ARTICLES

Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law

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Environmental law is riddled with paradox. Seemingly nonsensical twists of policy abound in the double helix of statutory enactments and corresponding regulatory schemes that makes up modern environmental law. Conflict and contradiction are the rule rather than the exception for those hardy enough to go beyond the symbolic rhetoric and promise of environmental policy in an effort to discover the actual terms of environmental law itself.¹

* Professor of Law, Washington University in St. Louis. This article found its genesis in work I performed in December 1992 as a member of the Department of Justice Transition Team for the President-Elect and Vice-President-Elect. The article discusses several Supreme Court cases in which I served as counsel for one of the parties, in my capacity as Assistant to the United States Solicitor General from 1986-89, and as counsel before the Court for several states, local governments, and environmental organizations since 1989. In addition, several of the federal environmental criminal felony provisions that I discuss and question in this article are provisions that I worked to have Congress adopt when I served as a Justice Department lawyer in the fall of 1979. The views expressed in the article are not the views of the Transition Team or of any of my clients in those cases. In addition, this article relies only on public information and not on any possibly privileged information that I received as a member of the Transition Team. I would like to thank Stuart Banner, Kate Bartlett, Kathy Brickey, John Dwyer, Dan Farber, Katherine Goldwasser, Jay Hamilton, William Hassler, Lisa Heinzlerling, Vicki Jackson, Avery Katz, Dan Keating, Ron Levin, Dan Mandelker, Ronald Mann, Tom Merrill, Robert Moesteller, Paul Robinson, Carol Rose, Roy Schotland, Phillip Schrag, David Shapiro, Dan Tarlock, Edith Brown Weiss, and Jonathan Wiener for their comments (and criticisms) of an early draft. The article also benefited greatly from faculty and student comments during presentations of an early draft at Duke, Georgetown, Harvard, and Northwestern University law schools, and from students in Professor Elizabeth Foote’s Environmental Enforcement Seminar at Boston University, who read and commented on an early draft. Finally, I would like to thank several law students at Washington University, particularly, Lisa Russell, Chris Man, and Michael Bloomquist, who provided valuable research assistance.


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But the persistence of paradox in environmental law also presents a tool for better understanding the foundations of environmental law and for promoting its positive evolution. The current debate surrounding criminal enforcement of environmental laws is no exception. As the following three accounts of recent environmental prosecutions (or lack thereof) demonstrate, the environmental crimes controversy illustrates the paradox often evident in environmental law, yet on further examination, also suggests paths for its reformation.

2 See George P. Fletcher, Paradoxes in Legal Thought, 85 Colum. L. Rev. 1263, 1263-65 (1985) (arguing that grappling with uncovered paradoxes and antinomies will lead to more consistent theoretical structures in law).

3 As described infra notes 5-7, the following accounts are based on descriptions of the cases that have been offered by others. In re-examining these same cases in a later section, this article provides a fuller, more balanced account. See infra Part III B.


Because the federal lessons transfer to the state context, this article's focus on federal criminal environmental enforcement is not as confining as one might think. Most significant, the two types of prosecutions are interrelated. Most of the state programs derive from the federal statutes in the first instance. See, e.g., Clean Water Act, 33 U.S.C. § 1342(b) (1988); Resource Conservation and Recovery Act, 42 U.S.C. § 6926 (1988); Clean Air Act, 42 U.S.C. § 7410(a)(2) (1988 & Supp. V 1993). They also tend to be closely coordinated. Federal and state environmental law enforcement officials frequently coordinate their investigations. See J. Preston Strom, Jr., The United States Attorney's Policy Towards Criminal Enforcement of Environmental Laws, 2 S.C. ENVTL. L.J. 184, 186-88 (1994). EPA and the Justice Department, moreover, view the states virtually as partners in environmental law enforcement and, for this reason, they established a national environmental enforcement training institute that trains both federal and state law enforcement officers alike. See Office of Enforcement, U.S. ENVTL. PROTECTION AGENCY, ENFORCEMENT ACCOMPLISHMENTS REPORT, FISCAL YEAR 1993, at 5-1 to 5-3 (1994) [hereinafter ENFORCEMENT ACCOMPLISHMENTS] (noting that state and local enforcement personnel constituted 45% of those trained). Finally, the number of federal environmental criminal prosecutions rose sharply in recent years and should continue to do so in light of the Pollution Prosecution Act, which increases by several fold the number of criminal investigators employed by EPA. See Pollution Prosecution Act of 1990, Pub. L. No. 101-593, § 202(a), 104 Stat. 2954, 2962; ENFORCEMENT ACCOMPLISHMENTS, supra at 2-2 & app.; see also Criminal Cases, Fine Collections Rise in 1993, EPA Says in Report on Enforcement, supra at 1516-17.
1. *The Pesticide Dumper:* To avoid the high cost of disposing of pesticide residue in a licensed landfill, an agricultural business purchased a small field for the ostensible purpose of using the residue as a "product" to help grow corn for a company picnic. Almost immediately after the company sprayed the field with 3500 gallons of a liquid mixture containing the pesticide residue, many neighbors became severely ill. One person ultimately died. The United States Department of Justice rejected the company's offer to plead guilty to one felony count and to pay a fine. Justice instead secured a federal grand jury indictment of the company and four officers on six counts, including five felonies. But following meetings with defense counsel, the Justice Department under President Bush replaced the experienced federal prosecutor who had been assigned to the case with a prosecutor who had relatively little environmental law expertise. The company was allowed to plead guilty to one misdemeanor count and pay a $15,000 fine.5

2. *The Threatening Wetlands Filler:* A land owner filled in a wetland on his property, notwithstanding repeated official warnings and administrative orders that prohibited him from doing so without a Clean Water Act permit. Proclaiming that the Department of Justice did "not have the balls to prosecute him," he also told a federal officer that he would shoot the next person who came onto his property. The Justice Department decided against criminal prosecution.6

3. *The Government Weapons Contractor:* A government contractor operated a weapons production facility pursuant to a contract with the Department of Energy (DOE). With either the Department's knowledge or acquiescence, the contractor and its individual corporate officers and employees conducted clandestine midnight incinerations of hazardous waste, sprayed hazardous waste onto land that drained into public waterways, and stored hazardous waste residues—all in flagrant and knowing disregard of federal environmental protection law. The contractor also submitted false statements regarding its compliance with these laws. Nonetheless, the Justice Department decided not to prosecute the responsible officers. It also allowed the corporation itself to avoid trial by pleading guilty to several counts and paying an $18.5 million fine, which was less than both the $22.4 million *in profits* that the corporation received from the federal govern—


ment during the time period when the crimes occurred and the maximum applicable fine of $68.5 to $78.85 million. In failing to prosecute any individual corporate officers or employees, the Department overruled the recommendation of the chief career prosecutor responsible for the case. Moreover, the Department refused to allow the grand jury (which opposed the plea agreement) to issue a report substantiating its conclusion that the corporation, its individual employees, and DOE officials should all have been charged and prosecuted for far more serious environmental crimes.\(^7\)

As a result of these and other publicized controversies, charges that the Department of Justice was “letting criminals off the hook” and “letting politics get in the way of prosecutions” became both a campaign issue in the 1992 Presidential elections and the subject of intense congressional investigation.\(^8\) Three different House committees investigated allegations of improper political influence over the prosecution of environmental crimes. Two of the committee chairs denounced the Justice Department, and the Bush Administration and the third committee chair commissioned a report that did the same.\(^9\)

For many, there was an obvious explanation for these prosecution decisions. The Bush Administration purposefully weakened environmental protection laws, as evidenced by the rise of Vice President Quayle’s Council on Competitiveness and President Bush’s 1992 moratorium on regulations,\(^10\) and in doing so signalled the Justice Department to curtail its environmental criminal prosecutions. This seemingly simple explana-

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8. The Clinton-Gore campaign accused the Bush Administration of “letting criminals off the hook after they pollute our air and our water and our land. . . . Worse still, the Bush administration is letting politics get in the way of prosecutions.” Jim McGee, Environmental Crimes Controversy Lingers Under Reno, Wash. Post, Apr. 7, 1994, at A25.

9. See Dingell Report, supra note 5, at 9-10 (complaining of “failure to pursue aggressively a number of significant environmental cases”; “a serious lack of environmental law expertise”; “failure to inform the EPA of the reasons why [the Environmental Crimes Section] has declined to prosecute the cases”; and “a lack of creativity and aggressiveness among some attorneys at the ECS”); Turley Report, supra note 5, at 5-6 (criticizing “a pronounced failure to prosecute environmental crimes to the same degree as conventional crimes . . . and to prosecute individuals”; “chronic case mismanagement”; and “possible political influence in both individual cases and general policies within the Environmental Crimes Section”); Wolpe Report, supra note 7, at 31-32 (stating that “main Justice has declined to prosecute serious environmental crimes over the strong advice and protestations of U.S. Attorney’s offices, EPA, state enforcement officials, and even, at times, other headquarters personnel”).

tion, however, was undermined during the early years of the Clinton Administration when two independent Justice Department investigations gave largely unqualified endorsements to the exercises of prosecutorial discretion by the prior Administration.\(^{11}\) In fact, the internal reviews sharply criticized Congress for its faulty and misleading analysis.\(^{12}\) Hence, the paradox.

Can anything possibly explain both the apparently indefensible nature of the Justice Department’s failure under President Bush to prosecute plainly meritorious cases and the likewise inexplicable behavior of the Clinton Administration in defending those prior actions? The explanation favored by congressional critics is that the Bush Justice Department acted inappropriately, and that these more recent Justice Department reports to the contrary should be discounted. According to this explanation, the critical position of the Clinton Justice Department was the result of a bunker

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11. See William J. Corcoran et al., U.S. Dept of Justice, Internal Review of the Department of Justice Environmental Crimes Program 83 (1994) [hereinafter Justice Environmental Crimes Review] (report to the Associate Attorney General) (stating that “we have found no shortage of professional competence and personal commitment at any level of the [environmental crimes] program”); id. at 147 (finding “no evidence” that prosecutions influenced by improper considerations; in some instances agreeing “entirely” with the prosecution decision; and in others concluding that decision made “reflects a proper exercise of prosecutorial discretion”); Memorandum from Mark H. Dubes, Acting Chief, Public Corruption and Government Fraud Section of the United States Attorney Office for the District of Columbia, and Steven Bunnell, Assistant United States Attorney, United States Attorney Office for the District of Columbia, to Webster L. Hubbell, Associate Attorney General 75-82, 88 (Apr. 8, 1994) [hereinafter Justice Rocky Flats Review] (on file with The Georgetown Law Journal) (stating that “the decision to forgo individual prosecutions was based on a host of valid considerations” and “reflected an appropriate exercise of prosecutorial discretion”; maximum theoretical fine not an “appropriate benchmark” to evaluate the fine obtained; and the decision not to allow a grand jury report was a decision made by career personnel “based on a good faith interpretation of the relevant statute and case law”); see also William T. Hassler, Congressional Oversight of Federal Environmental Prosecutions: The Trashing of Environmental Crimes, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,074, 10,077 (Feb. 1994) (contending that congressional reports “are neither fair nor accurate”). Although the Justice Department’s internal review of the Environmental Crimes Section concluded that the government prosecutors properly exercised their prosecutorial discretion in each case, the internal review did find fault in the management practices of the Environmental Crimes Section.

12. See Justice Environmental Crimes Review, supra note 11, at 81 (lamenting that “[a] result of unfounded accusations, Department attorneys must exercise prosecutorial discretion in an atmosphere of distrust”); id. at 95 (stating that “[t]hose ad hominem criticisms are especially destructive, because they have personalized what are at bottom disagreements over policy”); id. at 99 (stating that “[i]ronically, many [Environmental Crimes Section] attorneys attribute the current morale problems to the Subcommittee’s accusations”); id. at 109 (stating that “[t]he Department cannot expect to attract and retain those individuals . . . if congressional subcommittees openly impugn an attorney’s competence and integrity because the attorney faithfully discharged his responsibilities, but in a way not to the subcommittee’s liking”); Justice Rocky Flats Review, supra note 11, at 86-87 (suggesting that case presents “the danger of permitting inquiry into the specific differences of opinions among individual attorneys” and Department of Justice must “impress forcefully on Congress the serious consequences of politicized attacks on individual line prosecutors”).
mentality among career lawyers at the Department responding to congressional criticism. These career lawyers who dominate the Department represented that Congress had forced them into the role of scapegoats in a congressional disagreement with the policies of a prior Administration.\footnote{See McGee, supra note 8, at A25 (suggesting that poor record of prior Administration "creates a substantial doubt as to the adequacy or credibility of any review conducted by Department personnel in position prior to Inauguration Day") (quoting Congressman Dingell). Immediately before Congressman Dingell lost his position as Chair of the House Committee on Energy and Commerce, with the Republican takeover of the House leadership in January 1995, that Committee's staff issued a report attacking the Justice Department's internal review of the Environmental Crimes Section and reiterated its earlier criticism of the Department's environmental crimes program. See STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, 103D CONG., 2D SESS., DAMAGING DISARRAY—ORGANIZATIONAL BREAKDOWN AND REFORM IN THE JUSTICE DEPARTMENT'S ENVIRONMENTAL CRIMES PROGRAM: A STAFF REPORT PREPARED FOR THE USE OF THE SUBCOMM. ON OVERTSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE 128-63 (Comm. Print 1994) [hereinafter House Energy and Commerce Committee Staff, Damaging Disarray].}

A second possible explanation, favored by those within the executive branch, points to the institutional friction that has long characterized the relationship between Congress and the executive branch agencies (the EPA and the Justice Department) primarily responsible for implementing the federal environmental protection laws. Under this view, congressional distrust of the executive branch's willingness to implement environmental laws is a constant in legislation, whatever the political party in the White House. The origin of the interbranch distrust lies in a fundamental disagreement regarding the efficacy and reasonableness of environmental mandates and their implementation.\footnote{See JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 82-110 (describing "The Problem of Distrust"). See generally Richard J. Lazarus, The Tragedy of Distrust in the Implementation of Federal Environmental Law, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 314-15, 321-47 [hereinafter Lazarus, The Tragedy of Distrust] (discussing distrust of EPA).} The present environmental crimes controversy is simply the latest manifestation of that ongoing refrain.

This article argues that neither of these competing views fully apprehends the core problem. The problem can be better traced to the shared failure of those charged with enacting, enforcing, and construing the environmental criminal provisions to integrate properly the competing principles of the two bodies of law—environmental and criminal—necessarily underlying those provisions. All three branches of government did not, in their respective spheres of responsibility, consider the nature, aims, and limits of criminal law and how they relate to the underlying substantive offenses defined in the environmental statutes. Individual prosecutors attempted to remedy these failures by filling the void on an ad hoc basis through the exercise of decentralized discretion. These efforts exacerbated matters by unwittingly colliding with the myth of political neutrality, which pervades public and legislative perceptions of law enforcement.
The article is divided into four parts. Part I describes the role of integration in promoting legal evolution, especially in environmental law, and seeks to identify those features of both criminal and environmental law that must mutually be accommodated by any environmental crimes program. Part II discusses the absence of integration in the development of environmental criminal law. This includes separate analysis of the distinct roles played by each branch of government: Congress in the drafting of the laws, the executive branch in their enforcement, and the courts in their construction.

Part III examines the costs of nonintegration. These range from inconsistent and inequitable enforcement to the inevitable politicization of law enforcement. The latter, moreover, threatens to undermine both the integrity of law enforcement efforts and the environmental laws themselves. This Part also re-examines the three cases described at the outset of the article and explains in detail how each illustrates the problems that result from the absence of effective integration of environmental and criminal law.

Part IV of the article then addresses how environmental criminal law should be reformed. This Part addresses the applicable mens rea, including the role of presumptions and inferences in criminal prosecutions. This Part also suggests more carefully assigned burdens of proof and affirmative defenses in narrowly defined circumstances. Finally, a brief conclusion focuses on the future of environmental crime and the challenge environmental crime presents to those who support both the general policies and specific programs of environmental protection laws as well as their strict enforcement.

I. LEGAL EVOLUTION, ASSIMILATION, AND THE DEMANDS OF INTEGRATION

The notion that the law changes or evolves is "virtually a canon of professional faith for American lawyers." Few aphorisms in the law are as well known and as frequently repeated as Oliver Wendell Holmes's famed statement in The Common Law that "[t]he life of the law has not been logic: it has been experience." Holmes there describes how "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, ... even the prejudices which judges share with their fellow-men" continually alter legal rules over time.

17. Id. Of course, Holmes is hardly alone in devoting significant scholarship to the question of how and why law evolves. For instance, one commentator described the nineteenth-century German scholar Friedrich Karl von Savigny as the "fountainhead for Anglo-
A common focus in much legal scholarship is the way in which societal changes in culture, government, and economic structure promote changes in legal doctrine. Law is seen as the result of a tentative equilibrium struck between competing interests at any moment in time; yet this equilibrium is always susceptible to destabilization in response to changes in any of the factors underlying it (e.g., factual assumptions, values, distribution of political or economic power). Thus John Henry Wigmore described law as a series of wrestling bouts; the prize to the final winner signifies the enactment of the winning force as a rule of law. . . . But the victory does not signify the annihilation of the losing force . . . [just] a more or less temporary rest.18

There has been relatively little academic discussion, however, of how these competing interests are often reflected in settled legal rules in different areas of the law. Law is, as a result, often marked by incongruence and contradiction when one compares those differing rules and their sharply contrasting premises and goals. Only through repeated confrontation between these different areas of law followed by a gradual process of integration do lawmakers strive to work legal rules into Maitland's always elusive "seamless web."19 As areas of law merge, they reform and modify each other, based on competition between, and accommodation and reconciliation of, their respective premises and goals.


18. John H. Wigmore, Planetary Theory of the Law's Evolution, in 3 Evolution of Law, supra note 17, at 532. Holmes offered similar characterizations of the evolutionary process. See Oliver Wendell Holmes, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 449 (1899) ("the struggle for life among competing ideas").

A. THE ASSIMILATION OF ENVIRONMENTALISM INTO LAW AND THE NEED FOR INTEGRATION

Legal assimilation denotes the process by which a new set of priorities and information simultaneously influence different legal sectors, restriking equilibria that underlie a host of legal rules in disparate contexts. By contrast, integration describes the evolutionary process within any one discrete area of law. It involves an initial period of confrontation between one body of law's assumptions, values, and goals and those underlying other intersecting areas of law. Confrontation is followed by accommodation and reconciliation as the two areas of law interact and inform each other in a process of mutual evolution.

The emergence of environmental law during the last three decades has witnessed a general process of assimilation as the teachings and values of environmentalism infused one category of legal rules after another, transforming our nation's laws in response to the public's demands for environmental protection. Likewise, the development of environmental law has sparked integration in other intersecting areas of law, as the science, values, and goals underlying environmental laws have prompted re-examination and reform of a range of existing legal doctrines. Indeed, because of the pervasive nature of environmental pollution and of those activities causally related to it, there is hardly an area of law left untouched by the emergence of this massive regulatory regime.20

The development of administrative law provides an obvious example of integration, the second step in this process. It is fair to say that the reformation of modern administrative law occurred primarily on an environmental law slate.21 Judges responded to what they perceived to be a pressing need for a heightened judicial role in environmental controversies.22 The result was, in the first instance,23 the proliferation of the "hard

23. The "in first instance" caveat is important here, because the courts, especially the United States Supreme Court, have since limited many of these earlier rulings. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (constraining environmental groups' standing); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) (same); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983) (involving requirements of Administrative Procedure Act and National Environmental Policy Act in nuclear power plant licensing); Vermont Yankee Nuclear Power Corp. v. Natural Resources De-
look” doctrine and the related development of hybrid rulemaking,\textsuperscript{24} as well as the relaxation of traditional standing requirements.\textsuperscript{25} Congress, in turn, created new administrative procedural requirements, such as the National Environmental Policy Act,\textsuperscript{26} and statutory “hammers,”\textsuperscript{27} which revolutionized agency decisionmaking.\textsuperscript{28} Finally, the executive branch agencies themselves sought to develop new techniques such as negotiated rulemaking to accommodate the kinds of concerns that environmental issues presented for traditional rulemaking.\textsuperscript{29}

Tort law has likewise evolved in response to environmental concerns. Traditional tort doctrine proved unable to provide meaningful redress to the new class of environmental injuries, warranting reformation of tort rules. The result has been the emergence of an entirely new area of law

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\text{fense Council, Inc., 435 U.S. 519 (1978) (involving nuclear plant licensing). See generally Glicksman & Schroeder, supra note 22, at 276-97 (discussing Chevron doctrine, judicial deference to agency decisions, and environmental legislation); Richard B. Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 Harv. L. Rev. 1805 (1978) (arguing courts should have province to insist agencies’ decisions include consideration of relevant evidence and policy issues); Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 Mich. L. Rev. 163 (1992) (discussing new issues that will arise given change in law of standing effected by Lujan).}
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\text{25. See Japan Whaling Ass’n v. American Cetacean Soc’y, 478 U.S. 221 (1986); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 81 (1978); United States v. S.C.R.A.P., 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972). Recently, Justice Kennedy well described the need for standing rules to evolve in response to environmental protection laws: “As government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.” Lujan, 504 U.S. at 589 (Kennedy, J., concurring).}
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\text{27. See 42 U.S.C § 6924 (e)-(g) (1988); see also James J. Florio, Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980’s, 3 Yale J. on Reg. 351, 351-53 (1986) (discussing Congress’s drastic limitation of EPA discretion under reauthorized versions of RCRA and CERCLA resulting from EPA’s reluctance during 1980s to enforce hazardous waste laws).}
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\text{28. See Sydney A. Shapiro & Robert L. Glicksman, Congress, the Supreme Court, and the Quiet Revolution in Administrative Law, 1988 Duke L.J. 819, 820 (describing congressional attempts during 1980s to confine administrative discretion of agencies in area of environmental law).}
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\text{29. See Percival et al., supra note 10, at 683-85; Philip J. Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1, 40-42 (1982).}
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referred to as "environmental torts," as well as the modification of previously longstanding tort doctrines such as nuisance law, causation, and limitation periods.

The interaction between property and environmental law has also been significant, but far less one-sided in character. Because environmental law challenges many of the scientific, economic, and sociological assumptions underlying much private property doctrine, its rise in the 1970s and 1980s seemed to portend a corresponding erosion of private property rights in natural resources. Recently, however, property rights advocates have sought to resist this trend and to force environmental law to accommodate the values and aims underlying private property doctrine. This ongoing conflict is being waged in many contexts, the most notable of which has occurred in the battery of takings claims challenging environmental regulations, as well as in the efforts of the property rights movement to persuade state and federal legislators to pass laws to protect their inter-


The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source... Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

Lucas, 112 S. Ct. at 2903 (Kennedy, J., concurring).
The same evolutionary pattern is repeated throughout the law. Bankruptcy, civil rights, corporate, First Amendment, insurance, international, remedies, securities, and tax law have each undergone a
significant process of transformation in response to the public’s desire to have a legal system that better reflects the public’s environmental protection goals. Consistent with the evolutionary paradigm discussed above, conflict in the first instance is followed by an uneasy period of interchange and experimentation, and finally by a period of reconciliation and accommodation. Under optimal circumstances, the new equilibrium that results offers a more coherent set of legal rules.

This article’s thesis is that this process of integration, necessary to law’s consistency and coherence, has not yet occurred in environmental criminal law. That is not to say that other areas of the law are currently in a state of equilibrium; it is unlikely this will ever occur, given the dynamic nature of environmental policy, science, and law. Yet for reasons discussed below, the process of integration is far less mature in environmental criminal law than in virtually any other area that intersects with environmental law—including some of the most controversial, like property law.

Better integration is, however, simultaneously more important in environmental criminal law than in other areas of the law. The fundamental fairness of the criminal incarceration sanction—one of the most severe imposed by the law—is undercut by any incoherence and inconsistency in its imposition. They sap the sanction of its legitimacy and invite, just as has happened in environmental criminal law, accusations of government abuse both when those sanctions are imposed and when they are not. Such claims of government abuse can, to be sure, provide the impetus necessary to prompt a thoughtful effort to address the underlying problem. The risk, however, is that the emotions of the moment, which are generally high in both the environmental and criminal contexts, will instead prompt misdirected surficial changes that fail to address the source of the problem and ultimately make matters worse. That is precisely the risk presented now by


46. See infra text accompanying note 440.
the federal environmental crimes program, as it is increasingly attacked by those on either end of the political spectrum.

Testing the validity of the thesis of the need for better integration first requires the identification of those features endemic to environmental and criminal law. The term "features" refers, for this purpose, both to the material characteristics of the problems addressed by both areas of law, as well as the peculiar nature, if any, of the kinds of legal rules that result. Both of these distinct types of features become relevant during integration. Moreover, because integration requires a melding of sometimes competing and sometimes reinforcing purposes, the testing of this article’s thesis also requires identification of the basic aims and limits of both environmental law and criminal law.

B. THE CHARACTERISTICS OF ENVIRONMENTAL POLLUTION AND ENVIRONMENTAL LAW

There are many features of environmental pollution and environmental law relevant to the development of an effective environmental crimes program. Four stand out: (1) the need for risk reduction; (2) the difficulty of assigning responsibility for environmental pollution both because of scientific uncertainty surrounding the causes of environmental harm and the fragmentation of decisionmaking authority in many polluting activities; (3) the pervasive nature of environmental pollution; and (4) the resulting features of environmental law itself.

1. Risk Reduction

Most criminal laws are concerned with actual harm and only secondarily punish acts that create the risk of harm. Frequently, the harm caused by environmental pollution is not significantly different from the harm caused by more familiar kinds of criminal misconduct. Pollution causes harm to public health, ranging from aggravating illness to death. More broadly, it causes harm to the environment and thus interferes with human enjoyment of nature.

But what distinguishes environmental pollution from conduct classically addressed by criminal laws, and ultimately triggers a greater focus on risk reduction, are the spatial and temporal dimensions of the harm that it causes. Pollution can cause catastrophic harm that extends over great distances and endures long into the future.47 The stakes are therefore much greater than those presented by more traditional crimes.48

Pollution of a sole-source drinking water supply can threaten the health of thousands of persons. The release of toxics into the air or the applica-

tion of unreasonably dangerous pesticides onto agricultural products destined for human consumption can result in similarly devastating harm. Oil spills can destroy an entire ecosystem encompassing huge areas of land or water. A fishery can be wiped out by pollution, eliminating the economic livelihood of entire communities.

Environmental harm also tends to be continuing in character and to exhibit latency—a significant delay between exposure and manifestation of harm. Its adverse effects are frequently long-lasting and can reach and spread their destructive force across generations. Indeed, these effects are often irreversible: a sole-source aquifer, wilderness area, or ecologically priceless wetlands can be irreparably destroyed, or an endangered species can be made extinct.

As a result, risk reduction becomes essential for an effective enforcement program. The offenses cannot simply be defined in terms of the immediate harm they cause. They instead need to be defined in terms of the risks they create.

2. Causation and Assignment of Responsibility

Environmental pollution also differs from more conventional criminal conduct because of several features that render the assignment of responsibility for pollution more difficult than it is for many traditional crimes. First, the relationship between cause and effect is rarely direct. Scientific uncertainty makes proof of causation more difficult in cases involving environmental harm, especially in the context of risk creation. The

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49. See Page, supra note 47, at 213, 222-23.
50. See id. at 214, 223.
widespread nature of the harm and its temporal distance from its cause necessarily invite the possibility of multiple causes, synergistic effects, cumulative impacts, and delayed manifestation of injury. Sorting out these issues, in turn, depends upon uncertain scientific information and predictive modeling techniques based on speculative assumptions. For these reasons, the kind of rigorous proof normally required for criminal prosecution becomes more problematic.

Second, scientific uncertainty regarding cause and effect likewise undermines the assignment of moral responsibility based on traditional notions of intent, such as purpose and knowledge. Moral culpability is traditionally based not just on harm (or risk of harm), but instead on the relationship between the actor’s state of mind regarding his or her acts and the harm (or risk of harm) that results. Not only is the causal link between conduct and environmental harm difficult to demonstrate, but the decisionmaking structure of the kinds of activities that produce pollution makes assigning blame doubly hard. Environmental pollution comes from all kinds of sources. But many of the largest sources of pollution, and those therefore presenting the greatest risk of a catastrophic incident, are typically large institutions. Knowledge and decisionmaking authority within those institutions can be both widely diffuse and fragmented, sometimes by the nature of these entities and sometimes by design. It is therefore difficult to identify any one individual within the institution who possessed and exercised the authority to control the polluting activities, while simultaneously having knowledge of the environmental consequences of those actions.

3. Inevitability and Pervasiveness

Two other features that distinguish environmental pollution from other types of criminal harm are its inevitability and its pervasiveness. Pollution occurs constantly—whenever there is human contact with the natural environment. Even sustainable development economies devoted to low technology will necessarily result in significant pollution in an effort to satisfy just the bare essential human needs of food and shelter. The laws of nature—the chemical makeup of the periodic table of the elements, their expression and interaction in the ecosystem, and the laws of thermodynamics—require that result. The laws of humankind cannot prevent it.

Nor would elimination of all pollution be a desirable result. Many socially beneficial activities cause pollution, either indirectly or directly. This does not mean, of course, that pollution is not a serious problem. It

\[\text{fis legislative purposes); Symposium, Risk Analysis and the U.S. Environmental Protection Agency, 21 ENVTL. L. 1321 (1991).} \]
53. See infra text accompanying notes 172-77.
plainly is. Rather, the inevitability and the desirability of some pollution are important because of their implications for how environmental protections standards are fashioned. Pollution regulations seek to limit and redirect pollution. They do not seek to eliminate pollution altogether, except in those rare circumstances in which the activity causing the pollution is both avoidable and offers no net societal benefits. Environmental laws otherwise seek to “eliminate” pollution only in a very narrow sense of that term, by reducing or redirecting pollution of a more serious kind to a less serious kind along temporal and spatial dimensions.\(^{55}\) For this reason, even those governmental environmental protection agencies or private pollution control companies that tend to focus their efforts on being part of the “solution”—by reducing pollution of one kind and at one place and time—are likely to be simultaneously perceived as part of the “problem” elsewhere.

The pervasiveness of pollution is also significant because of the number of persons and human activities potentially subject to, and affected by, environmental protection regulation. Few individuals could reasonably claim not to be the source of significant pollution in their daily activities. At the very least, virtually everyone adds to consumer demand that induces sellers of goods and services to pollute to meet that demand. Virtually all sectors of the economy, including agriculture, construction, education, forestry, fishing, manufacturing, mining, medical services, transportation, utilities, and the government itself, are important contributors to environmental degradation. Criminal enforcement of environmental law therefore has far-reaching implications for our entire society.

4. Features of Environmental Law

To the extent that a criminal enforcement program seeks to superimpose itself onto a pre-existing set of environmental protection laws, the features of those environmental protection laws themselves are relevant to the proper integration of environmental and criminal law. Indeed, as discussed below,\(^{56}\) the absence of any meaningful consideration of the distinct features of the environmental laws upon which the criminal provisions rely is the principal failing of current environmental criminal law.

Many significant features of environmental laws derive directly from the characteristics of environmental pollution just discussed. The laws seek to reduce risk to avoid possible catastrophic results and to compensate for the uncertainty of environmental science. Environmental standards are based on imprecise scientific information regarding cause and effect; and those standards apply to virtually every kind of human activity, including


\(^{56}\) See infra text accompanying notes 213-20.
many socially desirable activities and the activities of the government itself. There are, however, further defining features of environmental law that emerge from the legislative and regulatory processes and are important in thinking about environmental crime. These include: (a) the aspirational quality of environmental law; (b) its dynamic and evolutionary tendency; and (c) its complexity.

a. Aspirational Quality. Environmental statutes reflect the nation’s aspirations for environmental quality. They were not intended to codify existing norms of behavior, but to force dramatic changes in existing behavior. They supply an “inspirational and radical message.”

In enacting these statutes, Congress aspired to obtain dramatic improvements in environmental quality and sought to force the social and technological changes necessary for their accomplishment through the imposition of strict deadlines and mandatory pollution controls and standards. The United States Environmental Protection Agency (EPA) was made responsible for the implementation of myriad environmental laws that Congress enacted in the 1970s and 1980s, including: the Clean Air Act; Clean Water Act; Comprehensive Environmental Response, Compensation, and Liability Act; Federal Insecticide, Fungicide, Rodenticide Act; Resource Conservation and Recovery Act; and Toxic Substances Control Act.

These laws imposed hundreds of deadlines on EPA, state regulatory authorities, and industry. EPA was “told to eliminate water pollution, and all risk from air pollution, prevent hazardous waste from reaching ground water, establish standards for all toxic drinking water contaminants, and register all pesticides.” The Clean Air Act of 1970 mandated that states

58. See generally Dwyer, supra note 1 (noting that lawmakers’ desire for social change has not been met by similar desire in agencies or general public); James A. Henderson, Jr. & Richard N. Pearson, Implementing Federal Environmental Policies: The Limits of Aspirational Commands, 78 Colum. L. Rev. 1429 (1978) (considering limits of attempts to compel good faith cooperation with environmental policies); Howard Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and “Fine-Tuning” Regulatory Reforms, 37 Stan. L. Rev. 1267 (1985) (criticizing focus on ideally efficient solutions to environmental problems); Lazarus, The Tragedy of Distrust, supra note 14, at 323-28 (noting EPA’s failure to meet strict deadlines in aspirational statutes).
65. COUNCIL ON ENVTL. QUALITY, SIXTEENTH ANNUAL REPORT 14 (1985).
attain national ambient air quality standards necessary for the protection of public health and welfare by 1975.\textsuperscript{66} Achievement of those standards not only would require dramatic changes in the pollution control technology and industrial processes of 20,000 to 40,000 major stationary sources of air pollution, but would also mandate fundamental change in the driving habits of millions of Americans and a major retooling of motor vehicles.\textsuperscript{67}

The Clean Water Act was no less ambitious. The 1972 law sought to achieve fishable and swimmable waters everywhere by 1983, and zero discharge of pollutants into the waters of the United States by 1985.\textsuperscript{68} Attaining this goal would have required at least 68,000 existing dischargers to reduce their existing effluent pollution by several orders of magnitude to comply with a series of technology-forcing standards.\textsuperscript{69} All discharges of regulated pollutants into waters of the United States were made unlawful in the absence of a permit issued by EPA or an approved state program that affirmatively allowed the discharge.\textsuperscript{70} Similarly ambitious aspirational goals and demanding environmental standards are contained in the other environmental laws.\textsuperscript{71}

Not surprisingly, over two decades later, few of the above deadlines or environmental quality goals have been met. In fact, EPA has met only about fourteen percent of the deadlines Congress imposed on the agency.\textsuperscript{72} Many geographic areas, if not most, do not meet at least one of the environmental standards prescribed under the Clean Air Act, Clean Water Act, or the other environmental laws. Nor do most businesses fully comply with these laws\textsuperscript{73}—existing technological and economic constraints simply will not allow it. EPA itself acknowledged that meeting the Clean Air Act requirements in the Los Angeles area "would impose requirements so draconian as to remake life in the South Coast Basin. . . . [EPA] would have to prohibit most traffic, shut down major business activity, curtail the

\begin{footnotesize}
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\item \textsuperscript{67} See R. Shep Melnick, Regulation and the Courts: The Case of the Clean Air Act 299, 307 (1983).
\item \textsuperscript{69} 33 U.S.C. § 1311(b) (1988); see also A. Myrick Freeman, III, Water Pollution Policy, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 112 (P. Portney ed., 1990).
\item \textsuperscript{70} 33 U.S.C. § 1311(a).
\item \textsuperscript{71} See Rodgers, supra note 20, § 5.6, at 478-79 (describing how FIFRA labeling requirements are unrealistic and never met); Lazarus, The Tragedy of Distrust, supra note 14, at 326-28 (describing such goals and standards in FIFRA, TSCA, RCRA, and CERCLA).
\item \textsuperscript{73} In a recent survey of corporate officers, 66.8% acknowledged that they had been in violation of state or federal environmental requirements during the past year. Marianne Lavelle, Environment Vise: Law, Compliance, Nat'l L.J., Aug. 30, 1993, at S1. Industry representatives claim that, short of a massive shutdown of all industrial activity, they simply cannot comply with all the detailed requirements. Id.
\end{itemize}
\end{footnotesize}
use of important consumer goods, and dramatically restrict all aspects of social and economic life."\(^{74}\)

This is not to detract from the vast accomplishments of these laws. The nation’s waters, land, and air are no longer open dumping grounds. Strict regulation of air emissions, effluent discharges into waterways, and land disposal has resulted in significant improvements in the quality of the environment in many places. Perhaps more important, these laws have retarded serious further degradation that otherwise would have occurred in their absence as the nation’s economy has grown. Pollution control technologies and industrial process changes have, in fact, been successfully “forced” by those laws.\(^{75}\)

Moreover, the aspirational quality of environmental laws—including their overly ambitious goals, unrealistic deadlines, and uncompromising and unduly rigid standards—doubtless deserves much of the credit for these environmental successes. But it does not inexorably follow that such aspirational laws are equally well suited to civil and criminal enforcement. The susceptibility of those environmental laws to criminal, rather than just civil, enforcement presents a distinct policy issue. As Part II discusses, however, environmental policymakers have mostly ignored the difference.

**b. Dynamic and Evolutionary Tendency.** The only constant in environmental law is change. The field is marked by “dynamics and flux where a regulation is inseparable from a revision, a statute not far from an amendment.”\(^{76}\) “[T]he old idea of a stable and predictable regulatory agency, patiently negotiating solutions that will then be fixed and unquestionable for years, or even decades, is hopelessly outdated”\(^{77}\) even the solutions themselves are in a constant state of revision.\(^{78}\) This phenomenon of constant revision is endemic to environmental law, deeply rooted in the law’s relationship to both science and politics. And, for this reason, it is not a phenomenon that is itself likely to change.

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\(^{75}\) See generally COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY, TWENTIETH ANNUAL REPORT 7-11 (1990).


\(^{77}\) ANDERSON ET AL., supra note 21, at 226 (quoting Joseph Sax, A General Survey of the Problem, in SCIENCE FOR A BETTER ENVIRONMENT 753, 755-56 (1976)).

The relationship between environmental law’s dynamic quality and science (including technology) is straightforward. Much of environmental law, particularly the environmental standards themselves, are based on “scientifically informed value judgments.” 79 Scientific changes create pressure for legal redefinition. Moreover, because so much of the scientific information underlying environmental law is tentative and uncertain, the momentum towards change is constant. 80 “[E]very solution seems provisional and subject to reevaluation as new information appears and old solutions are tested against experience.” 81

The important role of politics in environmental law likewise contributes to its dynamic nature. Congress often passes environmental statutes by overwhelming margins, 82 but those final votes mask the intense conflict among diverging values and interests that characterizes the legislators’ drafting of precise statutory language and the executive branch’s subsequent construction and implementation of these terms. 83

Some of the debate is prompted by sincere disagreement, based on competing value judgments about desirable societal goals. In addition, public opinion concerning the relative merits of competing social visions can change dramatically over short periods of time. The bulk of the controversy surrounding environmental law, however, derives instead from the tremendous redistributive thrust of the environmental statutes. Environmental protection laws create discrete costs and benefits and confer them upon definite winners and losers. The precise distribution that results and the identity of those who gain as a consequence is dictated by the statutory terms, their implementing regulations, and the method of their enforcement. 84

As a consequence, environmental law is the product of fiercely contested entrepreneurial politics within both the legislative and executive branches. 85 The makeup of the significant congressional authorization and appropriation committees in both chambers and the constituencies of their members, as well as the relative power within the executive branch of various stakeholder agencies (most important EPA and the Office of

80. See id. at 1135-44. As Professor Tarlock succinctly put it: “There can never be a final decision in science-based management.” Id. at 1144.
82. See Lazarus, The Tragedy of Distrust, supra note 14, at 323.
83. See Percival et al., supra note 10, at 189-90; Rodgers, Lesson of the Red Squirrel, supra note 1, at 184.
84. See Lazarus, Distributional Effects, supra note 38, at 792-96, 811-22.
Management and Budget), \(^{86}\) shape the result.\(^{87}\) Consequently, as the identity of the key players and the relative power of their respective institutions shift, pressure invariably increases in favor of revisiting and modifying the statutory and regulatory provisions. As described by Professor Rodgers in his remarkable treatise, the result is “an ongoing kaleidoscope of tussling organizations, interests, jurisdictions, and states where strategies, goals and outcomes are subject to constant redefinition.”\(^{88}\)

c. Complexity. For those who dare to study, teach, or practice environmental law, its complexity is virtually a mantra. Complexity is “[t]he catchword for the study of environmental law” and “the price of escape from awkward universalities.”\(^{89}\) Casebook and law review authors likewise refer to environmental law’s “extraordinary complexity”\(^{90}\) and how “the quantity of minutely detailed language in modern environmental law beggars description.”\(^{91}\)

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88. Rodgers, supra note 20, § 1.2, at 25; see Tarlock, supra note 79, at 1124 (“Despite its political success, however, both the legitimacy of environmental protection and the means chosen to achieve it remain the subject of intense debate. Much of environmental law is either trivial or ephemeral and therefore is vulnerable to being uprooted and eroded by political pressures.”); see also James E. Krier, The End of the World News, 27 LOY. L.A. L. REV. 851, 852-56 (1994) (describing environmental law as matter of muddling through problems—that is, of trial and error). Current issues before Congress—including risk assessment reform, private property protection, and unfunded mandates—prove that the debate regarding environmental protection laws remains dynamic. See supra note 76 and accompanying text.


90. See, e.g., Percival et al., supra note 10, at 72.

Environmental law's complexity undoubtedly is attributable in large part to its dynamic tendency, especially the scientific and political roots of that dynamism. But, at bottom, this complexity has even more basic origins: environmental laws reflect the complexities of the ecosystem itself. Lawmakers cannot avoid those complexities; instead, they must ultimately subsume them within a regulatory scheme. Environmental law's complexity is therefore not merely the notion that the subject is "hard," "difficult," or "rigorous," but is far more multidimensional. It encompasses: (i) technicality; (ii) indeterminacy; (iii) obscurity; and (iv) differentiation. Each warrants separate discussion.

i. Technicality. Of the ways in which environmental law is complex, "technicality" is perhaps the most self-evident and, ultimately, the least problematic for the development of an environmental crimes program. Environmental law's "technicality" refers to the way in which environmen-
tual laws "require special sophistication or expertise on the part of those who wish to understand and apply them." 94

The most obvious source of environmental law's technicality is its dependence on science, engineering, and economics. Environmental law is ultimately written in the language of the experts in those fields—the language of people who develop the standards at EPA in the first instance, as well as the scientists, engineers, and economists within industry who seek to comply with those standards. Although these government and private sector lawyers and policymakers may use the experts' technical terms of art easily in their oral and written presentations, their understanding of the subtle distinctions involved is usually less impressive than their rhetorical skills. Few have even the dimmest comprehension of the makeup and structure of the various chemical compounds, biological processes, and engineering practices that serve as the true denominators of environmental protection standards. 95

Further contributing to environmental law's technicality is that the law itself is "packed with bizarre terms and opaque acronyms." 96 Environmental law's acronyms are legion. 97 Mastery of these acronyms is a de facto

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94. Schuck, supra note 93, at 4.
95. The author, though the proud possessor of two different bachelor degrees (one in chemistry and the other in economics, both with an emphasis of the relationship of each discipline to environmental protection), freely acknowledges his own relative ignorance of environmental science and economics. Test yourself: (1) For the Clean Air Act: (a) what is the pararosaniline method of determining the amount of sulfur dioxide in the atmosphere? see 40 C.F.R. § 50 app. A (1994); (b) if you know that, then please describe the significance of the following formula for determining flow rate at a sampling site: Qstat = Qact × Pb = (1 − RH)/4H2O/Psd × 298.16/(Tmeter + 273.16)? see id.; (c) look at the formula for calculating emission levels for motor vehicles (I can't even type it) and explain each of the terms and their practical significance, see 40 C.F.R. § 86.345-79 (1992). (2) For the Clean Water Act, (a) what is the difference between 1,2 Dichlorobenzene and 1,4 Dichlorobenzene (even I know this) and are they both "purgeable halocarbons" for the purpose of determining the methods for chemical analysis of municipal and industrial wastewater? see 40 C.F.R. § 136 app. A, Meth. 601, § 1.1 (1992); (b) CWA regulations describe the effluent limitations for "the manufacture of sulfonic acid and sulfuric acid esters by means of sulfonation and sulfation of raw materials, including but not limited to petroleum derived alkyls, employing oleum in either continuous or batch processes." What is that? See 40 C.F.R. § 417.90 (1994). (3) For RCRA, (a) what does it mean to have a "flash point less than 60°C (140°F), as determined by a Pensky-Martens Closed Supt Tester, using the test method specified in ASTM Standard D-3278-78?"; (b) to meet closure and post closure requirements, you need to know what are a "letter of credit," "surety bond," and "tangible net worth." 40 C.F.R. §§ 264.141, 264.147(h), (i) (1994) (most lawyers go into environmental law hoping to avoid just this kind of question).
97. Courts routinely make reference to this phenomenon, referring to "a symphony of acronyms," see, e.g., North Shore Gas Co. v. EPA, 930 F.2d 1239, 1242 (7th Cir. 1991), and comment that environmental law is "mired in an alphabet soup of acronyms," see, e.g., Sierra Club v. Froehlke, 816 F.2d 205, 208 (5th Cir. 1987). Few understand the difference, when there is any, between BACT, BADT, BART, BATEA, BCT, BDAT, and BPCT (i.e., Best Available Control Technology, Best Available Demonstrated Technology, Best Available
credential for any practitioner claiming to be an environmental lawyer.\textsuperscript{98}

ii. Indeterminacy. "Indeterminate" laws are "open-textured, flexible, multifactored, and fluid";\textsuperscript{99} "outcomes are hard to predict"\textsuperscript{100}—a description that fits many of environmental law's key provisions, especially the jurisdictional terms of art that determine the scope of the law's applicability. It also describes well many environmental protection standards. There are rarely any clear threshold levels at which environmental pollution becomes unacceptable. The legal system, therefore, draws lines that tend to be based on fairly arbitrary distinctions. The jurisdictional boundaries of most environmental laws, as well as the substantive environmental protection standards themselves, tend to turn on questions of degree that are, at best, gray at the border. It is rarely self-evident, on which side of the border one lies.

Environmental regulations rarely pose the question whether one can pollute, but instead precisely where, when, and how much one can pollute. The real-world difference in terms of the environmental impact of the various legal lines drawn to answer the where, when, and how much of environmental law—that is, the difference between being on just one side of the line rather than just on the other side—is likely to be negligible, if any at all. Indeed, the answers given are just as likely to be based (as they are in other areas of law) on political and economic clout as they are on environmental impact.\textsuperscript{101} Despite the lack of environmental consequences, however, the legal implications of being barely on one side of the law rather than barely on the other side can nonetheless be tremendous.


\textsuperscript{99} Schuck, \textit{supra} note 93, at 4.

\textsuperscript{100} Id.

\textsuperscript{101} See PERCIVAL ET AL., \textit{supra} note 10, at 72 ("The diverse philosophies that animate environmental concerns and the immense uncertainties that confront policymakers provide ample opportunity for controversy. When regulatory policy is developed and implemented, tensions submerged in ambiguous statutory language often are resolved in ways that contribute further to the extraordinary complexity of environmental regulation."); Julie L. Edelson, \textit{A Win for Clean Air}, \textit{Envtl. F.}, Jan./Feb. 1991, at 14 (quoting Robert Hurley) ("The legislation was so intricate, so complicated, so divided on geographic, political, and economic levels, it would have been nearly impossible to publicly debate all the issues.").
In the Clean Water Act, for instance, the two most significant threshold inquiries are, first, whether the activity emitting effluent is a "point source" or a "nonpoint source" and, second, whether the effluent is being deposited into "navigable waters." Only point source discharges into navigable waters require a Clean Water Act permit.\(^\text{102}\) Although both terms are defined by statute, neither has a determinate meaning.

A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to a pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . ."\(^\text{103}\) The meaning of this standard has been litigated in myriad factual circumstances—for example, vehicles spreading cow manure onto agricultural land,\(^\text{104}\) an individual throwing hypodermic needles into a river,\(^\text{105}\) a dam discharging dead fish into a lake,\(^\text{106}\) snowmelt from a settling pond,\(^\text{107}\) and surface runoff from a mine.\(^\text{108}\) As a statutory touchstone, "discernible" is plainly vague and open-ended.

The meaning of "navigable water" is likewise indeterminate, especially as applied to wetlands. Section 502(7) of the Clean Water Act defines "navigable waters" as "waters of the United States, including the territorial sea."\(^\text{109}\) As the Supreme Court has acknowledged, there are "inherent difficulties [in] defining precise boundaries to regulatable waters."\(^\text{110}\) Indeed, the Army Corps of Engineers has adopted varying definitions over the years; for a significant period of time in the 1980s, the Army Corps of Engineers and EPA (jointly responsible for implementing the Section 404 wetlands program) had conflicting definitions of the jurisdictional scope of "wetlands" and, therefore, of the program itself.\(^\text{111}\) Today, a single regulatory definition, which asks whether the land at issue is "normally characterized by the prevalence of vegetation that requires saturated soil conditions


\(^{104}\) See Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114 (2d Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995).

\(^{105}\) See United States v. Plaza Health Labs., 3 F.3d 643 (2d Cir. 1993), cert. denied, 114 S. Ct. 2764 (1994).


\(^{107}\) See United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979).


for growth and reproduction,"\textsuperscript{112} is accepted by both agencies. The test is sensible from an ecological perspective, but the inquiry hardly provides a bright line for those seeking to determine on which side of the law they fall.\textsuperscript{113} The Resource Conservation and Recovery Act (RCRA) is likely the most indeterminate of all. Subchapter C of RCRA provides a "cradle to grave" scheme for the regulation of "hazardous waste."\textsuperscript{114} Because the costs of compliance with Subchapter C can be extremely burdensome,\textsuperscript{115} determining whether a material is "hazardous waste" within the meaning of RCRA has huge financial implications.

On the face of the statute, the inquiry seems simple: a "hazardous waste" is merely a "solid waste" that presents a statutorily defined level of threat to human health or the environment when improperly managed.\textsuperscript{116} A "solid waste" is, in turn, defined to include a specific list of materials such as "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility," followed by an important, vaguely open-ended catch-all category: "other discarded material."\textsuperscript{117} Determining whether a particular material has been "discarded" turns out, however, to be an undertaking fraught with ambiguity.\textsuperscript{118}

\textsuperscript{112} 33 C.F.R. § 323.2c (1994).
\textsuperscript{113} Many of the Clean Water Act's effluent limitations are no more precise. Point source discharges must comply with water quality standards, including "nondegradation standards" and water quality criteria that "are often expressed in broad, narrative terms." Public Util. Dist. No. 1 v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1910 (1994). Nondegradation simply means the maintenance and protection of existing uses. See id. at 1912-13; 40 C.F.R. § 131.12 (1995). Even the NPDES effluent limitations, which sound "hard and fast," turn out to be less so in actual application. There is, in fact, much "bargaining, exchange, and compromise" between the regulator and the regulated. See RODGERS, supra note 20, § 4.8, at 364.
\textsuperscript{115} See id.
\textsuperscript{116} The relevant statute states:
The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

\textsuperscript{117} STENSVAAK, LAW AND PRACTICE, supra note 91, §§ 2.8, 2.24.
\textsuperscript{118} See, e.g., Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1314 (2d Cir. 1993) (in considering whether lead shot fired from gun club amounted to "discarded material" for RCRA purposes, the court of appeals inquired: "Does the transformation from useful to discarded material take place the instant the shot is fired or at some later time?").
As recently described by the EPA official overseeing the Agency's hazardous waste programs, there were only "five people in the agency who understand what 'hazardous waste' is. What's hazardous one year isn't [the next]—[what] wasn't hazardous yesterday, is hazardous tomorrow, because we've changed the rules." 119 The principal source of the difficulty is that "RCRA wants to encourage resource conservation and recovery, including recycling activities, but those activities often are the source of considerable environmental harm." 120 Combustion of waste for its energy value produces air pollution. Re-use of wastes in building materials may present serious hazards if those wastes contain certain contaminants. The result is a regulatory scheme that "contains some of the most puzzling English word patterns ever devised," 121 in which "'solid wastes' are not necessarily solid and they are not necessarily wastes." 122

What EPA seeks to do in determining whether a material has been "discarded," within the meaning of RCRA, is both necessary and commendable: that is, to determine when materials being recycled in some manner are part of the solution rather than the problem. The resulting confusion is nonetheless considerable. Determining what regulatory burdens apply depends on both seemingly illusory distinctions between "spent materials," "by-products," "sludges," "commercial chemical products," and "scrap metals," and indeterminate, subjective characteristics such as "used in a manner constituting disposal," "reclaimed," "burned to recover energy," "used or reused," and "accumulated speculatively." 123


120. Rodgers, supra note 20, § 7.4, at 371. A second source of indeterminacy is found in the series of explicit statutory exclusions from the definition of "solid waste." See 42 U.S.C. § 6903(27) (excluding "solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows . . . or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954"). Some of these exclusions derive from practical problems; others from overlapping agency jurisdictions, but, as in other areas of environmental law, political compromise is the most obvious explanation. See Rodgers, Lesson of the Red Squirrel, supra note 1.


122. 3 ENVIRONMENTAL LAW PRACTICE GUIDE—STATE AND FEDERAL LAW § 29.02[2], at 29-24 (Michael Gerrard ed., 1993) [hereinafter ENVIRONMENTAL LAW PRACTICE GUIDE]; see also 4 BATTLE & Lipeles, supra note 91, at 7 ("The Part 261 regulations [defining hazardous waste for Subchapter C] are among the most dense, obtuse, and significant of the vast array of RCRA regulations."). The reference to the fact that "solid waste" is not necessarily solid refers to the definition of "solid waste" including "liquid, semisolid, or contained gaseous material," 42 U.S.C. § 6903(27). That same extension of solid to liquid and gas is also what prompted the Seventh Circuit to refer to RCRA as "statutory Cloud Cuckoo Land." Inland Steel Co. v. EPA, 901 F.2d 1419, 1421 (7th Cir. 1990); see supra text accompanying note 91.

123. 40 C.F.R. § 261.2 (1995); see 1 Cooke, supra note 91, § 2.03[2][b][vi][A]; Jeffrey M. Gaba, Solid Waste and Recycled Materials Under RCRA: Separating Chaff from Wheat, 16 ECOLOGY L.Q. 623, 646 (1989) ("The regulations are horrendously complex, make fine distinctions that have significant regulatory consequences, and simply do not seem to have a
Consider, for instance, the term “by-product” and its significance. Whether or not a material is a by-product can determine whether reclamation of that material renders it a “discarded material” subject to RCRA subchapter C and exposes responsible individuals to criminal penalties. To be a by-product, the material must not be “one of the primary products of a production process” and “not solely or separately produced by the production process.” The regulatory definition elaborates by saying that a by-product does not include a “co-product that is produced for the general public’s use and is ordinarily used in the form it is produced by the process.” What precisely does “primary product,” “separately produced,” “general public’s use,” or “ordinarily used” mean? The meanings of none of these terms are self-evident, particularly to one who transports or disposes of the material, but did not initially produce it. The same kinds of problems occur with the other regulatory terms of art. The upshot is “operationally difficult” language, the criminal enforcement of which is necessarily problematic.

Determining whether a particular “solid waste” is “hazardous” is no easier than determining if it is “discarded” or a “by-product,” and no less anomalous in its regulatory criteria. EPA determines whether a waste is

coherent basis.”); Stephen Johnson, Recyclable Materials and Complicated, Conflicting and Costly RCRA’s Definition of Solid Waste, 21 Env’t L. Rep. (Envtl. Inst.) 10,357 (July 1991) (arguing that lack of clarity in definition of solid waste has negatively impacted RCRA’s goal of encouraging recycling and recovery of resources from solid waste); Needelman, supra note 91, at 973 (reporting that “definition of solid waste . . . is so complex and confusing that it hampers enforcement and compliance”).

126. Id.
127. Cf. Stensvaag, Law & Practice, supra note 91, § 3.10 (discussing similar problem arising in context of “spent material”).
128. See id. § 3.18 (describing how “accumulated speculatively” standard is “highly subjective standard”); id. § 3.10 (describing how term “spent material” involves “questions of degree” and asserting that “[t]he inherent ambiguity in the definition will be particularly unfortunate when the government seeks to criminally prosecute.”); 1 Cooke, supra note 91, § 2.03[2][a][E], at 2-22 to 2-23 (noting that “[w]hether a particular material constitutes a solid waste because it has been abandoned by being burned or incinerated depends upon whether it is burned in a boiler, an industrial furnace, or an incinerator. . . . [But] the EPA has not promulgated an ‘objective,’ universal definition of burning for destruction.”); Robert V. Percival et al., Environmental Regulation—Law, Science, and Policy 52 (Supp. 1993-94) (describing how stringency of RCRA regulation turns on vague regulatory distinction between “tank” and “surface impoundment”).
130. See, e.g., United States v. Self, 2 F.3d 1071 (10th Cir. 1993) (rejecting EPA contention that natural gas condensate is “by-product”).
hazardous based either on whether the material exhibits a physical characteristic (e.g., toxicity, ignitability, volatility, or reactivity),\textsuperscript{132} or on whether it appears on a list of specific hazardous wastes.\textsuperscript{133} The former inquiry necessarily turns on the application of fairly arbitrary questions of degree.\textsuperscript{134} The latter is based on lengthy lists not just of specific chemical compounds, but more often of precise industrial processes, thereby reinjecting the kinds of indeterminacy present in the "solid waste" inquiry.\textsuperscript{135}

iii. Obscurity. Environmental law’s "obscurity," while closely related to its indeterminacy, describes a slightly different feature. "Indeterminacy" focuses on the meaning of the law once it is located. "Obscurity" refers to the difficulty, in the first instance, of even locating the law. This obscurity stems from the sheer density of environmental rules and their obscure, often inaccessible source materials.

There are, for instance, approximately 1000 pages of RCRA regulations,\textsuperscript{136} 4000 pages of Clean Air Act regulations,\textsuperscript{137} and 2400 pages of Clean Water Act regulations.\textsuperscript{138} While the "fine print" of these rules is not easy to uncover, their significance nonetheless can be great. For instance, EPA classifies approximately 350 dangerous chemical compounds as hazardous wastes when they are solid wastes. But, according to the regulations' "fine print," this list includes only the pure grade of the listed chemical compound and those formulations in which the chemical is the "sole active ingredient." Hence, if a manufacturer formulates a product with two of the listed chemicals, each of which is an active ingredient, then the resulting formulation does not amount to a listed hazardous waste.\textsuperscript{139} There are myriad other ways in which, with slight changes in approach, an industry can take advantage of the fine print to escape costly environmental regulations altogether, or the agency can exploit the fine print to target unwitting

\textsuperscript{133} See 40 C.F.R. § 261.3 (1995).
\textsuperscript{135} See United States v. Bethlehem Steel Corp., 38 F.3d 862 (7th Cir. 1994) (rejecting EPA’s contention and holding that hazardous waste listing for sludge from electroplating operations applies only to sludge from pure electroplating wastewaters and not mixture). Moreover, whether a waste is hazardous turns on the dangers it presents if "improperly managed." See 42 U.S.C. § 6903(5) (1988). Consequently, the number of materials that become "hazardous" may be enormous: "[A]ny endless range of materials have at least some potential to cause harm assuming they are mishandled." JOHN QUARLES, FEDERAL REGULATION OF HAZARDOUS WASTES: A GUIDE TO RCRA 16 (1982).
\textsuperscript{139} Stensvaag, The Not So Fine Print, supra note 91, at 1094-97.
industries.\textsuperscript{140}

EPA’s regulations are merely the most formal and visible peaks in a vast range of underground and fragmented agency guidance on the meaning of the relevant federal statutory and regulatory provisions. For instance, EPA’s preambles (overviews of the agency’s plans to implement specific titles) do not appear in the Code of Federal Regulations, but EPA often provides much detailed guidance in these documents. The preambles tend to be far lengthier than the rules themselves. For instance, EPA’s rules regarding the definition of “solid waste” covered few pages of the Federal Register. By contrast, there were fifty-four pages of explanation of those rules in the accompanying preamble.\textsuperscript{141} EPA’s regulations governing used oil and hazardous waste transportation all had preambles three to four times longer than the rules themselves.\textsuperscript{142}

The lengthy preambles just begin to suggest the extent of underground environmental law. EPA routinely issues informal guidance memoranda and letters to deal with complex issues on a case-by-case basis. Indeed, EPA is “regarded by some as a champion in the game of ‘rule by memorandum.’”\textsuperscript{143} For instance, EPA’s Office of Solid Waste and Emergency Response, which oversees the implementation of EPA’s hazardous waste programs, has issued over 19,500 pages of informal regulatory guidance.\textsuperscript{144} EPA engages in this practice for a reason: to avoid the scrutiny of many of its frequently unfriendly overseers—the Office of Management and Budget, Congress, and the courts.\textsuperscript{145}

Whatever the reason, the practical effect on those seeking to comply with the law is plainly considerable. In United States v. Self,\textsuperscript{146} for instance, the court addressed the issue whether natural gas condensate was a “by-product” or an “unlisted commercial product.” The viability of the federal government’s criminal prosecution depended on the condensate being one or the other because otherwise it would be exempt from the hazardous waste provisions of RCRA Subchapter C. To determine the status of the condensate, the court consulted and tried to reconcile at least four different and arguably conflicting preamble discussions.\textsuperscript{147} A member

\begin{itemize}
\item \textsuperscript{140} Stoll, supra note 121, at 8-9.
\item \textsuperscript{141} See 50 Fed. Reg. 614 (1985).
\item \textsuperscript{142} Percival et al., supra note 10, at 260; EPA, At a Crossroads, supra note 129, at 37.
\item \textsuperscript{143} Robert A. Anthony, Interpretive Rules, Policy Statements, Guidelines, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 Duke L.J. 1311, 1346 (1992); see also Bryan G. Tabbler & Mark E. Shere, EPA’s Practice of Regulation-By-Memo, NAT. RESOURCES & ENV’T, Fall 1990, at 3.
\item \textsuperscript{144} James T. Hamilton & Christopher H. Schroeder, Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste, LAW & CONTEMP. PROBS., Spring 1994, at 111, 140.
\item \textsuperscript{145} Id. at 139-48; Lazarus, The Tragedy of Distrust, supra note 14, at 356.
\item \textsuperscript{146} 2 F.3d 1071 (10th Cir. 1993); see supra text accompanying note 130.
\item \textsuperscript{147} Self, 2 F.3d at 1077-82 (citing 50 Fed. Reg. 618 (1985)); 50 Fed. Reg. 14,216, 14,219
\end{itemize}
of the regulated community would necessarily have to do the same to
determine any applicable legal constraints ahead of time.

iv. Differentiation. "Differentiation" is a shorthand reference for "institu-
tionally differentiated"; it is present when the law "contains a number of
decision structures that draw upon different sources of legitimacy."\(^{148}\) This
is a prominent feature of environmental law; indeed, when it comes to its
role in environmental protection, the government exhibits both "multiple
personality disorder" and "schizophrenia." Its multiple personalities are
revealed in the many different governmental bodies with authority to
regulate environmental pollution. Governmental schizophrenia derives from
the government's dual role as both regulator and regulated in environ-
mental protection.

aa. multiple personality disorder. The government's multiple regulatory
personalities extend both horizontally and vertically. Horizontally, federal
regulatory authority is surprisingly fragmented. Although President Nix-
on's Ash Council, which was the advisory group charged by the President
with recommending how environmental protection should be organized
within the executive branch, had originally planned to make one federal
agency responsible for all environmental protection issues,\(^ {149}\) that is not
what happened. EPA consolidates many of the federal government's envi-
nmental protection programs. As the result of historical happenstance,
political compromise, bureaucratic infighting, and careful policy planning,
however, a host of other federal agencies, including the Department of
Agriculture, Department of Energy, Department of the Interior, Army
Corps of Engineers, Federal Energy Regulatory Commission, National
Oceanic and Atmospheric Administration, and Nuclear Regulatory Com-
mission, possess significant regulatory authority over environmental protec-

\(^{148}\) Schuck, supra note 93, at 4.

\(^{149}\) See Alfred A. Marcus, EPA's Organizational Structure, LAW & CONTEMP. PROBS.,
tion. 150 These competing regulatory authorities are frequently the source of considerable friction and confusion for the regulated community. 151

The fragmentation extends vertically to state, tribal, and local governments, and even to EPA's own regional offices. 152 State, tribal, and local governmental entities administer environmental protection programs wholly of their own creation. 153 In addition, virtually all of the major federal environmental laws allow for some type of state administration, coupled with ongoing federal supervision, 154 and tribal governments are increasingly assuming similar responsibilities. 155 Finally, at least one federal program allows the state regulatory authorities to veto or at least impose environmental protection conditions on a federal agency's issuance of a federal license or permit, even when that agency has already purported to take environmental concerns into account. 156

One unavoidable effect of these overlapping sovereign authorities is conflicting governmental signals between the federal and state sovereigns. When the state interprets federal law, the courts ultimately resolve the dispute as a matter of federal statutory and regulatory construction. 157 When the state exercises its own law, the regulated entity often claims that any state law more stringent than the federal standard is preempted. 158 Until such issues are resolved, however, the law remains unsettled and confusing.

150. Lazarus, The Tragedy of Distrust, supra note 14, at 317-18 (describing dismantling of proposed cabinet-level environmental agency in favor of creating EPA, while retaining environmental protection authority in other federal agencies).


155. See, e.g., 58 Fed. Reg. 67,966 (1993) (authorizing Indian tribes to administer, as state, aspects of Clean Water Act program); 59 Fed. Reg. 43,956 (1994) (proposing to authorize Indian tribes to implement air pollution control programs, as states can).


government schizophrenia. The single greatest source of institutional differentiation in environmental law is the government's schizophrenic role as both regulator and regulated, simultaneously enforcing environmental protection laws both against others and against itself as the single largest source of pollution. Federal facilities constitute a significant percentage of all sites listed on the Superfund's National Priorities List. And the federal agencies, in particular the Departments of Defense and Energy, operate many facilities that must comply with federal environmental requirements. Indeed, the cost of federal governmental compliance with environmental laws exceeds the cost of government administration and enforcement of those same laws.

The unhappy prospect of the government enforcing against itself and its employees, or against another sovereign, is one result. For the purpose of establishing an environmental crimes program, however, the more significant ramification is the likelihood that members of the regulated community will get conflicting signals from the "government" regarding environmental legal requirements. Specifically, EPA will likely embrace a very different approach to what the law requires than will, for instance, the Departments of Defense or Energy. The missions and cultures of these two agencies, and those who work within them, are fundamentally different than EPA's. EPA is far more apt to embrace a more demanding view of the law. When a private party finds itself subject to the competing demands of each agency, fundamental fairness issues may bar a criminal prosecution if the defendant can demonstrate that it relied on the advice, albeit erroneous, of some part of the government.

160. See 56 Fed. Reg. 35,840 (1991) (approximately 10% of all NPL sites are federal facilities).
164. The easy case for a valid defense is when a defendant "acts in reasonable reliance
C. THE AIMS AND IDENTIFYING FEATURES OF CRIMINAL LAW

At some level of abstraction there may be "no distinction better known, than the distinction between civil and criminal law," but in practice the precise dividing line between the two has become increasingly blurred. Civil sanctions seem more and more like criminal sanctions in their severity and harshness. Moreover, at the federal level, Congress has virtually criminalized civil law by making criminal sanctions available for violations of otherwise civil federal regulatory programs. An estimated 300,000

upon an official statement of the law, afterward determined to be invalid or erroneous, contained in an administrative order or grant of permission or an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the offense." MODEL PENAL CODE § 2.04(3)(b)(iii) (1962). For similar formulations, see Cox v. Louisiana, 379 U.S. 559, 571 (1965); Raley v. Ohio, 360 U.S. 423, 426 (1959); Note, Applying Estoppel Principles in Criminal Cases, 78 YALE L.J. 1046 (1969); see also United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674 (1973) (finding that government agency's interpretation of the law deprived defendant "of fair warning as to what conduct Government intended to make criminal"); United States v. Barker: Misapplication of the Reliance on Official Interpretation of the Law Defense, 66 CAL. L. REV. 809 (1978). The broader principle is "that when the government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of government deception." Heckler v. Community Health Serv., 467 U.S. 51, 61 n.12 (1984); see also Raley, 360 U.S. at 438 ("Inexplicably contradictory commands in statutes ordaining criminal penalties have ... judicially been denied the force of criminal sanctions."). In environmental law, such contradictory commands may be the result of differing preambles, see supra note 147, or possibly of differing agency views, even when the erroneous agency view upon which the defendant relied was not the agency with the ultimate authority to speak to the issue. The courts have not yet fully explored the potentially mischievous notion that erroneous advice from a government official with only apparent authority can supply a defense to subsequent criminal prosecution. This proposition, however, is not totally devoid of force. See United States v. Tallmadge, 829 F.2d 767, 775 (9th Cir. 1987) (conviction for unlawful firearms possession reversed because defendant had received erroneous legal advice from federally licensed firearms dealer).


166. Civil law, including civil sanctions, can no longer be fairly characterized as concerned with the mere arbitration of "private" disputes. Civil law is as "public" in its reach and purpose as criminal law. Authorized remedies include punitive remedies, designed not merely to compensate unlawful forced wealth transfers, but to influence social behavior more broadly. Whether or not one ascribes to the view that tort law historically served these purposes at the behest of common-law judges, compare Morton Horwitz, The Transformation of American Law (1977) (arguing that nineteenth-century judges formulated private law doctrine to promote economic growth) with Gary Schwartz, Tort Law and the Economy in Nineteenth Century America: A Reinterpretation, 90 YALE L.J. 1717 (1981) (rejecting contention that nineteenth-century judges were influenced by efficiency theory of law in formulating tort doctrine), that such is the purpose of these civil punitive remedies is plain. See John C. Coffee, Jr., Paradigms Lost: The Blurring of the Criminal and Civil Law Models— and What Can Be Done About It, 101 YALE L.J. 1875, 1890-91 (1992) [hereinafter Coffee, Paradigms Lost]; Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Liability, 101 YALE L.J. 1795, 1798-1801 (1992); Note, Statutory Penalties—A Legal Hybrid, 41 HARV. L. REV. 1092 (1938); see also Nancy Frank, From Criminal Law to Regulation: A Historical Analysis of Health and Safety Law 177-95 (1986).

167. The expansion of federal criminal law roughly parallels the expansion of federal law in general. See generally Kathleen F. Brickey, Criminal Mischief: The Federalization of
federal regulations are now subject to criminal enforcement.\textsuperscript{168}

Notwithstanding this modern blurring of civil and criminal law, criminal law retains certain distinguishing core features. The most significant is its sanction, from which most of criminal law's other features flow. Criminal sanctions are no longer unique simply because their purpose is to punish; civil sanctions have long included a punitive dimension (e.g., punitive damages in tort law), which has dramatically increased with the inclusion of civil penalty provisions (e.g., civil fines) in most federal regulatory programs.\textsuperscript{169} Criminal law's uniqueness instead derives from its invocation of society's harshest sanctions, including the loss of liberty that results from incarceration, death, and the moral stigma associated with a criminal conviction. The long-term effect of this stigma on an individual can be the most severe.\textsuperscript{170} In fact, when applied to corporate entities that cannot be incarcerated, stigma can be the only meaningful justification for the choice of criminal prosecution rather than the less socially burdensome option of civil enforcement.\textsuperscript{171}

Virtually all of criminal law's distinguishing features derive from the need to identify the circumstances that justify the use of criminal sanctions. Such justification entails both carefully defining the human behavior warranting the sanction, as well as attaching procedural safeguards to the criminal proceeding to ensure a fair and accurate adjudication of culpability. Moreover, because moral stigma is one of a criminal conviction's essential features, such careful definitions and procedural safeguards are critical to the viability of the sanction. For the moral stigma of the criminal

\textit{American Criminal Law}, 46 Hastings L.J. 1135 (1995). Federal criminal jurisdiction began fairly modestly with statutory provisions concerned with uniquely federal concerns (crimes committed on federal enclaves). The law's first extensions were likewise modest; the new crimes possessed an obvious national security, foreign policy, or interstate nexus (treason, forgery of United States currency, securities, immigration, and tax). By the 1930s, however, Congress began to exercise its Commerce Clause authority far more expansively, first with a series of crimes distinguished by the intensity of public concern rather than any uniquely federal interest; ultimately, Congress expanded the reach of its Commerce Clause power by routinely providing for criminal enforcement of the New Deal legislation of the late 1930s and 1940s. \textit{Id.} at 1137-45.


169. See supra note 166.

170. Henry M. Hart, \textit{The Aims of the Criminal Law}, 23 LAW & CONTEMP. PROBS., Summer 1958, at 401, 404 ("What distinguishes a criminal from a civil sanction and all that distinguishes it ... is the judgment of the community condemnation which accompanies and justifies its imposition.") [hereinafter Hart, \textit{Aims of the Criminal Law}]; Mann, supra note 166, at 1809 (arguing that “imprisonment and the special stigma associated with convictions are the core remedies used to achieve the purposes of the criminal sanction”).

sanction will attach in the long term only if the public is persuaded both of the moral culpability of the proscribed conduct and of the reliability of the adjudication of the defendant's guilt. In this respect, the criminal law exhibits unavoidable circularity: criminality turns on morality, yet morality may itself turn on criminality. Hence, one of the features that makes criminal law unique—the moral stigma associated with a criminal conviction—is not self-executing. It can be lost over time by overreaching.

The defendant's "moral culpability" is the feature most frequently invoked to justify the severe sanctions of criminal law. What makes conduct more or less morally culpable turns, in the first instance, on the actor's state of mind. The more culpable the state of mind, the harsher the corresponding punishment ought to be. Culpability in this context turns on the defendant's purpose, the extent of the defendant's knowledge of the circumstances surrounding her conduct, the conduct itself, its results, and the reasons for the defendant's behavior.

Other major factors contributing to moral culpability include the nature of the conduct at stake, as well as the kind and amount of resulting harm (either created or threatened). A morally culpable state of mind alone is generally not considered sufficient to warrant criminal sanction; there must be some action (or inaction) in conjunction with that state of mind. There also usually needs to be some concrete harm with a public dimension that is realized or threatened as a direct result of the action.

172. Hall, supra note 165, at 756; Hart, supra note 170, at 404-05.
176. See generally Paul H. Robinson, The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception, 5 J. CONTEMP. LEGAL ISSUES 299 (1994) (contrasting "objective" and "subjective" views of criminality; the former views threatened or actual harm or evil as central element of criminal offense, and latter views culpability of defendant's state of mind sufficient, by itself, to justify criminal sanction without regard for whether harm or evil actually occurs or is even threatened).
Criminal misconduct is a crime against society; it is not just a private wrong.

Because of these prerequisites, criminal law is more appropriate for redressing violations of absolute duties, whereas tort law is better suited for redressing violations of relative duties.\textsuperscript{178} Ideally, criminal standards should be clear and determinate in defining these duties.\textsuperscript{179} Absent clarity, criminal law cannot serve well its deterrent function. Nor does societal retribution in the form of a criminal sanction seem fair when society has not given fair notice of what conduct warrants such an extreme sanction.\textsuperscript{180} In addition, clarity indicates that lawmakers have squarely focused on the propriety of invoking society's most severe sanction in particular circumstances. There is an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."\textsuperscript{181}

Criminal standards also tend to reflect settled societal norms of conduct, rather than sharply disputed matters.\textsuperscript{182} "Moral" culpability justifies criminal sanction, which in turn brings the "moral" stigma associated with that form of societal condemnation. The criminal law, then, seeks principally to reflect morality, including more newly settled norms, not to create it. Thus, even though the concept of morality is necessarily elusive and the precise boundary between moral and immoral conduct inevitably debatable, criminal standards risk losing their legitimate claim to moral force when they seek to promote certain utilitarian preferences rather than to condemn conduct that is not morally debatable.\textsuperscript{183}

\textsuperscript{178} See Coffee, Paradigms Lost, supra note 166, at 1879, 1884; Coffee, Reflections on the Disappearing Distinction, supra note 168, at 227-28; Robert Cooter, Prices and Sanctions, 84 COLUM. L. REV. 1523, 1538-44, 1548-50 (1984); Hall, supra note 165, at 760.

\textsuperscript{179} See Coffee, Reflections on the Disappearing Distinction, supra note 168, at 202; Hart, supra note 170, at 411-12.

\textsuperscript{180} See Posters 'N' Things v. United States, 114 S. Ct. 1747, 1754 (1994) (finding that "[t]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited") (quoting Kolen v. Lawson, 461 U.S. 352, 357 (1983)); Marks v. United States, 430 U.S. 188, 196 (1977) (holding Due Process Clause prevents indicting persons under case law decided after conduct in question occurred); Miller v. California, 413 U.S. 15, 29 (1973) (clarifying proper standard for testing obscenity under First Amendment analysis); Colten v. Kentucky, 407 U.S. 104, 110 (1972) (stating that no one should be held criminally liable for conduct "which he could not reasonably understand to be proscribed") (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)); Robert C. Post, Reconceptualizing Vagueness: Legal Rules and Social Orders, 82 CAL. L. REV. 491 (1994); Note, Due Process Requirements of Definiteness in Statutes, 62 HARV. L. REV. 77 (1948); see also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (declaring that prosecution under vague law is due process violation because it failed to give innocent persons fair warning).


A final distinguishing feature of criminal law is that it imposes a more
exacting burden of proof on the government and otherwise provides the
defendant with significant additional procedural guarantees. The govern-
ment must establish the defendant's guilt beyond a reasonable doubt and
not, as in civil enforcement actions, by a mere preponderance of the
evidence. Moreover, there are a host of evidentiary and procedural rules
applicable only to criminal proceedings that are intended to enhance the
reliability of the evidence before the factfinder and to preclude consider-
ation of unduly prejudicial information.

II. THE ABSENCE OF INTEGRATION IN THE DEVELOPMENT OF
ENVIRONMENTAL CRIMINAL LAW

Even the most cursory review of the competing features of environmen-
tal law and criminal law reveals several obvious tensions confronting the
development of an environmental criminal program. Criminal law requires
more demanding proof to convict, but environmental-law makes such a
showing problematic because of scientific uncertainties and fragmented
decisionmaking authority. Criminal law emphasizes settled norms, while
environmental law constantly changes and aspires for fundamental and
dramatic change. And, although criminal law requires clear, determinate,
and readily accessible legal standards, familiar to the general public,
environmental law is replete with obscure, indeterminate, and highly tech-
nical standards, the meaning of which few can claim genuine mastery.

None of these tensions means that there is something "wrong" with
environmental law; most of its features are justifiable. There are legiti-
mate, often unavoidable, reasons for this conflict inherent in both the
subject of environmental pollution and this nation's institutional structure
for lawmaking. But regardless of the merits of their origins, the above
tensions testify to the need for reconciliation and some mutual accommoda-
tion of competing interests in the development of environmental criminal
law. Each presents a distinct challenge.

Nor is any one of these tensions totally unique to environmental crimi-
nal law. Undoubtedly, there are other regulatory schemes with criminal
sanctions that present problems of complexity, especially indeterminacy
and obscurity, and that are also dynamic in character. Food and drug law,
securities regulation, and the tax code (which is also marked by pervasiv-
eness in its application) are obvious examples. Few other regulatory areas,
however, present as many of these features in combination as does environ-
mental law. Environmental law is likely unparalleled in the intensity of the
conflicts that have resulted from its criminalization. But even more impor-
tant, those in government responsible for resolution of these kinds of
tensions have done so more successfully in other areas of law than in
environmental criminal law. Criminal law applicable to securities regula-
tion and the tax code, for example, reflects more concerted integrative
efforts in the initial definition, interpretation, and enforcement than environmental criminal law.\textsuperscript{184} And problems that might be posed in food and drug regulation have likely not been as acute because the applicable penalties are so low.\textsuperscript{185}

In the environmental criminal area, all three branches of government have not met the challenges that are presented by the need to integrate environmental and criminal law: Congress, in drafting the relevant statutory provisions; the Executive Branch, in prosecuting environmental crimes; and, finally, the Courts, in construing the relevant language—all share responsibility for this lapse. No branch has appreciated how these tensions bear on its respective role.

A. CONGRESS

Congress formally enacted environmental criminal legislation in three distinct chronological waves. First, Congress created environmental criminal programs as part of virtually all of the environmental regulatory programs Congress enacted in the 1970s and 1980s. These included the Clean Air Act in 1970; Federal Water Pollution Control Act Amendments in 1972; Federal Insecticide, Fungicide, Rodenticide Act in 1972; Safe Drinking Water Act in 1974; Toxic Substances Control Act and Resource Conservation and Recovery Act in 1976; and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. In each of these laws, Congress provided for criminal enforcement of statutory violations.\textsuperscript{186}

Second, Congress defined a series of new crimes with reference to existing environmental statutes, triggered by proof of both a more culpable mens rea and the existence of heightened threats to human health.\textsuperscript{187} At the same time, Congress significantly enhanced the penalties applicable to

\textsuperscript{184} See infra notes 216-17 and accompanying text.

\textsuperscript{185} See infra note 215 and accompanying text. The absence of higher sanctions, though, may express a different kind of nonintegration problem—the failure to account adequately for the important purposes of the regulatory program. Nowhere is that problem greater than worker safety law. See infra note 448.


existing environmental criminal provisions. Congress upgraded most violations from misdemeanors to felonies and raised the maximum applicable fines and prison sentences accordingly. In a parallel development, Congress created the United States Sentencing Commission, whose binding guidelines dramatically lengthened the prison terms federal judges must impose and the minimum time that convicts must actually serve. Congress also increased the collateral civil implications of penalties for criminal conviction under the environmental laws.

Finally, in 1990, Congress enacted the Pollution Prosecution Act in order to bolster the resources available to the environmental crimes program. That statute endowed EPA with long-sought enhanced investiga-
tory authority, including the right to carry firearms, and substantially increased the number of EPA investigators to prosecute environmental crimes. EPA had twenty-three criminal investigators in the entire United States in 1983 and had increased the number of investigators to 110 by 1990.\textsuperscript{192} The Act provided for a further quadrupling of the number of EPA criminal investigators by 1995.\textsuperscript{193}

Throughout these initiatives, Congress has maintained a consistent approach to environmental crime. There are essentially three different models that Congress might have pursued: (1) a criminal law model; (2) an administrative law model; or (3) a hybrid model that shares aspects of both other models.\textsuperscript{194}

Under the criminal law model, an environmental crime provision is, like any traditional criminal prohibition, a "stand-alone" law that prohibits conduct motivated by a morally culpable state of mind and causing a certain result. What justifies the "environmental crime" label is that the elements of the crime are defined in the context of environmental pollution. The crime is defined either in terms of the environmental harm caused by the conduct, for example, the destruction of a groundwater aquifer that was the sole drinking water supply for a municipality, or in terms of the role played by environmental media in bringing about a certain result, for example, the emission of toxic pollutants into the ambient air resulting in the death of another.

Under the "administrative model," the environmental crime piggybacks on top of an existing administrative regulatory scheme. Here, the crime is defined in terms of a violation of a pre-existing agency regulation. Examples of crimes include engaging in certain conduct without a required permit or failing to comply with a permit condition. In addition, the government can assure compliance with the administrative regulatory framework through criminal sanctions—for instance, by making it a crime to fail to submit a report (or a crime to submit a false report) necessary for the regulatory scheme’s proper functioning.

The hybrid model is self-explanatory, incorporating different aspects of the other two "pure" models into the elements of the crime. For example, the crime might require a showing of environmental pollution as the harm necessary for a violation, but define the proscribed conduct in terms of a violation of an existing regulation.

Congress essentially adopted the pure administrative model in the vast majority of existing environmental crime provisions. These crimes are

\begin{itemize}
\item \textsuperscript{192} Strock, \textit{supra} note 189, at 918.
\item \textsuperscript{193} Pollution Prosecution Act of 1990, § 202(a), 104 Stat. at 2962.
\end{itemize}
defined as violations of existing statutory or regulatory requirements. The only distinction between a civil and criminal violation is that criminal defendants act with a culpable state of mind—a "knowing" state of mind is the mens rea common to environmental statutes.\textsuperscript{195} The relevant civil enforcement provisions, by contrast, do not require any particular state of mind. In neither context is proof of actual environmental harm or risk of such harm an element of the statutory offense.

The most common environmental criminal provision,\textsuperscript{196} appearing in the Clean Air Act, Clean Water Act, Federal Insecticide, Fungicide, and Rodenticide Act, and the Toxic Substances Control Act, makes it a crime (usually a felony)\textsuperscript{197} to "knowingly violate[]" a statutory or regulatory requirement.\textsuperscript{198} The Resource Conservation and Recovery Act (RCRA) includes several provisions with slightly different, but roughly equivalent, language, that criminalize "knowingly" engaging in conduct that is "in

\textsuperscript{195} Except for the Clean Air Act's negligent endangerment provision, see infra note 205, the only environmental criminal provision that provides for criminal prosecution based on negligence is within the Clean Water Act, which creates a misdemeanor offense (first conviction) for "negligently violat[ing]" statutory requirements or for negligently introducing any pollutant or hazardous substance into a sewer system or publicly owned treatment works when the defendant both "knew or reasonably should have known" of the potential danger to health or property and the introduction causes the treatment works to violate its Clean Water Act permit. See 33 U.S.C. § 1319(c)(1) (1988 & Supp. V 1993); United States v. Oxford Royal Mushroom Prod., Inc., 487 F. Supp. 852, 857 (E.D. Pa. 1980) (noting that 33 U.S.C. § 1319(c) provides a single penalty for negligent and willful discharge, thereby suggesting that crimes are not separate and distinct); United States v. Frezzo Bros., Inc., 461 F. Supp. 266, 268 (E.D. Pa. 1978), aff'd, 602 F.2d 1123 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980). The Toxic Substances Control Act is the only environmental statute that bases criminal prosecution on a higher mens rea—"willfully"—but because that Act provides that the violation must either be "knowingly or willfully committed," the latter is of little practical significance. 15 U.S.C. § 2615(b) (1994).

\textsuperscript{196} For the sake of simplicity this portion of the article does not separately describe the various criminal provisions contained in most of the environmental statutes that make it a felony to "knowingly" make false statements, omit required material information, or fail to make required notifications. See Clean Water Act, 33 U.S.C. § 1319(c)(4) ("knowingly makes any false statement"); Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(3) (1988) (knowingly omits any material information or makes a false statement); Clean Air Act, 42 U.S.C. § 7413(c)(2) (1988 & Supp. V 1993) ("knowingly . . . makes any false material statement . . . or [fails to notify or report]"); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b)(3) (1988) ("information which he knows to be false or misleading"); id. § 9603(c) ("knowingly fails to notify" and "knowingly fails to provide the notice required").

\textsuperscript{197} The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Toxic Substances Control Act (TSCA) are the exceptions. Unlike the other environmental criminal provisions, TSCA violations are only misdemeanors, not felonies. See 7 U.S.C. § 136(l)(b)(1), (2) (1994); 15 U.S.C. § 2615(b) (1994). FIFRA felony violations are confined to the unlawful disclosure of product information obtained pursuant to the statute. 7 U.S.C. § 136(b)(3).

knowing violation” of a permit condition or limitation or certain regulatory requirements.\textsuperscript{199} RCRA, however, also contains several other criminal provisions that utilize different wording in describing the applicable mens rea requirement. Rather than criminalize conduct that “knowingly violates” RCRA standards, these provisions require only that the person “knowingly” engage in certain conduct and that the conduct occur without a required permit or otherwise fail to comply with a procedural requirement (e.g., a manifest requirement).\textsuperscript{200} A criminal action can be brought either against the party lacking the required permit or against someone with whom that party is directly or indirectly engaged in a mutual undertaking.\textsuperscript{201}

The only exceptions to the pure administrative model are the more recent “endangerment” provisions contained in the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act.\textsuperscript{202} These provisions all apply to any person who “knowingly” engages in conduct that results in an underlying violation,\textsuperscript{203} and they impose a heightened penalty of higher fines and up to fifteen years imprisonment upon proof of some additional mens rea; that is, that the offender “knows” his conduct “places another person in imminent danger of death or serious bodily injury.”\textsuperscript{204} To that end, each statute defines more precisely what the offender must “know” to satisfy that standard.\textsuperscript{205}

The legislative history accompanying Congress’s initial enactment of

\begin{itemize}
\item 200. Id. § 6928(d)(1), (d)(2)(A), (d)(5), (d)(6).
\item 201. See id. § 6928(d)(1) (“knowingly transports or causes to be transported any hazardous waste... to a facility which does not have a permit”). The Clean Water Act does, however, include a distinct provision making it a felony to “knowingly engage in conduct—introducing pollutants or hazardous substances into a sewer system or publicly owned treatment works—when the defendant ‘knew or reasonably should have known’ about the resulting danger to health or property and the treatment works, as a result, violated its Clean Water Act permit. See 33 U.S.C. § 1319(c)(2)(B).
\item 203. The Clean Water Act and Resource Conservation and Recovery Act explicitly provide that there must be an underlying violation. See 33 U.S.C. § 1319(c)(3)(A); 42 U.S.C. § 6928(e). The Clean Air Act seems to imply the same, but never states it directly. See 42 U.S.C. § 7413(c)(4), (c)(5)(A) (punishment for releases of “listed” hazardous substances, where release results in imminent danger).
\item 204. 42 U.S.C. § 7413.
\end{itemize}
these provisions, their subsequent amendment and enhancement to felony status, the addition of endangerment provisions, and the promotion of environmental prosecution through additional resources is the best source of information about what Congress considered in taking each of these steps. More particularly, the legislative history suggests the extent to which Congress addressed the need to integrate the competing, and sometimes conflicting, features of environmental and criminal law. What that history reveals is that Congress understood certain basic issues well yet did not consider others that, while more subtle, are equally important. The features Congress understood related to the characteristics of environmental pollution. Where Congress fell short was in the need to account for the distinct features of environmental law itself. Moreover, because Congress adopted the administrative model of environmental crime—defining environmental crime in terms of violations of pre-existing environmental restrictions—the absence of such an accounting amounted to a significant lapse.

1. What Congress Considered

Congress appreciated those characteristics of environmental pollution that render criminal sanctions at least as appropriate as they are for more traditional crimes. As one member of Congress aptly put it, "environmental criminals are nothing but white-collar criminals with ring around the collar."

Specifically, Congress understood: (1) the widespread and long-term harm that may be caused by environmental pollution; (2) the deliberateness of the conduct behind many environmental violations and the indistinguishability of the financial motive for that conduct from that for many other crimes; (3) the need for incarceration, in addition to punitive economic sanctions, to deter environmental violations; and (4) the difficulty of proving mens rea and causation because of the character of environmental pollution.


207. The testimony of one recent witness before Congress seems to encapsulate congressional thinking:

Environmental crime is an especially vicious form of violent offense against society. Representing a narrow band of individuals and corporations, environmental felons have most of the characteristics of conventional violent offenders, save one: environmental felons commit crimes that often continue to victimize long after the commission of the predicate offense . . . .

What makes environmental crime so insidious is that its victims will often experience physiological injuries without attributing the cause to an outside actor or even a particular environmental media. They are, in a phrase, the perfect victims. The environmental [criminal] is, in fact, worse than his traditional counterpart in crime. Environmental crimes generally encompass more victims than a murder or other violent offense. Moreover, these are often violations that continue for long periods beyond the initial act. While a robbery is committed in an instant, an
Environmental restrictions create an incentive for their violation by raising the cost of lawful activity,\textsuperscript{208} giving those who violate the law a competitive advantage over those who comply. For some in the regulated community, the mere command of the law and the respect to which that command is entitled are sufficient to promote compliance. Others, however, will comply only if the government demonstrates its intent and ability to impose punitive sanctions against violators, thus eliminating the economic incentive in favor of noncompliance. Even the most law-abiding are likely to reduce their compliance efforts if they perceive the absence of enforcement against noncomplying competitors.\textsuperscript{209}

Congress understood that an environmental law program must have a punitive dimension to deter violators effectively. That the rise of environmental law led to a rise in organized crime’s involvement in environmental pollution illustrates the avoidance incentives created by environmental law.\textsuperscript{210} In response, Congress sought to deter violations of environmental protection requirements\textsuperscript{211} by creating more than an economic deterrent. Economic sanctions risk becoming a mere cost of doing business. But,

\begin{quote}
  environmental violation can victimize generations through birth defects, immune deficiencies and countless other physiological reactions. Finally, while some crimes are committed in the heat of passion or without premeditation, environmental crimes are committed for only one reason: cold hard cash. The difference between an environmental felon and a racketeer is purely cosmetic.
\end{quote}


\textsuperscript{208} S. REP. NO. 284, 98th Cong., 1st Sess. 46 (1983).

\textsuperscript{209} See D. Gogol, \textit{Enforcement, Economics, and the Law: The Development of Economic Law Enforcement by the Connecticut Department of Environmental Protection}, excerpted in PETER S. MENELL & RICHARD B. STEWART, \textit{ENVIRONMENTAL LAW & POLICY} 533-34 (1994) ("The Department soon realized that the rate of voluntary compliance depended [partly] on ... whether or not regulated sources perceived that others in similar situations had been able to ignore the law successfully."); Hamilton & Schroeder, \textit{supra} note 144, at 1121 ("In the case of RCRA, industrial interests have ... been among those urging a more consistent enforcement policy because ... [i]n a highly competitive industry, companies cannot afford to spend their resources on environmental protection ... unless they perceive those rules are backed up by a credible enforcement policy.") (citation omitted).


“chief executives can’t pass jail time on to consumers.”

2. What Congress Did Not Consider

What Congress did not consider in crafting environmental criminal law was the relevance of those distinctive features of environmental law itself that Congress criminalized by adopting the administrative law model for environmental crime. It never focused on those features in defining the requisite mens rea for criminal conduct, in assigning burdens of proof, or in allowing for possible affirmative defenses or mitigating circumstances. Congress did not consider these issues when it first enacted those criminal provisions, and it ignored them again in the second and third waves of congressional action when, by increasing the associated sanctions and improving the efficacy of enforcement, it made the provisions that much more important.

Congress apparently satisfied itself that an environmental criminal could possess a mens rea as culpable as the most heinous of traditional criminals. From that premise, Congress concluded that criminal provisions were appropriate, but failed to define the crimes in terms of that heightened level of culpability. As a result, Congress never considered or resolved the difficult policy issues that would have been raised if Congress had undertaken the genuine effort necessary to define culpability in light of the peculiar features of environmental law—including its aspirational quality, dynamic tendency, complexity, and technicality. When environmental violations were punishable as misdemeanors, the absence of such congressional consideration did not create a significant problem. Misdemeanor

212. Environmental Crimes Act of 1992 Hearing, supra note 206, at 14 (statement of Rep. Schumer); see also McMurtry & Ramsey, supra note 186, at 1158-59 (“For the well-off white collar officer with a genteel background, a devoted family, and prominent community status, the specter of a year in county jail with all manner of miscreants can provide an impetus for law abiding behavior that no corporate concern could match.”); Strock, supra note 189, at 916 (stating that criminal enforcement is most effective deterrent). The prospect of incarceration, however, does not affect only high ranking corporate officers. It may well be mid-level managers who are most significantly deterred from unlawful behavior. They are the persons who are both more likely to make the critical decision to engage in illicit conduct and under the greatest pressure to do so. This pressure does not, moreover, come in the form of direct requests to violate environmental laws. Instead it can be traced to general pressure (perhaps based on compensation formula) to reduce company costs and increase company profits within that part of the corporation within which the mid-level manager works. See John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 393-400 (1981).


offenses do not implicate the degree of moral stigma historically associated with felony convictions. And, largely for this reason and because of the absence of significant incarceration or fines, misdemeanor convictions for regulatory violations have quite frequently not required proof of a culpable mens rea. But when the legislature transformed those environmental violations into felonies and promoted their prosecution and lengthy periods of incarceration, Congress should have addressed these issues.  

There is hardly a hint, however, of any consideration of the relevance of environmental law's sweeping breadth and pervasiveness, aspirational quality, dynamic and evolutionary tendency, or complexity (including technicality, indeterminacy, obscurity, or differentiation) to environmental crime. In contrast, for some other regulatory violations punishable as felonies, Congress required a state of mind exhibiting greater culpability precisely because of the complexity of the underlying regulatory scheme. For instance, Congress defined the standard of criminal culpability in tax cases as "willful" rather than just "knowing." In securities law, Congress created an affirmative mistake of law defense to incarceration. Furthermore, violations of food and drug safety and worker safety provisions are not punishable in the first instance as felonies (even though the latter requires a showing of "willful" mens rea).  

In environmental law, however, Congress avoided addressing at all what it meant by the mens rea requirements it enacted. By not addressing these issues directly, Congress left them, in effect, to the other two branches of government to resolve: first, to the executive branch, through the exercise of prosecutorial discretion; and second, to the courts, through

215. My work at the Department of Justice in the fall of 1979 included assisting in efforts to persuade Congress to increase the applicable penalty for these environmental violations to the felony level. See supra note *.


219. For instance, the Conference Committee Report accompanying amendments to the Resource Conservation Recovery Act in 1980, explicitly states that the Committee has "not sought to define 'knowing,' " leaving that process instead "to the courts under general principles." H.R. CONF. REP. NO. 1444, 96th Cong., 2d Sess. 39 (1980); see also S. REP. NO. 172, 96th Cong., 2d Sess. 39 (1980) (same). The Senate Report accompanying the 1990 Clean Air Act Amendments, which increased the applicable sanction to a felony, likewise eschews any effort even to consider whether changes should also be made in the applicable culpability standard. See S. REP. NO. 228, 101st Cong., 2d Sess. 6 (1990). A joint statement of the Senate Managers of those amendments, however, does provide that "these new criminal provisions shall be crimes of general intent, rather than specific intent." 136 CONG. REC. S16,591 (daily ed. Oct. 27, 1990).

220. See H.R. CONF. REP. NO. 1444, 96th Cong., 2d Sess. 37 (1980) ("The Department of Justice has exercised its prosecutorial discretion reasonably under similar provisions in other
the application of canons of statutory construction. Both of these branches, however, are ill-equipped to resolve these issues and have done so in a way that can generously be described as haphazard and exacerbating.

B. EXECUTIVE BRANCH (ENVIRONMENTAL PROTECTION AGENCY AND DEPARTMENT OF JUSTICE)

One possible solution to Congress's not addressing the difficult policy issues inherent in environmental crime rests in guidance from the executive branch. At least in theory, the executive branch could develop a coherent framework, complete with detailed guidance, for determining which cases actually warrant criminal prosecution. A viable program would consider how the peculiar features of environmental law, including its aspirational quality, dynamic tendency, and varied complexity, bear (especially in combination) on the level of culpability that the government should require as a matter of prosecutorial discretion before seeking an indictment.

Historically, no such framework or guidance has existed. Indeed, although much about the federal environmental crimes program is sharply disputed, those familiar with the decisionmaking process on all sides of the debate agree that the federal government's choice between prosecuting a case criminally or pursuing a less severe enforcement option has been "largely a random process."221

The roots of the executive branch's failure can be traced to the structure of environmental policymaking, which did not lend itself well to the criminal justice context and was at odds with a myth of political neutrality in law enforcement. This failure is also traceable to policy conflicts within the executive branch during much of President Bush's Administration, when the Department of Justice could not reconcile its proclaimed enthusiasm for both law enforcement and regulatory relief.

statutes and the conferees assume that, in light of the upgrading of the penalties from misdemeanor to felony, similar care will be used in deciding when a particular permit violation may warrant criminal prosecution under [the Resource Conservation and Recovery Act]."

221. JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 128; see also Kevin A. Gaynor & Thomas R. Bartman, Frontier Justice, ENVT. F., Mar.-Apr. 1991, at 23, 24 (stating that "whether a violation is treated criminally, civilly, or administratively is more a function of what type of investigator first learns of the infraction and in which judicial district it occurs, rather than its environmental severity"); McMurry & Ramsey, supra note 186, at 1137 (originally reading "largely by happenstance"); id. at 1161 (absence of "hard and fast rules on when a criminal case should be brought in the environmental area"); Judson W. Starr, Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains, 59 GEO. WASH. L. REV. 900, 913 (1991) [hereinafter Starr, Turbulent Times] (claiming "the way a case is handled depends on whose desk the case first arrives"); Judson W. Starr & Nancy Voisin, Toward an Environmental Voluntary Disclosure Program, 16 COLUM. J. ENVTL. L. 333, 338 (1991) (arguing that absence of uniform EPA and Justice Department policy on environmental audits led to "irrational enforcement").
1. The Exercise of Prosecutorial Discretion and the Myth of Political Neutrality in Law Enforcement

When, as with federal environmental laws, Congress criminalizes a wide range of activity, the executive branch does not, of course, assume that Congress actually expects the government to discover and prosecute every possible violation. Instead, the executive branch must act within the limited resources made available by Congress (the extent of which is often an indicator of congressional expectations of the desired level of enforcement). Moreover, because those resources never remotely approach that necessary for “full enforcement,” the executive branch assumes that Congress has, in effect, delegated to it the policymaking authority to decide which cases warrant criminal prosecution.

Some aspects of that discretion turn on nothing more than the application of fairly neutral principles of administrative efficiency and efficacy. Those enforcing the law must determine how their limited resources can best be used to address the problem identified by Congress. Hence, some obvious factors to be considered are the resources required to prosecute a case, the strength of the prosecution on the merits, the likely sanction upon conviction, and its likely deterrent effect on others.

In addition, a significant aspect of the agency’s assessment is its perception of the willingness of the regulated community generally, and the offender, in particular, to comply. Whether the agency adopts a legalistic or a more cooperative enforcement style depends on that perception. Finally, when, as in environmental law, the enforcement agency has available a litany of enforcement tools—criminal, civil judicial, and civil


223. See James Voremburg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521, 1525 (1981) (arguing that because of disparity between crimes committed and resources available for trial and punishment, prosecutors are forced to utilize greater discretion).


226. See infra text accompanying notes 235-39.
administrative—reserving criminal enforcement for those actions warranting the additional expenditure of resources is especially important.227

Those more neutral principles, however, are only part of the decisionmaking equation. Resource allocation determinations are inevitably the product of political judgments. Scarce resources require the executive branch to make decisions about priorities, which, in turn, necessarily reflect significant value judgments regarding social policy. Political considerations motivate both enforcement decisions regarding particular regulations, as well as the substance of the regulation to be enforced.228

These decisions encompass a wide range of issues. Agencies must make a threshold assessment of the overinclusiveness of the statutory standards,229 determining the potential unreasonableness of the regulatory scheme as applied to a particular case.230 Policy determinations must also be made in deciding whether to seek convictions against high-ranking corporate officers and the relative unfairness, if any, of disproportionately prosecuting lower-level managers and employees, the individuals against whom the evidence tends to be the strongest.231 In addition, policymakers must decide whether certain conduct (e.g., voluntary audits and self-reporting) mitigates otherwise illegal activity and, if so, to what extent.232


230. See BARDACH & KAGAN, supra note 229, at 28-63.

231. DiMento, supra note 227, at 138-39; Mann, supra note 166, at 1872; Shapiro, supra note 227, at 211-23; see also Richard A. Posner, An Economic Theory of the Criminal Law, 85 COLUM. L. REV. 1193, 1204-05 (1985) (arguing that tort law is more appropriate for affluent whose behavior can be influenced by economic sanctions, and criminal sanctions, including incarceration, are therefore more appropriate for poor); Robert A. Kagan, Criminal Prosecution for Regulatory Offenses—Trends and Questions Based on Published Data from EPA, FDA, and OSHA 7 (May 20-21, 1993) (unpublished paper prepared for the Workshop on Regulatory Law Enforcement, Socio-Legal Center, Ohio State University) (on file with author).

232. In environmental law, the relevance of environmental auditing to criminal culpability—admissible evidence of guilt or mitigating factor—has been the subject of heated debate for several years. See, e.g., Robert W. Darnell, Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for a Compromise?, 31 AM. CRIM. L. REV. 123, 124 (1993). The Department of Justice has issued a memorandum providing guidance regarding its policy about environmental auditing. See U.S. Dep’t of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (1991), reprinted in 2 HARRIS ET AL., supra note 186, app. E. The EPA recently restated its enforcement policy related to environmental
Finally, the policymaker must consider any possible positive and negative third-party effects of an enforcement action, including the extent to which a criminal sanction might adversely affect innocent persons.\textsuperscript{233}

None of these enforcement policy decisions is made in a political vacuum. Executive branch officials, including political appointees, career managers, and line attorneys, understand the political dimensions to their decisions and frequently respond to them.\textsuperscript{234} They are cognizant of the politics of their congressional overseers, as well as those of the elected Administration;\textsuperscript{235} they accordingly are wary of the possibility of being attacked,\textsuperscript{236} but also stand ready to exploit the political benefits of a positive public image.\textsuperscript{237} The notion that law enforcement, especially criminal prosecution, is or even could be devoid of politics is simply a myth.

\footnotesize

\textsuperscript{233} See Coffee, supra note 212, at 400-02, 407; Kagan, supra note 222, at 389.


\textsuperscript{235} See McMurry & Ramsey, supra note 186, at 1141.


\textsuperscript{237} Of course, what to some might be viewed as political exploitation, others might characterize as efforts to use the media to create a credible enforcement threat and thereby to deter violations. See, e.g., Alfred Marcus, Environmental Protection Agency, in THE POLITICS OF LEGISLATION 267, 286 (James Q. Wilson ed., 1980) (describing how EPA's first Administrator, William Ruckelshaus, effectively used news media to give EPA aggressive enforcement image); McMurry & Ramsey, supra note 186, at 1141; Barbara Bradley, Prosecutors Target Executives—Not Just Companies, CHRISTIAN SCI. MONITOR, Apr. 25, 1988, at 1; Justice Department Says It's Tough on Crimes Against the Earth, WASH. POST, Dec. 28, 1989, at A21.

There is, however, also a second source of such extreme rhetoric. Former government officials seem to be even more eager than current government officials to persuade the business community that the government is about to use criminal sanctions to punish all noncompliance with environmental laws. See, e.g., Roger J. Marzulla & Brett G. Kappel, Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s, 16 COLUM. J. ENVTL. L. 201 (1991); Judson W. Starr, Avoiding the Government’s Tough New Criminal Enforcement of the Environmental Laws, C776 A.L.I.-A.B.A. 1-21 (1992); Starr & Kelly, supra note 189, at 10,096. Some might speculate that the primary purpose of this rhetoric is to create business for themselves in their newly minted private sector employment. See Casey Bukro, Environmental Managers Feel Heat of Pollution “Crime” Laws, CHT. TRIB., Aug. 23, 1992, at C1 (“There’s a lot of hype being put out by defense attorneys who have a self-interest in scaring the bejesus out of corporate individuals.”) (quoting Earl Devaney, Director of EPA Criminal Enforcement Division). Others, however, would likely defend the practice as a legitimate effort to lend their expertise to those in the business community who might otherwise unnecessarily find themselves criminal defendants.
2. The Structure of Policymaking in the Exercise of Prosecutorial Discretion in Environmental Crime

The decisionmaking structure of the agencies engaged in environmental enforcement has proven especially ineffective in addressing the policy issues delegated to them through Congress's criminalization of environmental law. The constant tug-of-war in environmental policymaking between centralized and decentralized decisionmaking authorities has resulted in ad hoc, rather than systematic, policymaking in the exercise of prosecutorial discretion. Even worse, however, ad hoc efforts in individual cases have not ameliorated the situation. To their credit, decisionmakers in EPA and the Justice Department frequently considered the kinds of factors that Congress should itself have addressed in the first instance, like the relevance of environmental law's features to the defendant's culpability. However, the case-by-case nature of these efforts proved fatal, colliding directly with the myth of political neutrality in law enforcement and igniting political controversy that eventually engulfed the entire Environmental Crimes Section of the Justice Department.

This disastrous result flowed naturally from the way in which prosecutorial discretion has been exercised in the environmental crimes context. The classic image of a lone prosecutor deciding whether, based on the facts provable at trial and years of personal experience, prosecution is appropriate bears scant resemblance to the way in which such decisions are made in the environmental crimes context. In environmental law, there are often at least two (and sometimes three)238 distinct governmental entities deeply involved in the decision—EPA and the Justice Department (as well as their state counterparts)—and each one brings a distinct perspective to the decisionmaking process. Worse, both agencies are internally fragmented. EPA power is spread among: (a) EPA Headquarters in Washington, D.C.; (b) the EPA regional office responsible for the geographic jurisdiction where the crime allegedly occurred; and (c) the various law enforcement and programmatic branches at Headquarters and the regional offices. The Justice Department's prosecutorial authority resides in: (a) "Main Justice" (the Justice Department in Washington, D.C., including both the Environmental Crimes Section and the Assistant Attorney General for the Environment and Natural Resources Division); and (b) the United States Attorney

238. The third would be the state government, either in the form of the State Attorney General's Office, the state legislature, and/or the state environmental agency. The state can be quite a significant player in the federal decisionmaking process. See, e.g., Keith Schneider, *Alaska and Exxon Drop Settlement in Valdez Oil Spill*, N.Y. TIMES, May 4, 1991, at A1 (reporting that rejection by Alaska House of Representatives led to unraveling of settlement agreement); Keith Schneider, *Judge Accepts Exxon Pact, Ending Suits on Valdez Spill*, N.Y. TIMES, Oct. 9, 1991, at A14 (reporting acceptance of settlement pact urged by Alaska's Attorney General). For purposes of the present discussion, however, this article confines itself to an explication of the problems endemic to the structure of decisionmaking within the federal government.
Office in the jurisdiction where the crime allegedly occurred.\textsuperscript{239}

The federal government has a number of enforcement options, of which criminal enforcement is only one, and the relative authority of the various governmental entities over a particular enforcement action depends on the option selected. The enforcement options generally are: (1) civil administrative penalties; (2) civil judicial penalties; and (3) criminal penalties. Civil administrative penalties are generally less severe than civil judicial penalties, which are, in turn, less severe than criminal penalties. The required proof for imposition of the penalty, and the associated procedural safeguards, correspondingly increases with the severity of the potential sanction.

Roughly speaking, EPA has complete autonomy to decide whether to impose civil administrative sanctions. By contrast, because EPA lacks independent litigating authority, the Justice Department decides whether to initiate a civil enforcement action or criminal prosecution in court. As a matter of practice and interagency agreement, the Justice Department first receives a formal referral from EPA recommending an enforcement action or prosecution. Justice generally takes the view that its decision whether to prosecute is far more autonomous in a criminal case, in which it is representing the United States, than in an ordinary civil enforcement action, in which EPA is its client agency. The United States Attorney Offices draw the same distinction in terms of their decisionmaking autonomy vis-à-vis Main Justice: civil enforcement decisionmaking authority is centralized in Main Justice and criminal prosecution decisionmaking authority is decentralized in the United States Attorney Offices.

The fragmentation of authority and the resulting jurisdictional jealousies undercut coherent policymaking. EPA is likely to be in the best position to address the relative merits of different enforcement options. It is likewise best able to appreciate environmental law's features and to develop appropriate culpability guidelines. However, EPA personnel lack a well-grounded understanding of the competing features of criminal law. That expertise is instead more present in the United States Attorney Offices, which, in turn, lack the necessary understanding of the unusual features of environmental law.

The government's current solution to this dilemma is the Environmental Crimes Section within the Environment and Natural Resources Division at Main Justice. In theory, the Section is in the best institutional position to bridge the gap between environmental and criminal law expertise.\textsuperscript{240} It


\textsuperscript{240} See \textit{Justice Environmental Crimes Review}, supra note 11, at 51-58; McMurry \& Ramsey, supra note 186, at 1136-44; Starr, \textit{Turbulent Times}, supra note 221, at 910-11. Main
has, however, routinely been a target of criticism for its failure to perform that function.\textsuperscript{241} Both EPA and the United States Attorney Offices have perceived Main Justice as an obstacle to decisionmaking instead of as a facilitator or source of litigation support.\textsuperscript{242}

There are many reasons for this development. Some are rooted in the kinds of bureaucratic tensions and conflicts that have developed over the years between the Justice Department and its client agencies, and between Main Justice and the United States Attorney Offices.\textsuperscript{243} Others are likely the product of individual personality and management style clashes.\textsuperscript{244} The most relevant reason, though, is that EPA and the United States Attorney Offices, failing to understand the integrative function underway, took

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Justice became more involved as it became increasingly apparent in the late 1970s and early 1980s that EPA lacked essential expertise in criminal investigation and enforcement. In United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979), the district court dismissed a multiple count indictment because an EPA employee tainted grand jury proceedings by improperly serving both as a Special Assistant United States Attorney presenting the government’s case to the grand jury and as a witness before the grand jury on EPA’s behalf. \textit{id.} at 1351. The Justice Department also turned down over 60% of EPA’s criminal referrals during this time because of the Department’s concern with the inadequacy of the investigatory bases for those referrals. See \textit{Starr, Turbulent Times}, supra note 221, at 907.

\textsuperscript{241} \textit{JUSTICE ENVIRONMENTAL CRIMES REVIEW}, supra note 11, at 57-75.

\textsuperscript{242} \textit{See November 1993 Dingell Hearing}, supra note 4, at 101-03 (testimony of Richard T. Nixon, Director, National Environmental Crimes Prosecution Center); \textit{id.} at 134-38 (testimony of Breckinridge L. Willcox, former U.S. Attorney); \textit{id.} at 150-53 (testimony of Robert J. Worthan, former U.S. Attorney); EPA’s Criminal Enforcement Program, Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 102d Cong., 2d Sess. 82-86 (1992) (testimony of Dixon McClary and Sandra Smith, Special Agents, EPA); \textit{id.} at 140-91 (testimony of John West, Special Agent-in-Charge, Criminal Investigations Division, EPA; Thomas Kohl, Special Agent-in-Charge, EPA, accompanied by Fred L. Burnside, Special Agent, EPA, and Kathleen A. Hughes, Associate Regional Counsel, EPA; and David W. Wilma, Special Agent-in-Charge, EPA, accompanied by Dan Hogan, Special Agent, EPA); \textit{id.} at 66-87, 146-49; \textit{TURLEY REPORT}, supra note 5, at 14-16.


\textsuperscript{244} \textit{See, e.g., JUSTICE ENVIRONMENTAL CRIMES REVIEW}, supra note 11, at 58-59 & n.86 (describing management style of one Environment Division official that “created antagonism” because of “a perception that [he] was philosophically opposed to aggressive criminal enforcement of the environmental laws”); \textit{id.} at 59-60 (describing how one section chief’s management style was marked by “group consensus,” which unfortunately caused Section to be viewed as “dilatory and indecisive”).
substantive and procedural issue with the Environmental Crimes Section’s halting efforts at integrating environmental and criminal law. Nor were they persuaded of its institutional propriety—both EPA and the United-States Attorney Offices thought that their own institution was better suited to the task.

In sum, the fragmented decisionmaking structure of the different agencies and their differing perspectives operate against mutual understanding and trust. As discussed in the next section, moreover, Main Justice did an especially poor job of overcoming those institutional obstacles.

3. Environmental Crimes Section Practice and Procedure

The major failing of the Department of Justice’s Environmental Crimes Section in the Environment and Natural Resources Division was the Section’s failure to pursue integration in a generic fashion. The Environmental Crimes Section was designed to be a repository of the expertise needed in both environmental law and criminal law to create a coherent environmental crimes program. In practice, however, the Section became an intense microcosm of the unyielding debate between these two areas of law, rather than a vehicle for their thoughtful resolution.

In the early years, the Section possessed very little expertise in criminal law and, consequently, could not perform its assigned function. For that reason, the Division made a concerted effort to hire individuals possessing criminal expertise, whether or not they had any knowledge of environmental law. Indeed, the perceived need for criminal expertise was so great that the Division hired as Section Chief an experienced, very successful, federal criminal prosecutor, even though he lacked knowledge of environmental law.

Rather than promoting integration, the result was a clash within the Section between environmental law and criminal law factions. Each considered the other, in effect, incompetent to perform the integrative tasks the Section faced. A complete breakdown in the Section’s decisionmaking and morale resulted, and the ensuing acrimony within the Section under-

245. See November 1993 Dingell Hearing, supra note 4, at 157 (testimony of Breckinridge L. Willeox, former United States Attorney) (“I fail to understand any articulated rationale that makes environmental cases different.”); id. at 154 (testimony of Dennis C. Vacco, former United States Attorney) (“[T]here are many areas where the law is constantly evolving and there isn’t the intense Main Justice oversight in those other areas.”).

246. Borrowing Professor Schroeder’s terminology, the Environmental Crimes Section was supposed to provide the “cool analysis” needed to temper the extremities that would otherwise occur with rigid application of rules produced by “moral outrage.” See Schroeder, supra note 213, at 258-60.

247. See JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 54.

248. Id. at 69-70, 73, 92-96.

249. See Dingell Report, supra note 5, at 10 (identifying “serious morale problems within the EPA criminal investigative units and within the ECS itself”); TURLEY REPORT, supra note 5, at 14-25; JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, 62-75, 98-100.
mined its credibility with both EPA and the United States Attorney Offices.\textsuperscript{250} Hence, rather than bridging the gap, the Section only exacerbated it.

A second Main Justice failing lay in its inability to define the Environmental Crimes Section’s role, perhaps because the Environment Division never really understood it. Main Justice never formally articulated the integrative function expected of the Environmental Crimes Section. Nor did it ever make a meaningful effort to justify that function to EPA or the United States Attorney Offices. It should not be surprising, therefore, that when the Section sought to review and question EPA’s criminal referrals or a United States Attorney’s proposed prosecution, the Section’s review engendered suspicion and accusation.

Finally, the Environmental Crimes Section’s efforts at integration undermined the kind of considered debate and discussion necessary to develop coherent prosecutorial guidelines. A close examination of many of the cases reveals that some prosecutors did in fact consider the peculiar features of environmental law, such as the law’s complexity, aspirational quality, and dynamic tendency, and the relevance of those features to moral culpability,\textsuperscript{251} even though the statutory language of the environmen

\textsuperscript{250} See Turley Report, supra note 5, at 14-16, 25-27.

\textsuperscript{251} See, e.g., \textit{1 Environmental Crimes at the Rocky Flats Nuclear Weapons Facility, Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology, 102d Cong., 2d Sess. 1158-62, 1173-74} (1992) [hereinafter \textit{Rocky Flats Hearing}] (testimony of Attorney Peter Murtha, Environmental Crimes Section) (relying on environmental law’s indeterminacy, obscurity, institutional differentiation, pervasiveness, and fragmentation of decisionmaking authority in defendant corporation in defending exercise of prosecutorial discretion); \textit{id. at 1482} (testimony of Kenneth R. Fimberg, Assistant U.S. Attorney) (relying on environmental law’s aspirational quality and institutional differentiation in defending exercise of prosecutorial discretion); \textit{JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 160-61, 169-70, 189-93, 213-14, 250-53} (relying on environmental law’s pervasiveness, dynamic tendency, aspirational quality, indeterminacy, obscurity, institutional differentiation, fragmentation of decisionmaking authority within potential defendant corporations, and availability of alternative civil sanctions, in defending exercise of prosecutorial discretion); \textit{STAFF OF HOUSE SUBCOMM. ON INVESTIGATIONS AND OVERSIGHT, INTERVIEWS, supra note 243, at 163, 167} (testimony of Kenneth R. Fimberg, Assistant U.S. Attorney) (describing how Environmental Crimes Section instructed U.S. Attorneys to “assess the case based upon more traditional concepts of criminal culpability, individual criminal intent, what lawyers call \textit{mens rea}” and stating that, “[a] prosecutor has got to make a decision, even apart from the legalities, that this is a person, someone who deserves to be prosecuted. And that involves more than just legal issues.”); \textit{id. at 316-17} (testimony of Michael J. Norton, United States Attorney) (relying on environmental law’s aspirational quality and indeterminacy in defending exercise of prosecutorial discretion); \textit{id. at 406-07} (testimony of Peter Murtha, Environmental Crimes Section Attorney) (relying on environmental law’s complexity in defending exercise of prosecutorial discretion); \textit{see also KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT—REGULATION AND THE SOCIAL DEFINITION OF POLLUTION 27, 32-33, 35, 162-69, 173-74} (1984) (describing how prosecutors account for both environmental law’s indeterminacy and aspirational quality); Strom, supra note 4, at 189 (advocating use of environmental criminal provisions only if conduct “knowing and willful”).
tal crime provisions did not require such consideration. Indeed, many of those efforts reflect the work of very skilled, conscientious prosecutors. But this effort at integration occurred only haphazardly, when the exigencies presented by a particular case demanded it. Prosecutorial decisions were based on lengthy, often acrimonious, oral debates,\textsuperscript{252} rather than on reflective, written documentation.\textsuperscript{253} Decisions to decline a client agency's request that the Department bring certain charges were not written and presented to the client agency, notwithstanding Justice Department guidelines requiring the preparation of such documentation.\textsuperscript{254}

Moreover, because prosecutors made significant policy decisions on an ad hoc basis in individual cases, the Environment Division's political appointees often injected themselves into the decisionmaking process in those cases.\textsuperscript{255} Their participation, in light of the significant policymaking implications of various prosecutorial decisions, may have been entirely legitimate. It is not inappropriate, after all, for the political appointees of an administration to consider the President's general priorities and policies in exercising their litigation authority.\textsuperscript{256} Yet doing so in individual cases significantly increases the likelihood, realized in the environmental context, that congressional and other overseers of the Department's enforcement functions would claim that such involvement constituted improper reliance on such factors is, of course, not a phenomenon evident only in environmental law. Prosecutors routinely engage in such determinations in other areas of law as well. See Joseph T. Small, Jr. & Robert A. Burgoyne, Criminal Prosecutions Initiated by Administrative Agencies: The FDA, the Accardi Doctrine and the Requirement of Consistent Agency Treatment, 78 J. CRIM. L. & CRIMINOLOGY 87, 88 (1987); Shapiro, supra note 227, at 189-92. See generally Frank, supra note 166, at 9-10 (describing how strict liability scheme not strictly enforced in practice). Yet, those other areas of law are sometimes, yet rarely, as politically volatile as is environmental law and therefore such an ad hoc approach has proved less problematic.

\textsuperscript{252} See JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 234-35 & n.435, 240.
\textsuperscript{253} Id. at 114-15.
\textsuperscript{254} Id. at 100-01, (citing U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 14 (1980)).
\textsuperscript{255} The Justice Department’s Report on the Environmental Crimes Section prepared in response to Congressman Dingell’s allegations faulted the Environment Division’s political appointees for the way in which they intervened in litigation by making “abrupt, last-minute changes in prosecution decisions.” JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 64. The Report concluded that the ultimate decisions were often “based on serious and legitimate policy concerns,” id. at 160, but that “articulation of policy on such an ad hoc basis does not permit enforcement agencies or prosecutors an opportunity to make reasoned decisions,” creates “needless discord” between Main Justice and the United States Attorneys, and fosters “distrust.” Id. at 160-61.

\textsuperscript{256} One would likely have to search long and hard to discover a Department of Justice that did not do so. Current Attorney General Janet Reno's speeches, with regard to how the Department will allocate resources to protect the rights of those seeking abortions, provide paradigmatic examples. See David Johnston, Attorney General Weighs Greater Federal Role in Abortion Rights, N.Y. TIMES, Mar. 13, 1993, § 1, at 6; Reno Vows Inquiries into Abortion Violence, N.Y. TIMES, Oct. 31, 1993, § 1, at 22. Such a policy decision is entirely appropriate, yet it is plainly a product of the current Administration’s “politics.”
"political" interference with law enforcement and undermined the Section's integrity. 257

The ad hoc nature of the integrative efforts at Main Justice during the late 1980s and early 1990s was also likely not the product of pure happenstance. Integration requires a policymaker to come to terms with the difficult policy decisions regarding criminal culpability in the environmental law context. These are never easy decisions, but they were especially difficult for policymakers in the Bush Administration, who had to reconcile the Administration's aggressive pro-law enforcement rhetoric with the Administration's greater sensitivity to claims (including those made by many in the Administration itself) that the environmental requirements underlying criminal prosecutions were unwise and unreasonably stringent. 258 In fact, the Administration had formulated a policy to be more demanding in its search for traditional criminal culpability, but simultaneously displayed a proclivity not to announce that practice too loudly, lest it be perceived as "watering down" the criminal provisions of these statutes for political reasons. 259

C. COURTS

The courts have fared no better than Congress or the executive branch in integrating environmental and criminal law. To be sure, the judicial integrative function is significantly less extensive than that of either of the other two branches. But it remains substantial, because of the substantial discretion courts exercise in their construction of statutory language in general, and the mens rea requirements of criminal provisions in particular, as well as their application of relevant constitutional safeguards. Unfor-

257. Justice Environmental Crimes Review, supra note 11, at 64-65 (political appointees intervention created "discord" and "generated complaints" from United States Attorney Offices; id. at 115 (stating that "[t]heir sometimes abrupt challenges to case decisions precipitated accusations of improper motives"). See generally Bardach & Kagan, supra note 229, at 209-10 (arguing that because the exercise of enforcement discretion can be viewed as a "sellout," "going by the book" is politically safer).

258. Compare, for example, statements made at the time by Attorney General Richard Thornburg with statements made, soon after he left the Department, by the person who had been his Acting Assistant Attorney General for the Environment and Natural Resources Division. See Richard Thornburg, Attorney General of the United States, Address of the Annual Association of District Attorneys (July 19, 1989) (on file with The Georgetown Law Journal) ("pollution is not just an unfortunate by-product of an industrialized America—it is not something that just happens—it is a crime"); Hazardous Dumping Brings Federal Charges, Ctn. Trib., June 1, 1990, at C15 ("An environmental crime is like a robbery or assault against all of us."); DOJ Says Rocky Flats Report Inaccurate, Misleading, Incomplete, St. Env't Daily (BNA) (Jan. 7, 1993) (quoting Barry Hartman, former Acting Assistant Attorney General, Environment and Natural Resources Division) ("Environmental crimes are not like organized crime or drugs. There you have bad people doing bad things. With environmental crimes, you have decent people doing bad things.").

259. Schroeder, supra note 213, at 267.
fortunately, the judiciary has largely exacerbated the adverse effects of the other two branches' lapses rather than redress them.

1. Canons of Statutory Construction and the Judicial Integrative Function

The courts provide the least obvious opportunity for integration. If Congress drafts a criminal provision that is unwise or not well considered because it fails to account for the features of environmental law adequately, the judicial role is quite limited. In the extreme circumstance of an unconstitutional law, a judge can strike it down. Or, when the courts possess discretion in sentencing (and federal courts currently possess relatively little due to the federal sentencing guidelines), a judge can consider the overlooked issues at that time.

A court's role in reviewing the propriety of prosecution in a particular case is likewise much more limited than that of a prosecutor exercising prosecutorial discretion. The court is confined to case-by-case analysis. It can decide only the case before it, it cannot generally order an enforcement action be taken that the government has decided not to initiate, and it can dismiss an indictment for lack of evidentiary proffer only in an extreme instance. The court cannot dismiss simply because the prosecution seems unwise or unfair.

The judicial integrative function is nonetheless more significant than it first seems. Only when the meaning of the statutory language is plain is the judicial role limited in criminal cases. And ambiguity abounds in federal statutes, especially with respect to the appropriate mens rea in criminal provisions. "Generally ... common law crimes consist of several elements, and complex statutorily defined crimes exhibit this characteristic to an even greater degree. Is the same state of mind required of the actor for each element of the crime, or may some elements require one state of mind and some another?" In most cases, "[a]s a matter of grammar the statute is ambiguous."

In the criminal context, therefore, ambiguous statutory language compels courts to decide for themselves what the statute means. They cannot

260. Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("[T]he Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce ... is a decision generally committed to an agency's absolute discretion.").

261. The discriminatory exercise of prosecutorial discretion provides a possible basis for judicial override. See United States v. Armstrong, 48 F.3d 1508, 1514-15 (9th Cir. 1995) (en banc) (holding that use of colorable basis standard for selective prosecution ensures proper balance between tradition of discretionary prosecutorial decisionmaking and protection against impermissible prosecutorial bias).


264. Id. at 405.

265. LAFAVE & SCOTT, supra note 188, § 3.4(b), at 214.
simply defer to the government prosecutor as they can to the federal agency responsible for administering the statute in the civil context.\textsuperscript{266} Perhaps to give their task a more principled and less arbitrary air, courts determine the meaning of ambiguous language through the application of various, sometimes conflicting, canons of statutory construction.\textsuperscript{267}

These canons provide a useful focus for evaluating the judiciary’s effort to integrate environmental and criminal law through its interpretation of federal environmental criminal law.\textsuperscript{268} There is nothing talmudic about the

\textsuperscript{266} In the civil context, when the statutory language is ambiguous, the judicial role remains limited so long as the agency responsible for the statute’s implementation has spoken to the issue in a manner entitled to judicial deference and the agency’s proffered interpretation is reasonable. Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). In the criminal context, when the question concerns the meaning of a federal criminal provision, no such agency deference is due. The Department of Justice, as federal prosecutor, is not entitled to Chevron deference. See Crandon v. United States, 494 U.S. 152, 158, 168 (1990) (using rule of lenity to resolve any ambiguity in criminal statutes coverage in petitioner’s favor). What is less clear is whether EPA is entitled to deference when, as often occurs, the federal criminal provision incorporates by reference an environmental protection standard subject to both civil and criminal enforcement. See Federal Communications Comm’n v. American Broadcasting Co., 347 U.S. 284, 296 (1954) (“It is true . . . that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give [the statute] the broad construction [that] would apply in criminal cases, . . . it would do violence to the well-established principle that penal statutes are to be construed strictly.”). But cf. Babbitt v. Sweet Home Chapter of Communities for A Great Or., 115 S. Ct. 2407, 2416 (1995) (“We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement.”). That intriguing issue, however, need not be further explored here because the ambiguity in mens rea arises only in the federal criminal provision itself. And, with respect to the meaning of that distinct provision, neither the Justice Department nor EPA is entitled to Chevron deference.


\textsuperscript{268} The discussion in the text intentionally elides a theoretically intriguing issue regarding the relationship of canons of statutory construction to “plain meaning” inquiry. The text assumes that the canons come into play only after the courts conclude that there is no plain meaning. In actual practice, however, courts often invoke the canons to determine whether the statutory language has a plain meaning in the first instance. See, e.g., EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring) (invoking canon that reach of law restricted to U.S. jurisdiction unless contrary intent); Edward J. De Bartolo Corp. v.
canons. They are merely "judicial inventions." The canons, accordingly, reflect certain values and assumptions, as do the frequency and context of their application.

Because almost all of the criminal penalty provisions in the environmental statutes require the government to prove that the defendant acted "knowingly," they are not strict liability offenses. The ambiguity that nonetheless persists is the most classic one in interpreting criminal provisions: "how far down the sentence the word ‘knowingly’ is intended to travel." The judicial inquiry can be further subdivided into two parts: (1) what law, if any, must the defendant "know" to satisfy the "knowingly" standard; and (2) what facts, if any, must the defendant "know" about his conduct, including the circumstances surrounding it and the results. Each of these questions is discussed separately below.

a. Law. Knowledge of the law denotes two different kinds of knowledge. It may mean that the defendant must know both that the criminal prohibition exists and that she is violating it. Or, it may mean only that when, as often occurs, a criminal provision incorporates by reference a standard of conduct from another source of law (either a different statutory provision or implementing regulations), the defendant must know that there is a standard of conduct and that she is violating it. Under this second, broader meaning, the defendant need not know that such a violation is subject to criminal sanction.

In environmental criminal law, the issue of the defendant's knowledge of the law is confined to the second meaning. None of the criminal penalty provisions requires the government to prove the defendant's knowledge of the criminal status of her conduct. There is, however, textual support for the view that the defendant must possess some knowledge of the environmental standards external to the criminal penalty provision that serve as the basis for prosecution. Because many of the provisions impose criminal penalties on any person who "knowingly violates" a statutory or regulatory requirement, the juxtaposition of "knowingly" and "violates" presents a facially strong argument that Congress has made knowledge of the violation an element of the offense.

Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (invoking canon that court will construe statute to avoid unconstitutionality). A court's willingness to do so will clearly have a significant impact on the number of times that plain meaning is found and, accordingly, the frequency of Chevron deference to an agency construction. For the purposes of this article, however, the precise timing of the canon's application is not significant, which is why the text sidesteps the issue.

269. Macey & Miller, supra note 267, at 649.
270. LAFAVE & SCOTT, supra note 188, § 3.4(b), at 214.
Many federal courts have addressed the question whether the government must prove the defendant's knowledge of the environmental standard, the violation of which served as the underlying basis for the criminal prosecution. Without exception,\(^2\) the courts agree that the criminal penalty provisions in the Clean Air Act, Clean Water Act, Federal Insecticide, Fungicide, Rodenticide Act, and Toxic Substances Control Act that require that a person "knowingly violates" do not require the government to prove that the defendant was actually aware of the applicable environmental standard.\(^3\)

RCRA's differently worded criminal penalty provisions have been the greatest source of controversy. These provisions create a series of distinct offenses applicable to those who generate, transport, cause to be transported, treat, store, dispose of, or otherwise handle hazardous waste.\(^4\)

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\(^2\) The Fourth Circuit's decision in United States v. Ellen, 961 F.2d 462, 466-67 & n.2 (4th Cir.), cert. denied, 113 S. Ct. 217 (1992), does include some loose dictum that might be read to suggest that the government must prove the defendant knew that the property in question was a "wetland" within the meaning of the Clean Water Act, but this was not an issue before the court.


\(^4\) The actual wording of this provision states that any person who

1. knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter . . .
2. knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—
   A. without a permit under this subchapter . . .; or (B) in knowing violation of any material condition or requirement of such permit; or
   C. in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;
3. knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste . . .;
4. knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement . . . in a manner not in conformance with such agreement; or
5. knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter—
   A. in knowing violation of any material condition or requirement of a permit under this subchapter; or
   B. in knowing violation of any material condition or requirement of any applicable regulations or standards under this subchapter;
For each offense, the person must "knowingly" engage in certain conduct and, for each, there must be a violation of a legal standard external to the criminal penalty provision itself such as a permit requirement, permit condition or limitation, or other environmental standard. But, for some offenses and not for others, the statute provides that there must also be a "knowing violation" of that external legal standard.\textsuperscript{275}

The courts uniformly agree that, in a RCRA prosecution, the government need not prove that the defendant knew that the material at issue was a "hazardous waste" within the meaning of that statute and its implementing regulations.\textsuperscript{276} Almost without exception,\textsuperscript{277} the courts agree

\begin{quote}
shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both.
\end{quote}


\textsuperscript{275} Compare 42 U.S.C. § 6928(d)(1988) ("which does not have a permit") and id. § 6928(d)(2)(A) ("without a permit") with id. § 6928(d)(2)(B) ("in knowing violation of any material condition or requirement of such permit"); id. § 6928(d)(2)(C) ("in knowing violation of any material condition or requirement of any applicable interim status regulations or standards"); id. § 6928(d)(7)(A) ("in knowing violation of any material condition or requirement of a permit") and id. § 6928(d)(7)(B) ("in knowing violation of any material condition or requirement of any applicable regulations or standards").

\textsuperscript{276} See, e.g., United States v. Laughlin, 10 F.3d 961, 965 (2d Cir. 1993), cert. denied, 114 S. Ct. 1649 (1994); United States v. Self, 2 F.3d 1071, 1089-91 (10th Cir. 1993); United States v. Goldsmith, 978 F.2d 643, 645-46 (11th Cir. 1992) (per curiam); United States v. Dean, 969 F.2d 187, 193 (6th Cir. 1992), cert. denied, 113 S. Ct. 1852 (1993); United States v. Baytank, Inc., 934 F.2d 599, 612 (5th Cir. 1991); United States v. Sellers, 926 F.2d 410, 414-17 (5th Cir. 1991); United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990), cert. denied, 499 U.S. 919 (1991); United States v. Hofilin, 880 F.2d 1033, 1039 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502-03 (11th Cir. 1986); United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985). By contrast, several court of appeals opinions contain language suggesting that the government must prove that the defendant knew that the material at issue was "waste," within the meaning of RCRA. See, e.g., United States v. Heuer, 4 F.3d 723, 731 (9th Cir. 1993), cert. denied, 114 S. Ct. 1190 (1994); United States v. Bentley-Smith, 2 F.3d 1368, 1378 (5th Cir. 1993) (per curiam); Sellers, 926 F.2d at 415-16; Dee, 912 F.2d at 746 & n.9; Hayes Int'l Corp., 786 F.2d at 1506. Upon closer examination, however, in none of those decisions do the courts seem to be allowing a defense based on a mistake of law, but rather simply allowing for the possibility of a valid mistake of fact defense. See, e.g., Hayes Int'l Corp., 786 F.2d at 1506 (acknowledging that "good faith belief" that products were harmless could constitute valid mistake of fact defense).

\textsuperscript{277} The only exception is an isolated ruling of the Third Circuit, in which that court concluded that proof of the defendant's knowledge of a permit requirement should be required, notwithstanding what seemed to be the clear negative implication to be drawn from the subsection's lacking the explicit "in knowing violation" clause included in parallel subsections in the same statutory provision. Johnson & Towers, Inc., 741 F.2d at 667-69. The court in that case concluded that it would be "arbitrary and nonsensical" for Congress to require a different mens rea in this one subsection and the difference in wording was therefore best understood as the product of mere oversight or "inadvertent[ce]." Id. at 668. Every other court has since explicitly disagreed with the Third Circuit's view. The leading court decision in conflict with the Third Circuit's ruling in Johnson & Towers, Inc. is the Ninth Circuit's decision in Hofilin, 880 F.2d at 1036-39 (finding that "the statute is not ambiguous" and "there is nothing illogical about this"); accord United States v. Wagner, 29
that the only provisions of RCRA that could require proof of any knowledge of the applicable legal standard—like a permit requirement or permit condition—are those few that include the specific “in knowing violation” clause. Otherwise, no such showing is required.278

b. Fact. The distinction between knowledge of law and knowledge of fact is simultaneously obvious and subtle. Knowledge of facts refers to the facts that make the defendant’s conduct unlawful. The facts that make the defendant’s conduct unlawful can include the conduct itself, any external circumstances, or any consequences of the conduct. No knowledge of the legal consequences of a defendant’s conduct or even its legal relevance is necessary. In a prosecution for battery, for instance, the government would have to prove that the defendant knew that he was hitting another person, but not that he knew that his doing so was unlawful or a crime.

In the environmental law context, requiring knowledge of the facts that make the defendant’s conduct unlawful could be a very exacting standard, given that the factual predicates for liability are often highly complex, technical, and indeterminate.279 The facts that determine lawfulness involve fine distinctions of degree, not kind.

For instance, the factual inquiry under the Clean Water Act would not simply be whether the person knew that she was emitting pollutants into water. Instead, the issues would be whether the defendant knew precisely how much was being emitted, where and when it was being emitted, how discernible and discrete the manner of emission was, and in a wetlands case, what kinds of vegetation predominated in the area at certain times of the year. For RCRA, the factual inquiry is even more intricate. On the issue of whether the material was a “waste,” did the defendant know whether the material was “spent material,” “sludge,” “commercial product,” “byproduct,” “substitute for raw material feedstock,” “not solely or separately produced by the production process,” being used in a closed-loop industrial process, being stored only for a certain number of days, or “being accumulated speculatively?”280 On the issue of whether a waste was “hazardous,” the defendant would have to know what industrial processes produced the material, what its boiling point was under one set

F.3d 264, 266 (7th Cir. 1994) (holding that 42 U.S.C. § 6928 does not contain requirement that government prove that defendant had knowledge of RCRA’s permit requirement); Laughlin, 10 F.3d at 965-66 (holding that 42 U.S.C. § 6928 requires only that defendant have general awareness that he is performing acts proscribed by RCRA); Goldsmith, 978 F.2d at 644-45 (holding that in § 6928 case government only needs to prove that defendant had knowledge of general hazardous characters of chemical, not that defendant knew that EPA had defined chemical waste as hazardous waste); Dean, 969 F.2d at 190-92 (holding that knowledge of permit requirement was not element of crime for 42 U.S.C. § 6928).

278. See Wagner, 29 F.3d at 266; Laughlin, 10 F.3d at 965-66; Heuer, 4 F.3d at 728-30; Goldsmith, 978 F.2d at 644-45; Dean, 969 F.2d at 190-92; Hoflin, 880 F.2d at 1036-39.

279. See supra text accompanying notes 89-147.

280. See supra text accompanying notes 116-30.
of prescribed physical conditions, what concentration of toxic constituents would leach out under a second set of prescribed physical conditions, and how the material would chemically react with other specific substances under yet another set of prescribed physical conditions.\textsuperscript{281} The same pattern of technical, precise, factual inquiries would be repeated for each of RCRA’s multiplicity of environmental standards, as it would for the standards and requirements in each of the other environmental protection laws.\textsuperscript{282}

There is textual statutory support for the proposition that such factual knowledge is required for criminal culpability. Virtually all of the environmental criminal penalty provisions require in some fashion that the defendant “knowingly” commit a violation: in each of these provisions, “knowingly” modifies either “violates” or “in violation of,”\textsuperscript{283} or refers to the particular conduct in which the defendant was engaging (e.g., “knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter . . . without a permit”).\textsuperscript{284} The question the courts have faced, in light of this statutory language, is what facts a defendant must know about her conduct to be convicted of a “knowing” violation. Does criminal culpability turn on the defendant’s awareness of facts with the level of precision actually determinative of the lawfulness of the defendant’s activity?

Courts have addressed this issue in a variety of environmental law contexts. Their virtually uniform answer is that no such rigorous proof of the defendant’s knowledge of relevant facts is required. Some factual knowledge is necessary—liability is not entirely strict. Yet, given the breadth and depth of relevant facts of which the government need not prove knowledge, liability for knowing violations could be fairly dubbed mostly strict (if such a characterization is not an oxymoron).

In most contexts, the courts essentially require knowledge of enough facts to alert the defendant to the possibility of environmental regulation.\textsuperscript{285} Once that standard is met, the defendant, in effect, acts at her own peril. For example, she need not know all of the facts relevant to determining precisely how much waste is being discharged at a particular time; to

\begin{itemize}
\item \textsuperscript{281} See supra text accompanying notes 131-35.
\item \textsuperscript{282} See supra text accompanying notes 89-93.
\item \textsuperscript{283} See supra text accompanying note 274.
\item \textsuperscript{284} 42 U.S.C. § 6928(d)(2)(A) (1988); see supra text accompanying notes 275, 277-78.
\item \textsuperscript{285} See, e.g., United States v. Laughlin, 10 F.3d 961, 965 (2d Cir. 1993), cert. denied, 114 S. Ct. 1649 (1994) (“requires only that a defendant have a general awareness that he is performing acts proscribed by the statute”); United States v. Buckley, 934 F.2d 84, 88-89 (6th Cir. 1991) (“very nature of hazardous substances such as asbestos puts individuals controlling the substances on notice”); United States v. Sellers, 926 F.2d 410, 416 (5th Cir. 1991) (“Thus, when a person knowingly possesses an instrumentality which by its nature is potentially dangerous, he is imputed with the knowledge that it may be regulated by public health legislation.”).
\end{itemize}
characterizing material as "waste," or waste as "hazardous" under RCRA; to identifying "wetlands" under the Clean Water Act; to distinguishing between "point" and "nonpoint" sources under the Clean Water Act, or "major" and "nonmajor" sources under the Clean Air Act; or equivalent facts involved in any of the other complex determinations described earlier in this article. The court, of course, has to determine whether, as a matter of law, the actual facts satisfy those legal standards. But the defendant need not know those facts, even though they determine the lawfulness of her conduct.

One illustration of the threshold of knowledge required by courts is the treatment by the courts of appeals, in sustaining RCRA prosecutions, of a defendant's knowledge of a waste's hazardousness. The courts have routinely upheld jury instructions requiring proof only that "the defendant knew [that the material] had a potential to be harmful to others or the environment or, in other words, it was not a harmless substance like uncontaminated water."286 This definition is far less demanding than the statutory definition of hazardous waste,287 let alone its complex implementing regulations.288

286. United States v. Self, 2 F.3d 1071, 1089-91 (10th Cir. 1993) ("The defendant need have no specific knowledge of the particular hazardous characteristics of the material in question, only that it was hazardous waste and not a benign or innocuous material such as water."); Laughlin, 10 F.3d at 965; see also United States v. Goldsmith, 978 F.2d 643, 645 (11th Cir. 1992) (per curiam) ("defendant knew that the . . . material had the potential to be harmful to others or to the environment, in other words, that it was not an innocuous substance like water"); United States v. Baytank, 934 F.2d 599, 611-13 (5th Cir. 1991) (defendant "knew that the waste stored had the potential to be harmful to others or to the environment"); Sellers, 926 F.2d at 416-17 ("There is no requirement that the defendant must know that the waste would be harmful 'if improperly disposed of.'"); United States v. Dee, 912 F.2d 741, 745-46 (4th Cir. 1990) (upholding jury instruction requiring jury to find only that materials were "chemicals," but not that they were hazardous; impression of instruction was harmless error), cert. denied, 499 U.S. 919 (1991); United States v. Hoflin, 880 F.2d 1033, 1039 (9th Cir. 1989) (defendant "knew that the chemical wastes had the potential to be harmful to others or the environment, or in other words, it was not an innocuous substance like water"); cert. denied, 493 U.S. 1083 (1990).


288. See supra text accompanying notes 116-35. In reviewing criminal prosecutions under RCRA, however, the courts of appeals have sharply disagreed on the question of whether the government must prove the defendant's awareness of the absence of a RCRA permit, when the underlying violation turns on the applicability of that Act's permit requirement. The relevant statutory language is the same that generated the dispute between the Third Circuit and the other courts of appeals concerning the distinct issue whether the defendant must know that a permit is required. See supra note 277. Here, however, the issue is not whether the defendant must know the law (whether a permit is required), but instead just a fact (whether there is a permit). For instance, under a mistake of law, one would know the permit status, i.e., no permit, but not know that a permit is required. Under a mistake of fact, one would know that a permit is required, but not know the permit status, i.e., mistakenly believe that the activity has a permit. Under traditional doctrine, the former would be a defense to prosecution; the latter would not. And, while the Third Circuit alone concluded that the defendant must know the law, several courts of appeals have joined the Third Circuit in concluding that the government must prove the defendant's knowledge of
c. Judicial Reliance on Public Welfare Offense Canon. In finding that the government need not prove the defendant’s knowledge of either the applicable legal standards or, with minor exceptions, the defendant’s knowledge of the facts making the conduct unlawful, the courts have not relied on the statutory language as a critical factor. The statutory provisions, standing alone, provide little support for either conclusion. Review of the courts’ opinions instead reveals almost a universal reliance on a canon of statutory construction referred to as the “public welfare offense” doctrine. Roughly speaking, under that doctrine, courts deem Congress to have provided for diminished mens rea in criminal regulatory offenses that protect the public welfare by regulating dangerous activities that pose risks of “wide distribution of harm” on society. One oft-cited justification for this canon is that “[t]he accused . . . usually is in a position to prevent [wide distribution of harm] with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.”

The Supreme Court’s decision in United States v. International Minerals & Chemical Corp. is the case most often cited by the lower courts in justifying their rulings based on the public welfare offense doctrine. In that case, the Court construed a federal statutory provision making it a crime to “knowingly violate” a regulation applicable to shippers of hazardous material. The applicable regulation required each shipper to describe the fact of permit status (in more than one type of RCRA prosecution). Courts have concluded that knowledge of permit status is required under RCRA, 42 U.S.C. § 6928(d)(2)(A). See Baytank, 934 F.2d at 599, 613; United States v. Johnson & Towers, Inc., 741 F.2d 662, 668-69 (3d Cir. 1984). Courts have concluded that knowledge of permit status is not required under RCRA, 42 U.S.C. § 6928(d)(2)(A). See Laughlin, 10 F.3d at 965-66; Hoflin, 880 F.2d at 1036-39. Courts have concluded that knowledge of permit status required under RCRA, 42 U.S.C. § 6928(d)(1). See United States v. Hayes Int’l Corp., 786 F.2d 1499, 1503-05 (11th Cir. 1986); see also United States v. Speach, 968 F.2d 795, 796-98 (9th Cir. 1992) (holding that knowledge of permit required under 42 U.S.C. 6928 (d)(1)); United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 47-48 (1st Cir. 1991) (citing favorably district court’s position requiring knowledge of permit status under 42 U.S.C. § 6928 (d)(1)).


290. Morissette, 342 U.S. at 256.


292. Id. at 559 (citing 18 U.S.C. § 834(f)).
article in the shipping paper, including any "classification prescribed in
section 172.4 of this chapter." Relying on the public welfare offense
doctrine, the Court held that the government need not show that the
defendant was aware of the terms of the underlying regulation, notwith-
standing the statutory language that the defendant must "knowingly vi-
late . . . [the] regulation," the government had only to prove the
defendant's knowledge that he was shipping sulfuric acid. The Court
rejected the defendant's claim that such diminished mens rea violates
due process. It reasoned that "where, as here . . . , dangerous or deleterious
devices or products or obnoxious waste materials are involved, the proba-
Bility 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." The Supreme Court has not yet had occasion to consider the applicable-
ity of its ruling in International Minerals to the construction of the "know-
ingly violates" language included in several federal environmental protection
laws. The lower courts in such cases, however, routinely rely on the
International Minerals decision to support their rulings that Congress in-
tended to require the government to make only a fairly minimal showing of
mens rea to secure conviction. In support of their construction of similar
language in environmental statutes, those courts cite the Supreme Court's
conclusion that "knowingly violates . . . [the] regulation" does not require
the government to prove the defendant's knowledge of applicable regulations.
Similarly, they rely on International Minerals in support of their
rulings that the government must prove the defendant's knowledge of only
those facts sufficient to alert the defendant to the probability of environmen-
tal regulation. The lower courts presume that the International Minerals
Court held that anyone dealing with potentially dangerous materials must
know that "the probability of regulation is so great" and that a defense is
allowed only when the person charged believed "in good faith that he was

294. International Minerals, 402 U.S. at 562 ("We therefore see no reason why the word
'regulations' should not be construed as a shorthand designation for specific acts or omis-
sions which violate the Act.").
295. Id. at 565.
296. United States v. Hopkins, 53 F.3d 533, 537, 540 (2d Cir. 1995); United States v.
Wagner, 29 F.3d 264, 266 (7th Cir. 1994); United States v. Laughlin, 10 F.3d 961, 965 (2d
Cir. 1993), cert. denied, 114 S. Ct. 1649 (1994); United States v. Self, 2 F.3d 1071, 1090-91
(10th Cir. 1993); United States v. Weitzenhoff, 1 F.3d 1523, 1529-30 (9th Cir. 1993), am-
ended by 35 F.3d 1275, 1284-85 (1994), cert. denied, 115 S. Ct. 939 (1995); United States v. Dean,
969 F.2d 187, 191-92 (6th Cir. 1992), cert. denied, 113 S. Ct. 1852 (1993); United States v.
Baytank, 934 F.2d 599, 612 (5th Cir. 1991); United States v. Buckley, 934 F.2d 84, 88-89 (6th
Cir. 1991); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502-03 (11th Cir. 1986); United
States v. Corbin Farm Servs., 444 F. Supp. 510, 519-20 (E.D. Cal), aff'd, 578 F.2d 259
(9th Cir. 1978).
[shipping] distilled water." As discussed below, such an interpretation is seriously flawed.

2. Critique of Judicial Construction of Environmental Criminal Penalty Provision

The lower courts’ reasoning, in effect, eroding the mens rea requirement of environmental criminal penalty provisions, is flawed for several reasons. The courts both misread and misapply the Supreme Court’s opinion in *International Minerals*. The principal cause of these errors is the courts’ failure to appreciate that the assumptions underlying the public welfare offense canon and its application in *International Minerals* do not readily apply to the environmental crimes context. The courts mistakenly treat environmental crimes as if they were equivalent to the regulatory crimes that first spawned the public welfare offense canon. Environmental law’s features, however, are quite distinct from the regulatory regimes under which the public welfare offense canon arose. They require different analysis and, arguably, a very different result—one that increases the government’s burden of proof in establishing criminal culpability. Indeed, it seems quite likely that the current Supreme Court would do just that in construing the environmental criminal penalty provisions.

The lower courts’ most fundamental error is in confusing the *International Minerals* Court’s discussion of the validity of a mistake of law defense with the possible merits of a mistake of fact defense. The Court’s exclusive holding in *International Minerals* was that the government need not establish the defendant’s knowledge of the law (i.e., regulation). The Court could hardly have been clearer in this regard, describing “the sole


and narrow question" before it as "whether 'knowledge' of the regulation is also required." The Court repeatedly acknowledged that the statute requires knowledge of the legally relevant "facts." The lower courts are accordingly on thin precedential ice when they cite International Minerals, as they routinely do, to support their rulings in environmental cases that a defendant need not know all of the legally relevant facts to be convicted.

Irrationally, the source of the lower courts' confusion is a sentence in the International Minerals opinion likely intended to make clear the availability of a mistake of fact defense. The Supreme Court buttressed its conclusion that a defendant would have to know the fact of "possession of . . . sulfuric acid"—the chemical substance at issue in that case—with the statement that “[a] person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered.” But, contrary to the lower courts' apparent assumption, the purpose of that illustration was not to define the only circumstances constituting a valid mistake of fact defense; it was simply to describe one obvious instance of a valid defense. The lower courts, nevertheless, have misread International Minerals as standing for the proposition that once a party knows that he is handling something more dangerous than distilled water, he can be deemed constructively to know all the legally relevant facts as well as the terms of the regulation. International Minerals, however, quite clearly holds that the only thing the party can be deemed to know is the terms of the regulation, and not all of the relevant underlying facts. That is why in International Minerals the government had to establish the defendant's knowledge of the legally relevant material facts: that the defendant knew he was transporting sulfuric acid.

300. See id. at 560 (holding that "knowledge of the shipment of the dangerous materials is required. The sole and narrow question is whether 'knowledge' of the regulation is also required."); id. at 563 (stating that "we decline to attribute to Congress the inaccurate view that that Act requires proof of knowledge of the law, as well as the facts"); see also id. at 562 ("We therefore see no reason why the word 'regulations' should not be construed as a shorthand designation for specific acts or omissions which violate the Act.").
301. Id. at 563-64.
302. See supra note 297.
303. There are, to be sure, instances when the Supreme Court has described the public welfare offense rationale as extending to the elimination of mens rea as to facts as well as to the law. See Staples v. United States, 114 S. Ct. 1793, 1798 n.3 (1994) ("Under such statutes, we have not required that the defendant know the facts that make his conduct fit the definition of the offense."). The Court has also, in language reminiscent of the International Minerals Court's rejection of a mistake of law defense, explained how prosecutions for violations of public welfare offenses "generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct." Posters 'N' Things v. United States, 114 S. Ct. 1747, 1753 (1994). But in none of those cases has the Court been construing language, like that at issue in both International Minerals and the environmental criminal penalty provisions, that includes an express mens rea element. "Generally speaking, [that the defendant know the facts that make his conduct fit the definition of the offense] is necessary to establish mens rea, as
The lower courts also misapply *International Minerals* in an important respect: they frequently misapprehend the meaning of "law" in the *International Minerals* Court's reaffirmation of the "principle that ignorance of the law is no defense in the public welfare offense context." The Court held that the principle "applies whether the law be a statute or a duly promulgated and published regulation." As previously described, however, the meaning of much environmental law is discernable only through examination of a multiplicity of obscure sources, including regulatory preambles, guidance memoranda, and informal opinion letters. None of those materials is, strictly speaking, "law." Indeed, courts have traditionally accorded less weight to those agency expressions of the meaning of law because they do not purport to announce legal rules binding on the public. One cannot therefore fairly presume public awareness of the substance of those nonbinding materials. Yet, the lower courts routinely fail to draw this distinction.

The lower courts are on firmer ground in concluding that defendants in environmental cases are, like the defendant in *International Minerals*, presumed to know the "law"—in particular, the existence and terms of applicable regulations. The analogy between *International Minerals* and the environmental crime cases is, in that respect, direct: both interpret virtually identical "knowingly violates" statutory language. In addition, environmental pollution seems to present the risks of "wide distribution of harm" that the public welfare offense was historically intended to redress. 

reflected in the maxim *ignorantia facti excusat." *Staples*, 114 S. Ct. at 1798 n.3; see id. at 1805-06 (Ginsburg, J., concurring) (arguing that firearm statute not only required knowledge, but specific higher level of knowledge). In other public welfare cases, the government has at least had to establish some of the legally relevant facts. In *United States v. Freed*, the government established that the defendant knew that he possessed a hand grenade, 401 U.S. 601, 609 (1971). And, finally, just last Term, the Court held in *Staples v. United States* that the government had to prove the defendant knew that the firearm at issue was fully automatic. 114 S. Ct. at 1804 (1994). Nothing in *International Minerals* is to the contrary.

305. *Id.*
306. See Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991) (holding that interpretive regulation, while not entitled to deference on basis of agency secretary's delegated lawmaking powers, still entitled to some weight on judicial review); Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) (same); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (same). See generally Robert A. Anthony, *Interpretive Rules, Policy Statements, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1312-19 (1992) (arguing that federal agencies can give interpretive rules binding effect to extent that enforcement can be viewed as implementing previously existing law but that federal agencies should not try to use these rules directly to bind public).
307. Cf. *United States v. R.L.C.*., 503 U.S. 291, 312 (1992) (Thomas, J., concurring) (presuming citizen and congressional “familiarity . . . with the United States Reports [because] [l]ike Congress’s statutes, the decisions of the Court are law . . . [unlike] committee reports and floor statements, which are not law”).
There are nonetheless reasons to question the forcefulness of the analogy in the environmental crimes context.

First, the *International Minerals* Court never held that persons dealing with "dangerous or deleterious . . . obnoxious waste materials" must be presumed to be aware of applicable regulations. The Court held only that Congress could eliminate knowledge of the applicable regulations without violating due process. And the reason why due process would not be violated in this situation was that Congress could fairly assume such knowledge in the described circumstances. What Congress can assume without violating due process and what Congress intends to do in a statutory provision, however, are two very different matters. The lower courts, however, have repeatedly relied on the quote from the due process discussion in *International Minerals* to determine what Congress intended in the environmental criminal penalty provisions.

Second, *International Minerals* assumes that the applicable law is in the form of a readily discernible regulation or statutory provision, and that the regulated entity is a part of a specialized, highly regulated economic activity. But neither of those assumptions can be maintained in many environmental law contexts.

The applicable law is, as described above, notoriously obscure. To discover the "law," or at least what the administrative agency believes the law to be, can require legal research akin to a physicist's search for the "quark." And even when discovered, the indeterminate standards often yield imprecise and indeterminate guidance. There may also be several apparently authoritative and conflicting voices in different federal agencies, their various regional offices, and separate federal and state sovereign entities.

Both the activities and pollutants regulated by environmental protection laws are also far more extensive than those addressed by the Court in *International Minerals*. To be sure, the regulated community includes, as in *International Minerals*, some of the most sophisticated members of the business community. But it reaches far beyond. 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. Under the Clean Water Act, for example, the definition of pollutants would readily extend to the very kinds of materials—"[p]encils, dental floss, paper clips"—that the *International Minerals* Court acknowledged "might raise substantial due process ques-

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309. Cf. Liparota v. United States, 471 U.S. 419, 443 n.6 (1985) (White, J., dissenting) ("[T]he Court's references to the dangerousness of the goods in *International Minerals* were directed to possible due process challenges to convictions without notice of criminality. . . . The only issue here is one of congressional intent.").
tions if Congress did not require . . . 'mens rea' as to each ingredient of the
offense.'310 The nation's environmental protection laws are appropriately
far reaching in their scope both as to what and who is regulated. But the
ramifications of that regulatory range cannot be ignored. One such con-
sequence is that it may no longer be fair to apply the International Minerals
assumption to all actors swept within those regulatory embraces.311

There is a third, perhaps more important, reason to question the vitality
of applying the public welfare offense canon and International Minerals to
the environmental criminal penalty provisions. Environmental crimes are
genearly classified as felonies. Pursuant to congressional design,312 the
actual sentences courts are meting out under the environmental laws have
significantly lengthened in recent years.313 Almost without exception, the
cases that invoke the public welfare offense canon, including International Minerals, involved misdemeanors.314 The misdemeanor nature of the re-
levant sanction was not incidental to the Court's application of the public
welfare offense doctrine. The Court stressed that what made reduced
mens rea permissible was the relative lightness of the associated criminal
penalties.315

The difference between these two categories of crimes—felony and
misdemeanor—is not merely a slight difference in degree. A felony convic-
tion portends far greater punishment, including moral stigmatization, and,
for that reason, triggers far greater constitutional protections. A canon
properly applied in the misdemeanor context cannot readily be transferred
to a felony.

Finally, there is much reason to suspect that the current Court would
agree with this critique, notwithstanding limited precedent suggesting the

310. International Minerals, 402 U.S. at 564-65 (emphasis added); see also 33 U.S.C.
Court precedent that "instructs that the presumption in favor of a scienter requirement
should apply to each of the statutory elements which criminalize otherwise innocent
conduct"); Staples v. United States, 114 S. Ct. 1793, 1800 (1994) ("But that an item is
'dangerous,' in some general sense, does not necessarily suggest . . . that it is also not entirely
innocent."); Liparota, 471 U.S. at 426 (holding that "to interpret the statute otherwise would
be to criminalize a broad range of apparently innocent conduct"); United States v. United
States Gypsum Co., 438 U.S. 422, 441 (1978) (hiding that mens rea must be element of
criminal antitrust statute because otherwise "overdeterrence" would result when businesses
were discouraged from engaging in "the gray zone of socially acceptable and economically
justifiable business conduct"); Hart, supra note 170, at 413 (essential rationale of maxim
Ignorantia legis neminem excusat is that legislature has done proper job of reflecting com-

312. See supra note 188 and accompanying text. This feature suggests the propriety of an
affirmative mistake of law defense. See supra text accompanying note 217.
313. See supra note 189.
314. See Morissette v. United States, 342 U.S. 246, 256 (1952) ("Also, penalties commonly
are relatively small, and conviction does no grave damage to an offender's reputation.").
315. Id.; see also Sayre, supra note 289, at 70, 72.
contrary. The only Supreme Court cases supporting application of the public welfare offense canon to a felony sanction are United States v. Freed,316 which involved a statute making the unlawful possession of hand grenades a felony, and United States v. Balint,317 which involved a statute making the unlawful sale of narcotics a felony. Both cases, however, are readily distinguishable because the relevant statutes did not include any explicit mens rea requirement.318 Indeed, the federal government’s brief in Balint stressed that “the legislature has not used the word ‘knowingly’ ” in the relevant statutory provision.319 The environmental criminal penalty provisions, by contrast, generally require the government to establish that the defendant “knowingly violates” the applicable environmental standard. In no case, therefore, has the Court applied the public welfare offense canon in a felony context to an express “knowingly” mens rea requirement.

The current Court is even less likely to do so. The current Court is far more inclined to rely on statutory plain meaning than Courts of the past.320 And the language, “knowingly violates,” would support a strong plain meaning argument that the defendant must possess knowledge of at least all of the relevant facts, and even possibly the applicable law. Hence, the Court might simply relegate the public welfare offense canon to nonfelony provisions, about which courts are “construing statutes and regulations which make no mention of intent.”321 The canon would accordingly have no bearing on the meaning of an environmental felony provision that includes an explicit “knowing” mens rea element and refers to an underlying environmental standard.322

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317. 258 U.S. 250 (1922).
318. See Freed, 401 U.S. at 607 (finding no requirement of specific intent or knowledge under National Firearms Act); Balint, 258 U.S. at 254 (finding no mens rea requirement under section 2 of Narcotic Act).
320. See Merrill, supra note 262. Application of contemporary plain meaning analysis based on strict rules of grammar might yield very different results in settled case law. See Vitiello, supra note 298, at 220-23.
321. Morissette v. United States, 342 U.S. 246, 256 (1952); see Balint, 258 U.S. at 252 (“It is a question of legislative intent to be construed by the court.”); Staples, 114 S. Ct. at 1798 (“whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements”).
322. Cf. Liparota, 471 U.S. at 425 n.9 (“Our holding today no more creates a ‘mistake of law’ defense than does a statute making knowing receipt of stolen goods unlawful . . . . In both cases, there is a legal element in the definition of the offense.”); United States v. Bailey, 444 U.S. 394, 406 (1980) (“[C]ourts obviously must follow Congress’ intent as to the required level of mental culpability for any particular offense. Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates.”); Freed, 401 U.S. at 615-16 (“‘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
Furthermore, those Justices on the Court who are more philosophically sympathetic to the social policies underlying federal regulatory programs like environmental protection laws are also likely to be those members of the Court most sensitive to possible overreaching of federal criminal law. Thus, they are unlikely to conclude that the public welfare offense canon governs the meaning of the environmental criminal penalty provisions.\textsuperscript{323} They may instead be more willing to apply a competing statutory canon to these cases—the "rule of lenity"—which calls for courts to construe narrowly, and in the defendant's favor, any ambiguities in a criminal penalty provision.\textsuperscript{324} The lower courts have regularly failed to appreciate the ready applicability of this canon in the environmental context. But the Supreme Court has increasingly invoked the "rule of lenity" in recent years as that canon has found favor in an unusual, but ultimately not surprising, coalition of liberal and conservative Justices.\textsuperscript{325}

The current Court is also unlikely to be sympathetic to an expansive reading of International Minerals. Indeed, the Justices are more apt to be influenced by those who dissented from International Minerals—Justices Harlan, Stewart, and Brennan—than they are to be swayed by the International Minerals majority. Those three Justices reflect the combination of

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\item "(quoting Model Penal Code § 2.02 cmt. 131 (Tentative Draft No. 4 1955)); United States v. Golitschek, 808 F.2d 195, 202-03 (2d Cir. 1986) ("[W]hen the law makes knowledge of some requirement an element of the offense, it is totally incorrect to say that ... everyone is presumed to know such law. Establishing an element of an offense concerning a requisite state of mind by a presumption relieves the prosecution of its burden of proof, contrary to the requirements of due process.")). See generally Ronald A. Cass, Ignorance of the Law: A Maxim Reexamined, 17 WM. & MARY L. REV. 671 (1976) (arguing that ignorance maxim illogical).
\item While Justice Brennan is, of course, no longer on the Court, his treatment of these issues is fairly indicative of a traditionally liberal Justice. Not surprisingly, the opinions of more liberal Justices, like Justice Brennan, do not reflect much sympathy for the harsh maxim that ignorance of the law is no excuse. Justice Brennan authored the Court's opinion in Liparota, 471 U.S. 419, which found congressional intent to require knowledge of applicable law in congressional silence; he wrote a concurring opinion in Freed, 401 U.S. at 612, which seems to question the "residual validity" of the "ignorance of the law is no defense" maxim; and he joined the dissent in International Minerals, 402 U.S. at 565. The recently released papers of Justice Thurgood Marshall reveal, moreover, that Justice Brennan originally sided with the majority, but then changed his vote based on Justice Stewart's dissent. See Letter from the Honorable William J. Brennan to the Honorable Potter Stewart (May 19, 1971) ("Dear Potter: I voted the other way but your dissent has changed my mind. Won't you please join me? Sincerely, Bill") (on file with Manuscript Division, Library of Congress). The "ignorance of the law is no excuse" maxim has also long attracted sharp criticism. See, e.g., Hall, supra note 165, at 771 (maxim "in its bald paper formulation is not merely immoral, it is definitely immoral").
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traditional conservatism, liberalism, and pragmatism, evident in today’s Court. Indeed, the dissenters’ analysis in *International Minerals* heavily stresses the “plain statutory language,” much the way the Court’s majority often does today.

*United States v. Staples* may well be a harbinger. In *Staples*, the Court drew the very distinction suggested above between mistake of law and mistake of fact defenses, and it held that the public welfare offense canon did not eliminate the government’s obligation to prove knowledge of the legally relevant facts. Based on its reading of the early case law, the Court also suggested the possibility that

punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.

Yet the Court declined to resolve this issue in *Staples*. Instead, it concluded that “the usual presumption that a defendant must know the facts that make his conduct illegal should apply” where the applicable penalty is “severe” and “dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct.”

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327. The Court’s more recent decision in United States v. X-Citement Video, 115 S. Ct. 464 (1994), is likewise instructive. In *X-Citement Video*, the Court construed the term “knowingly” in a federal criminal provision making it a felony to “knowingly” transport, ship, receive, distribute, or reproduce a visual depiction of a minor engaging in sexually explicit conduct. See 18 U.S.C. § 2252(a)(1), (2) (1994). At issue in the case was whether the “knowingly” men’s rea requirement meant that the government had to prove that the defendant knew that the performers were minors. The Court construed “knowingly” to require such proof; although the case is readily distinguishable from environmental criminal penalty provisions—the Court was heavily influenced in its reasoning by the potential First Amendment implications of not requiring such knowledge—the Court’s reasoning is nonetheless informative. The Court discussed its decision in *Staples* at length, reiterating the presumption in favor of scienter and a narrow reading of the public welfare offense canon. See *X-Citement Video*, 115 S. Ct. at 468-69, 472. The Court likewise restated that “harsh penalties attaching to violations of the statute are a ‘significant consideration in determining whether the statute should be construed as dispensing with *mens rea’.” Id. at 468 (quoting *Staples*, 114 S. Ct. at 1802). The Court’s decision in *X-Citement Video* is likely to have its greatest potential application to the question of whether the term “knowingly” in several RCRA criminal penalty provisions applies beyond the transportation, storage, and disposal of hazardous waste to require the defendant’s knowledge of the applicable permit requirement and/or the permit status of the relevant treatment, storage, or disposal facility. See supra notes 274-78 and accompanying text.
329. See id. (“We need not adopt such a definitive rule of construction to decide this case.”).
330. Id.; see MODEL PENAL CODE § 2.02(3) (Official Draft 1962) (presuming that *mens rea* applies to every material element in the crime, unless statute clearly provides otherwise); see also Morissette v. United States, 342 U.S. 246, 250 (1952) (“The contention that an injury
Application of the *Staples* analysis to environmental crime strongly suggests that the Court would, unlike the courts of appeals to date, apply the “usual presumption” that the government must establish the defendant’s knowledge of “the facts that make his conduct illegal.” Indeed, the environmental criminal provisions supply a stronger basis for application of that presumption than *Staples* itself. At least they include, unlike the statute at issue in *Staples*, an explicit conditioning of criminal liability on a knowing violation.

The larger battle is whether today’s Supreme Court would even apply the *International Minerals* rationale that the government need not prove the defendant’s knowledge of the underlying environmental protection standard. The Court might decline on the basis of a wholesale rejection of *International Minerals* pursuant to a more contemporary “plain meaning” analysis. Alternatively, the Court might simply decide not to apply *International Minerals* to a felony provision. In either event, the lower courts have failed to consider these important issues, due to their reflexive application of *International Minerals* to the environmental crimes context.

can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).

331. *Cf. Staples*, 114 S. Ct. at 1802 (“[W]e 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.”).

332. A recent Ninth Circuit case suggests the potential vulnerability of a broad application of *International Minerals* to the environmental felony provisions. In United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1993), amended by 35 F.3d 1275 (9th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995), the court affirmed the felony convictions of two managers of a municipal sewage treatment plant for knowingly violations of the Clean Water Act. Relying on the public welfare offense canon and *International Minerals*, the Court of Appeals concluded that the government need not establish the defendants’ knowledge that their conduct violated the applicable Clean Water Act permit. “[T]he dumping of sewage and other pollutants into our nation’s waters is precisely the type of activity that puts the discharger[s] on notice that [their] acts may pose a public danger.” *Id.* at 1286. More significant than the panel’s reasoning, which fairly typifies lower court application of *International Minerals*, is that five judges dissented from the order denying rehearing en banc. *Id.* at 1293-99. Moreover, like the *International Mineral* dissenters the five judges span the liberal to conservative spectrum on the Ninth Circuit. They range from Judge Reinhardt to Judge Kozinski, and also include Judges Kleinfeld, Nelson, and Trott (who is a former United States Attorney and formerly the Assistant Attorney General of the Justice Department in charge of the Criminal Division). Their reasons for dissenting also rely on the same kinds of concerns expressed in this article, albeit without express awareness of how those reasons fit within the assimilation model and the demands of integration. The dissent relies on the “plain meaning” of the statutory language “knowingly violates,” the “tremendous sweep” of the Clean Water Act and its application to otherwise “innocent conduct” (i.e., pervasiveness), how Clean Water Act permits “are often difficult to understand and obey,” and present questions of degree (i.e., obscurity and indeterminacy), the severity of felony sanctions, and the applicability of the “rule of lenity” in construing ambiguous language in favor of criminal defendants. *Id.*
III. THE COSTS OF NONINTEGRATION

Whether further integration of environmental and criminal law is warranted turns on an analysis of its costs and benefits.333 The environmental crimes program, integration or not, has certainly achieved much during the past few years. Notwithstanding the current crisis and controversy, there are far more environmental criminal prosecutions now than ever before.334 The federal environmental crimes program was virtually nonexistent a few years ago.335 Now there are an increasing number of EPA investigators with enhanced powers devoted exclusively to criminal enforcement,336 as well as many more environmental prosecutors both in Main Justice and in United States Attorney Offices whose principal responsibility is environmental crime.337 As described by one EPA official, "[t]he front end of this pipeline is well loaded right now," and there are likely to be further significant increases in the numbers of criminal prosecutions in future

333. This is not to suggest that the required benefit/burden inquiry is ultimately quantitative. Quite the opposite is true. The assessment is far more qualitative and value-laden. The character of the competing interests at stake resists the application of a common denominator, which would be necessary for a quantitative comparative assessment. And the inherently speculative nature of any predictions as to which of the possible furthe or frustration of those interests is more likely to result in the use of efforts to rely on supposedly neutral efforts at quantification. For a recent, provocative example of a largely qualitative effort to consider the social costs of the possible overcriminalization of certain kinds of human behavior, see Randy E. Barnett, Bad Trip: Drug Prohibition and the Weakness of Public Policy, 103 Yale L.J. 2593 (1994).

334. A comparison of enforcement statistics for fiscal years 1982, 1988, and 1993 is illustrative. The number of criminal referrals from EPA to the Department of Justice during those years increased from 20 to 59 to 140; convictions increased from 11 to 50 to 135; months of imprisonment served increased from zero to 182 to 76; and the months of probation increased from 534 (FY 1983) to 1284 to 3240. ENFORCEMENT ACCOMPLISHMENTS, supra note 4, at app. tbl. 3. For fiscal year 1994, the numbers seem to have increased significantly yet again. EPA referrals increased 60%, from 140 in 1993 to 220 in 1994. See EPA Chalks Up Another Year of Record-Breaking Enforcement Numbers, INSIDE EPA, Dec. 2, 1994, at 14. The Department of Justice criminal enforcement statistics reported for years 1983 to 1992 reflect similar increases. See Memorandum from Peggy Hutchins, Paralegal to Neil S. Cartusciello, Chief, Environmental Crimes Section (May 27, 1992) (on file with The Georgetown Law Journal). The DOJ statistics, however, are quite different from the EPA numbers for the same years. For instance, EPA claims 50 convictions for 1988 and Justice claims 63 convictions. And, for that same time period, while EPA claims sentences of 185 months served, Justice claims 3020 months served. The Department of Justice has itself suggested that the federal government's enforcement statistics "overstated its successes" and "do not appear reliable." JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 52 n.73.

335. Cohen, supra note 171, at 1056; McMurry & Ramsey, supra note 186, at 1137-39; Starr, supra note 221, at 906-07.


337. See November 1993 Dingell Hearing, supra note 4, at 66 (testimony of L. Nye Stevens, Deputy Assistant Comptroller General, General Accounting Office).
years. One might argue that the program’s current problems are merely unavoidable growing pains in an emerging enforcement area that will naturally dissipate over time without the need for broad based reforms. The flaw with this analysis is that it mistakes the problem for the cure. The growth of the environmental criminal enforcement program is positive, to be sure, but it simultaneously raises the costs of nonintegration. Nonintegration is a significant problem only because the program is growing so much. The growth of the enforcement program and the increased severity of the penalties being meted out make the need for integration more, not less, pressing. The problems currently evident in environmental criminal enforcement are likely to get worse in the absence of meaningful reform. In fact, Congress has already exacerbated the problem by forcing the Justice Department to adopt measures that will make proper integration efforts more difficult in the future by, for instance, effectively compelling Main Justice to decrease its oversight of the handling of environmental cases by regional federal prosecutors.

A. DISCRETION, DISTRUST, AND THE DEMORALIZATION OF ENVIRONMENTAL CRIMINAL LAW

The cost of nonintegration includes both the cost to environmental law’s integrity and the concomitant reduction of the moral force of criminal law. Criminal law possesses moral force because of its close adherence to traditional criteria of moral culpability, especially the mens rea element of the offense. It is not enough, therefore, that the environmental concerns safeguarded by environmental protection standards clearly fall within those kinds of interests warranting the protection of criminal sanctions. Nor are environmental criminal penalty provisions justified simply because many violators of environmental standards are indistinguishable in motive and intent from those committing more traditional crimes condemned by society. Those important general truisms are not a substitute for proof that an individual defendant possesses the level of culpability necessary to justify one of society’s harshest sanctions: felony incarceration. Environmental law cannot have it both ways. It cannot seek to exploit criminal law’s moral force, while abandoning those elements, like mens rea, upon which the legitimacy of that moral force ultimately rests. When it does, “the vitality of the criminal law has been sapped.”

338. EPA Criminal Probes Come of Age, Officials Say: Cases Expected to Double, ENV’T DAILY, Mar. 14, 1994, at D3 (quoting Earl Devaney, Director, EPA Office of Criminal Enforcement). Consistent with this prediction, EPA recently announced that the number of criminal cases (220) the agency referred to the Department of Justice in fiscal year 1994 amounted to a 60% increase over the previous year. See EPA Chalks Up Another Year of Record-Breaking Enforcement Numbers, supra note 334, at 14.

339. See infra note 501.

340. Sayre, supra note 289, at 80; see United States v. Weitznenhoff, 35 F.3d 1275, 1299 (“We undermine the foundation of criminal law when we so vitiate the requirement of a
The importance of environmental interests no doubt requires some accommodation in the application of traditional criteria of criminal culpability. The difficulty of assigning environmental responsibility in certain corporate contexts likely requires statutory innovations designed to make criminal prosecutions feasible.\(^{341}\) The risk of irreversible environmental catastrophes in some settings can justify a carefully crafted reduction of the mens rea requirements applicable to those heightened risks.\(^{342}\) But the generic need for deterrence, administrative convenience, and prosecutorial expediency does not justify an abandonment of those requirements altogether.

Nor do the last few years suggest that the exercise of prosecutorial discretion is an adequate answer. Under the prosecutorial discretion approach, which could be called the “Al Capone” model, prosecutors are blindly trusted to exploit the full sweep of the criminal law only against those who are truly culpable and not against the morally innocent who only technically fall within the terms of the criminal prohibition.\(^{343}\) This approach has the advantage of allowing prosecutors, once they have identified the “truly culpable” actors, to obtain conviction based on relatively little evidence of actual culpability. Higher conviction rates are thereby obtained.

There are, however, great disadvantages to this delegation model. First, there is a very real cost to criminalizing conduct of a far wider scope than society plans to subject to criminal sanction. Even assuming that prosecutors can exercise their prosecutorial discretion in a manner that successfully distinguishes between the “truly culpable” and the “morally innocent” better than the legislature can in the first instance, it remains that both types of conduct are made criminal under the law. Accordingly, many individuals must live in fear of possible criminal prosecution and depend on governmental goodwill to maintain their freedom.\(^{344}\) Deterrence is

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341. See infra text accompanying notes 451-87.
342. See Sayre, supra note 289, at 79 (“[I]f violation threatens serious and widespread public injury, courts have no other course open to them. The orthodox fundamental principles of criminality must be sacrificed in such cases in the interest of enforcement.”); see also infra text accompanying notes 466-71.
343. See, e.g., United States v. Dotterweich, 320 U.S. 284, 285 (1943) (“In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted.”); see also Coffee, Paradigms Lost, supra note 166, at 1889 (arguing that bureaucracy will use technical violations to save face when original prosecution breaks down).
344. See Coffee, Reflections on the Disappearing Distinction, supra note 168, at 219-20 (noting “fear and anxiety imposed on risk-averse individuals forced to live under the constant threat of draconian penalties”). See generally Susan W. Hedman, Expressive Func-
achieved, but at a price—the demoralization felt by the many individuals vulnerable to prosecution. The demoralization problem is especially acute when environmental pollution is the basis of the underlying offense because many legitimate, unavoidable activities are among those subject to possible prosecution.

There is also good reason to question both the ability of prosecutors to draw the necessary distinctions, as well as the accuracy of the threshold assumption that prosecutors are better equipped than legislators to decide the policy question of who warrants criminal incarceration.

There is nothing scientific about the exercise of prosecutorial discretion. It is necessarily based on highly subjective, impressionistic determinations.\(^{345}\) "Discretion' raises the specter of inconsistency, arbitrary treatment, bias, and corruption."\(^{346}\) The danger that such prosecutorial abuse will occur is considerable. "Little in the background, training, self-selection, or general outlook of prosecutors suggests that they are best equipped to make whatever diagnostic and rehabilitative judgments may be involved ...."\(^{347}\) As previously described,\(^{348}\) this is especially so in

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345. See, e.g., Rocky Flats Hearing, supra note 251, at 1328 (testimony of Assistant United States Attorney Kenneth R. Fimberg) ("The amount of evidence, prosecutive decisions are not scientific .... They are extremely subjective. They are matters of art, if you will, as opposed to science. You get ten prosecutors in the room, you will likely—you may get ten different opinions.").


347. James Vorneberg, Decent Restraint of Prosecutorial Discretion, 94 Harv. L. Rev. 1521, 1557-58 (1981); see Laurie L. Levenson, Good faith Defenses: Reshaping Strict Liability
environmental law where there is a separation of environmental policy and criminal law expertise between EPA and the United States Attorney Offices. There is certainly no reason to assume that federal prosecutors working on environmental cases are somehow magically immune from abusive prosecutorial practices that otherwise occur.

Finally, the current prosecutor-delegation model suffers from an even more fundamental problem, at least as applied to environmental criminal law. The volatility of the politics surrounding environmental law is too destabilizing and potentially destructive. The mere perception of prosecutorial abuse in environmental law, regardless of whether that perception is true, is sufficient to destroy what might otherwise be an effective program, including the careers of those prosecutors swept into the resulting controversy. A pathological cycle of controversy has long plagued environmental law and its implementation, largely as a result of the high level of distrust between different branches of government and the regulated and environmental communities.\textsuperscript{349}

The delegation of sweeping prosecutorial discretion cannot survive easily within such a politically charged environment. Effective delegation of this authority requires some mutual understanding between branches of government regarding the exercise of this authority and the bare modicum of trustworthiness necessary to handle those inevitable occasions when problems arise.

The environmental crime context has proven to be an exceedingly difficult area for nurturing such mutual understandings. Criminal prosecutors are protective of their jurisdiction and independence. They do not even regard EPA as their client, as Justice Department lawyers do in the civil context. In the criminal arena, the United States is the client. This further separation of perspectives makes it that much less likely that the policymakers at EPA and the criminal prosecutors will work well together to create a coherent program, let alone educate congressional overseers regarding their efforts.

With the benefit of hindsight, it seems quite clear that the effect of congressional delegation of sweeping discretion in environmental criminal prosecution was equivalent to setting two trains in motion toward each other on a single track. Policy decisions had to be made, and, for reasons explained above,\textsuperscript{350} they were inevitably made on an ad hoc basis. Lack of trust, coupled with an absence of clear policy guidance and explication,

\textsuperscript{348} See supra text accompanying notes 238-45.
\textsuperscript{349} See generally Lazarus, The Tragedy of Distrust, supra note 14.
\textsuperscript{350} See supra text accompanying notes 238-45.
accelerated the claims of abuse of prosecutorial authority. And, because of misguided notions of "political" neutrality in law enforcement, accusations of "political influence in the prosecution of environmental crimes by the Department of Justice" occurred.  

While the accusations from the political left have probably been the loudest, voices on the right have also made their share of accusations. These latter claims have long focused on the federal wetlands program, and, in recent years, they have found great political momentum in attacks on the federal endangered species program. The claim is that the Justice Department has overreached and prosecuted morally innocent conduct.

Congressional oversight has been the primary vehicle for this criticism.

351. TURLEY REPORT, supra note 5, at 32 see Hassler, supra note 11, at 10,084-87 (critiquing characterizing exercises of prosecutorial discretion as reflecting "political interference"); see also JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 192 (describing how "good-faith misunderstanding" has, as a "result of misplaced suspicions [..] been blown out of all proportion"); BARDACH & KAGAN, supra note 229, at 209-10 (describing how enforcement discretion can be viewed as a political sellout); Schroeder, supra note 213, at 269-70 (arguing government official cannot explain to citizen why environmental standard "should not be backed up with tough criminal sanctions on the ground that the standards were set at too stringent a level initially"); cf. Harry V. Ball & Lawrence M. Friedman, The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View, 17 STAN. L. REV. 197, 219-20 (1965) ("tensions and conflicts may arise because of lack of understanding by the broader public").

352. See Tom Bethell, Property and Tyranny, AM. SPECTATOR, Aug. 1994, at 16 (critique of wetlands enforcement); Paul D. Kamenar, The Truth: There Are Not Environmental Crimes, CAL. L AW., Aug. 1993, at 89 (arguing that many environmental violations would be more appropriately addressed by civil or administrative remedies); H. Jane Lehman, Trials and Tribulations of Landowners, L.A. TIMES, Oct. 18, 1992, at K2 (reporting on enigmatic enforcement of wetlands regulations); Maryland Wetlands Conviction Stirring Heated Debate, WASH. POST, Feb. 20, 1993, at F6 (same); Review & Outlook—Property Busters, WALL ST. J., Jan. 11, 1990, at A14 (same); see also Review & Outlook—The Ellen Pardon, WALL ST. J., Jan. 15, 1993, at A10 (arguing against wetlands convictions based on a lack of political consensus about environmental crimes); Review & Outlook—EEPA’s Most Wanted, WALL ST. J., Nov. 18, 1992, at A16 (concluding that wetlands enforcement has “gotten out of hand”).


354. Both those on the right and on the left seem to engage quite freely in significant factual distortion in support of their claims. The congressional reports have been criticized on this account. See JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 85-108; Hassler, supra note 11, at 10,079 ("But attempting to assess any case without a careful review of the concerns of the prosecutors involved, or of potential defenses, is no more valid than trying to pick the winner of the Super Bowl by reviewing one team’s highlight films."). The conservatives’ most recent cause celebre—the California immigrant farmer being prosecuted under the Endangered Species Act—appears to be a classic instance of factual distortion. See Howe, supra note 353; Jon Margolis, Simple Tale of Federal Meddling More Complex Than Proponents Will Admit, CHI. SUN-SENTINEL, July 16, 1994, at A23.
Most, but not all, of that criticism has come from those in Congress who are concerned that the Justice Department might undermine the environmental crimes program. The investigations of the Environmental Crimes Section by Representatives Dingell and Schumer, and former Representative Wolpe, are only the latest in a long history of congressional criticism of the executive branch for failing to meet legislators’ expectations. There is also reason to expect that congressional oversight may soon adopt a quite different voice, albeit equally critical. With the Republican Party having assumed leadership positions in both legislative chambers, those claiming that the Justice Department has gone too far have now found their view more often championed by congressional overseers.

Congressional oversight can serve an essential and legitimate function. Congress is certainly entitled to ensure that the executive branch faithfully implements the laws that it has enacted. Congress plainly needs to study the implementation of existing programs, including the problems that arise, to inform itself regarding how the law may require legislative amendment.


359. See Watkins v. United States, 354 U.S. 178, 187 (1957) (acknowledging congressional power to inquire into executive branch’s enforcement of laws and investigate need for further legislative action); Rocky Flats Hearing, supra note 251, at 33-45 (memorandum
As a practical matter, nonetheless, congressional oversight creates a potentially significant downside. Congress has responded to the executive branch’s ad hoc efforts to make policy in individual cases in the most natural way: by seeking to have government lawyers explain their decisions in those same individual cases. If those decisions are being made by career prosecutors as well as by political appointees within the Justice Department, the easiest way that Congress can educate itself about the efficacy of that process is to interview those career prosecutors. Career prosecutors, however, view their internal decisionmaking process as virtually inviolate. Catalyzed by their own shared myth that there is no room for “politics” or policymaking in law enforcement, they view such congressional oversight of career prosecutors as unduly coercive, inherently political, and therefore illegitimate. Congress, they believe, is attempting to politicize the exercise of prosecutorial discretion. Hence, what Congress views as a necessary means of overseeing the executive branch’s improper politicization of law enforcement, the executive branch lawyers view as the legislative branch’s improper effort to do just that: politicize law enforcement.

360. See Benjamin R. Civiletti, Justice Unbalanced: Congress and Prosecutorial Discretion, HERITAGE LECTURES, NO. 472 (Aug. 19, 1983); see also Justice Rocky Flats Review, supra note 11, at 86-88; Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Staff Interviews Conducted by the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, & Technology, 103d Cong., 1st Sess. 408-09 (Nov. 17, 1992) [hereinafter Rocky Flats Staff Interviews] (statement of David Margolis, Acting Deputy Assistant Attorney General, Criminal Division, U.S. Dep’t of Justice) (“There are a lot of cases we would bring, and could bring, irresponsibly if we just listened to the cry. We’re not going to do that. We’re not going to do it even if we have congressional investigations every day. . . . We have to resist the hue and cry of the populace to make the right decision based on our professional judgment, our judgment of what is the right decision. Not taking a straw vote.”); Viki Reath, Bush Appointee Assails Dingell’s DOJ Investigation, ENV’T Wk., Oct. 28, 1993 (on file with The Georgetown Law Journal) (quoting Roger Marzulla, former Assistant Attorney General Environment and Natural Resources Division, U.S. Dep’t of Justice) (“There are probably 100,000 actions that could be prosecuted criminally, but that doesn’t mean they all should be”).

361. Justice Rocky Flats Review, supra note 11, at 87 (Department of Justice must “impress forcefully on Congress the serious consequences of politicized attacks on individual line prosecutors.”).

362. Compare Rocky Flats Hearing, supra note 251, at 1054 (testimony of United States Attorney Michael Norton) (“It is established Department of Justice policy not to disclose individuals who were involved in criminal investigative endeavors and to—in so doing, to tarnish the reputations, careers, the families and the lives of those individuals.”) with id. at 1055 (statement of Rep. Wolpe) (“To allow the Congress to accept the principle and claim of deliberative privilege is a marvelous means for any executive agency to cover up potential wrongdoing in any sphere of government activity.”). See HOUSE COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY, MEETINGS TO SUBPOENA APPEARANCE OF EMPLOYEES OF THE DEPARTMENT OF JUSTICE AND THE FBI AND TO SUBPOENA PRODUCTION OF DOCUMENTS
In many respects, both sides are wrong. There is nothing inherently illegitimate about the executive branch exercising prosecutorial discretion based on the Administration’s policies and priorities.\(^{363}\) Congress must

FROM ROCKWELL INTERNATIONAL CORPORATION, H.R. DOC. NO. 146, 102d Cong., 2d Sess. 64-65 (1992) (statement of Rep. Wolpe) (stating that he was “startled” by claim that “politics” is behind this investigation of the Justice Department; “saddened by it; simply not true). The extent of the conflict is illustrated by the record reprinted in a series of meetings, chaired by Representative Wolpe’s Committee on Science, Space, and Technology, to consider whether to subpoena Department of Justice officials, including career lawyers to appear before the Committee. See generally Meeting to Subpoena Department of Justice Officials: House Committee on Science, Space, and Technology, 102d Cong., 2d Sess. (1992).

Various sections of the American Bar Association have recently considered this issue in light of the environmental crimes controversy. A task force of the ABA Criminal Justice Section recommended that the ABA address in a plenary session the propriety of congressional oversight questioning of career government prosecutors. The task force recommended that legislative committees seek “the testimony of appropriately designated high ranking agency officials” and “should not seek and prosecutorial agencies should resist requests for: A. Compelled testimony of prosecutorial agency officials or line attorneys about discretionary decisions being made in pending cases; and B. Work product or other deliberative or privileged information relating to pending cases.” See ABA CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 1-2 (1994) (on file with The Georgetown Law Journal).

The Task Force commented on the “chilling effect” of such oversight and how it would inevitably add “pressures on prosecutors to make discretionary decisions based upon political expediency and to avoid making unpopular ones.” Id. at 2. It recommended that such career prosecutor testimony should generally be barred “unless it becomes apparent that the Department of Justice or specially appointed independent counsel has not or will not undertake a timely and diligent inquiry of the allegations on his own.” Id. at 4. A Working Group of the Committee on Government Operations and Separation of Powers of the ABA Section on Administrative Law issued its own draft report. That report sought to balance the legitimate competing interests of the executive and legislative branches by developing a check list of questions that should be considered prior to congressional questioning of career government prosecutors. The thrust of the check list was to discourage such inquiry, particularly in pending cases, that risk interfering with sound prosecutorial judgments or with individual rights to privacy and due process, yet recognized that “exceptional circumstances may arise when Congress will be justified in seeking testimony about discretionary decisions, work product or deliberative or privileged information.” Memorandum from Cynthia Farina & Suellen Kelly, Co-Chairs of the Government Organization and Separation of Powers Committee, to Council Members of the ABA Section on Administrative Law and Regulatory Practices 2-3 (May 4, 1994) (on file with The Georgetown Law Journal); see WORKING GROUP OF THE COMMITTEE ON GOVERNMENT ORGANIZATION AND SEPARATION OF POWERS OF THE ABA SECTION ON ADMINISTRATIVE LAW AND REGULATORY PRACTICES, DRAFT REPORT ON CONGRESSIONAL INVESTIGATION AND OVERSIGHT OF EXECUTIVE BRANCH PROSECUTORIAL ACTIVITY (1994).

Somewhat ironically, the ABA ultimately decided not to take up the issue in a plenary session during the summer of 1994 after the ABA President received a joint letter from the Chairs of the House Committees on the Judiciary, on Government Operations, on Energy and Commerce, and on Science, Space, and Technology, strongly cautioning against the ABA’s doing so. See Letter from The Honorable Jack Brooks, Chair, House Comm. on the Judiciary, The Honorable John Conyers, Chair, House Comm. on Government Operations, The Honorable John D. Dingell, Chair, House Comm. on Energy and Commerce, and The Honorable George Miller, Chair, House Comm. on Science, Space, and Technology, to William R. Ide, III, President, American Bar Association (Aug. 2, 1994), reproduced in HOUSE ENERGY AND COMMERCE COMMITTEE STAFF, DAMAGING DISARRAY, supra note 13, at 452-56 (adoption by ABA House of Delegates of proposed resolution “without further due and considered deliberations can only reflect negatively on the credibility of the ABA”).
expect that to occur if it delegates to the executive branch such sweeping discretionary authority. But, for that same reason, there is not necessarily anything illegitimate or improper about Congress criticizing the policies reflected in the executive branch's exercise of prosecutorial discretion. This is the price the executive branch must pay for having such expansive authority in the first instance. Both sides therefore are engaging in the same misguided grandstanding when they claim that the other is "playing politics with crime." Environmental law has a political dimension. So too does crime.

In any event, whatever the merits of either of their diametrically opposed perspectives, it is clear that the intensity of the resulting clash had a devastating effect on the work of the environmental criminal enforcement program. Prosecutors reportedly became disinclined to take on controversial prosecutions and less willing to adopt strategically sensible approaches to cases because of their apparent fear of being misperceived as "soft on crime.""365

363. The Justice Department report responding to the Representative Dingell's criticisms implicitly embraces the legitimacy of policy considerations in the exercise of prosecutorial discretion. The report acknowledges that

it is fair to say that from 1989 to 1992, Assistant Attorney General Stewart and Acting Assistant Attorney General Hartman took a more cautious and conservative approach to prosecuting particular cases than others . . . would have followed. . . . They were philosophically more reluctant than some career attorneys to use criminal sanctions to enforce environmental requirements in situations . . . and they were more pessimistic than some career attorneys about the prospects of obtaining convictions.

JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 86-87 (citation omitted). The report nonetheless quite directly defends the legitimacy of the process by concluding that "reasonable minds may agree or disagree" with the judgments of those political appointees, but under Department of Justice regulations, they had authority to implement those views and make those judgments. Id. at 87-88.

364. Justice Rocky Flats Review, supra note 11, at 87; see Rocky Flats Staff Interviews, supra note 360, at 216 (testimony of Kenneth Finberg, Assistant United States Attorney):

But I do think it has a very chilling effect when you think that every tough call you make and every judgment call you make in the thick of day-to-day warfare, that someday somebody is going to get every piece of paper that you wrote and every internal thought that you ever had, and impression, and you are going to have to justify that. It's a hard process.

365. For instance, the United States petitioned for Supreme Court review of the Second Circuit's adverse decision in United States v. Plaza Health Labs., 3 F.3d 643 (2d Cir. 1993), in which that court ruled that a human being throwing medical waste into a navigable water did not amount to a "point source" within the meaning of the Clean Water Act. The United States had a strong legal argument in the case, as evidenced by Judge Oakes' dissenting opinion. Id. at 650-56. Petitioning for certiorari was nonetheless quite questionable as a matter of strategy. The term "point source" defines the jurisdictional sweep for the entire Clean Water Act—both civil and criminal. A criminal case, moreover, is generally the last context in which the government should want to have the Supreme Court construe "point source" for the first time, especially a Court not known for special sensitivity to environmen-
Government prosecutors also became deeply divided into factions that exhibited great animosity toward each other. Work was severely disrupted by the chorus of accusations and counteraccusations surrounding environmental prosecutions over the past few years. Different parts of the government have criticized each other before Congress. Relations between prosecutors at Main Justice and the United States Attorney Offices accordingly became strained. And the relationship between prosecutors and EPA likewise became quite poor.

Misinformation and misdirection have also resulted from intense congressional scrutiny in the absence of thoughtful integrative efforts. Examination of executive branch and legislative branch documents relating to Congress's scrutiny of several environmental crime prosecutions strongly suggests that most Congressional criticism is based on a fundamental misapprehension of the true nature of what career prosecutors have been trying to accomplish in the cases seized upon by congressional critics. Congressional overseers mistook good faith efforts at integration—made necessary by Congress’s failure to do so itself—for the injection of illegitimate factors into the exercise of prosecutorial discretion. The extent of that misapprehension is best illustrated by re-examining the three cases summarized at the outset of this article.

366. See JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 98-100 (acknowledging "serious morale problems" in Environmental Crimes Section, yet claims that congressional criticism is itself the major source of that problem); Marcia Coyle & Chris Carmody, Environmental Crimes, NAT'L L.J., July 12, 1993, at 26 (documenting dissension in the environmental crimes section).

367. A congressional criticism that possesses more merit is that the Department of Justice decisionmaking structure, as well as the relative expertise and personalities of those involved, was poorly suited to those tasks. Indeed, the Justice Department’s own internal review found fault in the decisionmaking methods used by the Environment Division, and the Crimes Section in particular, in the exercise of prosecutorial discretion. See supra note 251.

368. Hassler, supra note 11, at 10,086-87 ("In the world of congressional critics, prosecutors walk away from ‘airtight’ cases without explanation, and attorneys who have chosen environmental prosecution as their specialty exhibit an irrational and possibly subversive hostility to their work... [The critics] ignore the essential role of the prosecutor as a seeker of justice."); see supra note 251 and accompanying text.
B. RE-EXAMINING THE CASES

A common theme emerges from a re-examination of all three cases. Congressional overseers considered whether there was sufficient evidence to secure a grand jury indictment. The career prosecutors considered much more. Many of those considerations fall plainly within the settled expertise of the prosecutors. These include: (1) the actual likelihood of conviction based on the prosecutor's own assessment of the persuasiveness of the evidence to a jury; and (2) the comparative advantages of a criminal rather than civil enforcement action (or both) in light of the likely sanctions to be obtained and resources required for each. The prosecutors likewise considered general matters of equity, such as the fairness of prosecuting only lower-ranking individual officers of a corporation. There were, to be sure, serious disagreements between congressional overseers and career prosecutors about the latter's necessarily subjective assessment of all of these factors in the individual cases. But the greatest source of controversy continues to lie in the prosecutors' efforts to exercise discretion based on fairness and equity concerns that are raised by their need to consider environmental law's features in the criminal prosecutorial context.

1. The Pesticide Dumper

At issue in this case were the activities of an agricultural business that sought to avoid the high cost of disposing of pesticide residues. The company sprayed the residue on a plot of land for the purported purpose of growing corn. Nearby landowners became ill and one neighbor ultimately died. The factors that made this seemingly simple criminal prosecution more problematic stem from the scientific uncertainty surrounding

369. See, e.g., Justice Rocky Flats Review, supra note 11, at 50 (testimony of United States Attorney Michael Norton) (arguing that congressional criticism misdirected “because it focuses on the artificial issue of whether technically there was ‘enough evidence’ to prosecute individuals, without giving consideration to the relevant question, which is whether as part of the negotiated plea agreement, the government’s commitment not to prosecute individuals was a sound exercise of prosecutorial discretion”); Rocky Flats Staff Interviews, supra note 360, at 205 (testimony of Assistant United States Attorney Kenneth Fimberg) (“I thought the cases were marginal. I thought they were a close call. I thought there were serious fairness issues involved. I thought we were looking at a very favorable settlement with the company.”).

370. The Justice Department's internal review concluded that in no case was the Department's exercise of prosecutorial discretion influenced by improper factors and in each case that discretion was exercised reasonably. Whether the prosecutors in fact reached the right (or wrong) prosecutorial judgments in those cases is no doubt important to the protagonists intimately involved in the cases, but it is less central to this article's overall thesis. The exclusive purpose of the re-examination here is to demonstrate that much of what prompted congressional criticism involved prosecutorial efforts to consider the very kinds of integrative concerns that this article's thesis maintains should be considered.

371. See supra text accompanying note 5.
causation in environmental pollution and from two aspects of environmental law’s complexity: its “indeterminacy”\textsuperscript{372} and its “obscureness.”\textsuperscript{373} The viability of the criminal prosecution depended on the government establishing beyond a reasonable doubt at least that (1) the defendant placed 1,3 dichloropropene (1,3 D) in the evaporator tank; (2) 1,3 D was a “waste”; and (3) 1,3 D waste material was sprayed onto the field.\textsuperscript{374} The problems with such proof were several.\textsuperscript{375}

First, the admissible evidence fell short of establishing that the defendant placed 1,3 D into the evaporator tank.\textsuperscript{376} Testimony that the defendant had placed some 1,3 D in the tank turned out to relate to mixtures of that compound with water.\textsuperscript{377} Because 1,3 D quickly hydrolyzes—or degrades—in water, that testimony failed to establish the required connection.\textsuperscript{378} There was evidence of some trace residues in the tank, but they could have originated from other sources; in any event, there was not enough evidence to establish clearly that 1,3 D was sprayed from the tank and onto the soil.\textsuperscript{379} The soil samples did not reveal any 1,3 D residues.

Moreover, even if the government could prove beyond a reasonable doubt that 1,3 D had been in the tank, the prosecution would then face the additional hurdle of establishing that the 1,3 D was a “discarded commercial product.”\textsuperscript{380} Otherwise, it would not clearly be a “solid waste,” within the meaning of RCRA, and consequently not a “hazardous waste.”\textsuperscript{381} Under EPA regulations, “discarded commercial product” applies only to formulations in which the chemical is the “sole active ingredient.”\textsuperscript{382} The defendant company had actually used two different formulations of 1,3 D, only one of which had contained 1,3 D as the sole active ingredient.\textsuperscript{383} The government would consequently face a significant hurdle in trying to prove

\textsuperscript{372} “Indeterminacy” is an aspect of legal complexity that refers to laws that are “open-textured, flexible, multifaceted, and fluid,” making “outcomes . . . often hard to predict.” Schuck, supra note 93, at 4 (footnote omitted); see supra text accompanying notes 99-135.

\textsuperscript{373} “Obscureness” is an aspect of legal complexity that refers to the difficulty of even determining what the law is, because, for instance, of the sheer density of legal rules or their obscure, virtually hidden location. See supra text accompanying notes 136-51.

\textsuperscript{374} Cf. 40 C.F.R. §§ 261.21-.24, 261.31-.33 (1994) (enumerating regulatory characteristics of hazardous waste). Because there were no samples left of the contents of the evaporator tank, the government could not prove that the material was a “characteristic” hazardous waste and was instead confined to proving that it was a “listed” hazardous waste.

\textsuperscript{375} JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 193-224.

\textsuperscript{376} Id. at 194-220.

\textsuperscript{377} Id. at 216-19.

\textsuperscript{378} Id.

\textsuperscript{379} Id. at 215-16.

\textsuperscript{380} Id. at 217 (citing 40 C.F.R. § 261.33).

\textsuperscript{381} Id.

\textsuperscript{382} Id. at 222-23 (citing 40 C.F.R. § 261.33(d) (comment)); see supra note 139 and accompanying text.

\textsuperscript{383} JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 223.
beyond a reasonable doubt that the residues present in the tank and ultimately disposed of on the soil came from the particular formulation for which 1,3 D was the sole active ingredient.

Further complicating the prosecution was an EPA regulation that reportedly excludes residues of hazardous waste in "empty containers"\textsuperscript{384} from the regulation of hazardous waste. The pesticides found in the evaporator tank likely originated from the rinsing of such empty containers.\textsuperscript{385} Finally, some questions were raised regarding both the validity of EPA's testing of these samples and the competency of EPA's principal expert witness.\textsuperscript{386} Both cast further clouds over the viability of proceeding to trial to secure felony convictions.\textsuperscript{387}

In short, successful prosecution in this case was far more problematic than it initially appeared. The obscure and indeterminate nature of the relevant EPA regulation was a principal source of the difficulties prosecutors faced. And, while disagreements will no doubt persist regarding the ultimate decision not to pursue a felony conviction, the government's consideration of these factors in reaching its decision appears plainly legitimate.\textsuperscript{388}

2. The Threatening Wetlands Filler\textsuperscript{389}

In the case involving the landowner who filled a wetland on his property despite repeated government warnings and who threatened to shoot federal officials if they trespassed, Congressional overseers described the government's case against the wetlands filler as "air-tight."\textsuperscript{390} "Few conventional cases have this degree of physical, testimonial, and self-incriminating evidence against a violator . . . . [T]here is simply no legal infirmity that

\textsuperscript{384} Id. at 221 (citing 40 C.F.R. § 261.7).

\textsuperscript{385} Id

\textsuperscript{386} Id. at 210, 216 n.389 (EPA erroneous sampling reports 1000 times too high); id. at 220 (absence of credentials of EPA expert and the weakness of his scientific reasoning rendered him "undoubtedly . . . a disastrous witness for the government," whose expert opinion would have been "entirely discredited" on the merits).

\textsuperscript{387} Id. at 224

\textsuperscript{388} The initial description of this case included the fact that the Department replaced an experienced environmental crimes attorney with an inexperienced environmental crimes attorney, followed by meetings with defense counsel, before the felony prosecution was dropped. See \textit{supra} text accompanying note 5. It is, of course, impossible to know whether the original attorney would have exercised her prosecutorial judgment differently than the new federal prosecutor did, but the reasons for the substitution allayed many of the concerns likely created by the initial description. The substitution occurred only after the original lawyer was seriously injured in a bicycle accident, and apparently none of the other more experienced federal environmental crimes prosecutors were available. See \textit{JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra} note 11, at 209. The new prosecutor was not as seasoned, having been at the Environmental Crimes Section for only two years, but she had substantial prior criminal trial experience with the Civil Rights Division. Id. Meetings with defense counsel are, moreover, neither unusual nor improper in an ongoing criminal case.

\textsuperscript{389} See \textit{supra} text accompanying note 6.

\textsuperscript{390} \textit{TURLEY REPORT, supra} note 5, at 7.
justifies the decision not to go to a jury in this case.\textsuperscript{391} Once again, however, examination of the justifications given by the Department of Justice internal investigation reveals how the demands of integration made this case less appealing. The relevant features were the "aspirational quality,"\textsuperscript{392} and "differentiation,"\textsuperscript{393} of environmental law. Also important were significant longer-term strategic considerations overlooked by congressional overseers.

The differentiation problem had both vertical and horizontal aspects. The vertical dimension was that a state agency had engaged in a similar practice of wetland filling in a nearby parcel of land—placing rubble in a wetland—but had not been punished.\textsuperscript{394} The horizontal dimension related to the fact that both EPA and the Army Corps of Engineers share authority within the federal government for the implementation of the section 404 wetlands protection program.\textsuperscript{395} In the past, the United States Army Corp of Engineers had frequently granted after-the-fact fill permits to homeowners in the same general area.\textsuperscript{396} Further investigation of the landowner’s threat to shoot federal officials strongly suggested that those officials understood that statement to be made entirely in jest.\textsuperscript{397} Finally, the wetland at issue was not large or especially environmentally significant—only one-half acre—and the potential defendant was a homeowner and not a developer.\textsuperscript{398} The aspirational nature of section 404, however, allowed for no exceptions.

Finally, the government could achieve many of its goals with virtually no downside risk by bringing a civil enforcement action. Civil enforcement consumes far fewer resources; the government need not prove as much to prevail and the burden of proof and procedural protections are much less demanding. In this case, for instance, a subsequent civil enforcement action resulted in an order to restore the property, a civil penalty, and the erection of a billboard containing a message regarding the defendant’s culpability.\textsuperscript{399}

\textsuperscript{391} Id. at 7-8.
\textsuperscript{392} Environmental law is "aspirational" because it does not reflect existing behavioral norms but instead is intended to force dramatic behavioral changes that may even turn out to be unobtainable. See supra text accompanying note 214.
\textsuperscript{393} "Differentiation" is an aspect of legal regimes that have multiple "decision structures that draw upon different sources of legitimacy" and, as a result, many competing and sometimes conflicting authoritative voices defining the law. See Schuck, supra note 93, at 4; see also supra text accompanying supra note 148.
\textsuperscript{394} JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 170 (discussing DOE’s and EPA’s enforcement roles).
\textsuperscript{395} See supra text accompanying note 111.
\textsuperscript{396} See JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 170.
\textsuperscript{397} Id. at 172 & n.274.
\textsuperscript{398} Id. at 164, 171.
\textsuperscript{399} Id. at 175, 176. The billboard part of the order raises some First Amendment issues. See Levine, supra note 40.
For all these reasons, the Justice Department concluded that this was not a strong case for criminal prosecution. The defendant would have equitable arguments that a jury would likely find appealing. An acquittal would send the regulated community precisely the wrong message at the wrong time. At the beginning of a criminal enforcement effort, it is important to pick the strongest cases. The wetlands criminal enforcement program was not without controversy, and a loss in this case could have undermined its efforts.

3. The Government Weapons Contractor

In this final case, a government weapons contractor had allegedly engaged in an ongoing practice of violating federal environmental laws with the Department of Energy’s knowledge, or at least tacit acquiescence. As with the cases just discussed, the Department of Justice’s reasons for not seeking harsher criminal sanctions—for example, conviction of individual contractor employees, corporate officers, Department of Energy officials, or higher criminal fines—reflect prosecutorial efforts at integration. These reasons relate to environmental law’s “aspirational quality,” “dynamic tendency,” and several aspects of its complexity—indeterminacy, obscurity, and differentiation.

These considerations raised fairness and strategic concerns that played a major role in the Justice Department’s decision not to indict individuals but instead to allow the government contractor corporation to plead guilty to several felony counts and to pay an $18.5 million fine. While disagree-

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This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory felony of “discharging pollutants into navigable waters of the United States.”

See also supra note 352 and accompanying text.
403. See supra text accompanying note 7.
404. See supra note 392.
405. See supra text accompanying notes 76-88.
406. See supra text accompanying notes 99-135.
407. See supra text accompanying notes 136-47.
408. See supra text accompanying notes 148-58.
409. See, e.g., *Justice Rocky Flats Review*, supra note 11, at 11-12 (“The lines between lawful and unlawful conduct were not always clear, engendering good faith disagreements as to whether a particular practice was permitted by the statutes (let alone whether a violation was negligent or knowing). The applicability of criminal statutes turned on complicated implementing regulations.”).
ment between government lawyers and investigators regarding the relevant weight to be given these considerations resulted in considerable debate and acrimony, 410 all of the prosecutors ultimately concluded that the government's prosecutorial decisions in the case were entirely reasonable. 411

The government's chief prosecutor in the case, who had also favored the harshest criminal sanctions, 412 sought to explain the government's decision in his testimony before Congress. He repeatedly described how environmental law's distinct features necessarily affected prosecutorial decisions. He described the "complicated and technical" nature of RCRA's regulations; he noted that "[w]hether or not a substance is a RCRA 'hazardous waste' is generally based less on common sense than it is on a difficult set of legal, regulatory and scientific or technical questions." 413 He further explained how these inquiries made prosecution difficult, especially in light of the ongoing litigation controversies associated with EPA's definitions of solid and hazardous waste. 414 He directly challenged the "impression that this

410. Id. at 31-34. Congressional overseers saw these disagreements as evidence corroborating claims that improper factors were affecting the exercise of prosecutorial discretion. The government lawyers, by contrast, including those who sharply disagreed about the merits of the case, held a very different view of the nature of their disagreements. They viewed them as the kind of good faith disagreement between government lawyers and investigators that routinely occurs in the handling of major criminal prosecutions. See Hassler, supra note 11, at 10,083; 1 Rocky Flats Hearing, supra note 251, at 1165 (testimony of Peter Murtha, Attorney, Environmental Crimes Section, U.S. Dep't of Justice); id. at 1328 (testimony of Assistant United States Attorney Kenneth Finberg); Rocky Flats Staff Interviews, supra note 360, at 140-43, 205 (testimony of Kenneth Finberg recounting disagreements among prosecutors); see also id. at 284 (testimony of Peter Murtha) ("One of the great phenomenons of working on environmental cases under complex statutes is that you will often hear your criminal investigators say that, 'We have 'good stuff' on such and such an individual.... Oftentimes it's a little bit collateral or altogether misses the mark.'").

411. Rocky Flats Staff Interviews, supra note 360, at 284.

412. WOLPE REPORT, supra note 7, at 24, 128-29; Hassler, supra note 11, at 10,084; Justice Rocky Flats Review, supra note 11, at 5 n.4.

413. 1 Rocky Flats Hearing, supra note 251, at 1263 (statement of Assistant United States Attorney Kenneth Finberg); id. at 1165 (testimony of Peter Murtha) ("The situation is that these environmental crimes tend to be oftentimes complex, and that is why they need to be analyzed very carefully on a case-by-case basis.'').

414. 1 id. at 1263-64. In his testimony at the Rocky Flats Hearing, Kenneth Finberg stated:

What is a RCRA hazardous waste can be an extremely difficult question that no one has much fun dealing with let me tell you. It is not common sense, it is not based on common sense. It is based upon parsing through regulations that almost equal the tax code in deciding whether something is a hazardous or not. The mixture rule and the derived from rule... essentially allowed, in some sense allowed enforcement people to short circuit some of that,... [T]hose rules were very critical to proving the case.

1 id. at 1615; see also Rocky Flats Staff Interviews, supra note 360, at 258-62 (testimony of Peter Murtha) ("The fact of the matter is that they had contemporaneous legal memorandums [sic] supporting the position that under the American Mining Congress case, that the incinerator should not be considered as a RCRA regulated unit.''); id. at 278 (testimony of
was a hands-down killer case .... This was an extremely difficult, very problematic case .... There were lots of litigation risk here .... This was a very difficult case. It would have been very difficult to try. 415

As this testimony indicates, the government's prosecutorial decision was affected by the prosecutors' efforts to consider the traditional criminal law requirements of moral culpability and significant harm (or risk of harm), whether or not required by the statutory terms themselves. Prosecutors repeatedly described the perceived unfairness (and related tactical concerns) of seeking prison terms for lower ranking employees, who were the only individuals against whom sufficiently culpable evidence had been found. 416 In some instances, prosecutors characterized the violations as the result of good faith error rather than any action taken in bad faith. 417 In another instance prosecutors discounted "a pretty clear violation of law" because of the absence of any real harm or threat of harm. 418 All the

Peter Murtha) (noting that the federal court of appeals in Shell Oil Co. v. EPA, by invalidating the derived-from and mixture rules, "wreaked a little bit of havoc on all of our RCRA charges, because we had always relied upon the mixture rule and the derived from rule as our primary basis for finding pondcrete, saltcrete, saltbrine concentrate and vacuum filter sludge to be considered RCRA hazardous wastes").

415. Rocky Flats Staff Interviews, supra note 360, at 196 (testimony of Kenneth Fimberg). Kenneth Fimberg was the Assistant United States Attorney in charge of the case. The lead government prosecutor with the Environmental Crimes Section, Peter Murtha, took a similar view of the case:

These cases may seem very simple to you, and they may seem amazingly simple to Ms. Holleman. The reality of the situation is that when these cases go to trial, under 70 percent of them result in convictions. And that includes a lot of cases that are really quite simple.

This is the most complex environmental case that has ever been brought ....

....

And I have to tell you that if our chances of getting a conviction are under 70 percent on all the cases we bring, then that really has to call into question to some degree how easy it's going to be to bring home convictions in a case like this one, which is just fraught with defenses and just fraught with complexities, and is being very, very well defended.

Id. at 408 (testimony of Peter Murtha).

416. See Rocky Flats Staff Interviews, supra note 360, at 121-23 (testimony of Kenneth Fimberg) ("there was still a concern about to what extent these people really had—really were acting, you know, with some moral responsibility as opposed to doing what they were told"); id. at 291-92 (testimony of Peter Murtha) ("Part of what gave me a good deal of pause was that ... prosecution would leave us wide open to the possibility of having [lower-ranking managers and employees] be able to argue that they were being made scapegoats for the faults of DOE and the faults of higher-level Rockwell management."); id. at 412 (testimony of Peter Murtha) (speculating that negative consequences to program would have been worse if government had indicted more individuals and lost); 1 Rocky Flats Hearing, supra note 251, at 1146-49 (testimony of Peter Murtha); Justice Rocky Flats Review, supra note 11, at 43-54.

417. 1 Rocky Flats Hearings, supra note 251, at 1158-59, 1162, 1172 (testimony of Peter Murtha).

418. 1 Id. at 1158 (testimony of Peter Murtha); see Rocky Flats Staff Interviews, supra note 360, at 290-91 (testimony of Peter Murtha).
company needed to do was "submit[] a piece of paper and get[] the Colorado Department of Health to ultimately authorize the storage of that material there."

Additionally, many of the possible criminal violations were questionable because they involved what had been an ongoing problem of "differentiation" also reflective of environmental law's "dynamic tendency": a lengthy regulatory dispute between the Department of Energy and EPA regarding the correct regulatory status of residues of certain nuclear wastes and of certain resource recovery processes. Prosecutors were wary of creating a precedent that made the losers of that kind of ongoing debate—which occurs all the time in environmental law—into criminals. Government prosecutors also concluded that some allegations of violations were problematic because EPA had apparently sent conflicting signals to the regulated community. Other possible violations involved environmental standards that prosecutors believed were so indeterminate—for example, good engineering practices—that they did not readily lend themselves to a criminal prosecution.

No doubt the greatest single source of confrontation, however, related to the different reactions of the prosecutors, congressional overseers, and the public to environmental law's aspirational quality and differentiation.
of governmental authorities. Government prosecutors were, by their own accounts, heavily influenced by the weapons contractor's conduct being consistent with longstanding prevailing practices and attitudes fostered by the Department of Energy over the past several decades, all of which was known to Congress, yet never disturbed by that legislative body. Prosecutors perceived a "serious fairness" problem with prosecuting individuals under those circumstances.\footnote{424}

To congressional critics, however, this claim smacked of a "Nuremberg kind of defense":\footnote{425} as the "white collar equivalent of blaming an armed robbery on 'society'—not the individual holding the gun";\footnote{426} or, as "like a virus . . . I was sick, is that the response?"\footnote{427} "The implication seems to be that when a government agency has long-standing policies or practices, even if they are in direct violation of statutory law, no individual with the agency would be indictable for a criminal offense."\footnote{428} "Unlike ordinary citizens who will be held accountable for their infractions, government personnel are apparently immune from prosecution if their conduct—no matter how egregious—has been sanctioned by the agency."\footnote{429}

Notwithstanding congressionally professed outrage, the prosecutors' considerations of these potential pitfalls were entirely legitimate integrative efforts. The prosecutors never suggested that government employees, including high ranking officials, were immune from criminal prosecution "no

\footnote{424} Kenneth Fimberg testified:

The most fundamental [fairness issue] was . . . that DOE and ever since the Manhattan project and its predecessor agencies, Atomic Energy Commission, ERDA, and then eventually DOE had established a culture that existed for many years and predates the statute of limitations in this case . . . that colored everything the Department of Energy did, that put the production of weapons ahead of protection of the environment.

That culture was not the result of any one person at Rocky Flats or any one DOE individual within recent memory. That is a culture, an attitude, an institutional attitude, if you will, that goes back many, many years, 20 years, 30 years. There were serious questions, fairness questions in my mind that to charge someone with a crime when some at least general, generic sense that they were acting consistent with the culture that they operated in, which this Government, when I say the Government that all of us work for, established and fostered, the Federal Government that we represent different branches of, I thought there were serious fairness questions.

\footnote{1} Rocky Flats Hearing, supra note 251, at 1482.

\footnote{425} 1 id. at 1483 (statement of Rep. Wolpe).

\footnote{426} Letter from Representative Wolpe to The Honorable George E. Brown, Chair, House Committee on Science, Space, and Technology (Jan. 4, 1993) (on file with author) (letter transmitting Representative Wolpe's report on Rocky Flats to the full committee).

\footnote{427} 1 Rocky Flats Hearing, supra note 251, at 1485 (statement of Edith Holleman, Counsel, Subcomm. on Oversight and Investigations of the House Comm. on Science, Space, and Technology).

\footnote{428} WOLPE REPORT, supra note 7, at 109.

\footnote{429} Id.
matter how egregious" their statutory violations or how clear the relevant statutory standards. The prosecutors were directing their statements to circumstances where there were conflicting government signals about the requirements of the law in the context of a complex and confusing regulatory scheme. There was no identifiable government official responsible. Current attitudes were instead the product of decades of settled practices. And, while these practices were the subject of ongoing regulatory disputes between EPA and the Department of Energy, they were not unknown to Congress, which kept funding the existing Energy Department practices and requiring production quotas that depended on their continuation.\(^{430}\) The prosecutors questioned their ability to obtain the conviction of a private party from a jury under those circumstances.\(^{431}\)

There is also significant force to the more fundamental issue raised by the prosecutors: "[T]here are some societal problems that are not best resolved by the criminal justice system. Laws can be changed, new legislation can be adopted, new people can be put in charge at the Department of Energy."\(^{432}\) DOE officials were "trying to reconcile both their national defense obligation and their compliance with RCRA."\(^{433}\) Congress was

\(^{430}\) Indeed, the report prepared by Representative Wolpe acknowledged Congress’s involvement:

In addition to the failures of the Executive Branch, Congress, as a body, has failed to move aggressively to address these serious problems. . . . In fact, Congress has exempted programs and projects from the very laws it has established to protect taxpayers, public health and safety and the environment. . . . Therefore, Congress must share the blame for the deplorable conditions which now exist at these facilities.

Id. at 19; see also 1 Rocky Flats Hearing, supra note 251, at 1363-66 (letter dated April 22, 1991 from Vincent Fuller of Williams & Connolly and Harold Haddon of Haddon, Morgan & Freeman, to Richard B. Stewart, Assistant Attorney General, Environment and Natural Resources Division, U.S. Dep’t of Justice) (arguing that Department of Energy budget requests and congressional appropriations were knowingly below that necessary for compliance with applicable federal environmental laws).

431. Rocky Flats Staff Interviews, supra note 360, at 259 (testimony of Peter Murtha) ("open regulatory disputes are not necessarily the best place to test a new criminal law theory"); 1 Rocky Flats Hearing, supra note 251, at 1174 (testimony of Peter Murtha) ("[S]omething that is mired in the regulatory process at the Environmental Protection Agency, let me tell you with some degree of surety that you are not going to get a conviction on that, I guarantee it."). Peter Murtha testified that:

[T]he Department of Energy, giving its imprimatur to a particular action, may be something that casts considerable amount of doubt on the criminal intent of the contracting party. . . . [I]t may take a situation where you are trying to prove a knowing or willful violation and cast it in a somewhat different light where those actions may be somewhat more explainable.

Id.

432. 1 Rocky Flats Hearing, supra note 251, at 1550 (testimony of Kenneth Fimberg).

433. 1 id.
made aware of the issue and for years did not act. For this reason, as the prosecutors themselves explained in a pleading filed with the district court, if there were an "on-going criminal enterprise at Rocky Flats ... it [was] one that Congress [had], in essence, approved." The result was bad policy and a "horrendous job" by the Department of Energy of overseeing its nuclear weapons facility contractors, but not necessarily individual felonious conduct. Until the federal government sorts out for itself what

434. Id. at 1550-51; see The Impact of Mercury Releases at the Oak Ridge Complex, Hearing before the Subcomm. on Investigations and Oversight and the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology, 98th Cong., 1st Sess. 5, 117-37 (1983) (testimony of Joseph La Grone, Manager, Oak Ridge Operations Office, U.S. Dep't of Energy) (describing DOE's position that RCRA does not apply to DOE activities performed under Atomic Energy Act); id. at 137 (testimony of Howard D. Zeller, Assistant Regional Administrator for Policy and Management, U.S. Envtl. Protection Agency) (describing EPA's position that RCRA does not exempt DOE activities performed under Atomic Energy Act); see also supra note 430.


In truth, however, neither the contractor nor the regulatory agencies have any other choice. Legal means still do not exist to treat, dispose or store the type of mixed hazardous waste generated at Rocky Flats and other weapons plants. They never have. From the moment environmental laws such as RCRA were passed—or at least from the moment it was decided they applied to DOE facilities—plants such as Rocky Flats had to break the law if they were to continue operating. Rockwell knew this, the DOE knew this, the regulatory agencies knew this. So did Congress. Norton [the United States Attorney] and Fimberg [the Assistant United States Attorney] are on pretty firm ground when they say in a court document. [sic] "If there is an 'on-going criminal enterprise' at Rocky Flats ... it is one that Congress has, in essence, approved.

Id.

436. 1 Rocky Flats Hearing, supra note 251, at 1484 (testimony of Kenneth Fimberg). One striking example of DOE’s poor contracting practices was its inclusion in government contracts of an indemnification provision providing that DOE would indemnify the contractor for any fines assessed against the contractor unless based on "willful misconduct or lack of good faith on part of any of the contractor's managerial personnel." Justice Rocky Flats Review, supra note 11, at 43. In this case, the clause substantially weakened the prosecution's bargaining position. For, unless the prosecution could prove willful misconduct or lack of good faith—neither of which is a required element of an environmental crime—the convicted defendant would be able to recover any fines assessed against it from the United States itself. Hence, as a result of this contract provision, the advantages to the government of going to trial were significantly diminished. The government very much wanted to avoid the perverse result of obtaining a large criminal penalty against the contractor, only then to reimburse the contractor for that amount out of taxpayer funds. Under a plea bargaining agreement, the government could (as it did) avoid this result by securing the defendant's agreement not to seek reimbursement of the fine. That concession, however, necessarily required the government's willingness to accept a lower fine. See id. at 37-44.

437. 1 Rocky Flats Hearing, supra note 251, at 1550-51 (testimony of Kenneth Fimberg) ("It is highly unusual to come back and say we are now going to charge you, Mr. DOE official, with committing a crime because we don't think you reconciled those two [competing] statutes properly, ... There are many ways to change the performance and attitude of a government agency, which are short of criminal prosecution.").
the law is, government is hard pressed to prosecute those who have reasonably relied on conflicting government signals.

In short, the prosecutors in this case exercised prosecutorial discretion based on their understanding of the aims and limits of criminal law, including its implications for the criminalization of environmental law. Partly because Congress had never faced up to those issues itself, and partly because prosecutorial efforts like these were based on ad hoc application of intuition rather than on written guidelines, the end result was more, not less, controversy. This final case illustrates the high costs of failing to establish a coherent statutory or administrative framework for identifying those environmental violations appropriate for criminal prosecution.438

IV. REFORMING ENVIRONMENTAL CRIMINAL LAW

The stories of the three environmental prosecutions underscore the need for reform of environmental criminal law as well as provide insights on the scope and substance of the reform necessary. The stories illustrate the inevitable political pitfalls of broad delegations of prosecutorial discretion in environmental law and the structural problems with the way in which the executive branch has exercised that discretion in the past. But even more significant are the lessons to be learned by the efforts of the individual prosecutors in those three cases to answer the question left unanswered by Congress and not adequately considered by the courts: how to restore moral culpability to environmental crime by accounting for the tensions between the competing features and goals of environmental and criminal law. Those individual prosecutorial efforts offer insights on how the substance of environmental criminal law should be changed in response to the demands of integration.

These substantive insights should not, however, be the sole provence of prosecutors. They are instead concerns that Congress should take into account, in the first instance, in defining what constitutes felonious conduct. They are likewise concerns that should be relevant to the courts in construing the meaning of the laws that Congress has enacted. Relying on prosecutorial discretion alone is, for reasons already discussed, not a legitimate approach.439

438. The initial description of this case included the fact that the government declined to allow the grand jury to issue a formal report. See supra text accompanying note 7. In its review of this case, the government defended that decision on the ground that the decision not to allow such a report was made by career personnel in the Department's Criminal Division who concluded that such grand jury reports were statutorily authorized only when organized criminal activity was involved. The ultimate decision not to allow a grand jury report was therefore not made by the political appointees in the Environment Division who were the focal point of congressional attack. See Justice Rocky Flats Review, supra note 11, at 64-71.

439. See supra notes 344-54 and accompanying text.
Nor, in any event, could prosecutors perform this task alone. As also testified to by the events surrounding the three cases, the delegation of sweeping prosecutorial discretion in the politically charged area of environmental law is ultimately unworkable. The statutes themselves and their judicial construction must assist in bridging the gap between what is formally criminalized and what is actually prosecuted. Only then can there be the promotion of an atmosphere of trust and mutual understanding necessary between the three branches to have an effective environmental crimes program.

Reformation of environmental criminal law will nonetheless be difficult to achieve because the absence of integration is not mere happenstance: Congress has abdicated its integrative responsibilities, and the executive branch has encouraged Congress to do so. First, it is politically difficult for any member of Congress to oppose harsh criminal penalty provisions of any kind. Indeed, it can be political suicide. Because of the moral stigma associated with crime, what is in fact made criminal and the associated sanctions seem to be more often the product of sharp rhetoric than considered analysis. Furthermore, it is difficult to have the kind of meaningful debate required in drafting criminal provisions because those most directly affected—the violators—are naturally not interested in self-identification. Even academic commentators concerned about overly harsh requirements and penalties are likely reluctant to say so too publicly, lest their commentary be misapprehended as “soft” either on crime or as an approbation of the underlying activity being criminalized.  

Providing for a meaningful debate in the environmental crimes context is especially difficult. The environmental criminal penalty provisions can attract support from both the more liberal proenvironmental protection legislators and the more conservative “law-and-order” representatives. Both “environmental protection” and “criminal prosecution” enjoy a rhetorical advantage that masks the difficult policy issues underlying their scope and application—and that, unfortunately, render difficult the thoughtful public debate of the policy implications of different options. There is little political advantage for either liberal or conservative legislators to gain through concern for potential overreaching. It is far easier just to assume away those issues and rely on the exercise of prosecutorial discretion—a result naturally supported, notwithstanding the associated pitfalls, by the executive branch agency that wants its programs dignified by criminal sanctions and by a Justice Department that prefers maximum discretion. Consequently, the prospects for legislative or executive branch reform

441. Cf. Abraham, supra note 41, at 942 (“Interested parties have mainly traded accusations . . . and painted opposing portraits of the future. Persuasive analysis of underlying causes and realistic policy options has too often been missing.”).
of the existing program are bleak, despite the tremendous need for such reform.\footnote{442}

The political realities of reform should not, however, chill its discussion. Concrete examples of the kinds of reform possible and comparison of the environmental criminal penalty provisions with criminal law elsewhere can reduce existing misapprehensions. Reform of the environmental criminal penalty provisions is not tantamount to a retreat from environmental protection or from its strict enforcement. The substitution of program coherence and integrity for existing statutory rhetoric offers instead an opportunity to create an effective criminal enforcement effort.

Congress presents simultaneously the forum most resistant to reform and most appropriate to bring about this reform. There are also significant integrative functions to be performed by the other two branches—executive and judicial—in descending order of priority.\footnote{443}

\footnote{442. One relatively recent exception was a 1989 congressional hearing on proposed legislation to create a new environmental crime for knowingly or recklessly endangering life or causing an environmental catastrophe. See Environmental Crimes Act: Hearing Before the House Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 101st Cong., 1st Sess. (1989). Justice Department officials, as well as some state environmental officials, criticized the proposal because of the ambiguous and indeterminate nature of the proposed crime. See id. at 22 (comments of New York Department of Environmental Conservation on the Environmental Crimes Act of 1989) ("criteria for serious bodily injury too vague to satisfy the criminal proof standard"); id. at 27 (testimony of Keith Welks, Chief Counsel, Pennsylvania Dep't of Envtl. Resources) ("The potential confusion I have imagined here would only make a difficult situation more intolerable."); id. at 53 (prepared statement of George W. Van Cleve, Deputy Assistant Attorney General, Land and Natural Resources Division, U.S. Dep't of Justice) ("If we try to criminalize conduct on a wholesale basis, without closely assessing the need for deterrence of each particular kind of conduct on its own merits, we will weaken the deterrent effects of, and public support for, our enforcement program."); id. at 61 (statement of George W. Van Cleve) ("We question the propriety of providing felony liability on such a broad and ill-defined scale."). More recently, in the aftermath of the Supreme Court's denial of certiorari in Weitzenhoff, see supra note 273, industry representatives are contemplating seeking legislation that would raise the mens rea elements for most environmental felony provisions. See Industry May Ask Congress to Clearly Define "Criminal Intent", INSIDE EPA, Jan. 27, 1995, at 15. Recent regulatory reform legislation also includes new affirmative defenses. See infra note 459.

443. Not discussed in this article is the related, ongoing debate among members of the United States Sentencing Commission about its drafting of organizational sentencing guidelines for environmental crimes. At least one commentator has contended that, because of partisan politics, the Sentencing Commission is the only forum in which one is likely to have a considered effort to broker the tensions created by the emergence of regulatory criminal offenses. See Coffee, Reflections on the Disappearing Distinction, supra note 168, at 241. To date, however, the Sentencing Commission debate on the environmental organizational guidelines has been protracted and without final resolution. See John C. Coffee, Jr., Environmental Crime and Punishment, N.Y. L.J., Feb. 3, 1994, at 5; Patricia J. Devine, The Draft Organization Sentencing Guidelines for Environmental Crimes, 20 COLUM. J. ENVTL. L. 249 (1995); Draft Corporate Sentencing Guidelines for Environmental Crimes, [24 Current Developments] Env't Rep. (BNA) 1378 (Nov. 26, 1993); Environmental Criminal Guidelines Delayed Until 1995, To Industry's Relief, INSIDE EPA, May 6, 1994, at 15; Industry Predicts New Environmental Sentencing Guidelines Delay, INSIDE EPA, Sept. 23, 1994, at 19-20; Garry Sturgess, Environmental Crimes Guidelines Postponed, LEGAL TIMES, Apr. 15, 1991, at 7; U.S.
A. CONGRESS

The challenge Congress faces is to amend the existing environmental criminal penalty provisions to account better for the natural tensions that exist between environmental and criminal law. Congress needs to identify and define more carefully those states of mind and types of conduct that warrant the moral stigma of a felony conviction and a substantial term of incarceration. There is no one "correct" way for Congress to do so. Congress must strike a balance between competing concerns—ranging from the need to define felonies in a manner consistent with their associated moral stigma to the obvious deterrent advantages of the threat of criminal prosecution. How Congress strikes that balance is ultimately a matter of policy and (yes) politics.

But there are limits. Some of the more obvious boundaries are supplied by the Constitution itself. The law cannot, of course, be so vague as to violate due process. And there are constitutional limits on Congress's ability to create strict liability felony offenses.

Another limit lies on the other end of the spectrum—the notion that environmental violations never warrant felony sanction because the tensions between environmental law and criminal law are simply too great. Perhaps traditional criminal law norms and more modern law and economics analysis could be joined to support that result. The argument might be that environmental standards are generally not proper for criminalization because the activities being regulated are often socially beneficial and therefore not activities that society in fact wants to prohibit, which is one reason why we have been unable to "develop a clear community standard" (i.e., indeterminacy). They are accordingly activities that should be "priced" and not "sanctioned." And by punishing them criminally, we

Commission to Act on Environmental Sentencing Guidelines This Year, INSIDE EPA, May 5, 1995, at 14. That current debate also does not involve the incarceration or moral stigma implications associated with a felony conviction, which are this article's primary concerns. In all events, the Sentencing Commission does not offer the appropriate forum for resolving the basic question of what should be made a felony and what should not be. The Commission's inquiry is important to be sure, but it is necessarily subsequent to that more significant threshold matter.

444. See Post, supra note 180, at 491 (discussing the "void for vagueness doctrine" and its due process implications).


446. Cf. Cooter, supra note 178, at 1552 (stating that activities should only be sanctioned when there is clear community standard and unclear external costs).

447. Id.
risk promoting overcompliance with aspirational standards beyond that which society actually seeks to accomplish.

My own view is that a reasonable accommodation of the competing demands of environmental and criminal law can strike a proper balance long before embracing the extreme result of noncriminalization. Criminal law can reasonably accommodate environmental law’s need to define injuries in terms of risk, rather than actual harm. And, given the irreversible and ultimately noncompensable adverse human health and environmental effects on future generations that environmental laws seek to avoid, environmental law’s need for deterrence beyond mere liability rules is likewise worthy of accommodation, though not to the extent of a complete substitution of deterrence for moral blameworthiness. In short, violations of federal environmental laws can involve the kind of morally culpable behavior warranting felony sanctions. The challenge is to define the sanctions in a manner more consistent with that culpability touchstone, rather than either, at one extreme, basing crimes on deterrence needs alone or, at the other extreme, jettisoning the entire enterprise of criminalization as misguided from conception.

For example, at least those persons who know the relevant environmental standard and the associated human health and environmental risks of noncompliance and, notwithstanding that knowledge, engage in conduct that they know amounts to a violation, can be properly subjected to a felony sanction. Their knowledge of the risks they create is sufficient to establish the level of moral culpability that criminal law has traditionally sought prior to the imposition of felony sanctions.

It would also seem necessary and appropriate to have a criminal felony dimension to public health and safety laws like those currently established by federal environmental laws because of their deterrent effect. Criminal sanctions preserve the integrity or “transaction structure” of rules for social interaction by punishing those who refuse to conform to those rules. Because of their uniquely personal deterrent effect (that is, the

448. The criminal penalty provisions for violations of the Occupational Safety and Health Act reveal the problems created by undercriminalization. A crime under that law requires proof of a willful violation resulting in death and, even then, the applicable penalty is only a misdemeanor offense. See 29 U.S.C. § 666(c) (1988). The result has been virtually no criminal enforcement program. In the law’s first 18 years, the Occupational Safety and Health Act referred only 42 cases to the Justice Department; 14 of the cases were prosecuted, resulting in 10 convictions with fines or suspended sentences. Not until 1989 was the first employer sentenced to jail—for 45 days. See Timothy G. Gorbatoff, Note, OSHA Criminal Penalty Reform Act: Workplace Safety May Finally Become A Reality, 39 CLEV. ST. L. REV. 551, 557 (1991); See also FRANK, supra note 166, at 56-69.


threat of incarceration), criminal sanctions force respect for the regulatory scheme. When, as in the case of environmental law, the costs of regulatory compliance are so high, it becomes especially important to have available in appropriate circumstances a sanction, like felony incarceration, capable of overwhelming those monetary incentives otherwise favoring noncompliance. Those who comply will do so knowing that there will be a harsh penalty imposed on those who deliberately flout the regulatory scheme.

Even accepting the legitimacy of felony sanctions for environmental violations only raises, without answering, the threshold question of how the crimes should be defined. The mens rea requirements are likely the area most ripe for reform. Congress needs to define mens rea based on a better understanding of the demands of integration—the need to define the requisite mental state in light of the law being criminalized. What law must the defendant know? And what facts must the defendant know? These are critical policy matters that, when a felony conviction is at stake, should not be left to judicial speculation or to the whim of a single federal prosecutor. The special features of environmental pollution and environmental law suggest several possible standards regarding what a defendant must know about the relevant law and facts to be convicted of an environmental crime.

1. Law

For instance, environmental law's complexity, viewed in isolation, suggests that criminal felony offenses should include a heightened mens rea element. A major difference between "willfulness" and bare knowledge is that the former clearly requires the government to establish the defendant's knowledge of the underlying legal standard that has been violated. A heightened mens rea standard of willfulness is used in tax law precisely because of the complexity of the underlying legal standards. And, in amending the Clean Air Act in 1990, Congress specifically included a heightened mens rea element ("knowing and willful") for an "employee who is carrying out his normal activities and who is acting under orders from the employer.

A willfulness standard may be much too demanding in some situations,
though. Environmental legislation, however, is not simply economic legislation like tax, securities, or money laundering laws. Environmental protection has a significant public health dimension. Thus, the government has greater reason to be concerned about deterrence, especially because of the irreversible and sometimes catastrophic effects of environmental pollution, than it does in protecting the competitiveness of the marketplace or the fullness of the federal coffers, where society can more safely err on the side of underenforcement. The need for deterrence is also weighty because of the great difficulty in detecting and discovering environmental violations.\footnote{Two characteristics of environmental pollution—the need for risk reduction and the difficulty of assigning responsibility—present countervailing concerns counselling against a uniform willfulness standard.} An approach less demanding of the prosecution, but nonetheless more sensitive to environmental law’s features, would be to allow the defendant to assert an affirmative defense of mistake of law—a defense that might be based on the defendant’s good faith belief of what the law requires.\footnote{Both environmental law’s “dynamic tendency” and its multifaceted “complexity” create a very real possibility of good faith and reasonable mistakes of law, especially by lower-rank employees. Similarly, environmental law’s “inevitability and pervasiveness” create the possibility of reasonable mistakes of law; many of those subject to environmental regulations may lack sophistication about legal requirements. “Fair notice” of the law is therefore problematic, possibly as a matter of constitutional law, and most certainly as a matter of fundamental fairness. Because the underlying assumption of the maxim “ignorance of the law is no defense”—that the}

\footnote{Cf. Gary S. Becker, \textit{Crime and Punishment: An Economic Approach}, 76 J. Pol. Econ. 169, 174-76 (1968) (arguing that cost of apprehension and conviction is important factor in determining appropriate legal sanction); Menell & Stewart, supra note 209, at 534-35.} \footnote{See supra notes 47-54 and accompanying text.} \footnote{Cheek, 498 U.S. at 202-03 (stating that good faith misunderstanding of law or good faith belief that not violating law need not be objectively reasonable to negate willfulness).} \footnote{See infra notes 512-518 and accompanying text.} \footnote{Currently pending before Congress, as part of the omnibus regulatory reform package, is a provision that seeks to create an affirmative defense in any agency enforcement action based on these kinds of concerns, albeit not limited to environmental law. One defense would be available if the defendant establishes that the rule, regulation, adjudication, or order being enforced is “incompatible, contradictory, or otherwise cannot be reconciled” with a different agency rule, regulation, adjudication, or order with which the defendant is in compliance. See S. 343, 104th Cong., 1st Sess. § 5(c)(2) (1995). Another defense would allow for a reasonable mistake of law based, \textit{inter alia}, on the defendant’s reliance on regulatory preamble discussion (discussion of the basis and purpose of the rule) or on information provided to the defendant by the agency that promulgated the rule or by a State with delegated responsibility for the law’s implementation. \textit{Id}.} \footnote{The Justice Department, possibly to stave off this legislation, has also recently acknowledged the propriety of not prosecuting those who reasonably rely on mistaken state agency interpretation of federal law—a problem of “differentiation”—in certain specified circumstances. See \textit{DOJ Says Prosecution Unlikely If Company “Reasonably” Relies On State Interpretation}, [26 Current Developments] Env’t Rep. (BNA) 180-81 (May 12, 1995).}
applicable legal standard is easily discoverable—does not apply, such a
defense becomes more appropriate.\textsuperscript{460} The Supreme Court has recognized
such a defense in the tax context.\textsuperscript{461} Alternatively, the affirmative defense
could be a more demanding requirement of proof, not only that the
mistake was made, but also that the mistake was objectively reasonable.
The defense might also be further limited to the incarceration remedy,
similar to what Congress has done in the securities law context, in which a
defendant who "proves that he had no knowledge of [the] rule or regula-
tion [violated]"\textsuperscript{462} has an affirmative defense against imprisonment.\textsuperscript{463}

2. Facts

Congress should also consider the harder mens rea issue of the facts a
defendant must know to have committed a felony offense. The baseline
rule for environmental cases should be that, like other kinds of felony
offenses, the government must prove the defendant's knowledge of all of
the legally relevant facts. Congress must then justify any departures from
that default principle.

There are, to be sure, problems with this approach. Because the environ-
mental standards turn on the application of obscure factual questions of
degree, in some cases it may be quite difficult for the government to prove
such factual knowledge.\textsuperscript{464} This is not necessarily enough by itself, how-
ever, to support an automatic elimination of factual knowledge—to jett-

\textsuperscript{460} See Douglas Husak & Andrew Von Hirsch, Culpability and Mistake of Law, in Action
and Value in Criminal Law 166 (Stephen Shute & et al. eds., 1993) ("A person is not
given fair notice of his potential criminal liability unless he can inform himself of the law by
a reasonably diligent inquiry. . . . If the law prohibits given conduct, but the prohibition
be ascertained only with great difficulty, then the person has not been given fair notice of his
potential for liability at the time of his conduct.").

\textsuperscript{461} Similarly, Hart argues that for criminal
law to work:

(1) the primary addressee who is supposed to conform his conduct to the direction
must know (a) of its existence, and (b) of its content in relevant respects; (2) he
must know about the circumstances of the acts which make the abstract terms of the
direction applicable in the particular instance; (3) he must be able to comply with
it; and (4) he must be willing to do so.

Hart, Aims of the Criminal Law, supra note 170, at 412; cf. Lynn Lopucki, The Unsecured

\textsuperscript{462} See supra note 451.

\textsuperscript{463} See supra text accompanying note 462.

\textsuperscript{464} See Rodgers, supra note 20, § 8.11, at 662 (noting impracticality and high cost as
policy reasons for eliminating need to prove connection between act of disposing and harm);
know that species was endangered would "eviscerate the [ESA's] purpose because it would
be nearly impossible to prove that the average hunter recognized the particular subspecies
protected under the Act").
son, as some courts have done, the traditional requirement of factual knowledge in favor of the creation of something more akin to a strict liability felony offense.

The lesson to be learned may instead be quite different. If the necessary knowledge is difficult to prove, there may be a fundamental problem of fairness with the use of a felony sanction in those circumstances. Perhaps some of the environmental standards as drafted do not readily lend themselves to felony prosecutions. Alternatively, perhaps EPA needs to make those standards less indeterminate and obscure if the agency wishes to obtain felony convictions for their violation. Otherwise, the federal government ought to be confined to the other enforcement tools at its disposal, including hefty punitive civil fines and injunctive relief.

There are also a number of middle ground options worth detailed legislative consideration. Congress could, for instance, dictate that the defendant must know only a few limited critical facts that Congress believes sufficient to establish the defendant’s moral culpability. Once that threshold knowledge is established (e.g., the toxic nature of the material), the government need not prove the defendant’s knowledge of all the technical details related to his or her conduct (e.g., the precise extent of the leaching of contaminants under specified conditions), notwithstanding their relevance to the applicable legal standard.465

Another option would be to provide for a lesser mens rea requirement—such as recklessness—in certain narrowly defined circumstances, for example, when heightened irreversible health or environmental risks are created. Most environmental violations would not meet this standard. But for those that do, the need for additional deterrence could justify a reduced showing of mens rea. One feature of environmental law—the fragmentation of authority in corporate decisionmaking466—would certainly support the need for such a reduction in a narrowly defined set of cases. Otherwise, it may be too difficult to hold accountable those in large corporations who seek to insulate themselves from knowledge of pollution activities.

A distinct, yet related option would be to include a “stand-alone”

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465. Cf. United States v. X-Citement Video, 115 S. Ct. 464, 469 n.3 (1994) ("Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful."); Posters 'N' Things v. United States, 114 S. Ct. 1747, 1753 (1994) (The defendant need not know "that a particular customer actually will use an item of drug paraphernalia with illegal drugs. It is sufficient that the defendant be aware that customers in general are likely to use the merchandise with drugs."); Liparota v. United States, 471 U.S. 419, 434 (1985) (the prosecutor "need not show that [the defendant] had knowledge of specific regulations"); United States v. Lilley, 201 F. Supp. 989 (S.D. Tex. 1968) (SEC need not prove defendant's knowledge of precise facts).

466. See supra note 152 and accompanying text.
criminal sanction.\textsuperscript{467} Such a provision would depart from the administrative law model that currently dominates environmental criminal law and be more like a traditional criminal endangerment provision.\textsuperscript{468} The criminal sanction would not depend on proof of a violation of an underlying environmental regulation, but would instead turn on proof of mens rea and either actual serious harm to human health or the environment or, perhaps, a substantial threat of such harm. Virtually all of the major federal environmental laws currently include an analogous civil enforcement provision that provides for civil enforcement based on the presence of an imminent and substantial endangerment, without the need for a showing that any environmental standard has been violated.\textsuperscript{469}

The advantage of such a provision is that it would avoid having the success of a felony prosecution turn on the government’s ability to prove the defendant’s knowledge of the very obtuse and rarified facts that frequently determine whether a particular environmental regulation has been violated. But, to maintain the propriety of such a felony sanction in the absence of such proof, the endangerment provision would need to provide an alternative justification. Such a justification could be, as it is in criminal endangerment provisions generally, based on a showing of the defendant’s awareness of the environmental and human health risks created by her conduct. Congress could also draft the provision, as it has in a host of other areas of criminal law, to impose especially high sanctions when that threat is realized and actual serious harm occurs.\textsuperscript{470} Although

\textsuperscript{467} In its response to this article, the Justice Department somehow reads my suggestion that the environmental statute “include” a stand-alone criminal endangerment provision, analogous to the stand-alone civil endangerment provisions already existing in most federal environmental laws, as suggesting the very different proposition that Congress “replace” all existing environmental criminal penalty provisions with a stand-alone provision. See Lois J. Schiffer & James F. Simon, The Reality of Prosecuting Environmental Criminals: A Response to Professor Lazarus, 83 GEO. L.J. 2531, 2536-37 (1995). I do not believe that my text above comes any where close to supporting the Department’s reading, which I respond to in my separate reply to their response. But, in an abundance of caution, there should be no mistake that I am here proposing the possibility of a stand-alone criminal endangerment provision in addition to the existing model that turns on violation of an underlying statutory or regulatory requirement. This kind of dual approach is, of course, precisely what is currently contained in the statutes for civil enforcement. See infra note 469. The other possibility—only a stand-alone provision—would defeat the ability of criminal penalties to secure the integrity of the regulatory scheme itself.

\textsuperscript{468} See supra text following note 194 (describing “stand alone” provisions). Several of the environmental laws already include criminal “endangerment” provisions, see supra note 202, but they generally require the government to prove a violation of an underlying statutory standard. They are not, therefore, “stand-alone” criminal provisions.


the defendant’s state of mind is the same regardless of whether the harm threatened is actually realized, society has long drawn that distinction in imposing heightened criminal penalties.471

Finally, as with mistakes about the applicable law, an affirmative mistake of fact defense as to certain types of facts might well be an appropriate accommodation of the competing demands of environmental and criminal law. The burden would not be on the government to prove the defendant’s knowledge of all the legally relevant obscure facts; there would instead be a threshold presumption of such knowledge. But, unlike under current case law, the defendant would be allowed to rebut that presumption. The burden would be on the defendant, not the government, but the possibility of such a defense would exist. The defense could be written either in terms of good faith mistakes of fact or, more likely, objectively reasonable mistakes of fact.472 And, as with a reasonable mistake of law defense, this defense could be made applicable only to substantial terms of imprisonment.

3. Impact of Legislative Reform

The impact of changes such as these, in terms of the number of successful environmental prosecutions, is likely to be minimal on overall enforcement efforts; in fact, there may by an increase in successful prosecutions. The reasons for the minimal impact are three-fold.

First, the statutory amendments would simply codify what many are already trying to achieve.473 As evidenced by the three case studies discussed above, many prosecutors are already trying to exercise their prosecutorial discretion based on many of the same criteria. To the extent, therefore, that Congress codifies what those prosecutors are already trying to accomplish, albeit in an ad hoc, random way, such a statutory codification should not interfere with many prosecutions that would actually be otherwise brought.

Indeed, such a codification would likely have a significant positive impact on criminal enforcement. It would bridge the substantial gap now existing between statutory definitions of environmental crimes and the reportedly far narrower circumstances under which prosecutors claim they actually initiate felony prosecutions. There would accordingly be less occasion for the kinds of misapprehension between (and within) branches that, as revealed by the contrasting versions of the three stories first discussed at the outset of this article, fueled much of the recent environmental crimes controversy.

471. See Robinson, supra note 176, at 315-22 (noting that most jurisdictions choose to impose greater liability when a harm actually occurs).
472. See Mandiberg, supra note 298; see also Levenson, supra note 347, at 451-68 (arguing for good faith defenses to strict liability crimes).
473. See supra note 251.
Second, while proof of knowledge of law or facts seems problematic in the abstract, prosecutors frequently prove such knowledge in a host of areas of criminal law. They do so with the aid of evidentiary inferences that a jury can make regarding the defendant's knowledge. A jury rarely has direct evidence of a defendant's subjective knowledge in criminal cases. Judges routinely allow juries to infer such knowledge based on indirect evidence, including the sheer implausibility (approximating gross unreasonableness) of the defendant's professed ignorance of the relevant facts. When the government has introduced into evidence a sufficient factual basis for such an inference, courts frequently instruct jurors that the jury can make an inference of knowledge based on evidence of the defendant's deliberate avoidance of the relevant facts.

Permissible evidentiary inferences are a frequent basis of jury convictions in environmental cases. Juries are sometimes presented with direct

474. See Liparota v. United States, 471 U.S. 419, 434 (1985) (finding that "as in any other criminal prosecution requiring mens rea, the Government may prove by reference to facts and circumstances surrounding the case that [the defendant] knew that his conduct was unauthorized or illegal"); Staples v. United States, 114 S. Ct. 1793, 1802 n.11 (1994) ("But knowledge can be inferred from circumstantial evidence."); United States v. Moskowitz, 883 F.2d 1142, 1150-51 (2d Cir. 1989) (evasive behavior established facts to support inference that knew defendant conduct unlawful).


476. See United States v. Speach, 968 F.2d 795, 797 (9th Cir. 1992) (permissible inference based on willful failure to determine permit status, unduly low charges or unduly high payments for hazardous waste); United States v. Baytank, 934 F.2d 599, 615 (5th Cir. 1991) ("Given Baytank's own sampling and possession of the EPA regulations, we also conclude that the jury could properly find that Baytank knew that the contents of the tanks were hazardous."); MacDonald & Watson Waste Oil Co., 933 F.2d at 41-42, 52, 55 (upholding conviction because there was sufficient evidence for jury to infer that defendant actions violated permit or willfully failed to determine legality of actions under permit); United States v. Brittain, 931 F.2d 1413, 1420 (10th Cir. 1991) (upholding conviction despite conflicting evidence because a "rational trier of fact could have found beyond a reasonable doubt that material dumped" was illegal); United States v. Boldt, 929 F.2d 35, 38-39 (1st Cir. 1991) (upholding conviction on grounds that government may prove its case by circumstantial evidence that need not exclude every reasonable hypothesis of innocence); United States v. Greer, 850 F.2d 1447, 1452-53 (11th Cir. 1988) (upholding conviction because reasonable jury could infer from evidence that plaintiff's conduct was willful causation of illegal discharges); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986) (upholding conviction noting that knowledge need not be proved with certainty and government may prove guilty knowledge with circumstantial evidence); United States v. Fresso Bros., 602 F.2d 1123, 1128-29 (3d Cir. 1979) ("government [does] not have to present evidence of someone turning on a value of diverting wastes in order to establish a willful violation" of environmental laws), cert. denied, 444 U.S. 1074 (1980).
evidence of the defendant’s knowledge;\textsuperscript{477} current and former employees of the company can be a valuable source of such information.\textsuperscript{478} But indirect evidence is more often the sole evidence available, and that too can be sufficient. Thus, corporate officers, for example, cannot avoid prosecution simply by insulating themselves from information regarding the environmental consequences of their corporation’s conduct. Hence, an owner of a hazardous waste disposal facility may cleverly avoid ever explicitly ordering his employees to engage in unlawful disposal practices, but the absence of such an express order does not preclude a jury inference that such was nonetheless the defendant’s intent.\textsuperscript{479}

The Supreme Court has explained how such permissible evidentiary inferences temper what might otherwise seem to be unreasonably high and insurmountable evidentiary hurdles.\textsuperscript{480} The Justice Department also has acknowledged that such inferences may make a stricter mens rea requirement less significant a barrier to effective enforcement. In a brief filed with the Supreme Court, the Justice Department explained that there was little practical difference between a Third Circuit ruling that the government must prove the defendant’s knowledge of a specific fact in order to obtain a conviction in a RCRA prosecution and the rulings of other courts of appeals that no such evidentiary showing was necessary.\textsuperscript{481} The government maintained that the different rulings would “not lead to different results in many cases” because of the various evidentiary inferences available to the government to establish a defendant’s knowledge.\textsuperscript{482}

\textsuperscript{477} See United States v. Distler, 671 F.2d 954 (6th Cir.) (noting that jury presented with eye witness testimony it considered to be substantive evidence of guilt), cert. denied, 454 U.S. 827 (1981).


\textsuperscript{479} For instance, in Greer, 850 F.2d at 1451, the owner of a hazardous waste disposal facility advised his employees of the need “to keep this drum count down” in order to comply with local zoning ordinances and that “a rainy day is a good day to get your drum count down.” The court held that a “jury could infer from the context of the statements that the defendant was instructing the employees to engage in unlawful waste disposal. Id. at 1452.


\textsuperscript{481} See supra note 277.

\textsuperscript{482} In opposing a petition for certiorari in United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), the United States candidly acknowledged that permissible evidentiary inferences made entirely manageable the Third Circuit’s decision in United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985), which required the government to prove the defendant’s knowledge of the applicable RCRA permitting requirements. See supra note 277. The federal government stated that it “did not believe that the difference in the approach taken in Johnson & Towers and [in Hoflin, which did not require knowledge of the permit requirement] is of sufficient practical importance to warrant review at this time.” Brief for the United States in Opposition at 17, United States v. Hoflin,
Third, there are ways that Congress and EPA can more directly address the knowledge issue without jeopardizing the moral integrity of criminal enforcement. If the problem is that high-ranking corporate managers may be able to distance themselves from the required knowledge, then perhaps the cure is to create internal corporate reporting requirements that eliminate that option. Those reporting requirements would make it quite difficult for responsible corporate officers to claim ignorance of the relevant facts or law; such a defense to prosecution for one kind of environmental offense would be tantamount to admission of guilt of a distinct environmental criminal offense, based on violation of the internal reporting requirement.\textsuperscript{483} In short, the best solution may not be to ignore the problem by eliminating the kind of mens rea requirements historically required for criminal prosecution. It may instead be to identify and address the underlying problem—here, the distancing of corporate officers—more directly.

Finally, what seems to have been forgotten is that the original impetus for inclusion of civil enforcement sanctions in regulatory statutes, including the environmental statutes, was to allow the government to punish violations through injunctive relief and civil penalties (but not imprisonment),\textit{without} having to afford the enhanced procedural protections required in the criminal arena.\textsuperscript{484} Because civil enforcement offers substantial remedies\textsuperscript{485} and consumes fewer resources, government can bring far more enforcement actions by relying on a combination of civil and criminal

\textsuperscript{480} F.2d 1033 (9th Cir. 1989) (No. 89-6080),\textit{cert. denied}, 493 U.S. 1083 (1990). The government's brief contended that because the government could meet that burden based on evidentiary inferences, the Third Circuit’s “knowledge requirement would not have led to a different result in [Hofflin], and ... it might not lead to different results in many cases.” Id. The government stressed all of the circumstantial evidence in Hofflin that would have supported such an inference, including his “managerial responsibilities as Director of the Public Works Department,” that “it was his business to know of RCRA’s permit requirements,” his “admission” at trial that he knew that a permit was required for the disposal of hazardous wastes,” and his “long career in responsible positions in the Department and his familiarity with other permits.” Id. at 17-18. These are the very kinds of facts that the government could prove in other cases to establish the defendant’s knowledge.

483. Such an internal reporting requirement would need to include a duty to inquire as well as a duty to report in order to sweep high-ranking corporate officers into the ambit of the criminal penalty provisions.

484. One historical account suggests that Congress enacted the civil penalty provisions in response to sustained academic criticism of public welfare criminal penalty provisions earlier this century. The civil penalty provisions were thus intended as a compromise: Congress would promote deterrence through civil penalty provisions and thereby avoid being criticized for creating strict liability crimes. See Frank, supra note 166, at 182-95; Note,\textit{Statutory Penalties—A Legal Hybrid}, 51 Harv. L. Rev. 1092, 1092 (1938) (noting that courts usually opt for a civil rule when there is variance between a civil and criminal rule in a proceeding).

enforcement, rather than on criminal prosecution alone.\footnote{486} Indeed, one commentator has suggested that government frequently has little reason to pursue a defendant criminally when such severe sanctions can be obtained civilly instead.\footnote{487} Under such a scheme, the substantial commitment of agency resources required for criminal prosecutions would be confined to the most serious cases, and more civil enforcement actions could be directed at the vast majority of other instances of noncompliance.

The end result of such reforms could well be more, not fewer, successful prosecutions and certainly more efficient and effective use of government enforcement resources. Nonintegration has proven costly. The current crisis affecting environmental crimes, including the beleaguered Environmental Crimes Section, is strong testimony to that effect. So too is the current congressional backlash being launched by those who think the government has gone too far, which threatens a dramatic defunding of environmental enforcement.\footnote{488} Clearer statutory guidance should facilitate enforcement and thereby eliminate the root cause of many of the current controversies. EPA, the Environmental Crimes Section, and the United States Attorney Offices would then be able to refocus their resources on actual prosecutions.

B. EXECUTIVE BRANCH

The executive branch could also pursue several possible reforms. The


\footnote{487} Mann, supra note 166, at 1861-63. For this reason, the principal criticism of civil enforcement is not that the associated penalties are weak. It is instead that civil penalties can now be so substantial that it seems unfair to defendants to allow the government to obtain them absent compliance with criminal procedural (including constitutional) safeguards. Coffee, Paradigms Lost, supra note 166, at 1890-92; Mann, supra note 166, at 1870-71. Recent Supreme Court decisions suggest that the Court is likewise concerned about government abuse of civil penalty sanctions. In United States v. Halper, 490 U.S. 435, 451 (1989), the Court held that the Double Jeopardy Clause limited the imposition of civil sanctions against a defendant who had already been criminally prosecuted for the same offense. In Austin v. United States, 113 S. Ct. 2801, 2802 (1993), the Court held that civil forfeiture proceedings were subject to the Excessive Fines Clause. And, even more recently, in Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1946 (1994), the Court similarly held that “at some point, an exaction labeled as a tax approaches punishment” and, consequently, a tax on unlawful activity may raise double jeopardy concerns. Id. At issue in Kurth Ranch was a tax on marijuana plants.

\footnote{488} See supra note 357.
single most important is the establishment of guidelines for deciding whether a particular case warrants civil or criminal enforcement.489 These guidelines should not be drafted in an open-ended, indeterminate fashion. They should force policymakers to make the tough policy decisions that can best be made prospectively on a generic basis, rather than in a hurried, ad hoc fashion. The latter context simply does not allow for the kind of considered and reasoned decisionmaking that the underlying policy issues require.

The guidelines also need to be drafted in coordination with all the major participants in environmental enforcement, at least at the federal level. These include EPA’s Office of Enforcement (both civil and criminal offices) and the Department of Justice (both Main Justice and the United States Attorney Offices). The drafting process will be difficult, but that is precisely why it needs to be done: both to rationalize the decisionmaking process and to build the bridges between the policymakers necessary to promote greater understanding and acceptance of each other’s decisions.

The content of the guidelines will, of course, depend on whether Congress itself reforms the environmental criminal penalty provisions by addressing the issues raised by integration. If Congress does not, then it is incumbent upon the executive branch to do so. To a certain extent, EPA has recently initiated that process. EPA’s Office of Criminal Enforcement has issued a guidance memorandum on “The Exercise of Investigative Discretion.”490 The memorandum appropriately recognizes the need to “instill confidence that EPA’s criminal program has the proper mechanisms in place to ensure the discriminate use of the powerful law enforcement authority entrusted to us.”491 And the memorandum likewise reflects EPA’s appreciation that its enhanced criminal enforcement authority and penalties require the agency to be more careful about case selection.492

The factors described in this memorandum also properly reflect an effort to consider the aims and limits of criminal law. It identifies two major focal points for decisionmaking—significant harm and culpable conduct—and then further defines those factors relevant to their analysis.493

489. See S. Rep. No. 366, 101st Cong., 2d Sess. 2 (1990) (Congress increased EPA enforcement resources in part to “enable EPA to develop a more consistent and equitable approach to handling enforcement cases.”).

490. Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement, to All EPA Employees Working In or In Support of the Criminal Enforcement Program (Jan. 12, 1994) (addressing “The Exercise of Investigative Discretion”) (on file with The Georgetown Law Journal).

491. Id. at 2.

492. Id. at 1-3.

493. Id. at 3-6. The factors relevant to the significance inquiry include: the amount of actual harm to human health or the environment, the degree of threats of harm to human health and the environment, any failure to report an actual discharge, and any trends or common attitudes within the regulated community suggesting the need for additional deterrence. Id. at 4. The factors identified for assessing culpability include: history of repeated
Some of these factors are plainly responsive to integrative concerns, such as “when the clarity of the underlying legal authority is in dispute, the more appropriate vehicle for resolution lies, most often, in a civil or administrative setting.”\textsuperscript{494} To the extent that this memorandum promotes a mutual understanding between EPA investigators in the field and prosecutors regarding the kind of conduct that is sufficiently culpable to warrant criminal prosecution, it may reduce the degree of institutional friction that contributed significantly to the recent environmental crimes controversies.

A variant on this theme is that Congress could require the executive branch both to develop such guidelines \textit{and} to follow those guidelines in individual cases. The State of Oregon recently enacted such guidelines as part of a political compromise that included raising applicable environmental penalties from misdemeanors to felonies. The Oregon legislature (unlike Congress) appreciated that heightened penalties required additional safeguards to limit the possibility of unreasonable exercise of prosecutorial discretion. Under the Oregon scheme, a prosecutor must submit a formal certificate of compliance with the guidelines with the trial judge when initiating an environmental criminal prosecution that seeks felony penalties.\textsuperscript{495}

In any event, EPA’s guidance memorandum is a good start,\textsuperscript{496} but still falls short because of its vagueness and deliberate avoidance of discernible boundaries for the agency. More important, the guidance memorandum reflects the views of only one of several important decisionmakers. There needs to be coordinated exercise of discretion between civil and criminal enforcement both at EPA and at Justice. In its current form, the guidance memorandum is an effort by only one decisionmaker in one of the two agencies principally responsible for environmental criminal prosecutions.

Major reforms within the Environmental Crimes Section at Main Justice are also necessary. The Section now has a new Section Chief,\textsuperscript{497} which is

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\item violations, deliberate misconduct, concealment of misconduct, falsification of records, tampering with monitoring equipment, and absence of required permits. \textit{Id.} at 4-5.
\item \textsuperscript{494} \textit{Id.} at 7 n.9.
\item \textsuperscript{495} See generally Gregory A. Zafiris, \textit{Limiting Prosecutorial Discretion Under the Oregon Environmental Crimes Act: A New Solution to an Old Problem}, 24 \textit{ENVT'L. L.} 1674 (1994) (discussing OR. REV. STAT. § 468.961).
\item \textsuperscript{496} EPA is likewise to be commended for reinitiating a debate on how environmental audits should affect enforcement decisions. See Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455 (1994) (reassessing EPA policy regarding environmental audits and self-evaluation by the regulated community). The audit issue is closely tied to the problems posed by the demands of integration to the extent that environmental law’s complexities make those audits essential to maintain a company’s compliance with environmental protection requirements. See Marianne Lavelle, \textit{Audit Privilege Mobilizes EPA, Business Bar, NAT’L L.J.}, Aug. 8, 1994, at A1.
\item \textsuperscript{497} See Jim McGee, \textit{Chief of Environmental Crime Section Quits}, \textit{WASH. POST}, Apr. 2, 1994, at A4 (reporting that head of Environmental Crimes Section was resigning after sustained scrutiny by Congress); Al Kamen, \textit{Teaming Up}, \textit{WASH. POST}, July 13, 1994, at A15 (discussing possible new appointees to head Section).
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likely part of the Section’s effort to try to put its past behind it. But much more is required. The root causes are not the mere product of individual personalities. The Environment Division needs to define the Section’s mission more precisely. Many of its current internal and external problems stem from the absence of such a clearly defined mission.498 When those inside and outside the Section do not share an understanding of the Section’s essential purpose, the likelihood for misapprehension and for suspicion begetting further suspicion dramatically increases. The Section’s mission should be described in terms of the integrative function that the Section is best-equipped of all the government entities to handle.499

This function includes taking the lead in developing meaningful guidelines on the identification of cases warranting criminal prosecution.500 It also includes significant Section oversight of the cases brought, especially in these early years of the program’s development.501 Such oversight is

498. JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 11-14, 120-22, 137-38, 145-46; see supra text accompanying note 11.
499. JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 66-68, 110-25.
500. The Justice Department recently took an initial step by announcing this prosecution was unlikely of those who reasonably rely on erroneous state interpretations of federal environmental requirements. See supra note 457.
501. Unfortunately, the Section’s important oversight function is one of the casualties of intense congressional criticism of the Section’s work during the Bush Administration. Congressional critics mistook a symptom of the problem—disagreements between the United States Attorney’s Office and the Environmental Crimes Section—for the problem itself. Compare Dingell Report, supra note 5, at 3-4 (Main Justice putting “stranglehold” on environmental prosecutions) and TURLEY REPORT, supra note 5, at 25-27 (“Divisional Policies Restricting United States Attorneys”) with Hassler, supra note 11, at 10,082-83 and JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 11, at 63-66, 101-10. They accordingly placed considerable pressure on the Justice Department, including holding up the confirmation hearing of President Clinton’s nominee to be in charge of the Environmental and Natural Resources Division to provide United States Attorney Offices with more autonomy from Main Justice. See Nomination of Lois Jane Schiffer for Assistant Attorney General for the Environment and Natural Resources Division, United States Department of Justice: Hearing Before the Senate Committee on the Judiciary, 103d Cong., 2d Sess. (Aug. 18, 1994); Jim McGee, Environmental Crimes Controversy Lingers Under Reno, WASH. POST, Apr. 7, 1994, at A25 (reporting on Environmental Crimes Section’s diffuse leadership); Dingell Offers New Proposal on ECS Authority, DOJ ALERT, July 18, 1994, at 3; Jim McGee, Environmental Prosecutions Decentralized, WASH. POST, Aug. 26, 1994, at A23 (noting that the decentralized control gives local U.S. Attorney greater freedom in cases). The Department ultimately capitulated by redrafting the United States Attorneys’ Manual to reduce (not to eliminate) Main Justice oversight and thereby to increase the circumstances when the United States Attorneys may initiate environmental criminal prosecutions without the benefit of prior Main Justice approval. See Memorandum from the Attorney General to All United States Attorneys and the Environmental Crimes Section of the Environment and Natural Resources Division (Aug. 23, 1994) (on file with author) (“Bluesheet Revision of the United States Attorneys’ Manual on Environmental Crimes”)(“USAM”); HOUSE ON ENERGY AND COMMERCE COMMITTEE STAFF, DAMAGING DISARRAY, supra note 13, at 75-79. The United States Attorneys’ Manual, as amended, creates a category of cases of “national interest,” for which Main Justice prior approval must still be sought. USAM 5-11.104. Those are cases that “present novel issues of law,” “a case with simultaneous investigations in multiple jurisdictions,” “a case with international or foreign policy implications,” or “an urgent or sensitive
necessary both as insurance against the abuse of prosecutorial discretion and as a matter of sound litigation strategy. The government needs to obtain favorable judicial precedent in the first cases, which it can then enjoy (and exploit) in future prosecutions. The government can accomplish this only through careful case selection both for initial prosecution and for appeal from adverse lower court rulings.

The Section must earn the respect of the rest of the government by example. A necessary step is to institute procedures for decisionmaking based on written memoranda. Such written documentation will promote more reasoned decisionmaking in individual cases. Decisions lacking written explanation inevitably appear impulsive and invite misapprehension, especially at the outset of a program when mutual trust and understanding are in shorter supply. More rigorous decisionmaking procedures will also promote the kind of expertise within the Section that can then be more broadly applied and will ultimately be respected.

Finally, the Section must plan for the program's maturation, which ultimately includes a heavy reliance on the United States Attorney Offices. The effectiveness of environmental criminal enforcement will, in the long term, depend on those offices establishing an interest and expertise in environmental crimes. The promotion of that interest and expertise should be an explicit part of the Section's central mission and a measure of the Section's success.

The Section should accordingly identify those United States Attorney Offices and Assistant United States Attorneys who have a strong interest and expertise in environmental crimes, and delegate increasing authority to them over time as a reward. The potential for Main Justice oversight must always exist, and it must be regularly exercised in these early years when the Section is beginning to work with United States Attorney Offices in litigating environmental criminal cases.

As the program matures, however, the Section's mission can stay the same, yet the way that it accomplishes that mission should evolve. The Section lawyers should serve less of an oversight function and more of a resource function by making themselves available to help Assistant United States Attorneys in particular cases or to develop more thematic nationwide enforcement initiatives. The Environmental Crimes Section must measure its success, in part, by its ability to decrease its own importance.

Finally, EPA and the Justice Department must coordinate their selection of criminal and civil enforcement options more closely. The administrative and judicial civil enforcement options provide a forceful means for promoting deterrence at a significantly reduced cost to the government. The choice of an enforcement tool should not be the result of happen-

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case as defined in USAM 1-10.230." USAM, 5-11.105. The impact of these changes depends, of course, on how broadly or loosely these new jurisdictional terms of art are applied.
stance. Ensuring that it is not will require a level of coordination between the civil and criminal enforcement arms—within and between both EPA and the Justice Department—that has not previously existed.\footnote{See David Yellen & Carl J. Mayer, Coordinating Sanctions for Corporate Misconduct: Civil or Criminal Punishment?, 29 AM. CRIM. L. REV. 961 (1992) (arguing for coordination of civil and criminal sanctions, which has not historically existed).}

C. COURTS

The courts may seem the least obvious forum for integration, but they may be the most promising. Congress and the executive branch are likely to continue to shy away from their respective integrative responsibilities. The risk of being perceived by the public as “soft on crime” may be too high a political price to pay. Because the courts are less directly entangled with the politics of crime, they may be more willing to address integrative concerns in construing the environmental criminal penalty provisions. The lower courts have not yet done so, but that may be all the more reason why the Supreme Court, even in the absence of a clear circuit conflict, should step into the fray. The Court already appears to be doing so in other areas of federal criminal law and, in those cases, rejecting the government’s statutory construction arguments for reduced mens rea.\footnote{See William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court—1993 Term Foreword: Law As Equilibrium, 108 HARV. L. REV. 26, 69-71 (1994) (contending that recent Supreme Court decisions “showing such solicitude for . . . criminal defendants,” notwithstanding the Court’s normal “orientation towards law and order” are the result of the Court’s “extreme displeasure” with recent federal criminal enactments).}

As previously described, the courts’ integrative opportunities lie principally within the realm of statutory construction. It will require the abandonment of canons of statutory construction that are based on assumptions that cannot fairly be applied to many of the environmental criminal felony penalty provisions. The public welfare offense canon is the most vulnerable in that regard, at least in the context of felony sanctions, as is the lower courts’ (mis)application of the Supreme Court’s decision in International Minerals.\footnote{See supra text accompanying note 291.}

The courts should instead revitalize a different statutory canon that better responds to the demands of integration: the rule of lenity. Congress should endeavor to speak directly and clearly to the policy considerations underlying the identification of actors who deserve significant terms of incarceration for violating environmental protection laws. But when Congress has not done so—or when the environmental protection requirements upon which those violations are based are too obscure or indeterminate—the applicable law should be read in a light more favorable to the criminal defendant. That is the central teaching of the rule of lenity, consistent with the aims and limits of criminal law. There is no
sound reason why environmental laws should be exempted from the application of that rule. Indeed, for reasons outlined in this article, there is good reason to assume that the problems intended to be redressed by the rule of lenity are especially pronounced in the environmental law context.

Finally, there may be innovative ways in which courts can take a more proactive role in serving an integrative function should both Congress and the executive branch fail to do so. For instance, the courts could, on their own initiative, create affirmative defenses. The Eighth Circuit's decision in *Solid State Circuits, Inc. v. EPA* is instructive in this regard. In that case, the court of appeals construed the meaning of the punitive damages provision of the Comprehensive Environmental Response, Compensation, and Liability Act, CERCLA, which provides for treble damages for a party's failure to comply with an administrative cleanup order issued by EPA absent sufficient cause. The court concluded that to meet the "sufficient cause" standard, the "party must show that the applicable provisions of CERCLA, EPA regulations and policy statements, and any formal or informal hearings or guidance the EPA may provide, give rise to an objectively reasonable belief in the invalidity or inapplicability of the clean-up order." Of particular potential relevance to environmental crimes, the court of appeals further held that when "neither [the statute] nor applicable EPA regulations or policy statements provides the . . . party with meaningful guidance as to the validity or applicability of the EPA order," the burden of proof in showing validity or applicability should switch to EPA.

In the absence of explicit statutory language to the contrary, an analogous rationale could support a judicial inference of an affirmative defense based on a reasonable mistake of law in the environmental crimes context. In an appropriate circumstance, a court might even impose the burden on the government in the first instance to establish the unreasonableness of the defendant's mistake of law, consistent with *Solid State Circuits*. As explained by the Eighth Circuit, "it would be patently unreasonable and inequitable" for a court not to allow such a defense when the statute "is silent or ambiguous, and the EPA has failed to promulgate regulations or to issue position statements that could allow a party to weigh in advance the probability" that certain conduct would be unlawful. And, as the court further explained, "[a]lthough shifting the burden may seem onerous, . . . EPA could greatly limit [the availability of the] defense[] by issuing regula-

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505. 812 F.2d 383 (8th Cir. 1987).
508. Id.
509. Cf. United States v. Critzer, 498 F.2d 1160, 1162 (4th Cir. 1974) (dismissing federal criminal tax prosecution as a matter of law because "when the law is vague or highly debatable, a defendant, actually or imputedly, lacks the requisite intent to violate it").
tions and policy statements . . . that would enable a party to better determine the [applicable legal standards].\textsuperscript{510} While Solid State Circuits involved an administrative penalty provision, not a criminal sanction, the reasons for requiring clarity are even greater in the criminal than in the civil administrative context.

Another, more dramatic, approach would be for the courts to apply due process requirements of fair notice more aggressively.\textsuperscript{511} A recent ruling of the United States Court of Appeals for the District of Columbia Circuit suggests that the lower courts may be beginning to do just that in response to the very features of environmental law identified in this article. In General Electric Co. v. EPA,\textsuperscript{512} the D.C. Circuit upheld EPA's interpretation of its own regulation, which imposed restrictions under the Toxic Substances Control Act, but then refused to allow EPA to impose civil penalties on General Electric Co. for violating that regulation. The court reasoned that the company had not received "fair notice" of the terms of the regulation, as required by the Due Process Clause, prior to the imposition of a criminal or (as in this case) significant civil penalty.\textsuperscript{513}

The court created, in effect, a good faith defense based on due process. The court held that fair notice turns on whether "[i]f, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to inform."\textsuperscript{514} Applying that test to the facts before it, the court concluded that while EPA's reading of its regulation was permissible, a party could not be penalized for its violation because "[a] person 'of good faith' would not reasonably expect" that reading based on the regulation's language.\textsuperscript{515} The court also relied on the "location" of the relevant regulation (which the court, in effect, believed presented what I would call an "obscurity" problem),\textsuperscript{516} as well as the fact that different EPA offices disagreed on the meaning of the regulation (which is what this article suggests is a problem of "differentiation").\textsuperscript{517} Significantly, the court of appeals panel crossed the political spectrum of that circuit, including two judges considered liberals, Judge David Tatel (the opinion author) and Judge Patricia Wald, and Judge Lawrence Silberman, a Reagan appointee, who has a strong conservative reputation. Their unanimity on this issue reinforces the view,

\textsuperscript{510} Solid State Circuits, Inc., 812 F.2d at 392.
\textsuperscript{511} See supra note 180 and accompanying text.
\textsuperscript{512} 53 F.3d 1324 (D.C. Cir. 1995).
\textsuperscript{513} Id. at 1328-34.
\textsuperscript{514} Id. at 1329 (quoting Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976)).
\textsuperscript{515} Id. at 1331 (quoting McElroy Elecs. Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993)).
\textsuperscript{516} Id. at 1331-32.
\textsuperscript{517} Id. at 1332-33.
expressed elsewhere in this article, that the expansive reading of *International Minerals* that currently dominates in the courts of appeals is susceptible to successful challenge from both liberal and conservative perspectives. 518

**V. CONCLUSION: THE FUTURE OF ENVIRONMENTAL CRIME**

Environmental law’s greatest strength is also the source of its potentially greatest weakness: its moral force. Public acceptance of the basic morality of environmental protection has fueled environmental law’s revolutionary emergence and expansion during the past twenty-five years. At the same time, it has masked some of environmental law’s most significant problems by stifling needed debate.

Environmental law has matured to a stage at which it must now face up to those problems. The demands of legal evolution run both ways. Environmentalism has prompted evolutionary waves throughout this nation’s laws and is now increasingly reaching towards the international domain. The environmental laws themselves, however, must also be responsive to the possibility that there are legitimate competing concerns that may require accommodation.

Environmental justice is having just such an effect on environmental law. 519 But the lessons of environmental justice are naturally more acceptable to environmentalists because of the common roots and ends they share with the environmental justice movement. 520 By contrast, an argument in favor of accommodating the basic rights of those who violate the law—their right not to be incarcerated in the absence of violation of certain traditional norms of moral culpability—is far more difficult to accept. The argument is nonetheless persuasive.

Environmental law need not sacrifice its humanity and compassion to be effective. Nor, as dramatically revealed by current developments in Congress, are environmental protection goals furthered in the long term if the legal rules for their implementation foster perceptions of unfairness. Environmental law must maintain its integrity and its focus to be successful. And doing so requires greater responsiveness to the aims and limitations of the criminal law. The reformation of environmental criminal law by the legislative, executive, and judicial branches would be a positive step in that direction.

518. *See supra* notes 323-25 and accompanying text.