Moral Issues in Environmental Crime

Susan F. Mandiberg*
MORAL ISSUES IN ENVIRONMENTAL CRIME

Susan F. Mandiberg

INTRODUCTION

Recent indications have been mounting that courts and commentators are rethinking the principles of regulatory crime. One aspect of this trend seems to be a move away from strictly utilitarian, no-fault criminal liability. Instead, an effort is being made to identify and articulate the ways in which regulatory crimes do (in some instances) or should (in others) reflect the traditional culpability-based moral underpinnings of the criminal law. A good example of this trend is the Supreme Court’s slow but continuing exploration of a normative approach to interpreting mental-state provisions in ambiguous regulatory crime statutes.

A recent article explored some of the issues involved in interpreting environmental crimes statutes so that they incorporate a modern version of mens

---

* Professor of Law, Northwestern School of Law of Lewis and Clark College; J.D. 1975, University of California at Berkeley (Boalt Hall). The author wishes to thank Craig Johnston and Bill Funk for their helpful insights and suggestions.


2. A basic tenet of criminal law is that serious punishment and stigma may not be imposed absent moral culpability. See, e.g., Mandiberg, supra note 1, at 1177. Nineteenth-century federal courts struggled to integrate this tenet into their interpretation of regulatory crimes, which were just being adopted by Congress. See id. at 1178-84. However, they gave up the struggle at the beginning of the twentieth century and instead turned to a “strict liability” interpretation. See id. at 1184-88. Since about the 1950s, however, the Supreme Court has once again begun to explore the normative underpinnings of modern regulatory crime. See id. at 1188.

3. See id. at 1188-1204. This Essay will use the term “normative” as a shortcut for a culpability-based approach to assessing criminal liability. See id. at 1167 n.10 (discussing use of this term).
rea. This Essay will discuss an aspect of the mental-state issue in greater depth. It will also explore another doctrinal area important to environmental crimes that traditionally reflects normative culpability. This is an act-element doctrine — liability for omissions — that this Essay will address in the context of the “responsible corporate officer” doctrine.

The discussion that follows will show how difficult it is to apply traditional criminal law jurisprudence in the regulatory context. Because Congress has not adopted the Model Penal Code, its interpretive protocol is not directly applicable to federal statutes. In addition, the Court has said that statutory construction must be conducted “in light of the background rules of the common law . . . .” However, common-law principles are not always well understood. That is, although it is often easy to figure out what the common-law rule is, opinions and treatises rarely explore why the rule takes the form it does. However, if we want to use criminal law principles in a meaningful way, the “why” is often the most critical question.

This Essay will raise some of the important issues in harmonizing regulatory and criminal law doctrines. While it will suggest some answers, it does not intend to resolve the problems. Rather, this Essay will provide merely another step in what is expected to be a long-term and continuing exploration.

I. MENTAL STATE

Since about the mid-1950s, the United States Supreme Court has been developing a normative protocol for interpreting the mental state requirements of ambiguous federal criminal statutes. This

5. See Mandiberg, supra note 1, at 1235-36.
6. See id.
protocol uses traditional common law principles either directly or by analogy. In developing its approach, the Court has begun to articulate the nature of the modern moral consensus underlying use of the criminal sanction to enforce regulatory violations. However, the Court’s approach departs from its normative core in one major respect. When dealing with a “public welfare offense,” the protocol allows the government to convict a violator who believed that the proper permit or license existed for engaging in the activity.

In a previous article, it was explained why the defendant’s awareness of the fact of permit status is an essential element of moral culpability for many regulatory crimes. However, that article did not address the more difficult issue presented by a defendant who knew that a permit existed but misunderstood what the permit said. If the actor mistakenly believed the permit allowed the actions, was the actor aware of wrongdoing in the moral sense required by traditional criminal law principles?

United States, 342 U.S. 337 (1952); Mandiberg, supra note 1, at 1188-1204.


10. The Court has interpreted some types of regulatory crimes to include an “awareness of the non-criminal law” element. Liparota, 471 U.S. at 425 (holding that to convict defendant of the food stamp crime at issue, the government must prove “the defendant knew his conduct to be unauthorized by statute or regulations”); id. at n.9 (explaining that the issue was mistake of other law, not criminality); see Mandiberg, supra note 1, at 1196-98. This approach reflects both a traditional and a modern consensus that a person is aware of moral wrongdoing when actually aware of violating the law. Id. at 1210.

The Court interprets other types of regulatory crimes to require awareness of engaging in activity that is both uncommon and dangerous to the public health and safety. Id. at 1198-1203 (reviewing and summarizing cases). This approach reflects an attempt to articulate a modern moral consensus similar to the traditional views underlying general intent crimes. Id. at 1210, 1211-13.

11. A “public welfare offense,” in the Court’s usage, deals with an activity that “a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety,” Liparota, 471 U.S. at 433, and that is, in addition, not commonplace. Staples, 114 S. Ct. at 1798-1800.

12. See Freed, 401 U.S. at 607; Mandiberg, supra note 1, at 1223.

13. In other words, a defendant should be acquitted if the jury believes she made a reasonable mistake of fact about permit status. See Mandiberg, supra note 1, at 1223-27.

14. See Mandiberg, supra note 1, at 1204-11 (discussing the moral under-
As with awareness of permit status, the permit’s meaning has implications for the Court’s interpretive protocol. The Court’s compass point seems to be the notion that a felony conviction presumes moral culpability. If this is so, the Court may need to interpret ambiguous “public welfare offense” statutes to require proof of defendant’s awareness of understanding of the prohibitions contained in the permit.

Of course, not all “public welfare offense” statutes are ambiguous in this regard. In the Resource Conservation and Recovery Act (“RCRA”), for example, various sub-sections impose criminal sanctions for acting in violation of a permit condition or requirement. These seem unambiguously to require the government to prove defendant’s awareness of what the permit said. However, the issue is presented under the Clean Water Act (“CWA”), where the criminal enforcement provision is ambiguous as to the precise nature of the mental-state requirement.

15. See id. at 1188-98 (explaining how the Court’s interpretive protocol reflects moral considerations). In applying this protocol, the Court may be using statutory interpretation as a way to avoid the constitutional issue of whether due process requires mens rea for a felony conviction. See id. at 1239.


17. 42 U.S.C. § 6928 (d)(2)(B) and (d)(7)(A), SWDA § 3008. See also sub-sections (d)(2)(c) and (d)(7)(B) (imposing similar sanctions regarding interim status regulations or standards).

18. Id. Sub-section (d)(2)(B) provides, in pertinent part: “Any person who . . . knowingly treats, stores, or disposes of any hazardous waste identified or listed under this sub-chapter . . . in knowing violation of any material condition or requirement of such permit . . . shall [be guilty of a crime].”(emphasis supplied). The relevant language of sub-section (7)(A) is identical. The only case to address the mental state issue in these provisions indicates that the government must prove defendant’s awareness of what the permit required. United States v. Self, 2 F.3d 1071, 1091 (10th Cir. 1993) (interpreting the word “knowing” in sub-section (d)(2)(B) to ensure the defense of good-faith belief that the activity was permitted).


20. 33 U.S.C. § 1319(c)(2), FWPCA § 309(c)(2), authorizes criminal sanctions for “[a]ny person who . . . knowingly violates . . . any permit condition or limitation . . . or any requirement imposed . . . in a permit.” Unlike the RCRA provisions noted in the previous footnote, the word “knowing” appears only once,
To understand the problem under the CWA, consider a business that wants to discharge toxic pollutants\(^2\) from its factory\(^2\) directly into a river.\(^2\) In order to do this legally, the business must first obtain a National Pollutant Discharge Elimination System ("NPDES") permit\(^4\) by applying to the proper state or federal agency. The agency establishes the terms of the permit through an interaction between agency personnel and the business itself, with input from the public through comment or public hearing.\(^5\) The permittee may obtain judicial review of the terms of the permit or the process of obtaining a permit according to existing standards.\(^6\) The resulting permit provisions will consist of quotations or paraphrases from statutes and regulations, language that quotes or paraphrases other published agency materials, and language that is found only in this permit or other permits. The business then must comply with these permit terms regarding the amount of pollutants discharged into the river.\(^7\) When the company or one of its employees claims not to understand what a permit requires, it is this language in the permit that is at issue.

Take, for example, a plant manager who discharges a toxic pollutant in quantities greater than allowed under the plant's NPDES permit.\(^8\) The manager is charged criminally with a knowing violation of the CWA.\(^9\) The defendant claims that he read the permit

---

21. The CWA regulates direct discharges of "pollutants," which are defined as "dredged spoil, solid waste, [and so forth] discharged into water." 33 U.S.C. § 1362(6), FWPCA § 502(6).
22. The pipe or conduit leading from the factory to the river would be considered a "point source." 33 U.S.C. § 1362(14), FWPCA § 502(14).
23. The CWA regulates discharges of pollutants into "navigable waters," defined at 33 U.S.C. § 1362(7), FWPCA § 502(7), as "the waters of the United States, including the territorial seas." Id.
24. 33 U.S.C. § 1342(a)-(b), FWPCA § 402(a)-(b).
27. 33 U.S.C. §§ 1311(a), 1342, FWPCA §§ 301(a), 402.
28. The facts in this example are loosely based on those in United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994).
and concluded that it allowed excess discharges under the conditions that existed at the time of the alleged violation. However, the regulatory agency, for example the EPA, disagrees with the defendant’s interpretation. Assuming that the EPA’s version is correct, will the defendant’s mistake provide a defense? If the government has to prove at trial that the defendant knew what the permit actually prohibited, the defendant is entitled to use his mistake as a defense. To what extent should such knowledge be an element of a CWA felony charge?

The mistake in the hypothetical is different from a mistake about permit status. A defendant who makes a mistake about permit status says, “Yes, I knew a permit was required, but I thought we had one.” This is a mistake of fact. The mistake in the hypothetical, on the other hand, is a mistake of law.

30. In many instances, the relevant agency will be that of the state. See 33 U.S.C. § 1342(b)-(e), FWPCA § 402(b)-(e) (outlining the conditions under which state regulations and permits are substituted for those of the federal government).

31. A defendant can always argue that the agency’s interpretation is wrong. However, courts are inclined or required to defer to agency interpretations of the statutes, regulations, and permits they administer. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (regarding statutes); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) (regarding regulations); Skidmore v. Swift & Co., 323 U.S. 134 (1944) (regarding statutes and articulating a less extreme form of deference than Chevron). See generally Justice Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511 (1989), Jamie A. Yavelberg, Note, The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations after EEOC v. Aramco, 42 DUKE L.J. 166 (1992). As a result of the deference given to the agency's interpretation, the defendant’s argument that the agency is wrong is likely to fail in most cases. E.g., Weitzenhoff, 35 F.3d at 1288 (rejecting defendant’s interpretation of EPA’s regulation on the ground that EPA’s differing interpretation “is entitled to considerable weight.”). Of course, the validity of deferring to an agency’s interpretation of a statute providing the basis for felony prosecution is another issue in need of more exploration.

32. This question is relevant only when the CWA felony is considered a “public welfare offense” which will be interpreted according to the court’s protocol. However, there are instances in which a CWA felony arguably is not a “public welfare offense.” See Mandiberg, supra note 1, at 1219-21 (discussing the CWA’s wetlands provisions).

33. Accord Weitzenhoff, 35 F.3d at 1288 (noting that construction of a NPDES permit is a matter of law). But see Mandiberg, supra note 1, at 1171 n.26 (mistakenly referring to this as a mistake of fact).
of non-criminal law.\textsuperscript{34} This characterization is clearest when the permit provision is taken directly from the CWA. In this situation, a mistake about the permit is the functional equivalent of a mistake about the statute itself. Similarly, when the permit provision is taken from an EPA regulation, a defendant's mistake is the functional equivalent of a mistake about the regulatory law.\textsuperscript{35} However, as noted above,\textsuperscript{36} even the permit provisions that are not quotes or paraphrases of existing law have been through a sort of individualized "notice and comment" process. Thus, in all of these situations, Congress has either made the law that forms the basis for the permit provision, or it has delegated the lawmaking authority to an agency that has carried out its task in a standardized fashion. The permit holder can participate in the process at a variety of levels and has notice of the statute, the regulation, and the permit itself.

Once the mistake is characterized as one of "law" rather than "fact," standard analytical approaches have nothing more to say. Traditionally, the government is not required to prove awareness of law; thus, mistakes of law do not provide a defense.\textsuperscript{37} However, the issue can be pushed beyond the limits of standard analysis. The question is whether, in the context of a "public welfare offense,"\textsuperscript{38} the crime lacks a moral basis without proof of defendant's awareness of violating the regulation. That is, assuming it is immoral to cause an unpermitted discharge of toxic pollutants into waterways,\textsuperscript{39} is the defendant considered to be aware of wrongdoing if he honestly believed the discharge was allowed by the terms of the permit?

This analysis is aided by the fact that in the last century some

\textsuperscript{34} See, e.g., Joshua Dressler, Understanding Criminal Law 154-57 (2d ed. 1995). Mistakes of other law can be distinguished from mistakes about criminality. Defendant would be making a mistake of criminality if his argument was, "I knew I was violating my permit, but I did not know it was a crime to do so." Here, the defendant is saying, "I knew it was a crime to violate my permit, but I was not aware of violating it."

\textsuperscript{35} Cf., Bowsher v. Synar, 478 U.S. 714, 752 (1986) (Stevens, J., concurring) (explaining that agency regulations have the force of law).

\textsuperscript{36} See supra, notes 21-27 and accompanying text.

\textsuperscript{37} See, e.g., Mandiberg, supra note 1, at 1205 n.231.

\textsuperscript{38} See supra note 11 (defining "public welfare offense").

\textsuperscript{39} See Mandiberg, supra note 1, at 1211 and 1219 n.309.
common-law jurisdictions have allowed a type of "mistake of law" defense to some crimes. These crimes incorporate an issue of non-criminal law as an aspect of the "specific intent" element. For example, the crime of "theft" requires a specific intent to deprive another of his property; the government must prove the defendant's awareness that the property belonged to another. Therefore, mistake about the law of property that caused the defendant to believe the property was his own provides a defense in some common law jurisdictions. However, the situation is different when the crime only requires proof of general intent. An example is the crime of "bigamy." There, the defendant's mistake of the law of divorce, which led him to believe he was free to remarry, would not provide a defense, even if the mistake was reasonable.

The Supreme Court has adopted this distinction in its approach to regulatory crime statutes. When an ambiguous regulatory statute criminalizes "innocent" activities, the Court will, if possible, interpret the statute to require the government to prove defendant's knowledge that the activity violated non-criminal law, analogizing this to the "theft" example given in the previous paragraph. That

40. See, e.g., ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 851-54 (3d ed. 1982) (citing cases).


42. An "innocent" activity is one that does not fit the definition of a "public welfare offense." See Liparota v. United States, 471 U.S. 419, 432-33 (1985) (distinguishing innocent activities from "public welfare offenses"); Mandiberg, supra note 1, at 1199, 1203-04.

43. Liparota, 471 U.S. at 425 (holding that in prosecutions for food stamp fraud, the government must prove "that the defendant knew his conduct to be unauthorized by statute or regulations"). The Liparota Court denied that it was creating a "mistake of law" defense. Id. at 425 n.9. However, the text of the footnote, especially when compared with the dissent's opinion, reveals that the Court was merely clarifying that it was not establishing a defense for mistakes of criminality. The Court analogized the food stamp situation to "a statute making knowing receipt of stolen goods unlawful . . . . In both cases, there is a legal element in the definition of the offense." Id. The Court then distinguished this allowable mistake of law from an argument "that one did not know that [receipt of stolen goods] was illegal [or] that one did not know that possessing food stamps in a
is, the Court is treating "innocent activity" regulatory crimes as crimes requiring specific intent. On the other hand, when an ambiguous regulatory statute is a "public welfare offense," the Court will interpret it to require only proof that the defendant was aware of the facts that made the activity uncommon and dangerous to the public health and safety. Awareness of regulation is not an element, therefore, ignorance or mistake of non-criminal law is not a defense. The Court is treating these as crimes in exactly the way that traditional courts have treated crimes of general intent.

The CWA's felony provision is probably a "public welfare offense," at least when the Act regulates the discharge of toxic pollutants. Applying the Court's protocol, mistakes of non-criminal law are no defense. As we have seen, this conclusion is consistent with the common-law rule applied to non-regulatory crimes. On a superficial level, at least, the regulatory and non-regulatory criminal law appears to harmonize.

For some, it may be enough that the Supreme Court's present approach to regulatory crimes mirrors the current common-law rule. However, this common-law rule is relatively recent. In addition, in the cases that establish the rule for general intent crimes, the non-criminal law dealt with morally ambiguous situations. In these cases, when the common-law courts disallowed the mistake of non-criminal law as a defense, they knew that the resulting conviction did not reflect the defendant's choice to do moral wrong —

manner unauthorized by statute or regulations was illegal." Id.

44. See Mandiberg, supra note 1, at 1219.
45. Id.
46. See Perkins & Boyce, supra note 40, at 929-31 (citing one British case from 1782, but other cases from no earlier than the late nineteenth century).
47. In the bigamy cases, for example, the legal issues tended to focus on the effect of out-of-forum divorce decrees. The persons obtaining the decree evidently felt that both the divorce and remarriage were moral. The state granting the divorce evidently would agree, but the state prosecuting the bigamy charge would not. Society's increasing lack of agreement on the morality of divorce ultimately resulted in morally neutral no-fault divorce laws in all fifty states. Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 Mich. L. Rev. 1803, 1809-10 (1985) (noting that adoption of no-fault divorce laws beginning in the mid-1960s reflected changes in society's view of the morality of divorce). This situation, of course, reduces the circumstances in which bigamy prosecutions will arise.
they knew, in other words, that the resulting conviction was one of strict liability. If the thrust of current jurisprudence and judicial doctrine is to eliminate strict liability as a basis for felony convictions, then both the emerging common-law rule and the Court’s approach to regulatory crimes will have to develop further through legislative choice, statutory interpretation, or constitutional requirement. In other words, it may become necessary to allow

48. E.g., Braun v. State, 230 Md. 82, 89-90, 185 A.2d 905, 908 (Md. App. 1962) (asserting that in determining whether mistake about divorce law should be a defense to bigamy, the issue is whether mens rea, or criminal intent, should be required); State v. De Meo, 20 N.J. 1, 9-11, 118 A.2d 1 (1955) (noting that the weight of authority in the United States allows convictions for bigamy to be based on strict liability and explaining why the law is justified in imposing sanctions without “moral culpability”).

49. Cf., e.g., Model Penal Code § 2.04(1)(a) (allowing mistake of law to be a defense whenever it negates the mental-state element of the crime).

50. The Court has hinted that statutes imposing felony sanctions without proof of mens rea might be unconstitutional. See Mandiberg, supra note 1, at 1239 n.411. The Court’s statutory interpretation may emphasize moral considerations precisely to avoid reaching this constitutional issue.

In addition, another constitutional issue may push toward the same result. In the general-intent crimes under consideration, mistake of fact remains a defense. For example, in bigamy charges, the defendant can argue that she mistakenly believed her first husband was deceased. E.g., People v. Vogel, 299 P.2d 850, 852 (Cal. 1956) (holding that a “defendant is not guilty of bigamy if he had a bona fide and reasonable belief that facts existed that left him free to remarry”). Stated from the perspective of the prosecutor’s case in chief, when the lack of freedom to remarry is a factual issue, the government must prove defendant’s awareness that she was not free. In addition, if “awareness of lack of freedom to remarry” is an element of the crime, the prosecution must prove that element beyond a reasonable doubt. Compare Patterson v. New York, 432 U.S. 197 (1977) with Mullaney v. Wilbur, 421 U.S. 684 (1975). If the defendant’s lack of awareness is due to a mistake of the law of divorce, the prosecution’s burden is removed through a conclusive presumption that the defendant is aware of the law. Such conclusive presumptions violate due process. See County Court of Ulster County v. Allen, 422 U.S. 140, 165 (1979). On the other hand, if the rule is expressed in terms of a policy to exclude certain types of evidence as irrelevant or prejudicial, the “mistake of law” rule might survive. Cf., Susan F. Mandiberg, Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses, 53 FORDHAM L. REV. 221 (1984-85) (discussing the constitutionality of disallowing evidence of intoxication and mental impairment to negate a required mental state). But see, Montana v. Egelhoff, 900 P.2d 260 (Mont. 1995) (holding that the trial court violated due process by
those charged with felony "public welfare offenses" to argue mistakes of non-criminal law as a defense.

Such a development would be a radical change in the law of regulatory crimes. Since a permit is just another type of non-criminal law, the defense would encompass claims that the defendant was ignorant or mistaken about regulations and non-criminal statutes. Such a change raises the specter of the government's inability to obtain convictions.

This fear can be mitigated to some extent. For one thing, an actor's awareness of regulation is often easily proven circumstantially.\(^5\) In addition, to be consistent with the general-intent nature of the crimes, the mistake would have to be reasonable to provide a defense.\(^5\)

Given the nature of regulatory rule-making and administrative

---

\(^5\) instructing the jury that it could not consider evidence of defendant's voluntary intoxication in determining whether the government could prove the required mental state), cert. granted, 116 S. Ct. 593 (1995).

"Awareness of permit status" may be an element of proof in a "public welfare offense." See Mandiberg, supra note 1, at 1222-34. If it is, the foregoing analysis would apply. The desire not to start down this slippery slope may be behind the Court's reluctance to require the government to prove awareness of permit status.

\(^51\) Accord Liparota v. United States, 471 U.S. 419, 434 (1985) (suggesting that on remand the government will have little trouble proving awareness of regulation because of the back-room nature of defendant's transaction); cf. Weitzenhoff v. United States, 35 F.3d 1275, 1289 (9th Cir. 1994) (indicating in the context of a due process "vagueness" analysis that defendants' attempts to conceal their activities showed that they knew they were violating the law).

\(^52\) In other words, mistakes of non-criminal law would be treated identically to mistakes of fact, which must be reasonable to provide a defense to a general intent crime. Dressler, supra note 34, at 154-157; Perkins & Boyce, supra note 40, at 929; Mandiberg, supra note 1, at 1206-08; cf. Model Penal Code § 2.04(1) (treating mistakes of non-criminal law identically with mistakes of fact in negating mental-state requirements).

Requiring the mistake of non-criminal law to be reasonable would serve an additional function, that of maintaining the distinction between "public welfare offenses" and "innocent activity" crimes. This is so because, following the "specific intent" model, even unreasonable mistakes would be defenses to "innocent activity" crimes. See, Liparota, 471 U.S. at 433 (requiring the government to prove defendant's knowledge of violating regulations, thus implying that an honest mistake of non-criminal law would provide a defense).
oversight, it will be difficult for many defendants to establish a reasonable mistake. If the Supreme Court is correct, a reasonable person engaging in an uncommon and dangerous activity knows that it is regulated.\textsuperscript{53} It would be unreasonable for that person to fail to inquire about what the law allows or prohibits. In the context of the environmental "command and control" statutes in particular, a person can turn to published materials (statutes, regulations, and some agency guidance documents), the relevant permits, and the agency's own staff to clarify the regulatory law. Given the type of egregious violations that lead to criminal charges, the defendant who failed to make intelligent use of these resources probably has made an unreasonable mistake.

It is likely, of course, that the change in law would make it impossible to convict some defendants who are vulnerable under current rules.\textsuperscript{54} Still, in the cases in which a conviction would be prevented it is valid to ask whether that is a bad thing.\textsuperscript{55} If an ac-

\textsuperscript{53} See Staples v. United States, 511 U.S. 600, (1994) (indicating that a person is on notice of regulation because of the uncommonness of an activity, as well as its dangerousness); Liparota, 471 U.S. at 433 (defining "public welfare offense" as, among other things, involving activities whose very nature gives notice of regulation); United States v. Freed, 401 U.S. 601, 609 (1971) (indicating that a person should not be surprised to discover that hand grenades are regulated).

\textsuperscript{54} The corporation, which participates in the process of acquiring a permit, will be on notice of the permit's provisions. The same probably can be said for the officers of the corporation and perhaps management-level personnel. If these actors are unsure of how to interpret permit provisions, it would be unreasonable for them to fail to check published agency guidance documents or to ask agency personnel for the agency's interpretation.

The "reasonableness" requirement could, however, present difficulties if the government wants to prosecute low-level employees who accepted explicit or implicit guarantees of the employer and higher management that the activities of employment were legal. The issue is whether it is reasonable for a worker at that level not to check further. Whichever way this issue is resolved, it would be beneficial for courts and commentators to debate and clarify the matter.

\textsuperscript{55} Accord Lazarus, supra note 1, at 2487-88. It is interesting to note that in the course of the Symposium held by the Fordham Environmental Law Journal on February 29, 1996, a number of prosecutors asserted that they prosecute only those violators who know that they are violating the law. As summarized during the symposium by Neil Cartusciello, these prosecutors want this limitation as a matter of discretion, but not as a requirement of proof.
tor honestly and reasonably thought his activity was permitted, imposition of the felony sanction is arguably inappropriate. This is especially true given the full range of civil sanctions still available to the government for the violation at issue. By the same token, when the government convicts despite the existence of these morally based hurdles, society can be sure that the felony sanction has been imposed justly.

II. ACT ELEMENT: OMISSIONS & RESPONSIBLE CORPORATE OFFICERS

Assume that the Manager of a plant discharges waste in violation of the company's NPDES permit and that considerable evidence exists for convicting the manager under section 309 of CWA. Is there any way to also attach criminal liability to the Manager's superior, for example, the Vice President of the organization, whose office is in a distant city, who had allocated sufficient resources to the plant, and who had instructed the Manager never to permit such a discharge? When is the Vice President even deserving of the criminal sanction? The standard answer to both of these questions is "sometimes."

The two ends of the continuum are easy to define. On the one hand, if the Vice President aided or encouraged the Manager, intending the violation to occur, she is deserving of punishment and can be convicted under principles of accomplice liability, if not as the actual perpetrator. These rules allow liability to rest not only upon affirmative actions, but also on authorization or acquiescence by an officer in the criminal behavior of others. The Vice

56. 33 U.S.C. § 1319(c)(2), FWPCA § 309 (c)(2).
57. E.g., United States v. Ward, 676 F.2d 94 (4th Cir. 1982) (holding that the chairman of the board was liable as aider and abettor on evidence that he approved plans, made suggestions, was apprised of daily progress, and knew that the company's employees and equipment were used in the violations), cert. denied, 459 U.S. 835 (1982).
58. E.g., United States v. Johnson & Towers, 741 F.2d 662, 664-66 (3d Cir. 1984) (holding that a foreman and service manager were open to RCRA liability as principals even though they were not owners or operators able to obtain a permit), cert. denied, 469 U.S. 1208 (1985); See generally 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 5:02 (2d ed. 1984).
59. E.g., United States v. Greer, 850 F.2d 1447, 1451-52 (11th Cir. 1988) (affirming RCRA conviction of owner-manager who knowingly ordered employ-
President’s status as an officer with responsibility for the Manager’s operations may even serve the government as persuasive circumstantial evidence in proving mental state. However, status alone will not lead to conviction: On the other end of the continuum, traditional criminal law principles establish that personal criminal liability cannot be based solely on status. Based on the doctrine of respondeat superior, an organization can be convicted for its

60. E.g., United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 55 (1st Cir. 1991) (noting that defendant’s status as an officer can be evidence of actual knowledge for purposes of RCRA liability); Johnson & Towers, Inc., 741 F.2d at 670 (holding that in a RCRA prosecution the jury can infer that a defendant acted “knowingly” from his position within the corporation). Such circumstantial evidence is, of course, rebuttable.

The “willful blindness” doctrine also may be available to prove an officer’s knowledge. See United States v. Jewell, 532 F.2d 697, 704 (9th Cir. 1976) (quoting trial court’s instruction that the government can prove knowledge of a fact by showing the defendant’s “conscious purpose to avoid learning the truth”), cert. denied, 426 U.S. 951 (1976). But see Mandiberg, supra note 1, at 1229 n.365 (questioning the continued application of the willful blindness doctrine under the Court’s current approach).

61. E.g., Barnes v. State, 19 Conn. 397 (1849) (holding that employer’s liability for acts of agents must be based on employer’s act of giving improper instructions); cf. Commonwealth v. Koczwar, 155 A.2d 825 (Pa. 1959) (holding that employer could be held criminally liable for acts of employees without proof of knowledge or participation but that incarcerating the employer violated due process).

62. E.g., New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494-95 (1909); Apex Oil Co. v. United States, 530 F.2d 1291, 1295 (8th Cir. 1976) (allowing corporate criminal liability in a prosecution for failure to report a discharge under the CWA); United States v. Little Rock Sewer Committee, 460 F. Supp. 6, 9 n.3 (E.D. Ark. 1978) (in CWA prosecution, applying vicarious liability principles to a not-for-profit business entity that would benefit financially from its employee’s crimes and that had supervisory powers and duties analogous to those exercised by a corporate board of directors); United States v. Georgetown University, 331 F. Supp. 69, 72-73 (D.D.C. 1971) (rejecting vicarious liability in prosecution under Rivers and Harbors Appropriation Act, 33...
mere status as the offending Manager's employer. That doctrine does not, however, extend criminal liability to an individual employer or supervisor.

Although these two ends of the continuum are easy to define, the middle of the spectrum is murky. So far, this territory is staked out by the "responsible corporate officer" doctrine. The doctrine arose out of two cases applying the Federal Food, Drug, and Cosmetics Act ("FDCA"). In the first case, United States v. Dotterweich, the Court affirmed the conviction of a corporation's president and general manager for misdemeanors involving shipments of misbranded and adulterated drugs. The Court noted that the Act's purpose was to safeguard "the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." In addition, the statute allowed criminal conviction without proof of "awareness of some wrongdoing." Thus, the statute "puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." The defendant "had no personal connection with either shipment, but he had overall charge of the corporation's business and had given general instructions to its employees to fill orders received from physicians." On this basis, the Court concluded that the defendant fell within the category of persons who had "a responsible share in the furtherance of the transaction which the statute

U.S.C. § 407 (1964), where university's employee was acting under the direction of an independent contractor, and neither the contractor nor the supervisor was the university's agent); see generally BRICKEY, supra note 58, at ch. 3-4.
64. 320 U.S. 277 (1943).
65. Id. at 285. The corporation was acquitted of the same violations. The Court dismissed as "baseless" the argument that the corporation's acquittal precluded Dotterweich's conviction. Id. at 279.
66. Id. at 280.
67. Id. at 281. The Court noted that the Act was "a now familiar type of legislation whereby penalties serve as effective means of regulation." Id. at 280-81. It imposed strict criminal liability and put "the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." Id. at 281.
68. Id.
outlaws.\textsuperscript{70}  

In the second case, \textit{United States v. Park},\textsuperscript{71} the Court affirmed the conviction of the president and chief executive officer of a very large retail food chain. Violations involved the storage of food in such a way that it became contaminated by rodents. The defendant knew about the problems\textsuperscript{72} and, as was normal, had delegated responsibility for solving them to others.\textsuperscript{73} However, the defendant also admitted that he was responsible in general for all operations and results in the company.\textsuperscript{74} This was a sufficient basis for conviction:\textsuperscript{75}

\begin{quote}
[T]he Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.\textsuperscript{76}
\end{quote}

Courts and commentators have various interpretations of the doctrine established by these cases. Some courts see the "responsible corporate officer" doctrine as eliminating the mental state element of the crime\textsuperscript{77}—or significantly facilitating its

\textsuperscript{70} Dotterwach, 320 U.S. at 284. The Court recognized potential hardship, but found that "Congress has preferred to place [the hardship] upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless." \textit{Id.} at 285.

The Court did not try "to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation." \textit{Id.} The Court trusted that decision to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries." \textit{Id.}

\textsuperscript{71} 421 U.S. 658 (1975).

\textsuperscript{72} \textit{Id.} at 661-63.

\textsuperscript{73} \textit{Id.} at 663-64.

\textsuperscript{74} \textit{Id.} at 664-65.

\textsuperscript{75} \textit{Id.} at 673-74. Technically, the legal issue in \textit{Park} was sufficiency of the jury instructions. 421 U.S. at 660.

\textsuperscript{76} \textit{Id.} at 673-74. The Court also mentioned favorably that "Courts of Appeals have recognized that those corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a 'responsible relationship' to, or have a 'responsible share' in, violations." \textit{Id.} at 672.

\textsuperscript{77} \textit{E.g.}, United States v. Brittain, 931 F.2d 1413, 1419-20 (10th Cir.
proof—when the defendant is a responsible corporate officer. This approach runs into a number of problems. Foremost, the interpretation is not supported by the FDCA cases that gave the doctrine its start. Another problem is that the interpretation is probably unconstitutional. A third problem is that the ap-

1991) (indicating, arguably in dictum, that willfulness or negligence could be imputed from an officer's status). But see, e.g., United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 50-55 (1st Cir. 1991) (holding that the trial court erred in allowing the jury to use an officer's status as conclusive proof of the required mental state, thus in effect eliminating the mental state requirement); United States v. White, 766 F. Supp. 873, 895 (E.D. Wash. 1991) (rejecting use of the "responsible corporate officer" doctrine in a prosecution under RCRA and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") on the ground that its use would "allow a conviction without showing the requisite specific intent").

78. E.g., Jane F. Barrett & Veronica M. Clarke, Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After United States v. Dee, 59 GEO. WASH. L. REV. 862, 883-88 (1991) (suggesting that the doctrine can be used to establish a formal inference of knowledge upon proof that the officer knew of a previous or potential violation and reviewing unchallenged jury instructions that adopted this approach).

79. These approaches should not be confused with the simple use of an officer's status as circumstantial evidence of mental state. Unlike a formal inference, such circumstantial evidence is unaided by any specific judicial instruction. Unlike the elimination of the mental state requirement, the evidence can be rebutted, and the prosecution still must prove mental state beyond a reasonable doubt.

80. In those cases, the Court saw the misdemeanor provisions of the FDCA as imposing strict liability, that is, as having no mens rea requirement. United States v. Dotterweich, 320 U.S. 277, 280-81 (1943).

81. If the mental state approach amounts to a declaration that a defendant's "responsible corporate officer" status is conclusive proof of the required mental state, this mandatory presumption is unconstitutional when applied to an element of the crime. Sandstrom v. Montana, 442 U.S. 510, 523 (1979). The only way to avoid the constitutional problem would be to argue that Congress did not intend a mental state requirement when the defendant was a responsible corporate officer. This interpretation would go far beyond the statutory language of most, if not all, regulatory crimes, and is not supported by any recognized principle of statutory interpretation.

Fewer constitutional problems exist if the approach amounts to a rebuttable presumption that status proves the required mental state. However, even some rebuttable presumptions and inferences may violate due process. E.g., Sandstrom, 442 U.S. 510; County Court of Ulster County v. Allen, 442 U.S. 140, 165 (1979).
proach seems inconsistent with the Court's allowance of a defense based on powerlessness to prevent or correct the violation. 82

A more defensible approach is an interpretation of the doctrine as dealing with the act element of the offense. 83 The Dotterweich Court determined that the FDCA was a crime of strict liability, and from that fact it inferred that Congress also intended to impose a duty on those who had "a responsible share in the furtherance of the transaction" to seek out and prevent or rectify violations. In other words, the statute imposes the duty on certain officers, the organization's hierarchy determines who those officers are, and liability is imposed for failure to perform the duty unless the officers show that they were powerless to prevent or correct the violation. There is strong support for this approach in traditional criminal jurisprudence, which often allows the government to prove a criminal act by establishing a failure to perform a legal duty. 84 The "responsible corporate officer" doctrine merely declares that the criminal statute itself—not some other source—imposes the legal duty to act. The officer's failure to perform the duty is shown by the fact that the violation occurred. The "powerlessness" defense is merely an application of the traditional rule that an omission must be "voluntary" for the officer to be culpable. 85

82. United States v. Park, 421 U.S. 658, 673 (1975) (stating that the "responsible corporate officer" doctrine "does not require that which is objectively impossible [and] permits a claim that a defendant was 'powerless' to prevent or correct the violation . . . ").

83. See generally Kathleen Brickey, Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View, 35 VANDERBILT L. REV. 1337 (1982) (suggesting that "a strict liability interpretation of the responsible share standard . . . advances the goals of public welfare statutes and promotes increased corporate responsibility").

84. See, e.g., DRESSLER, supra note 34, at 86-91; PERKINS & BOYCE, supra note 40, at 592-604.

85. See, e.g., DRESSLER, supra note 34, at 86-91; PERKINS & BOYCE, supra note 40, at 592-604.

The "powerlessness" defense demonstrates that the "responsible corporate
In the environmental crimes context, this "act element" interpretation has the added benefit of making statutory language meaningful. Both the CWA and the Clean Air Act ("CAA") include language specifically imposing criminal liability on "responsible corporate officers." Congress' intent in adding the language is not perfectly clear. Thus, it is possible to argue

officer" doctrine does not impose liability based on corporate status alone. But see, Truxton Hare, Comment, Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act, 138 U. PA. L. REV. 935, 935-36 (1990) (asserting that in strict liability statutes the "responsible corporate officer" doctrine rests liability on status alone). The "status" approach is similar to the "duty" approach in the way that the government establishes its prima facie case. That is, prosecution would not occur absent proof of a violation or the defendant's status in the corporate hierarchy. However, the "status" approach precludes the officer's argument that he was incapable of carrying out his duty to prevent the violation; the officer can argue only that the prosecution misunderstood his place in the hierarchy. The Supreme Court has been clear that a defense of "impossibility" is at least theoretically available. In addition, liability based on status alone is increasingly disfavored in the criminal law (HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 78-79 (1968)) and may even be unconstitutional. Cf. Robinson v. California, 370 U.S. 660 (1962) (conviction based on status of being a drug addict violated eighth and fourteenth amendments). But see Powell v. Texas, 392 U.S. 514 (1968) (stating that it is constitutional to convict defendant for the act of being drunk in public, even assuming that defendant was an alcoholic).

86. 33 U.S.C. § 1319(c)(6), FWPCA § 309(c)(6) (providing that "[f]or the purpose of this subsection, the term 'person' means, in addition to the definition obtained in [the definition section] of this title, any responsible corporate officer"), 42 U.S.C. § 7413(c)(6), CAA § 113(c)(6) (providing the same, with unimportant differences in language). In both cases, the "subsection" at issue sets out criminal penalties.

Congress has not added similar language to RCRA or to other environmental crime statutes. Since RCRA is similar to the CWA and the CAA in important ways (such as the mental state provision and the definition of "person"), the lack of special language may be an argument that the "responsible corporate officer" doctrine does not apply to RCRA prosecutions. But cf. United States v. Mac's Muffler Shop Inc., 25 Env't Rep. Cas. (BNA) 1369 (N.G. Ga. 1986) (implying, in suit for injunction and civil penalties, that special statutory language is not required for use of the "responsible corporate officer" doctrine as long as the statute involves protecting the public health).

87. United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991) (indicating that the legislative history is "silent" regarding Congress's intent in adding the term). The provision first appeared in the CWA, with no clarifying legislative
that Congress meant only to ensure that corporate officers be treated just like everyone else. 88 However, it also is possible to argue that the language enhances the act elements of the enforcement provisions — validating that a duty exists for “responsible corporate officers.”

Assuming that the “responsible corporate officer” doctrine does affect the act element of a crime, it is legitimate to ask whether the doctrine can be extended beyond the type of “strict liability” crime represented by the FDCA 89 and statutes in which it

history. When the language was added to the CAA five years later, the only comment in the legislative history was: “The committee intends that criminal penalties be sought against those corporate officers under whose responsibility a violation has taken place and not just those employees directly involved in the operation of the violating source.” Alan Zarky, The Responsible Corporate Officer Doctrine, 5 Toxics L. Rptr. 983, 988 (1991) (quoting Report of the Committee on Environment and Public Works, U.S. Senate, Report No. 95-127, 51, reprinted at 6, A Legislative History of the Clean Air Act Amendments of 1977, 1371, 1425).

88. Zarky, supra note 87, at 987-88. But see Brittain, 931 F.2d at 1413 (noting that identical language then found in CWA was meant to expand liability, not restrict it); Mac's Muffler Shop Inc., 25 Env't Rep. Cas. (BNA) 1369 (rejecting the argument in a civil suit). Cf. United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1130 n.11 (3d Cir. 1979) (implicitly condoning use of the “responsible corporate officer” doctrine in CWA prosecutions without mentioning statutory language), cert. denied, 444 U.S. 1074 (1980).

89. A number of commentators predicate use of the “responsible corporate officer” doctrine on the crime being one of strict liability. However, they do not share a consistent definition of “strict liability.” The tension is between a “normative” and a “descriptive” approach to mental state. See Mandiberg, supra note 1, at 1167 n.10 (explaining the difference between normative and descriptive approaches).


Others commentators define “strict liability” in a descriptive way, as a statute that lacks a mental state term. E.g., United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 50-55 (1st Cir. 1991) (holding that the “responsible corporate officer” doctrine does not apply in RCRA prosecution because the statute requires proof of “knowledge”); United States v. White, 766 F. Supp. 873, 894-95 (E.D. Wash. 1991) (holding the same); Barrett & Clarke, supra note 78,
may be congressionally mandated, such as the CWA and the CAA.\(^9\) Can the doctrine be used with RCRA, for example? The answer is that a mechanism exists for effecting such an extension. Rather than focus on the nature of the crime’s mental state element to justify implication of a duty, it is possible to focus on the fact that the Act was meant to protect the public health and safety.\(^9\) The Dotterweich Court did mention, after all, both aspects at 882-83; Richard G. Singer, The “Responsible Corporate Officer Doctrine” in Environmental Cases, 6 TOXICS L. RPTR. (BNA) 1405 (1992); Zarky, supra note 87, at 986.

90. However, in light of the Supreme Court’s current approach to interpreting regulatory crime statutes, it is legitimate to ask whether the FDCA would still be considered a crime of “strict liability.” See Mandiberg, supra note 1, at 1203-04. Even if no “awareness of non-criminal law” requirement were added, the Court would interpret the statute as requiring awareness of the facts that made the Act a “public welfare offense.” Such awareness arguably amounts to mens rea in the modern sense, even using a normative approach to the concept. See generally, id. at 1211-15.

91. Some argue that the “responsible corporate officer” doctrine should not apply at all to statutes lacking the specific language in the CAA and CWA. E.g., Zarky, supra note 87, at 993. Of course, such language was also absent in the FDCA giving rise to the doctrine in the first place. In reported cases on the “responsible corporate officer” doctrine, Courts have not focused upon the lack of statutory language. Nevertheless, RCRA lacks such language, and the two reported RCRA criminal cases that directly confront use of the “responsible corporate officer” doctrine do not allow it to be used. United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 50-55 (1st Cir. 1991); United States v. White, 766 F. Supp. 873, 894-95 (E.D. Wash. 1991). Cf. United States v. Mac’s Muffler Shop Inc., 25 Env’t Rep. Cas. (BNA) 1369 (N.G. Ga. 1986) (implying, in suit for injunction and civil penalties, that special statutory language is not required for use of the “responsible corporate officer” doctrine as long as the statute involves protecting the public health).

92. RCRA may not be a “public welfare offense” under the Court’s current definition that includes the criterion of uncommonness. Staples v. United States, 511 U.S. 600 (1994); see Mandiberg, supra note 1, at 1220-22 (discussing RCRA’s regulation of commonplace activities). However, there is no real doubt that RCRA is meant to regulate public health and safety. For purposes of the current discussion, at any rate, this Essay will tie the “responsible corporate officer” doctrine to the latter consideration rather than to the technical inclusion in the “public welfare offense” category.

A number of courts and commentators do conclude that the “responsible corporate officer” doctrine can be used with a non-strict liability “public health and safety” statute. E.g., United States v. Dean, 969 F.2d 187, 193 (6th Cir.
of the FDCA. Seen this way, the proposition set down in *Dotterweich* and *Park* is that a regulatory statute meant to protect the public health and safety imposes a duty on responsible corporate officers to seek out and prevent violations of the statute. Once it is established that the duty attaches to a particular defendant because of his or her corporate status, voluntary omission to perform the duty suffices for proof of the act element. The government still must prove the mental state element of the crime, if any, by whatever evidence it has available.

However, the mere existence of an extension mechanism does not mean that the mechanism should be used. The *Dotterweich* and *Park* courts did not articulate a jurisprudential basis for inferring a duty for corporate officers, they merely hinted at one. In fact, such a basis probably can be found in the utilitarian realm of environmental law. However, can a basis be found in the more normative, or culpability-based jurisprudence of traditional criminal law?

In traditional criminal law, the concept of duty is another way

---

93. See Barrett & Clarke, supra note 78, at 882-83 (asserting that the “goal” of the doctrine is to hold officers liable for public welfare offenses); cf. United States v. Mac's Muffler Shop, Inc., 25 Env't Rep. Cas. (BNA) 1369 (N.D. Ga. 1986) (suit for injunction and civil penalties under CAA).

94. Accord United States v. Cattle King Packing Co., Inc., 793 F.2d 232, 240-41 (10th Cir. 1986) (applying the “responsible corporate officer” doctrine to the felony provision of the Federal Meat Inspection Act so long as the government was still required to prove intent to defraud), cert. denied, 479 U.S. 985 (1986).

95. See Lazarus, supra note 1, at 2424 (noting the “aspirational quality” of environmental statutes, which were intended “to force dramatic changes in existing behavior”). The rationale would be that imposition of criminal liability on officers with “line” responsibility, assuming they had the required mental state, would increase the deterrence function of the criminal law and thus change behavior.
to reflect or assess the defendant’s choice to do a moral wrong. This connection is seen in the doctrine itself. An omission to act is not sufficient proof of criminality unless the defendant had a legal duty to act. In addition, all legal duties are based in some way on an underlying moral duty, although the converse is not true. That is, not all moral duties give rise to legal duties. Thus, before we can assess whether duties should be imposed on officers of corporations whose work affects the public health and welfare, it is necessary to understand the types of moral duties that are legal duties as well.

At this point it probably is wise to clarify that we are not dealing with a duty completely imposed by statute, such as the duty to file income tax returns or the duty to provide certain information when involved in an automobile accident. The statutory language makes these duties unambiguous. The jurisprudential basis for such clear statutory duties is of only passing interest to the inquiry here.

Instead, we are dealing with duties that courts, not legislatures, have decided to import into criminal law. Violation of these duties involves a failure “to intervene, when necessary, to prevent

96. See Dressler, supra note 34, at 86; Perkins & Boyce, supra note 40, at 592-95 (citing 19th and early 20th century cases for the proposition that an omission is not an “act” unless there is a duty greater than simply a moral duty).

97. Perkins & Boyce, supra note 40, at 593 n.13 (citing Coleridge, C.J. in Regina v. Instan, 1 Q.B. 450, 453-54 (1893), for the proposition that “[i]t would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation.”).

98. Note that the environmental crimes statutes occasionally do impose statutory duties. See 33 U.S.C. § 1321(b)(5), FWPCA § 311(b)(5) (requiring any “person in charge” of certain facilities to report discharges of oil or hazardous substances and imposing felony sanctions for failure to do so); 42 U.S.C. § 9603(a)-(b), CERCLA § 103(a)-(b) (imposing similar requirements).

99. There may of course be a constitutional problem with imposing the duty. For example, statutory duties may raise due process “notice” problems. Lambert v. California, 355 U.S. 225 (1957) (declaring unconstitutional a city ordinance imposing a registration duty on convicted felons).

100. Such statutory duties do, however, raise interesting jurisprudential questions. See George P. Fletcher, Rethinking Criminal Law 422-24, 585-86 (1978).
the occurrence of a serious harm"\textsuperscript{101} and leads to liability for "commission by omission."\textsuperscript{102} Fletcher mentions six categories of common-law duties of this type\textsuperscript{103}: (1) duties inferred from the personal relationship between the defendant and a dependent person;\textsuperscript{104} (2) reciprocal duties of aid inferred from "the binding together of people to confront common risks;"\textsuperscript{105} (3) duties inferred from the defendant's undertaking to care for someone;\textsuperscript{106} (4) duties inferred from the defendant's creation of danger;\textsuperscript{107} (5) duties inferred from non-criminal statutes;\textsuperscript{108} and (6) duties to control third persons.\textsuperscript{109} The jurisprudential basis for these duties is of central interest to our inquiry.\textsuperscript{110}

Fletcher's examination of these traditional duties (in the context of homicide) provides insight into why they afford a basis for criminal liability. Two dimensions of this jurisprudence are especially important. The first is the way that the concept of "duty" functions as a method of attributing harm to a particular individual.\textsuperscript{111} The other dimension involves the ways in which "duty"

\begin{enumerate}
\item Id. at 422.
\item Id.
\item Id. at 611-22 (discussing duties in the context of homicide); see also Dressler, supra note 34, at 89-91.
\item Fletcher, supra note 100, at 611-14. The paradigmatic, but by no means only, example here involves family relationships.
\item Id. at 614. Fletcher excepts drinking sprees from this generalization.
\item Id. at 614-17. It is normal for commentators to assert a duty based on the existence of a contract and the breach of that contract. However, Fletcher points out that the cases fail to support a duty based on contract alone absent some undertaking.
\item Id. at 628-29 (pointing out difficulty in finding cases squarely supporting imposition of duty on defendants who were not culpable in creating the danger itself).
\item Id. at 620-21 (giving an example of ordinance requiring property owners to keep sidewalks clear).
\item Id. at 622 (noting, without citation, a growing body of case law). Fletcher comments that this type of duty is better treated through principles of accomplice liability. Id.
\item It is arguable that the responsible corporate officer's duty to seek out and prevent regulatory violations fits directly into one of the traditional categories. However, the validity of such arguments will depend, ultimately, on the jurisprudential fit.
\item Fletcher, supra note 100, at 606 (asserting that the concept of duty
analysis is different from negligence analysis.

Regarding attribution, Fletcher explains that in a sense these duties are extensions of the traditional affirmative crimes whose commission is at issue. Before the defendant can be held liable, the harm defined by the affirmative crime must have occurred. Theories of duty explain why a particular defendant, picked out from among all the people who did not act to prevent the harm, can be held culpable for its occurrence. In other words, Fletcher explains, the theories of duty all deal with issues of derivative liability. Such liability is imposed, in the first place, because of the nature of the moral connection between the harm and a particular actor’s responsibility for it: “[I]n the context of the relationship and under the particular circumstances, the failure to avert harm is as egregious a wrong as causing the particular harm. The impulse to recognize these duties, then, is fundamentally an impulse toward moral consistency in the criminal law.”

Thus, the choice among duties has a moral dimension. However, it is different from the moral dimension associated with negligence analysis. Fletcher points out three important distinctions. First, omissions involve a “duty to intervene and prevent harm,” while negligence involves a “duty of care in managing the activity.” Second, omissions entail a duty owed to a specific person or persons, while negligence addresses a duty

functions to provide “a surrogate for the causal link” between a particular actor and the harm that occurred and “a basis for assessing culpability”).

112. *Id.* at 422.

113. That is, a defendant will not be held liable for a breach of duty alone, as opposed to the fate of the accident participant who fails to leave her name and address at the scene. *Id.* at 423.

114. *Id.* at 588.

115. *Id.* at 611.

116. An example of negligence is an automobile driver who fails to turn on headlights, or a railroad switch operator who fails to keep a lookout. *Id.* at 586.

117. *Id.* at 596-97 (noting “negligent failures are embedded in larger activities [such that] the negligent breach of duty converts the driving, the railroad crossing, [and so forth] into unexpected hazards”). Fletcher notes that “[t]he negligently managed activity creates a substantial and unjustified risk of harm. If the harm materializes, the cause appears to be the negligent activity as a whole rather than the isolated failure to exercise due care.” *Id.* at 587.
owed to the world at large.\textsuperscript{118} A third difference is that in omissions analysis the duty is owed to someone who is already in a situation of distress, while negligence involves the duty not to create the situation of distress.\textsuperscript{119} Underlying all of this, perhaps, is the notion that omissions involve "an independent human or natural process that is the primary cause of harm," while negligence involves the defendant as the primary cause of harm.\textsuperscript{120}

Fletcher's analysis suggests a way to articulate when a moral duty becomes the type of legal duty that supports "omissions" culpability — when, in other words, failure to act is as egregious as affirmatively acting. An omission is criminal when danger exists that is not created by the defendant, and the defendant, by intervening, can prevent harm to a person or group with which he has a pre-existing moral relationship.

Viewed in these terms, the "responsible corporate officer" doctrine comes close to traditional omissions culpability. Consider the hypothetical with which this section started. The Vice President had allocated sufficient resources to the plant and had instructed the Manager never to permit a discharge of the type that occurred. However, the Manager had disobeyed. The "danger" at issue is the risk of excessive pollution of the river.\textsuperscript{121} Certainly, the Vice President did not create that danger in any meaningful sense of the term.\textsuperscript{122} In addition, the defendant might have prevented the harm by being more assertive in the management of the plant (by seeking out possible violations). The one dimension on which "responsible corporate officer" culpability seems to fail is the final aspect: By intervening, the officer would not prevent harm to a particular person or group with

\textsuperscript{118} Id. at 587.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 588.
\textsuperscript{121} A NPDES permit assumes that some discharges will occur, and thus there will be some pollution.
\textsuperscript{122} One could argue that the Vice President "created" the danger by working for an organization that discharges waste into the river. However, the CWA is premised on the assumption that businesses will discharge some pollutants; it merely seeks to minimize the harm by regulating the nature and amount of the discharges. Until society as a whole stops engaging in polluting activities, the Vice President's job seems to be a valid one.
which he has a pre-existing moral relationship. If the harm at issue is really excessive pollution of the river, intervention would prevent harm to the world at large. If Fletcher is correct, this is an earmark of negligence, not omission culpability.

This conclusion brings us full circle, in a sense. As noted above, courts and commentators have had trouble determining whether to classify the “responsible corporate officer” doctrine as a “mental state” or an “act” issue. The question of the object of the officer’s duty is, it seems, the crucial question. What is more, the analysis reveals that our difficulty may be in attempting to translate these traditional concerns to the regulatory context. Sanctions on traditional crimes such as homicide and theft exist to protect the rights of specific individuals. Punishment for regulatory crimes exists to protect the rights of the public at large. In order to make the “responsible corporate officer” doctrine comprehensible, we may need to articulate the moral calculus that raises public rights to the same level as individual rights. Such a task is not dissimilar from the one involved in articulating the moral underpinnings of mens rea in the regulatory context.

123. It is possible to argue that the officer prevents harm to his employer and subordinates by intervening to avert an unpermitted discharge. These potential “victims” do have a pre-existing moral relationship with the officer. However, the employer and subordinates stand in the same position as the public at large as regards an interest in less polluted rivers. The unique harm that accrues to them from the officer’s failure to intervene is the harm involved in violating the law.

124. It is also possible to argue that the defendant has a pre-existing moral relationship to the “group” defined by users of the river, a moral relationship established by acceptance of the NPDES permit. Definition of the “group” may raise issues similar to those addressed by the doctrine of standing in the civil judicial context. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). In any case, this argument merits further exploration.

125. At least, that is how we have thought of them in the last 200 years or so. Cf. FLETCHER, supra note 100, at 118, 232-33 (explaining that the concept of “subjective criminality” involves seeing the purpose of the criminal law as protecting specific legal interests and contrasting that with a pattern that focuses on harm to the community as a whole). See also id. at 60-61 (noting that “subjective criminality” became the dominant mode of analysis in the late eighteenth and nineteenth centuries).

126. See generally, Mandiberg, supra note 1.
III. CONCLUSION

This Essay attempts to reveal some of the problems involved in considering environmental crimes through the normative lens of traditional criminal law. It is difficult to harmonize the fields of regulatory and criminal environmental law, especially if the endeavor is to be more than superficial. This is not to say that the blending can not be done. It is incumbent upon those of us who make and apply the law to articulate the modern moral precepts that underlie our use of the criminal sanction. If we can do this effectively, the criminal sanction will be used appropriately and the public at large will more easily understand and accept felony convictions and prison time for environmental crimes.