assuming these extremely important positions."\textsuperscript{97} Because managers of industries impacted by environmental laws are held liable regardless of steps taken to correct the problem, with no regard to their state of mind, it is possible that they will seek other employment, leaving less qualified individuals in charge.\textsuperscript{98}

This idea may be better understood with an analogy to corporate law. Directors may be held individually liable to shareholders in derivative suits for breaching the duty of care but can be protected from liability through exculpatory clauses.\textsuperscript{99} Today,

\begin{flushright}
\textsuperscript{95} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} 8 Del. Laws 102(b)(7). See generally Rodman Ward, Jr. et al., Folk on the Delaware General Corporation Law GCL-I-27, § 102.15 (2003-1 Supp.). "Since insurance for directors' liability had become more expensive and sometimes unavailable, a concern developed with respect to the ability of corporations to continue to attract and retain qualified directors." Id. Rodman further notes that
\end{flushright}
these exculpatory clauses are necessary parts of a corporation’s Articles of Incorporation, because the most “qualified directors” demand such protections.\textsuperscript{100} Although exculpatory clauses seem to make directors less likely to care about corporate governance because they will not be liable even if they breach a duty owed to the corporation, these clauses are nevertheless essential in order to make the most “qualified directors” willing to lead the corporation in the first place.\textsuperscript{101} By analogy, environmental managers must be protected to a certain extent, at least requiring the state to prove the traditional element of mens rea, otherwise those managers may seek other employment.\textsuperscript{102} Although the reasoning behind the public welfare exception is to make individuals more responsible environmental actors, an unintended consequence is that it may actually make managers with years of experience, who are the least likely to commit a violation, less likely to remain environmental managers.

II. ARGUMENTS IN FAVOR OF THE EXCEPTION AND THEIR WEAKNESSES

Three prevalent arguments exist to support the use of the public welfare exception: first, the ease with which prosecutors can convict causes individual actors to behave more responsibly,\textsuperscript{103} second, individuals should have known their behavior was subject

\begin{quote}
[i]n response to this problem, the Delaware legislature decided that Delaware corporations should be authorized to include provisions in their certificates of incorporation limiting or eliminating the personal liabilities of directors for breach of the fiduciary duty of care. Liability may not be so limited for breach of the duty of loyalty, failure to act in good faith, [or] intentional misconduct . . . .

\textit{Id.} This limitation on section 102(b)(7) is the key. From this quote, one can surmise that the Delaware legislature recognizes that although intentional misconduct may lead to liability, mere negligence should not.
\end{quote}

\textsuperscript{100} \textit{Id.}
\textsuperscript{101} See \textit{id.}
\textsuperscript{102} See Carmichael, \textit{supra} note 96, at 751-52.
\textsuperscript{103} See \textit{infra} Part II.A.
to stringent regulation;\textsuperscript{104} third, the public welfare exception is used in many other areas of the law and environmental law cases should be treated no differently.\textsuperscript{105} While each of these arguments is strong, each also possesses critical weaknesses which must be addressed.

\textbf{A. The Exception Helps the Environment}

Public welfare exception proponents may argue that the public policy of protecting the environment is simply more important than the negative aspects of eliminating the mens rea requirement. Advocates of the exception need only cite the advice of environmental lawyers to environmental actors, which cautions that greater care be given in the strict liability context.\textsuperscript{106} Attorney Paul Berning, in a construction industry newsletter, cautions “[b]usinesspeople, beware. . . . [M]anagers can be sentenced to jail time simply for company violations that occurred on their watches.”\textsuperscript{107} One of the stated purposes of Berning’s article is to “offer some practical advice for avoiding liability and minimizing the impact of a violation.”\textsuperscript{108} This is pertinent advice for individuals in the construction industry because “the trend is to liberally construe statutes so that they are found to concern the ‘public welfare.’ Thus, courts can, and likely will, interpret the criminal provisions of these environmental laws to impose strict liability on executives and managers.”\textsuperscript{109} Berning offers a multitude of “ways to avoid or minimize liability.”\textsuperscript{110} His warning exemplifies the

\begin{itemize}
  \item \textsuperscript{104} See infra Part II.B.
  \item \textsuperscript{105} See infra Part II.C.
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id. (noting that corporations should create compliance programs where “overall responsibility” is given to a “specific, high-ranking individual with a significant policy role in the company,” should “[c]ommunicate the company’s conduct code and its compliance program to all employees and anyone who acts
argument that the public welfare exception has caused environmental actors to behave in a more environmentally friendly manner, albeit in order to avoid liability. The exception’s deterrent effect on industry must be recognized as promoting positive environmental outcomes.

Although this is a strong argument, it contains two major fallacies. First, while public policy in favor of the exception is strong, one cannot ignore the strong policy in favor of convicting only culpable individuals. These policy goals must be balanced; neither policy can clearly be favored over the other. Second, it is possible that “deter[ing] the most capable people from assuming these extremely important positions” actually harms the environment. Although there are strong deterrent effects of these regulations, there are also competing factors that policy-makers must not ignore.

B. Individuals Should Have Known About the Regulations

Proponents of the public welfare exception also argue “that public-welfare statutes impose liability for the ‘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.’” The argument is misleading, however, because what it really advocates, by stating that the actor “should know” that his acts are wrong and thus should be liable, is negligence and not strict liability.

Negligence should not be the rationale for strict liability, but instead should offer one of the “[a]lternatives to [s]trict [l]iability.” “There is a ‘half-way house’: criminal liability predicated upon negligence. . . . [T]he idea of criminal responsibility based

on the company’s behalf,” and should “[e]nforce the program consistently by promptly and thoroughly investigating any allegations of company wrongdoing and by swiftly disciplining any employees involved”).

111 See supra Part I.
112 Carmichael, supra note 96, at 751-52.
114 See LAFAVE, supra note 24, § 5.5(d).
115 Id.
upon the actor's failure to act as carefully as he should affords an important and largely unutilized means for avoiding the tyranny of strict liability in the criminal law." If one of the rationales for the public welfare exception is that the defendant should know of the regulations, then this does not mean the mens rea requirement should be eliminated in favor of strict liability, only that the appropriate mens rea standard should be negligence.

C. The Public Welfare Exception is Used Elsewhere, So Why Not for Environmental Crimes?

Proponents of the public welfare exception may also argue that if it is applicable in other areas of the law, environmental law should not be excluded. The exception is used in "pure food and drug acts, speeding ordinances, building regulations, and child labor, minimum wage and maximum hour legislation." It is also used in the statutory rape context. "Due to the seriousness of [statutory rape], legislatures wrote laws that irrespective of the subjective intent of the actor, he (or she) would be guilty of an offense with significant criminal penalties." However, it is not necessarily correct that the public welfare exception should be applied in these areas of the law either, because the exception does not distinguish the environment from other areas of the law.

However, some state legislatures support the proposition that the public welfare exception must be curbed. They "take a somewhat narrower view of what is allowed under their state constitutions. Thus, some authority is to be found to the effect that a strict-liability criminal statute is unconstitutional if...the statute carries a substantial penalty of imprisonment..." Alaska's

---

119 Id.
120 See supra Part I.
121 LAFAVE, supra note 24, § 5.5(c), at 278-79 (citing Hentzer v. State, 613 P.2d 821 (Alaska 1980)).
courts, for instance, are careful to apply the public welfare exception in either environmental or non-environmental areas. Alaska judges are cautious when “the penalty for violating . . . is not small,” because “[s]uch a sentence must carry with it considerable societal opprobrium.” Alaska recognizes that the public welfare exception must be applied with caution whenever stiff criminal penalties are possible, whether in the environmental or non-environmental area.

In Alaska, this caution even extends to statutory rape charges. In State v. Guest, the court noted its belief “that the charge of statutory rape is legally unsupportable . . . unless a defense of reasonable mistake of age is allowed. . . . When that opportunity is foreclosed the result is strict criminal liability.” Alaska is essentially requiring, in circular fashion, a mens rea of negligence, demanding proof that the defendant did not act as a “reasonable person would have acted in the same situation.

Proponents of the public welfare exception may argue that because it is used in other areas of the law without extensive criticism, such as statutory rape, environmental law should be no different. However, as Guest illustrates, this is not always true; the public welfare exception is not summarily used in other areas of the law without criticism, nor should it be.

The public welfare exception is applied in numerous states for a variety of environmental offenses. Although Alaska treats the exception with caution, other states are not so careful.

---

122 See Hentzer v. State, 613 P.2d 821, 826-27 (Alaska 1980). The court refused to allow the public welfare exception to apply in this securities fraud case “because the penalty for [a violation] . . . [was] not small. . . . [The defendant] could have been sentenced to a maximum term of imprisonment twenty years,” and although he was only sentenced to one year, it could have become five years had he violated a condition of his probation. Id.
123 Id.
124 Id. at 827.
125 See infra Part IV.
126 See id.
128 Id. at 838-39.
129 Id.
130 See infra Part III.
III. INCORRECT APPLICATIONS OF THE PUBLIC WELFARE EXCEPTION

A. Washington

The State of Washington applies the public welfare exception incorrectly, disregarding the penalty limitations central to the exception. In State v. Mertens, the defendant was charged with "commercial fishing without a license." The court concluded that strict liability was applicable "[b]ecause the prosecutor could prove all of the elements of the crime based on conduct alone." The court, attempting to justify the "harshness of the penalty," noted that it had "allowed characterization as a strict liability crime even where the potential punishment included a five-year maximum sentence." Although, academically, five years may seem like a relatively short amount of time compared to a life sentence in prison, it is potentially over 1800 days for a defendant to spend incarcerated without the prosecution ever having to prove mens rea.

The court rationalized that "[t]he statute at issue here only criminalized possession of more than three times the daily limit of shellfish, thereby minimizing the possibility that entirely innocent conduct will be punished." Certainly, Washington was trying to avoid punishing innocent conduct by using this standard. The inference drawn from this standard, however, is troubling. If one was actually in possession of that much shellfish, then one must have had the requisite intent to break the law, or at least did so knowingly or recklessly. If this is the case, then there is no reason

---

131 64 P.3d 633 (Wash. 2003).
132 Id.
133 Id. at 636.
134 Id. at 637.
135 Id.
136 This length of imprisonment is calculated by multiplying the number of days in a year, 365, by five.
137 Mertens, 64 P.3d at 637 (emphasis in original).
138 Id.
why the state should not require the prosecution to prove it as an element of the crime as it must in other criminal prosecutions.

The court offered the following response. "[I]t is reasonable to conclude that the legislature recognized that proving a defendant’s commercial intent could be extremely difficult . . . Thus, we conclude that the legislature intended commercial fishing without a license to be a strict liability crime."\(^{139}\) The problem with this rationale, however, is that carrying an amount of shellfish so far over the legal limit could be used by the prosecution as circumstantial evidence of a defendant’s state of mind and intent regardless. Although not requiring the prosecution to prove a defendant’s state of mind makes conviction easier, this prosecutorial crutch should not be necessary based on the rationale for this statute.

Washington permits the public welfare exception’s application in situations where the penalties are potentially high; its Supreme Court’s rationale is laudable, but not entirely consistent.\(^{140}\) Washington continues to apply the public welfare exception incorrectly and is a prime example of its potentially harmful application.\(^{141}\)

**B. Pennsylvania**

Pennsylvania provides another example of the problem with the public welfare exception. In *Commonwealth v. Sanico, Inc.*,\(^{142}\) the defendant was charged with “allowing solid waste to be transported in equipment which did not bear the type of waste being hauled,”\(^{143}\) in direct violation of a Pennsylvania solid waste transportation statute.\(^{144}\) The court found that under this statute

\(^{139}\) *Id.*

\(^{140}\) *Id.*

\(^{141}\) See *id.*


\(^{143}\) *Id.* at 623.

\(^{144}\) Compare 25 PA. CODE. § 285.218 (2003), with 18 PA. CODE § 2501 (2003). “[A] vehicle or conveyance that is ordinarily or primarily used for the transportation of solid waste shall bear a sign . . . .” 25 PA. CODE. § 285.218 (2003). Section 285.218 is a solid waste disposal statute that requires no showing of a defendant’s state of mind. *Id.* See also 18 PA. CODE. § 2501 (2003). “A person is
the fact that the driver has failed here does not excuse the owner, despite the owner’s bonafide efforts to comply with the regulation. . . . [T]his case do[es] not require criminal intent . . . you either are in compliance or not.”\textsuperscript{145} Sanico illustrates the basic problem with the public welfare exception. Giving no credit to recognized “bonafide efforts”\textsuperscript{146} is substantively inconsistent with one of the major rationales for the public welfare exception: the prosecution would have a difficult task in proving a truly guilty defendant’s state of mind.\textsuperscript{147} In this case, given the defendant’s attempts to comply, he would not have had a culpable state of mind in the first place.

Pennsylvania, though not necessarily applying the penalty aspect incorrectly, has ruled against defendants such as Sanico where one of the most basic rationales for the exception is simply not present. Although it was not necessarily inconsistent with any of the specific limiting factors,\textsuperscript{148} the court in Sanico was inconsistent with the overall purpose and direction of the exception.

C. Texas

Texas disregards the penalty factor of the exception in certain instances.\textsuperscript{149} A violation of Texas oil pollution laws can potentially carry a prison sentence of up to twenty years absent any showing of a defendant’s state of mind.\textsuperscript{150} For example, David, a homeless man who “volunteered to help a friend restore his car after it was flooded in Tropical Storm Allison,” was arrested after “spill[ing] . . . less than a quart [of transmission fluid].”\textsuperscript{151} “The guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being.” \textit{Id}. Section 2501 is a murder statute that requires the prosecution to prove that the defendant committed the act and had a particular state of mind. \textit{Id}.

\textsuperscript{145} Sanico, 830 A.2d at 624.
\textsuperscript{146} \textit{Id}.
\textsuperscript{147} See LAFAVE, supra note 24, § 5.5.
\textsuperscript{148} See supra Part I.
\textsuperscript{149} See Flynn, supra note 11.
\textsuperscript{150} \textit{Id}.
\textsuperscript{151} \textit{Id}. 
head of the pollution prosecution team” in the jurisdiction where David was arrested stated in response to complaints about the prosecution “that his office prosecutes more than 600 cases yearly, so there are bound to be isolated gripes.”152 A potential twenty-year prison sentence is not a light penalty, nor should it be characterized as an “isolated gripe.”153 Although the judge sentenced David to a much lighter sentence,154 there is no guarantee that a different judge would have solved the public welfare exception problem in the same manner.155

Texas, at least in this instance, ignored the penalty restriction for the public welfare exception. The defendant only had the grace of the trial judge to thank, and that should not be the situation for other defendants when courts apply the public welfare exception in Texas.156

D. Federal Government View

The constitutionality of high penalties for public welfare violations has not been an issue since the U.S. Supreme Court “backed off of going all the way to outlawing felony public welfare offenses” in the recent gun control case of Staples v. United States.157 “[W]e need not adopt such a definitive rule of construction to decide this case . . . . Instead, we note only that . . . a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a mens rea requirement.”158 The Supreme Court, despite frowning upon public welfare offenses with high penalties, declined to make a bright line rule invalidating them. This was despite the fact that, for some critics, “since violations of environmental criminal provisions constitute felonies, the absence of a culpability requirement is improper. . . .

152 Id.
153 See id.
154 Id. (noting that the judge sentenced defendant to a $1,000 fine).
155 See supra Part I.D.
156 See, e.g., Flynn, supra note 11.
157 Snyder, supra note 118, at 13.
[P]roponents point out that the original penalties contemplated by the doctrine were only misdemeanors.159 On the federal level, despite its own misgivings, the Supreme Court has declined to actually rule felony penalties unconstitutional,160 leading to cases such as United States v. Good,161 which involved violations of "Forest Service regulations."162

In Good, the court noted that "the penalty of not more than 6 months imprisonment and not more than a $500 fine is relatively small; convictions for violating regulations against mechanical mining and constructing an unapproved structure do not gravely besmirch Mr. Good's reputation..."163 This statement exemplifies the overarching problem with the use of the public welfare exception: judges, who interpret the statutes that use the exception, are disregarding the penalty limitation that "penalties imposed for the offense are minimal."164 This may not be the judges' fault, but may instead be caused by a lack of clear definition because "no satisfactory criterion is available to identify a given offense as 'regulatory' or 'public welfare.'"165

For example, it is unclear what exactly "besmirch Mr. Good's reputation"166 means. To claim that six months in jail, or even a criminal conviction with such an accompanying possible sentence, is not damaging to one's reputation is very naive.167 For instance, it is possible that potential customers and colleagues will not wish to do business with a convicted criminal. The current trend is towards increasing the penalties for environmental crimes. "In 1995, for example, environmental enforcement resulted in $23.2

159 Snyder, supra note 118, at 12.
160 See Staples, 511 U.S. at 618.
162 Id. at 1318 (citing 36 C.F.R. § 261.9(a) (2003) (listing general prohibitions, including "[d]amaging any natural feature of other property of the United States").
163 Id. at 1318.
164 Shaw, supra note 8, at 344. Although this is a federal case using the public welfare exception, it is illustrative of the problems on the state level.
165 Singer & Husak, supra note 53, at 902.
166 Good, 257 F. Supp. 2d at 1318.
167 See id. at 1318.
million in criminal fines and 74 years of prison time. In 1999, just four years later, criminal fines tripled to $61.6 million, and courts handed down 208 years of prison time. Given this upward trend, with the public welfare exception being one of a prosecution’s easiest tools of enforcement, environmental policy-makers simply cannot afford to ignore when and how the exception is used to convict defendants. Although 208 years may be an objectively small number given the population of the United States, it is a significantly substantial increase from four years earlier, when seventy-four years of prison time was given, and this total should not be discounted.

Although some of the states discussed in this Note apply the exception incorrectly, it is important to recognize that there are states that do apply the exception correctly. This Note’s primary contention is that the public welfare exception should be eliminated, given its negative aspects. If the exception is not eliminated, the next best solution is embraced by the states discussed in Part IV, which at least apply the exception correctly.

IV. CORRECT APPLICATIONS OF THE EXCEPTION

A. Minnesota

In the recent case of State v. Arkell, the defendant was charged with violations of a state building code, for which he was sentenced to ten days in jail. In deciding whether the public welfare exception was appropriate in the case, the court emphasized that the penalty was “light.” The court concluded

---

168 Berning, supra note 106.
169 Id.
170 See supra Part III.
171 See infra Part IV.
173 Id. at 886.
174 Id. at 888. “Strict-liability statutes are generally disfavored, but the supreme court has inferred mens rea in statutes that are silent on the subject only when the statutes provide felony or gross-misdemeanor penalties.” Id. (internal citations omitted). Here the penalty was small, not falling within the range of a “felony or gross-misdemeanor.” Id.
that "[b]ecause a violation . . . is a misdemeanor, the policy disfavoring strict-liability statutes is not implicated." The court affirmed the defendant's conviction because the penalty limitations on the public welfare exception were met. Although Minnesota used the public welfare exception, at least it attempted to apply the exception correctly. On an even more positive note, recently Arkell made its way to the Minnesota Supreme Court, and the "light" ten day sentence was reversed altogether, with the Court holding that the public welfare exception should not have been used at all.

B. Ohio

In another recent case, State v. Bowersmith, the defendant was convicted of "failing to carry and display a special deer permit while hunting upon the lands of another." The court applied "strict liability" and the defendant was fined just seventy-five dollars. This is a good example of an appropriate penalty.

Aside from a cautious approach regarding penalties, Ohio also displays an overall cautiousness in the use of strict liability through its statutory scheme: when a statute "plainly indicates a purpose to impose strict criminal liability . . . then culpability is not required . . . . [However,] [w]hen the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability . . . ." Ohio's statutes exercise discretion and offer at least some direction to the courts concerning the public welfare exception: strict liability is to be used only in specific, special situations.

---

175 Id. at 888.
176 Id. at 890.
178 State v. Arkell, 672 N.W.2d 564, 569 (Minn. 2003).
180 Id. at *1.
181 Id.
182 Id.
183 OHIO REV. CODE ANN. § 2901.21(b) (Anderson 2003).
184 See id.
Ohio's statutory discretion is typified by the child-support case of State v. Collins. There, the court "acknowledge[d] the convincing public policy arguments presented by the state . . . in support of the proposition that failure to follow a court-ordered child support order should be a strict liability offense." The court also noted, however, that according to state law, this could not be the case unless there was "a plain indication in the statute of a legislative purpose to impose strict criminal liability." The court in Collins recognized the strong public policy arguments in favor of conviction without mens rea in these circumstances. However, the court also acknowledged that there are competing concerns and that courts must use discretion when considering such drastic a measure as eliminating the mens rea requirement.

Although Collins did not directly involve the environment, like the statutory rape area discussed above, the court's caution in applying the public welfare exception is informative in the environmental law context. If a state chooses to use the exception, it should strive to emulate Ohio's statutory discretion.

C. Alabama

Alabama provides the same substantive safeguards as Ohio when it invokes the public welfare exception. In Phillips v. State, the defendant violated a hunting statute and "[h]e was fined $375 and his hunting privileges were revoked for one year." This is another example of a small, appropriate penalty for a public welfare offense with no mens rea requirement.

Like Ohio, Alabama also exercises statutory discretion in its use of the public welfare exception. In the strict liability hunting

185 733 N.E.2d 1118 (Ohio 2000).
186 Id. at 1123.
187 OHIO REV. CODE ANN. § 2901.21(b) (Anderson 2003).
188 Collins, 733 N.E.2d at 1123.
189 Id.
190 See supra Part II.
192 ALA. CODE § 9-11-244 (Michie 2001).
193 Phillips, 771 So.2d at 1062.
statute discussed above, the commentary following the statute states:

Sometimes the ends accomplished, the evil or harm sought to be regulated or prohibited, are deemed to justify the means. As long as the kind and degree of punishment is not disproportionate . . . strict liability serves a useful, if not necessary, sanction, but such statutory offenses should not be extended to impose harsh criminal sanctions and stigma for nominal crimes which any innocent man might commit.194

As in Ohio, the Alabama Legislature in its statutory law has directed the judiciary to specifically take caution when applying the public welfare exception.

D. Alaska

Alaska is a prime example of how a state should apply the public welfare exception. State v. Hazelwood195 involved one of the worst environmental catastrophes in recent memory, the Exxon-Valdez incident. The court refused to allow strict liability under the public welfare exception in the prosecution of Captain Hazelwood.196 The central issue was whether a “civil negligence” or a “criminal negligence” mens rea requirement should be applied in sentencing the defendant.197 Although this Note focuses on the imposition of strict liability, Hazelwood makes it clear that strict liability is not always appropriate.198 The court noted that it should only be allowed where the “penalties are light,”199 or where the penalty is only “a modest fine,”200 which here it was not. In re-

196 Id. at 884.
197 Id. at 877.
198 Id. at 880-84.
199 Id. at 884.
200 Id. at 883.
jecting strict liability, the Hazelwood court wrote: “Nevertheless, we reject any rule that grants the legislature unbridled discretion to impose strict liability crimes.” Although strict liability is beneficial to prosecutors, Alaska rejected imposing strict liability in one of the most publicized environmental disasters in history. The court noted that “[s]trict liability cannot be applied simply to expedite punishment when there is no reasonable expectation of deterrence.” Even in the one case where Alaska could have applied the public welfare exception to assign a high penalty, and where the public would certainly have supported such a decision, it refrained from doing so.

Alaska not only cautiously applies the public welfare exception in the environmental law area, but in other areas as well, such as securities fraud and statutory rape. In the securities fraud case of Hentzer v. State, the court refused to apply the exception because of an inordinate penalty. In the statutory rape case of State v. Guest, the court again refused to apply the exception because of an inordinate penalty, “unless a defense of reasonable mistake of age is allowed.” It thus permitted the defendant to avoid a strict liability conviction.

Like Minnesota, Ohio, and Alabama, Alaska applies the public welfare exception correctly, only allowing it when the penalties are light and other concurrent policies are met. These four states are positive models that the rest of the United States should follow.

Although the public welfare exception should be entirely eliminated, states have two options if they do not eliminate the exception. First, they can attempt through state common law to

---

201 Hazelwood, 946 P.2d at 882.
202 See supra Part I.
203 Hazelwood, 946 P.2d at 884.
206 Hentzer, 613 P.2d at 826-27.
207 Guest, 583 P.2d at 838-39.
208 See supra Parts I-II, IV.
apply the exception cautiously with regard to penalties. Second, states could define, through the implementation of statutes, exactly what constitutes a permissible use of the exception when assigning penalties.

V. GENERAL PUBLIC POLICY RECOMMENDATIONS

Eliminating the mens rea requirement is not sound environmental public policy. Although some states attempt to apply the public welfare exception correctly, this is not the best solution and cannot be the long-term answer. There is still simply too much confusion surrounding its application.

As discussed throughout this Note, the central issue is whether the public policy protecting the environment by making convictions easier to obtain outweighs the public policy of merely convicting and incarcerating culpable offenders. Historically, this has been the delicate balance between the “arrival of the industrial revolution” and its necessary “regulations,” and the traditional view espoused by Blackstone that “[t]o constitute a

\[209\] See Phillips v. State, 771 So.2d 1061 (Ala. Crim. App. 1998); State v. Hazelwood, 946 P.2d 875 (Alaska 1997); Hentzer v. State, 613 P.2d 821, 826-27 (Alaska 1980); State v. Guest, 583 P.2d 836 (Alaska 1978); State v. Arkell, 657 N.W.2d 883 (Minn. Ct. App. 2003); State v. Bowersmith, No. 14-02-02, 2002 WL 1434057 (Ohio App. 3 Dist. June 25, 2002); State v. Collins, 733 N.E.2d 1118 (Ohio 2000). In each of these cases, the state courts were careful to use the public welfare exception only when the penalties were small.

210 In the author’s opinion, two separate, hypothetical statutory schemes are possible: First, “No one may be convicted of a felony without the state proving the requisite mens rea; strict liability may not be imposed to circumvent this requirement.” This would be ideal in that it would statutorily eliminate the public welfare exception. Second, “No one may be sentenced to six months or more imprisonment without the state proving the requisite mens rea; strict liability may not be imposed to circumvent this requirement.” This would maintain the public welfare exception but keep penalties at an acceptable level.

\[211\] See supra Parts I-II.

212 Swanson, supra note 41, at 1265.

213 Id. at 1268.
crime against human laws, there must first be a vicious will and secondly an unlawful act consequent upon such a vicious will.\textsuperscript{214}

Even if the public welfare exception is not "singling out [individual] wrongdoers for the purpose of punishment or correction,"\textsuperscript{215} but simply trying to protect the public and the environment, the possibility still exists that, in the important process of protecting the environment on the state level, individuals will in fact be "punished."\textsuperscript{216} Various state environmental law and enforcement regimes take advantage of the public welfare exception for a variety of positive purposes.\textsuperscript{217} The end of protecting the environment is laudable, but the means create a dilemma.

This dilemma is rooted in the fundamental differences between environmental and criminal law and the failure to recognize such differences. David C. Fortney succinctly describes these differences in his article, \textit{Environmental Criminal Law}.\textsuperscript{218} "Environmental law is \textit{aspirational} in the sense that it sets enormously optimistic goals with the hope of forcing dramatic changes in behavior in order to bring about substantial and rapid change."\textsuperscript{219} It is \textit{dynamic} in the sense that it is constantly changing in response to scientific discoveries.\textsuperscript{220} For example, the "Clean Air Act of 1970 mandated that the new (and ambitious)
national air quality standards be met by 1975."\textsuperscript{221} On the other hand, Fortney notes, "criminal law relies heavily on stability and notice. . . Changes in the criminal law are generally made slowly, and the overall framework has not changed dramatically in hundreds of years. Because of this stability, criminals are assumed to be on notice of what behavior will or will not be tolerated."\textsuperscript{222}

Attempting to morph these two areas of the law together is bound to cause controversy and, as such, "[m]any critics contend that basic differences between environmental and criminal law render the two disciplines fundamentally incompatible."\textsuperscript{223} This Note does not argue that the two disciplines must be completely separate—there should in fact be criminal penalty aspects of environmental laws. The implication of the differences between these two areas of the law does not mean that there cannot be common ground. However, what it does mean is that there must be a large degree of discretion when implementing these penalties to protect the environment. Placing a "dynamic"\textsuperscript{224} system's (environmental law) priorities on top of a static system (criminal law) does not necessarily mean that the static system should be forced to change its most fundamental structures. Instead it should inform the "dynamic"\textsuperscript{225} system. Using bits and pieces of a static system that has over time evolved a set series of elements in a whimsical manner harms the integrity of both systems. The importance of one public policy cannot simply cause policymakers to disregard the other.

The traditional mens rea requirements\textsuperscript{226} must be respected. As a matter of public policy, the rationale for using the public welfare exception in the environmental criminal law area, though strong, should not outweigh the traditional requirements of criminal conviction. On the individual level, the penalty

\textsuperscript{221} Id.
\textsuperscript{222} Id. at 1622.
\textsuperscript{223} Id. at 1621.
\textsuperscript{224} Fortney, supra note 218, at 1621.
\textsuperscript{225} Id.
\textsuperscript{226} See supra Part I.
requirement\textsuperscript{227} for the exception is often misapplied.\textsuperscript{228} This cannot adequately be solved by the discretion of judges and of prosecutors.\textsuperscript{229} The potentially negative societal impacts on the environment and insurance premiums cannot be ignored.\textsuperscript{230} If one of the rationales for the exception is that the defendant “should know”\textsuperscript{231} about regulations, negligence would be the more appropriate standard.\textsuperscript{232} Although the exception is used in other areas, that does not mean it should be used in the environmental law area, because it is misapplied in those other areas as well.\textsuperscript{233} Finally, although it is applied correctly in a variety of states,\textsuperscript{234} it is applied just as incorrectly in other states, leading to a massive amount of discord.\textsuperscript{235} Although making environmental law enforcement easier is a positive end, and a correct application of the exception by individual states is a positive means towards such an end, the counter-balances cannot be ignored. The basic means towards achieving this end ignore traditional criminal law theory and, for each correct application of the exception at the state level, an incorrect application can be found as well. For these reasons, the exception should be disregarded in favor of the traditional mens rea requirement.

CONCLUSION

The possibility that individuals such as David, the homeless man in Texas “who had just worked his way up from being homeless . . . who volunteered to help a friend restore his car after it was flooded in Tropical Storm Allison,” and in the process

\textsuperscript{227} Id.
\textsuperscript{228} See supra Part III.
\textsuperscript{229} See supra Part I.
\textsuperscript{230} Id.
\textsuperscript{232} See supra Part II.
\textsuperscript{233} Id.
\textsuperscript{234} See supra Part IV.
\textsuperscript{235} See supra Part III.
“spilled . . . less than a quart of auto fluid,” can be sentenced to twenty years in prison, without regard to his state of mind, is the potential effect of indiscriminately applying the public welfare exception. Although this may seem like an overly dramatic, rare example, the justice system cannot simply disregard such examples, even for a goal as worthwhile as protecting the environment.

\[236\] Flynn, supra note 11.

\[237\] Id.