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Raising the States for Environmental Polluters: The Exxon Valdez Criminal Prosecution

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Raising the Stakes for Environmental Polluters: The *Exxon Valdez* Criminal Prosecution

*Stephen Raucher*

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INTRODUCTION

On March 24, 1989, the *Exxon Valdez* ran aground on Bligh Reef, spilling 240,000 barrels of oil into Alaska’s Prince William Sound.¹ In response to this catastrophic environmental disaster, the United States charged Exxon Shipping Company, the owner of the *Exxon Valdez*, and

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its parent, Exxon Corporation, with five criminal counts each. At every turn in the subsequent prosecution of Exxon, the government pursued aggressive and often untried legal strategies in its attempt to penalize Exxon for the nation's largest oil spill. Along the way, the government set new precedents for future criminal environmental enforcement.

The Exxon settlement resulted in the largest criminal fine in U.S. environmental history even though the government relied on unproven or tenuous legal theories. For the first time, an oil company was found criminally liable for the actions of its wholly owned subsidiary. This settlement has also helped answer the question of whether oil polluters can be charged under the general pollution laws of the Clean Water Act. By charging Exxon with violations of two statutes not aimed at oil pollution, the Refuse Act and the Migratory Bird Treaty Act, the government was able to make Exxon strictly liable for the spill. Using the Criminal Fines Improvement Act as a multiplier, the government then was able to threaten Exxon with an enormous fine. In short, by combining strict liability misdemeanor charges with an aggressive extension of agency theory, the misdemeanor charges alone created the potential for billions of dollars in criminal liability for Exxon.

The government's tactics brought Exxon to the settlement table. In March of 1991, Exxon Shipping agreed to plead guilty to three charges, Exxon Corporation to one. One hundred million dollars was settled upon as an acceptable criminal penalty. Nevertheless, in a ruling which surprised many observers, District Court

2. Exxon Shipping Company and Exxon Corporation will be referred to collectively as "Exxon" unless the distinction between the two defendants is relevant to the discussion.
5. See infra part II.A.
9. See infra part II.C.
12. Id. Of course, the Exxon Valdez oil spill was also the largest environmental disaster of its kind in United States history. Final Settlement, supra note 4.
Judge H. Russel Holland rejected this fine as too low, reopening the criminal case against Exxon. In addition to the criminal fine, the settlement would have covered the federal and state governments' civil claims against Exxon for natural resource damages and cleanup costs, with Exxon paying $900 million over a ten year period. Exxon would also have been liable for an additional $100 million in a "reopener clause" for unforeseen natural resource damages remaining after ten years. When Judge Holland rejected the $100 million criminal plea bargain, the $1 billion civil settlement unravelled as well.

Then, only a week before the criminal case was slated to begin, Exxon and the government agreed to a virtually identical settlement which increased the criminal component only $25 million, from $100 million to $125 million. Of the criminal fines, the $125 million consisted of $25 million in federal fines, and $100 million in criminal restitution split between the state and federal governments. Crucially, the new settlement insured that the civil claims of other independent parties such as Alaska natives and fishermen would be unaffected by the governments' departure from the case. This time the court approved the settlement, calling Exxon "a good corporate citizen." Even though the case against Exxon ended with this abrupt reversal, the $125 million criminal fine ranks as the largest environmental criminal fine in U.S. history.

This paper will attempt to reconstruct the criminal prosecution against Exxon and identify ways in which the settlement will make similar criminal prosecutions easier in the future. Part A examines how the government succeeded in applying a unique theory of agency law. Although wholly owned subsidiaries have rarely been characterized as agents—especially in criminal cases—in this case, the district court ruled that the criminal liability of Exxon Shipping Company, the subsidiary,
could be imposed on Exxon Corporation, the parent.\textsuperscript{22} Part B discusses how the case has helped lead to an authoritative interpretation of the Clean Water Act. Adopting the construction of the court in the \textit{Exxon} case, the Oil Pollution Act of 1990\textsuperscript{23} provides that oil polluters may be charged under the more general provisions of the Clean Water Act\textsuperscript{24} instead of laws specific to oil pollution.\textsuperscript{25} Part C examines how Exxon pleaded guilty to criminal charges under the Refuse Act and the Migratory Bird Treaty Act, laws not designed to address oil pollution, and evaluates the role of strict liability in creating an incentive to settle. Part D addresses the limits of this settlement by analyzing the government's willingness to drop its felony criminal charges against Exxon. Finally, Part E describes how the Criminal Fine Improvements Act enabled the government to invest misdemeanor charges with the potential for billions of dollars in criminal fines.

The results of the settlement are mixed. On the one hand, environmentalists should feel cheered by the size of this fine, which surpasses all previous criminal fines combined.\textsuperscript{26} On the other hand, Exxon Corporation's wealth and the amount of damage caused by the spill make $125 million seem relatively insignificant. The $25 million increase in the criminal fine from the original settlement is particularly disheartening in light of Judge Holland's comments at the time he rejected the original settlement. Although Judge Holland originally indicated that $100 million did not adequately achieve deterrence,\textsuperscript{27} a fine of $125 million does not seem very different. The government, which had so aggressively brought Exxon to the bargaining table by pursuing untried legal avenues, seemed to lose its courage just when it was positioned to extract an even larger criminal fine from Exxon. Yet despite this missed opportunity, the Exxon settlement has created new possibilities for criminal deterrence of large-scale polluters.

II

THE CASE AGAINST EXXON

A. \textit{The Agency Theory of Criminal Liability}

All five of the counts\textsuperscript{28} against Exxon rely on an innovative extension of agency theory,\textsuperscript{29} and for the first time, a court has signalled its

\begin{itemize}
  \item \textsuperscript{22} Order (Motions to Dismiss) at 5-6, United States v. Exxon Corp., 2 Oil Spill Litig. News (Litig. Reporting Serv.) 2272, 2274 (D. Alaska, 1990) (No. A90-015 CR) [hereinafter Order (Motions to Dismiss)].
  \item \textsuperscript{24} Clean Water Act §§ 301, 309(c)(1), 33 U.S.C. §§ 1311, 1319(c)(1) (1988).
  \item \textsuperscript{26} See Parrish, \textit{supra} note 20.
  \item \textsuperscript{27} Imposition of Sentence, \textit{supra} note 13, 3 Oil Spill Litig. News at 3191.
  \item \textsuperscript{28} See \textit{supra} note 3.
  \item \textsuperscript{29} As an alternative to the agency theory of liability, the government also asserted that
\end{itemize}
willingness to hold an oil company criminally liable for the acts of its wholly owned subsidiary. The Bill of Particulars states that:

Under controlling law, a principal is criminally liable for the criminal acts of its agents committed within the scope of the agency. Agency is established by proof that one person or corporation was acting under the control of and for the benefit of another. . . . Exxon Shipping and its employees . . . [are] the agents and subagents, respectively, of Exxon. . . . Exxon established its subsidiary as its agent and bears responsibility for its agent's criminal activities.\(^{30}\)

Although the Bill of Particulars treats this agency theory as commonplace, the application of agency principles to criminal law is actually fairly rare, as is the use of agency law to hold a corporation liable for the acts of its wholly owned subsidiary.\(^{31}\) In this case, the government employed both rarities, and the court upheld this extension of agency law.\(^{32}\)

In order to be as aggressive as possible, the government carefully avoided the doctrine of “piercing the corporate veil,” but relied instead on agency theory.\(^{33}\) Two reasons explain the government’s preference for agency theory. First, as an equitable doctrine, piercing the corporate veil requires that the parent corporation create and control the subsidiary for some fraudulent purpose. Agency theory does not require a showing of bad faith.\(^{34}\) Second, and perhaps more importantly, by piercing the corporate veil, parent and subsidiary are treated as one entity. On an agency theory, the principal and agent each remain liable for the agent’s acts, thus providing the government in this case with two deep pockets from which it can seek fines.

Of course, in order for any agency relationship to exist, the principal must exercise control over the actions of its agent.\(^{35}\) The authority granted to the agent by the principal determines the range of actions for which the principal may be liable. Authority may be “actual” or “appar-
ent." If an agent acts within the grant of its authority, its acts and intentions are imputed to the principal. Whether an agency relationship exists is a question of fact; hence, the determination of whether Exxon Shipping acted as Exxon's agent would have been a matter for the jury to decide.

I. Agency in the Criminal Context

Although agency principles have evolved primarily in civil law, since 1909 the imputation of an agent's criminal acts to its principal has been generally accepted. In New York Central & Hudson R.R. v. United States, the Supreme Court upheld the criminal conviction of a corporate defendant whose agent had, within the scope of his authority, paid illegal rebates. The Court stated that "we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them." Subsequent cases have reaffirmed the application of agency principles in the criminal context.

Courts first imputed agency liability for strict liability offenses. Statutes which do not require specific intent to impose criminal sanctions lend themselves to vicarious liability, since by their nature such statutes aim at improving public welfare rather than at punishing individuals for their bad acts and intentions. The Ninth Circuit, in United States v. Hilton Hotels Corp., employed agency law in this context. The Hilton Hotels court affirmed the conviction of a corporate defendant under the Sherman Act even though one of the corporation's managers actually

36. As the term suggests, actual authority refers to the express powers granted by the principal to the agent. Id. § 7; Warren A. Seavey, Handbook of the Law of Agency § 8 (1964). An agent has apparent authority to bind the principal with respect to a third party when the principal represents to the third party that the agent has the necessary authority. Restatement (Second) of Agency § 8 (1957); Seavey, supra, at § 8.
37. Restatement (Second) Agency § 12 cmt. a (1957). Similarly, agents may employ subagents to carry out the principal's business. Id. § 5 cmt. c. The acts of a subagent are just as binding on a principal as the acts of an agent. Id. § 5 cmt. d.
38. Pacific Can Co. v. Hewes, 95 F.2d 42, 46 (9th Cir. 1938); Order (Motions to Dismiss), supra note 22, at 5-6, 2 Oil Spill Litig. News at 2274.
41. Id. at 489.
42. Id. at 494-95.
43. United States v. Illinois Cent. R.R., 303 U.S. 239, 244 (1938); United States v. Hilton Hotel Corp., 467 F.2d 1000, 1004 (9th Cir. 1972); United States v. Bi-Co Pavers Inc., 741 F.2d 730, 737 (5th Cir. 1984); Restatement (Second) of Agency § 217D cmt. b (1957).
44. Hudson R.R., 212 U.S. at 494-95; CIT Corp. v. United States, 150 F.2d 85, 90 (9th Cir. 1945).
46. 467 F.2d 1000, 1004 (9th Cir. 1972).
committed the crimes.\textsuperscript{47} The strict liability provisions of the Sherman Act involved in \textit{Hilton Hotels} require no specific intent, but only that a restraint of trade result from the defendant’s conduct.\textsuperscript{48} The court noted that:

With such important public interests at stake, it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.\textsuperscript{49}

Hence, at least for the first three counts against Exxon, which similarly guard public interests and do not require specific intent, the application of agency concepts does not seem problematic.\textsuperscript{50}

In contrast, the fourth and fifth counts of the indictment do require specific intent.\textsuperscript{51} Yet by applying the government’s agency theory to these claims, only the agent, Exxon Shipping, need have acted with the requisite intent; the principal, Exxon Corporation, need not have acted knowingly. Despite the apparent inconsistency of holding the principal liable for a crime which requires specific intent where the principal admittedly did not possess the requisite intent, the doctrine of criminal agency has expanded to impute criminal acts requiring knowledge or specific intent to corporations as well.\textsuperscript{52} This development has effectively rendered corporations strictly liable for offenses that require knowledge or intent on the part of their agents.\textsuperscript{53}

2. \textit{The Wholly Owned Subsidiary as Agent}

In addition to taking the unusual step of employing agency concepts in the criminal context, the government also attempted to characterize Exxon Corporation’s wholly owned subsidiary, Exxon Shipping, as its agent by demonstrating an extremely close relationship between the two corporations. The level or form of control necessary to create an agency relationship between a parent corporation and its wholly owned subsidiary has not been well articulated by the courts. However, the mere exist-

\textsuperscript{47} Id. at 1004-05.
\textsuperscript{48} Id. at 1005.
\textsuperscript{49} Id.
\textsuperscript{50} Order (Motions to Dismiss), supra note 22, at 6, 2 Oil Spill Litig. News at 2274. The second and third counts of the indictment arise out of “public welfare” statutes which impose strict criminal liability. \textit{See infra} notes 151-55 and accompanying text. The first count, under the Clean Water Act, requires a showing of negligence, but not knowledge. \textit{See infra} notes 95-96 and accompanying text.
\textsuperscript{51} \textit{See infra} notes 224-26 and accompanying text; Indictment, \textit{supra} note 3, at 4-7, 2 Oil Spill Litig. News at 1049.
\textsuperscript{52} United States v. Illinois Cent. R.R., 303 U.S. 239, 244 (1938); Boise Dodge, Inc. v. United States, 406 F.2d 771, 772 (9th Cir. 1969); United States v. Carter, 311 F.2d 934, 941-42 (6th Cir.), \textit{cert. denied}, 373 U.S. 915 (1963); \textit{see also} \textit{Zarky}, \textit{supra} note 39, at 36-39.
\textsuperscript{53} \textit{Zarky}, \textit{supra} note 39, at 7.
ence of a parent-subsidiary connection does not demonstrate agency.\textsuperscript{54} As the Restatement of Agency presents it, “[a] corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other.”\textsuperscript{55} On the other hand, the parent’s ownership of the subsidiary provides some evidence of an agency relationship where the subsidiary exists to further the parent’s objectives.\textsuperscript{56} Other factors that may indicate an agency relationship include the sharing of common officers and directors,\textsuperscript{57} and use by the subsidiary of the parent’s resources.\textsuperscript{58}

Some authority, though scant, exists for holding Exxon liable for the criminal violations of Exxon Shipping. The only reported criminal case to treat a wholly owned subsidiary expressly as an agent of a parent corporation is *United States v. Johns-Manville Corp.*\textsuperscript{59} In that case, several Johns-Manville subsidiaries, as well as an officer of Johns-Manville, were charged with a conspiracy to commit antitrust violations.\textsuperscript{60} Johns-Manville claimed that the criminal liability of its subsidiaries should not also subject the parent to criminal liability.\textsuperscript{61} The district court refused to relieve Johns-Manville of liability, however, because “the subsidiaries were agents of the parent, and the employees of the subsidiaries acted as subagents of the parent corporation.”\textsuperscript{62} In arguing against the government’s agency theory, Exxon emphasized its subsidiaries’ lack of authority, and claimed that the *New York Central* doctrine extending agency law to the criminal context could not be extended to cover criminal acts by wholly owned subsidiaries.\textsuperscript{63}

\textsuperscript{54} Wells Fargo \& Co. v. Wells Fargo Express Co., 556 F.2d 406, 420 (9th Cir. 1977); Quarles v. Fuqua Indus., 504 F.2d 1358, 1364 (10th Cir. 1974).

\textsuperscript{55} *RESTATEMENT (SECOND) OF AGENCY* § 14M (1957).

\textsuperscript{56} *Wells Fargo*, 556 F.2d at 419 (“[E]stablishment of the requisite ‘agency’ control may be even easier when a parent-subsidiary relationship is involved.” (citations omitted)); *Seavey*, *supra* note 36, § 10 cmt. g.

\textsuperscript{57} See, e.g., Phoenix Canada Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1476 (3rd Cir. 1988); Pacific Can Co. v. Hewes, 95 F.2d 42, 46 (9th Cir. 1938); *Seavey*, *supra* note 36, § 10 cmt. g.

\textsuperscript{58} See Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1326-27 (7th Cir. 1979); *Restatement (Second) of Agency* § 14M cmt. a (1957) (“a subsidiary may become an agent for the corporation which controls it”).

\textsuperscript{59} 231 F. Supp. 690 (E.D. Penn. 1964).

\textsuperscript{60} *Id.* at 698. The defendants were charged with price fixing, an unreasonable restraint on trade and commerce. *Id.*

\textsuperscript{61} *Id.*

\textsuperscript{62} *Id.* Interestingly, the court also noted that the same facts could support a theory that “all of the corporations [were] one unitary enterprise,” and therefore all criminally liable. *Id.* The government similarly invoked enterprise liability as an alternative to agency theory in the Exxon case. Bill of Particulars, *supra* note 29, at 28-29, 2 Oil Spill Litig. News at 1912.

\textsuperscript{63} Motion of Exxon Corporation to Dismiss All Counts Insofar as They Attempt to Charge Offenses Based on Vicarious Liability, *United States v. Exxon Corp.*, 2 Oil Spill Litig. News (Litig. Reporting Serv.) 1942, 1942 (D. Alaska 1990) (No. A90-015 CR).
Despite the dearth of reported criminal cases decided on this type of agency liability, several civil cases have determined that a subsidiary can act as the agent for its parent corporation. In *Pacific Can Co. v. Hewes*, the Ninth Circuit considered a breach of contract suit filed against a can manufacturing company for the acts of its wholly owned subsidiary. The parent organized the subsidiary, operated and controlled it, selected its officers, and directed the expenditures of its funds. These factors were sufficient to demonstrate that the subsidiary was the agent of the parent.

The courts have also found agency liability for the acts of an oil company’s wholly owned subsidiary in at least one civil case. *Phoenix Canada Oil Co. v. Texaco, Inc.*, decided by the Third Circuit, involved a complex dispute over royalty payments made by an oil consortium to the Ecuadorian government. Phoenix Canada claimed that the Ecuadorian subsidiaries of Texaco and Gulf were Texaco’s and Gulf’s agents, and sought damages from the two oil companies for the actions of their subsidiaries. The parents and subsidiaries shared common officers and directors, and the parents approved all “large investments and acquisitions or disposals of major assets” by the subsidiaries. However, the subsidiaries maintained their own books and bank accounts, “paid their own taxes, and were responsible for their own day-to-day operations in Ecuador, including drilling oil wells and constructing the pipeline.”

The district court held that no agency relationship existed because there was no evidence of “complete domination or control by Texaco and Gulf over their subsidiaries.” The Third Circuit reversed the district court on the agency issue and remanded the case. The appellate court stated that complete domination was unnecessary to create an agency relationship. Rather, so long as the subsidiaries acted on behalf of the parent corporations, and the plaintiff’s claim related to this close relationship, agency could be found.

Civil cases such as *Phoenix Canada* and *Pacific Can* delineate a set of factors which can be used to measure the nature of the relationship between Exxon Corporation and Exxon Shipping. While complete domination and control may not be necessary, the subsidiary must be acting

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64. 95 F.2d 42 (9th Cir. 1938).
65. *Id.* at 43-44.
66. *Id.* at 44.
67. *Id.* at 46.
68. 842 F.2d 1466 (3rd Cir. 1988).
69. *Id.* at 1472.
70. *Id.* at 1476.
71. *Id.*
73. *Phoenix Canada*, 842 F.2d at 1478.
74. *Id.* at 1477.
within the scope of its authority to further the parent's objectives. 75 Other indicia, including common officers and directors, 76 and use by the subsidiary of the parent's resources, 77 factor into the analysis. These standards must then be transferred from the civil to the criminal context. The government's argument that Exxon's corporate relationship satisfied these standards established the whole framework for its criminal case against both defendants.

3. The Agency Relationship Between Subsidiary and Parent

The allegations made in the Bill of Particulars present a strong case for finding an agency relationship between Exxon Corporation and Exxon Shipping. First, the Bill notes that Exxon Corporation completely owns Exxon Shipping. 78 Exxon created Exxon Shipping in 1973, and in 1982 transferred its entire Marine Department to Exxon Shipping for tax purposes. 79 Second, Exxon Corporation chose the officers and directors of Exxon Shipping; in 1986, it reorganized Exxon Shipping so that it would have only one director on its board of directors. 80 Third, and perhaps most importantly, Exxon Shipping exists only to benefit Exxon by transacting some of Exxon's business. In 1989, Exxon defined its business as "energy, involving exploration for, and production of, crude oil and natural gas, manufacturing of petroleum products, and transportation and sale of crude oil, natural gas and petroleum products." 81 Exxon Shipping serves all of Exxon's domestic transportation needs, 82 and it transfers all revenues directly to Exxon in the form of dividends. 83

A variety of other allegations also point to an agency relationship. Exxon Corporation requires Exxon Shipping to obtain its approval for all major policy decisions. In fact, the Exxon Valdez itself was constructed at Exxon's impetus. 84 All operations are subject to control and audit by Exxon. 85 Exxon Shipping follows Exxon's Policy Manual (which includes an alcohol policy) as well as Exxon's Navigation and Bridge Organization Manual. 86 Exxon trains all shipboard personnel employed by

75. Id.
76. Id.
77. Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1326-27 (7th Cir. 1979); RESTATEMENT (SECOND) AGENCY § 14M cmt. a (1957).
78. Bill of Particulars, supra note 29, at 1, 2 Oil Spill Litig. News at 1905.
79. Id. at 2, 2 Oil Spill Litig. News at 1905.
80. Id. at 15-17, 2 Oil Spill Litig. News at 1909.
82. Bill of Particulars, supra note 29, at 7, 2 Oil Spill Litig. News at 1907. The Bill alleges that Exxon Shipping used a small percentage of its shipping capacity to transport oil for third parties, but only to use excess shipping capacity. Id. at 8, 2 Oil Spill Litig. News at 1907.
83. Id. at 7, 2 Oil Spill Litig. News at 1907.
84. Id. at 9, 2 Oil Spill Litig. News at 1907.
85. Id. at 10, 2 Oil Spill Litig. News at 1907.
86. Id. at 11-12, 17, 2 Oil Spill Litig. News at 1908-09. These policy manuals are signifi-
Exxon Shipping. Finally, Exxon Shipping's employees, according to the Bill of Particulars, consider themselves part of a unified Exxon organization.

Collectively, this evidence, if proven, provides a solid foundation for treating Exxon Shipping as Exxon's agent. Not only does the evidence show that Exxon Shipping acted on behalf of Exxon, as required by cases like Phoenix Canada, but the level of control allegedly exercised by Exxon easily matches the level of control present in Pacific Can. Given the generally accepted application of agency theory to criminal liability—even for crimes which include a scienter requirement—the government had a strong case for holding Exxon liable for any criminal acts which it could prove Exxon Shipping committed.

The district court's willingness to embrace the government's agency theory in this case marks the first time that criminal liability for the acts of a wholly owned subsidiary has been successfully employed in any reported environmental case. The notoriety of the Exxon Valdez case, even though it was settled, should alert corporate polluters to their potential liability for the environmental crimes of their subsidiaries and may give parent corporations an incentive to insure that their subsidiaries observe all environmental laws. Furthermore, expansion of agency concepts into realms once walled off by the corporate form would leave parent corporations much more vulnerable to criminal prosecution.

B. The Clean Water Act

Like the government's use of agency theory, its application of the Clean Water Act (the CWA) pushed existing law to its limits. The first count charged Exxon with a violation of the CWA not under section 311, which governs oil spills, but under sections 301 and 309, which impose criminal penalties for the discharge of pollutants. Section 311 does not criminalize oil spills, but arguably it is the section that should apply in this instance because it deals with oil spills. Nevertheless, the
government succeeded in putting pressure on Exxon to settle by bringing claims under sections 301 and 309, and Congress has since endorsed this aggressive interpretation of the CWA.94

In order to establish criminal liability under sections 301 and 309, the government had to prove that a pollutant was discharged from a point source without a permit. Section 301 makes discharge of pollutants into navigable waters without a permit illegal. Section 309 makes the negligent violation of section 301 a misdemeanor.95 Since accidental oil spills occur by definition without a permit, oil spills will always be unlawful under section 301, so long as oil can be defined as a “pollutant” and the vessel can be considered a “point source.” To establish criminal liability, the government had to prove that Exxon negligently violated section 301 by discharging a pollutant into navigable waters. This negligence standard is lower than the standard usually required for criminal convictions under environmental laws. Typically, the standard for criminal environmental law requires a showing of willful or knowing misconduct.96

I. Definitions: Pollutant and Point Source

Exxon attempted to show as a matter of statutory construction that the spill of oil from a vessel did not qualify as the discharge of a pollutant from a point source,97 and their claim had some merit. If they were right, the CWA charges would not have been valid. The definition of “pollutant” under the CWA, although it lists a wide variety of substances, does not specifically include petroleum products or oil.98 The District of Columbia Court of Appeals, in probing the breadth of the term, deferred to EPA’s interpretation and refused to extend “pollutant” to encompass other forms of pollution such as “low dissolved oxygen, cold, and super-

94. See infra notes 145-47 and accompanying text.
95. Section 309 states that “Any person who . . . negligently violates section . . . [301] shall be punished by a fine of not less than $2500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both.” 33 U.S.C. § 1319(c)(1) (1988). Section 309 also includes a felony provision, which the government did not invoke, since it requires “knowing” violation, a more difficult mens rea to prove. Id. § 1319(c)(2).
While admitting that the definition of "pollutant" leaves room for some discretion, the court also noted that it should not be equated with the broader term "pollution": "if 'pollutant' was intended to be as all-encompassing as 'pollution,' there would have been no need to fear litigation over what it included, and hence no need for such a definitional list." This logic, combined with the explicit mention of oil in section 311, suggests that oil should not be defined as a "pollutant" under section 301.

However, the only case to address the question squarely has included petroleum products under the term "pollutant." The Sixth Circuit Court of Appeals in United States v. Hamel set out to determine whether the defendant's conduct, willfully discharging gasoline into a lake, fell under section 309 of the CWA. The Hamel court noted that petroleum products may be subsumed under the category of "biological materials," since they contain organic compounds. It relied, however, on an analysis of congressional intent. The court viewed the generic terms employed in the definition of "pollutant" as evidence of an intent to cover a wide variety of materials. In particular, the court construed the CWA definition as encompassing at a minimum the coverage of the Refuse Act of 1899, which, the Supreme Court had previously held, includes oil. "Oil is oil and whether useable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation and a pollutant." The court in the Exxon case relied largely on the Hamel decision in ruling that oil may be considered a pollutant for purposes of section 301.

Like the term "pollutant," the definition of "point source" lists a broad assortment of items. Vessels are included in the list of point sources. Exxon looked beyond the strict wording of the definition, arguing that the function of the Exxon Valdez as a transportation vessel excluded it from the reach of section 301, which Exxon claimed is aimed

100. Id. at 173.
102. Id. at 109.
103. Id. at 110.
104. Id.
106. Id. at 110-11 (quoting United States v. Standard Oil Co., 384 U.S. 224, 226 (1966)).
107. Order (Motions to Dismiss), supra note 22, at 18-19, 2 Oil Spill Litig. News at 2280-81.
108. "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged . . . ." 33 U.S.C.A. § 1362(14) (West Supp. 1990) (emphasis added).
primarily at pollution from industrial facilities. However, the definition itself does not draw such a distinction. Furthermore, courts have tended to interpret “point source” very broadly. In United States v. Earth Sciences, Inc., the Tenth Circuit found that a gold leaching process qualified as a point source, and commented on the context in which point sources must be evaluated:

[T]he [CWA] was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes. The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.

Given the explicit inclusion of vessels within the definition and the history of broad construction, the Exxon court did not hesitate to classify the Exxon Valdez as a point source.

2. The Distinction Between Sections 311 and 309

Even if the Exxon Valdez spill technically fits within the definitions of sections 301 and 309, the structure of the CWA indicates a distinction between oil spills and other types of water pollution, perhaps indicating that oil spills should be treated exclusively under section 311. Historically, sections 311 and 309 developed separately, which supports the theory that section 311 contains the only remedies available against an oil spiller. Section 311 grew out of a series of statutes, beginning with the Oil Pollution Act of 1924. Eventually, the danger from oil spills outgrew this venerable act, because it did not address the recovery of cleanup costs, and Congress began to explore more comprehensive ways of regulating oil spills. The Water Quality Improvement Act of 1970 (the WQIA) provided a unique system of statutes to facilitate cleanup,

109. MPA to Dismiss Count One, supra note 97, at 22, 2 Oil Spill Litig. News at 1956. Exxon relied on an Executive Order distinguishing EPA's rulemaking power over nontransportation related facilities from the Coast Guard’s rulemaking power over transportation related facilities. Exec. Order No. 11735, §§ 1(4), 2(2), 38 Fed. Reg. 21,243-44 (1973). The Coast Guard regulations governing the discharge of oil operate with reference to § 311, not § 301, perhaps indicating that oil transportation vessels should be governed by the former section. See, e.g., 33 C.F.R. pts. 151, 153 (1989).

110. See, e.g., United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979); United States v. Tom-Kat Dev., 614 F. Supp. 613, 614 (D. Alaska 1988) (“Every identifiable point that emits pollution is a point source . . . .”).

111. Earth Sciences, 599 F.2d at 373.

112. Order (Motions to Dismiss), supra note 22, at 19-21, 2 Oil Spill Litig. News at 2281-82.


expanding federal authority over oil spills and imposing on spillers the costs of removing discharged oil. The WQIA did not impose any criminal sanctions for the discharge of oil. This new statutory scheme laid the foundation for section 311, and differentiated oil spills from other types of water pollution. Finally, in the Clean Water Act of 1972, section 311 was created, retaining essentially all of the provisions of the WQIA.

Section 309, on the other hand, was created as part of an entirely new regulatory system, original to the CWA, designed “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” By prescribing effluent limitations and establishing a permitting program known as the National Pollutant Discharge Elimination System (NPDES), the CWA completely overhauled water pollution law. The new scheme began with the principle of section 301, which prohibits any unauthorized pollutant discharge, and established section 309 as its criminal enforcement mechanism. Although both the NPDES and the section 311 oil spill regulations are found in the CWA, Exxon argued that they operate quite independently of each other, given their separate development.

Perhaps the most convincing evidence for excluding unintentional oil spills from liability under section 309 is the fact that section 309 does not list section 311 as one of the provisions whose breach incurs criminal liability. Section 309 does list section 301. Therefore, if section 301 covers oil spills, then section 309 applies to oil spills as well. However, extending section 301 to cover unintentional oil spills puts the rabbit in the hat: an unintentional spill always will be unauthorized, and therefore always will violate section 301. Interpreting section 301 to cover oil spills essentially creates strict criminal liability under the CWA for unintentional oil discharges, since virtually all oil spills will involve some degree of negligence. If Congress intended this fairly draconian result—and the legislative history suggests otherwise—it chose a particularly circuitous route to achieve its goal.

115. Id. § 11(c)(1), 84 Stat. at 93.
116. Id. § 11(f), 84 Stat. at 94.
120. Id. § 1311(b).
121. Id. § 1342.
122. MPA to Dismiss Count One, supra note 97, at 11-13, 2 Oil Spill Litig. News at 1958-59.
124. See supra notes 113-18 and accompanying text.
The language of the CWA provides little guidance. Sections 309 and 311 do cross-reference each other, but only to prohibit the assessment of civil penalties under both sections for the same discharge. In opposing Exxon's motion to dismiss Count One, the government argued that this cross-reference demonstrates that the two sections work in concert. Even if this is true, no such cross-reference covers criminal penalties, and the absence of any criminal provision in section 311 indicates that criminal prosecutions for unintentional oil spills were not intended.

Nevertheless, the few courts that have confronted this problem have brushed it aside and allowed the government to charge oil spillers under section 309. The most complete discussion of the relationship between sections 309 and 311 appears in United States v. Hamel, in which the defendant was prosecuted under section 309 for willfully discharging gasoline into a lake. Although the Hamel court recognized that section 311 explicitly covers oil, it rejected the notion "that specificity of definition alone indicates that [section 311] was intended to be the sole Congressional expression on oil discharges." Instead, the court opted to give the CWA a broad construction, affirming Hamel's conviction.

In a case even more directly on point, United States v. Ashland Oil, Inc., the defendant was charged with negligently discharging fuel from a storage tank. The Ashland court simply assumed the applicability of section 309 without comment. However, the case never went to trial, as Ashland pleaded no contest and was fined $2.25 million.

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127. 551 F.2d 107, 108 (6th Cir. 1977). Although the Hamel case involved the felony provision of § 309, which requires a showing of willfulness rather than negligence, the analysis of the relationship between §§ 309 and 311 remains the same. See 33 U.S.C. § 1319(c) (1988).
128. Hamel, 551 F.2d at 111.
129. Id. at 112-13. The court made two additional statutory arguments worthy of note. First, the court viewed the reporting requirement of § 311(b)(5) as an acknowledgement of the existence of criminal sanctions outside § 311, since this provision prohibits the use of a notification made in accordance with the statute from being used in a criminal trial against the person who reports the spill. Id. at 112; see also 33 U.S.C.A. § 1321(b)(5) (West Supp. 1991). Second, the savings provision of § 311, which states that "[n]othing in this section shall be construed as affecting or modifying any other existing authority," persuaded the court that § 311 should not be interpreted exclusively. Hamel, 551 F.2d at 112; see also 33 U.S.C. § 1321(o)(3) (1988).
131. Id. at 276. The court also assumed the applicability of the Refuse Act. Id.
132. Michael Arndt, Ashland Oil Fined $2.25 Million in '88 Diesel Fuel Spill, CHI. TRIB., Mar. 10, 1989, Business Section, at 3. The Ashland Oil case represents the only reported attempt—aside from the Exxon case—to hold a negligent oil spiller criminally liable under the CWA. An unreported case, United States v. Ballard Shipping Co., also ended when the defendant pleaded guilty to a violation of § 309 for the World Prodigy oil spill. Shipping Company, Ship Master Sentenced for Heating Oil Spill in Narragansett Bay, 20 Env't Rep. (BNA) 831
partment of Justice later boasted that "the prosecution theory in Ashland helped set the stage for the criminal indictment by a grand jury of Exxon Corporation."\textsuperscript{133}

In spite of persuasive evidence that sections 311 and 309 should be treated separately, the few courts to handle oil spill prosecutions have not shied away from applying section 309. In fact, the court in the Exxon case refused to dismiss Count One, ruling that the government had appropriately charged Exxon under section 309.\textsuperscript{134} Furthermore, the settlement includes a guilty plea by Exxon Shipping under the CWA.\textsuperscript{135} Thus, the Exxon case itself strengthens the argument for applying sections 301 and 309 to oil spills.

3. The Oil Pollution Act of 1990

The Oil Pollution Act of 1990 (the OPA),\textsuperscript{136} passed in response to the Exxon Valdez disaster, enacts into law the government's interpretation of the Clean Water Act by criminally sanctioning those responsible for oil discharges under section 309.\textsuperscript{137} The OPA overhauls the statutory framework for dealing with oil spills, principally section 311 of the CWA. The lesson Congress drew from the Exxon Valdez experience was that even with small spills, "any oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. Consequently preventing oil spills is more important than containing and cleaning them up quickly."\textsuperscript{138} As part of this emphasis on prevention, the OPA revises the licensing procedure for marine personnel,\textsuperscript{139} creates stricter contingency planning requirements,\textsuperscript{140} and phases in the use of double-hulled tankers.\textsuperscript{141}

The OPA focuses on increasing civil liability as the means of providing industry with more incentive to prevent oil spills. The Senate report voices concern that "spills are still too much of an accepted cost of doing business for the oil shipping industry. At the present time, the costs of spilling and paying for its cleanup and damage [are] not high enough to encourage greater industry efforts to prevent spills and develop effective

\textsuperscript{134} Order (Motions to Dismiss), supra note 22, at 22, 2 Oil Spill Litig. News at 2282.
\textsuperscript{135} Final Settlement, supra note 4.
\textsuperscript{137} Id. § 4301(c), 104 Stat. at 537 (codified at 33 U.S.C.A. § 1319(c) (West Supp. 1991)).
\textsuperscript{140} Id. §§ 4201-4202, 104 Stat. at 523-32 (codified at 33 U.S.C.A. § 1321(d), (j) (West Supp. 1991)).
\textsuperscript{141} Id. § 4115, 104 Stat. at 517-20 (codified at 46 U.S.C.A. § 3703a (West Supp. 1991)).
techniques to contain them.”

Hence, the OPA subjects “each responsible party for a vessel or a facility from which oil is discharged” to liability for removal costs and damages, including economic, property, and natural resource damages. The civil liability provisions share a deterrent effect with criminal fines, but they do not carry the same social stigma or punitive purpose as criminal violations.

Because of the OPA’s focus on prevention and liability, the act does little to extend the criminal charges which can be brought against an oil spiller. Aside from increases in penalties under existing provisions, the only substantive change wrought by the OPA in the criminal context is the amendment of section 309 of the CWA to cover section 311. The Senate report explains that the amendment affirms recent court decisions to explicitly provide that violations of the prohibition on the discharge of oil and hazardous substances are subject to the criminal penalties established under section 309 of the [CWA]... This amendment is intended to resolve any ambiguity concerning the intent of Congress on this question.

In other words, the OPA signals congressional approval of the government’s interpretation of the CWA in the Exxon case, endorsing the government’s extension of the statute, and settling the matter for future cases.

C. Strict Criminal Liability

Neither the Refuse Act nor the Migratory Bird Treaty Act (the MBTA) explicitly governs oil spills, yet the government charged Exxon with misdemeanor violations of both in an attempt to make Exxon strictly liable. Furthermore, in conjunction with the Criminal Fine Improvements Act, the government was able to use these misdemeanor offenses to make Exxon potentially liable for hundreds of millions—or even billions—of dollars in fines. Never before have these or any other misdemeanor violations been used to create such significant liability. The strategy of employing strict liability misdemeanor counts paid off for the government. Exxon Shipping pleaded guilty to violations of both the MBTA and the Refuse Act and ultimately paid a $100 million criminal fine.

144. See infra notes 270-74 and accompanying text.
146. Id. § 4301(c), 104 Stat. at 537 (codified at 33 U.S.C.A. § 1319(c) (West Supp. 1991)).
148. See infra notes 164-65 and accompanying text.
149. See infra notes 248-49 and accompanying text.
150. Final Settlement, supra note 4. Exxon Corporation itself also pleaded guilty to a
1. Public Welfare Offenses

Although the strict liability claims were controversial, the court refused to dismiss them. Although anomalous in light of the usual requirements of mens rea in criminal law, a number of statutes impose strict criminal liability for "public welfare offenses." Because they require no showing of intent, strict liability statutes significantly ease the government's burden of proof: the prosecution need show only that the defendant committed the proscribed act in order to impose criminal sanctions. This departure from the traditional view that criminal law should punish only "culpable" actors has engendered considerable controversy. In fact, Judge Holland has himself signalled discomfort with the government's strict liability counts: "I have some difficulty with the concept that we criminalize unintentional environmental accidents, in effect criminalizing the killing of birds and sea otters and so forth, yet we do not criminalize airline crashes which result from negligence and which kill people." Nevertheless, the government's strict liability counts survived Exxon's motion to dismiss.

Strict liability is rare in environmental cases, although the United States Supreme Court has historically declined to upset Congress' balancing of the competing concerns implicit in public welfare statutes. The Supreme Court spelled out the rationale for permitting strict criminal liability in Morissette v. United States:

These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care . . . . [W]hatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation

violation of the MBTA. Id.; see also infra note 193.
152. Id. at 255-56.
153. See Hare, supra note 96, at 936 & n.6; Francis B. Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55, 56 (1933) ("To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.").

One commentator has attacked the use of strict liability statutes specifically in the context of the Exxon case:

Exxon did not wreck its tanker and spill its valuable oil on purpose, but increasingly Congress and prosecutors are leaving intent out of the definition of environmental crimes. Once the historic protection that has been provided by the principle that crimes require intent is breached, it will spread into other parts of the law, and no citizen will be safe from government.

154. Imposition of Sentence, supra note 13, 3 Oil Spill Litig. News at 3191.
155. Order (Motions to Dismiss), supra note 22, at 11, 13, 2 Oil Spill Litig. News at 2277-78.
applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.\textsuperscript{156}

The \textit{Morissette} rationale seems to apply to the \textit{Exxon Valdez} oil spill. Regardless of Exxon's intent, the damage to Alaska's Prince William Sound has been done. However, despite the application of this rationale to environmental disasters, most criminal environmental enforcement provisions still require a showing of willfulness, knowledge, or at least negligence.\textsuperscript{157}

Other cases have framed the issue as one of responsibility.\textsuperscript{158} In \textit{United States v. Park}, a food store chain and its chief executive officer were charged with violating the Food, Drug and Cosmetics Act, which imposes strict criminal liability for causing the adulteration of food.\textsuperscript{159} The corporate defendant pleaded guilty, and the individual officer was convicted.\textsuperscript{160} The Supreme Court sustained the conviction, holding that the defendant bore a responsibility to the public under the statute simply by virtue of assuming a position of authority in a business enterprise "whose services and products affect the health and well-being of the public."\textsuperscript{161} The Court increased the likelihood of finding the defendant culpable without requiring formal proof of any mens rea.\textsuperscript{162}

Armed with this historical support for strict criminal liability in the public welfare context, the government charged Exxon with violating two public welfare statutes: the Refuse Act and the MBTA.\textsuperscript{163} The Refuse Act makes the discharge of "any refuse matter of any kind" into navigable waters a misdemeanor.\textsuperscript{164} The MBTA also imposes strict criminal liability, making the killing of any migratory bird "by any\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{156} 342 U.S. 246, 255-56 (1952). The Court also notes that public welfare offenses have been subject to expressions of judicial misgiving. \textit{Id} at 256. The \textit{Morissette} case reversed the petitioner's conviction for knowingly converting government property because the district court had refused to allow the petitioner to show that he lacked the intent to steal the property. \textit{Id} at 276. The discussion of public welfare offenses appears as dicta.
\item \textsuperscript{157} Riesel, \textit{supra} note 96, at 10,067, 10,071. The Clean Water Act, somewhat unusually, contains criminal provisions for both negligent and knowing violations. \textit{Id} at 10,071.
\item \textsuperscript{159} \textit{Park}, 421 U.S. at 670.
\item \textsuperscript{160} \textit{Id} at 661, 666.
\item \textsuperscript{161} \textit{Id} at 672.
\item \textsuperscript{163} These two charges appear as Counts Two and Three, respectively. Indictment, \textit{supra} note 3, at 5-6, 2 Oil Spill Litig. News at 1049.
\item \textsuperscript{164} 33 U.S.C. §§ 407, 411 (1988). Section 407 states:
\begin{quote}
It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind . . . any refuse matter of any kind or description whatever . . . into any navigable water of the United States . . . .
\end{quote}
\textit{Id} § 407.
\item \textsuperscript{165} Section 411, the penalty provision, states that "[e]very person and every corporation that shall violate . . . sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less that $500 . . . ."
\end{itemize}
means or in any manner" a misdemeanor.\textsuperscript{165} The government's extensive use of strict liability in its case against Exxon demonstrated the government's aggressiveness and bolstered its bargaining strength at the settlement table.

2. \textit{The Refuse Act}

The claim that Exxon violated the Refuse Act was probably proper. Because of the simple burden of proof accorded by strict liability, the United States extensively employed the Refuse Act to combat water pollution before the passage of the Clean Water Act of 1972.\textsuperscript{166} The language and legislative history of the CWA indicate congressional intent to preserve the criminal provisions of the Refuse Act. While the CWA contains a savings provision which preempts the Refuse Act with regard to the issuance of permits, the provision does not mention the criminal sections of the Refuse Act.\textsuperscript{167} Outside this savings provision, no language in the CWA explicitly modifies the Refuse Act. In fact, the Senate report on the CWA demonstrates an expectation that Refuse Act prosecutions will continue: "Under the Refuse Act the Federal government is not constrained in any way from acting against violators. The Committee continues that authority in this Act. . . . The [EPA] Administrator retains, without qualification, the authority presently available under the Refuse Act to prosecute for unlawful discharges."\textsuperscript{168} In the face of such clearly expressed intent, criminal prosecutions under the Refuse Act seem warranted, and the Exxon court accordingly refused to dismiss Count Two.\textsuperscript{169}

\textit{Id.} § 411 (1988).

The Refuse Act (also known the Rivers and Harbors Act) was enacted in 1899. Ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C. §§ 401-467n (1988 & Supp. 1991)).

Section 703 makes it "unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill . . . any migratory bird . . . included in the terms of the conventions between the United States and [Great Britain, Mexico, Japan, and the Soviet Union]." 16 U.S.C. § 703 (1988).

Section 707(a) provides that "any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter . . . shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500." \textit{Id.} § 707(a).


166. \textit{S. REP. No. 414, 92d Cong., 1st Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3730. See also the congressional debate: "it is inconceivable that the Senate would want to emasculate the best available enforcement device now available—the Refuse Act—and legislatively dismiss suits pending under it."

168. \textit{Order (Motions to Dismiss), supra note 22, at 29, 2 Oil Spill Litig. News at 2286.}
Exxon attacked the vitality of the Refuse Act on a different front, relying on a pair of Supreme Court cases which emphasize the comprehensiveness of the CWA.170 *Illinois v. City of Milwaukee*171 and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.172 In the former case, the Court refused to allow federal common law nuisance claims against alleged polluters, reasoning that this area of the law is governed exclusively by the CWA.173 The latter case similarly denied the existence in the CWA of an implied private right of action for damages from water pollution, since the CWA's "elaborate enforcement provisions" outline the only available remedies.174 Extending the logic of these cases, Exxon argued that the CWA also precludes other possible *statutory* remedies. However, neither Supreme Court case deals with statutory remedies outside the CWA.

As a counterpoint to Exxon's argument, the cases which specifically address the relationship between the CWA and the Refuse Act maintain the viability of the Refuse Act. Prior to the enactment of the CWA in 1972, a number of courts, including the United States Supreme Court, had held that earlier water quality laws did not supersede the Refuse Act.175 However, with the enactment of the CWA, some courts held that section 311 prevents the recovery of cleanup costs under the Refuse Act.176 Nonetheless, with regard to criminal sanctions, the few courts faced with oil spill prosecutions have found the statutes compatible.177 Although these cases offer little analysis of the preemption problem, in combination with the specific intent indicated by the CWA's legislative history, they present a solid foundation for Count Two of the indictment against Exxon.

The application of the Refuse Act to the *Exxon Valdez* oil spill is fairly straightforward. The Refuse Act does not require that the defendant act with any particular degree of intent. The actus reus itself, putting

176. See, e.g., Matter of Oswego Barge Corp., 664 F.2d 327, 343 (2nd Cir. 1981); United States v. Dixie Carriers, Inc., 627 F.2d 736, 740-41 (5th Cir. 1980) ("Even though the Refuse Act is not repealed by the [CWA], recovery of cleanup costs under this Act would be sharply inconsistent with section [311].").
177. See United States v. Hamel, 551 F.2d 107, 113 (6th Cir. 1977) (defendant could have been prosecuted under either the CWA or the Refuse Act); United States v. Ashland Oil, Inc., 705 F. Supp. 270, 276 (W.D. Pa. 1989).
refuse in the water, suffices to prove guilt; the statute imposes a mens rea condition only where the defendant has been charged with acting to "knowingly aid, abet, authorize, or instigate a violation."\footnote{178} Furthermore, the statute specifies that both natural persons and corporations are capable of violating the Refuse Act.\footnote{179} The indictment in this case makes clear that Count Two charges Exxon with a direct violation of the act, not with an aiding or abetting violation.\footnote{180} Finally, the Supreme Court has held that oil qualifies as "refuse" under the Refuse Act, resolving any question as to the applicability of the statute to oil spills.\footnote{181}

Numerous cases have upheld the Refuse Act's imposition of strict liability.\footnote{182} For example, in United States v. White Fuel Corp., oil which had accumulated under the defendant's property seeped into a cove. In a jury trial, the defendant was found guilty of violating the Refuse Act and was fined $1000 despite the defendant's protestations that it had not been aware of the underground deposit.\footnote{183} Rejecting the defendant's argument that some degree of mens rea must be proved, the First Circuit Court of Appeals stated that "in the seventy-five years since enactment, no court to our knowledge has held that there must be proof of scienter; to the contrary, the Refuse Act has commonly been termed a strict liability statute."\footnote{184} The Second Circuit interpreted the statute even more broadly in United States v. American Cyanamid Co.\footnote{185} In that case, one of the defendant's storage tanks overflowed, releasing titanium dioxide and calcium carbonate into a storm drain. The court of appeals upheld the defendant's Refuse Act conviction even though the government had not established beyond a reasonable doubt that the refuse actually washed into navigable water.\footnote{186} The court justified its liberal reading of the statute on policy grounds: "Semantic gymnastics must not be allowed to undermine a Congressional purpose to preserve the purity of

\footnotesize{178. 33 U.S.C. § 411 (1988).}  
\footnotesize{179. Id.}  
\footnotesize{180. The indictment charges:}  
\footnotesize{Defendants EXXON CORPORATION and EXXON SHIPPING COMPANY unlawfully did throw, discharge and deposit, and did cause, suffer and procure to be thrown, discharged and deposited, refuse matter, namely more than ten million gallons of crude oil, from a ship, namely the Exxon Valdez, into Prince William Sound, a navigable water of the United States . . . .}  
\footnotesize{Indictment, supra note 3, at 5, 2 Oil Spill Litig. News at 1049.}  
\footnotesize{183. White Fuel, 498 F.2d at 621.}  
\footnotesize{184. Id. at 622.}  
\footnotesize{185. 480 F.2d 1132 (1973).}  
\footnotesize{186. Id. at 1134.}
our waterways. Conservation of our once formidable natural resources is a matter of profound national concern.”

The environmental policies underlying the Refuse Act suggest a justification for the departure from normal mens rea requirements under this and other criminal environmental statutes. In fact, the Refuse Act’s purpose of environmental protection was noted by the White Fuel court in applying strict liability. The White Fuel court categorized the Refuse Act as a “public welfare offense,” explaining this term with language from the Supreme Court case Morissette v. United States. As the Court in Morissette noted, public welfare offenses are unique in the criminal law. Exxon’s failure to persuade the district court that the CWA preempts the Refuse Act almost certainly assured conviction under the Refuse Act, given that Act’s strict liability nature. The ease with which the government could prove its case under this statute undoubtedly encouraged Exxon to settle the case.

3. The Migratory Bird Treaty Act

Unlike the Refuse Act, the MBTA seems to bear only a tangential relationship to the oil spill itself. Although the MBTA forbids the killing “in any manner” of migratory birds, the language of this statute indicates primary concern for the unlawful hunting of migratory birds. Yet this third count is the only count to which both Exxon Corporation and Exxon Shipping Company pleaded guilty. The MBTA had not been applied to oil spill prosecutions in the past, although it has been used in analogous pollution cases. The MBTA’s strict liability provision makes it, perhaps unwittingly, a potentially powerful environmental law.

Cases under the MBTA have most commonly grown out of the activities of hunters rather than in response to lethal pollution. For ex-

187. Id. at 1135.
188. White Fuel, 498 F.2d at 622.
189. Id.
191. See 16 U.S.C. § 703 (1988). Among other things, the statute makes it unlawful “to pursue, hunt, take, capture [or] kill” migratory birds. Id.
192. Indictment, supra note 3, at 6, 2 Oil Spill Litig. News at 1048.
193. Final Settlement, supra note 4. Unlike the charges under the Clean Water Act and Refuse Act, Exxon Corporation could not hide behind its subsidiary, Exxon Shipping Company, in fighting the MBTA charge. Since Exxon Corporation admitted ownership of the oil on board the Exxon Valdez, and the oil killed the migratory birds, Exxon Corporation faced direct strict liability under the MBTA. The MBTA count did not face the same problems of agency which characterized the federal government’s attempt to hold both Exxon Corporation and Exxon Shipping Company liable under the other counts. Hence, only Exxon Shipping Company pleaded guilty to the first two counts, whereas both corporations admitted guilt under the MBTA. In this way, Exxon Corporation did not admit to liability for discharging the oil under the government’s criminal agency theory, but still admitted some degree of criminal conduct.
194. See, e.g., United States v. Catlett, 747 F.2d 1102 (6th Cir. 1984), cert. denied, 471
ample, in *United States v. Catlett*, several defendants were convicted under the MBTA for hunting on a "baited" field.\(^1\)\(^9\)\(^5\) Regulations promulgated pursuant to the MBTA proscribe the taking of migratory birds over any baited area.\(^1\)\(^9\)\(^6\) The *Catlett* case is particularly notable because the defendants themselves did not actually bait the field, nor did they know it had been baited.\(^1\)\(^9\)\(^7\) Nevertheless, the court upheld their convictions: "The law is, unhappily for defendants, established that scienter is not required for a conviction. We concede that it is a harsh rule and trust that prosecution will take place in the exercise of sound discretion only."\(^1\)\(^9\)\(^8\) Although the *Catlett* case hints at judicial dissatisfaction with strict criminal liability, the court refrained from upsetting MBTA case law.

Though the MBTA occasionally had been deployed against polluters before the *Exxon* case, it had never been used in the context of an oil spill. However, *United States v. FMC Corp.*\(^1\)\(^9\)\(^9\) presents a situation analogous to an oil spill. FMC, the defendant, manufactured pesticides and pumped its waste water into a large pond. Before pumping the water into the pond, the corporation treated it so as to break down a single toxic chemical present in the waste.\(^2\)\(^0\)\(^0\) However, the treatment process malfunctioned, leading to the death of a number of the migratory waterfowl which visited the pond.\(^2\)\(^0\)\(^1\) FMC was convicted of violating the MBTA, and the court of appeals affirmed the conviction.\(^2\)\(^0\)\(^2\) The court rejected the defendant’s claim that its lack of intent to harm birds should exonerate it from liability, holding that FMC’s involvement in “the manufacture of a pesticide known to be highly toxic” sufficed as an actus reus under the MBTA.\(^2\)\(^0\)\(^3\) By analogy, Exxon’s participation in the oil transportation business, combined with the known toxic effects of oil on birds, could constitute an act sufficient to incur liability.

U.S. 1047 (1985); *United States v. Brandt*, 717 F.2d 955 (6th Cir. 1983); *United States v. Green*, 571 F.2d 1 (6th Cir. 1977). All three of these cases upheld the defendants’ convictions for hunting migratory birds in violation of the MBTA.

195. *Catlett*, 747 F.2d at 1103. A “baited” field is one that is spread with corn or wheat to attract birds.

196. 50 C.F.R. § 20.21(c) (1990).

197. *Catlett*, 747 F.2d at 1103-04.

198. *Id.* at 1105 (footnote omitted).

199. 572 F.2d 902 (2nd Cir. 1978); see also *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal.), aff’d per curiam on other grounds, 578 F.2d 259 (9th Cir. 1978) (holding that application of pesticide to alfalfa which led to death of waterfowl sufficed to incur liability under the MBTA).

200. *FMC Corp.*, 572 F.2d at 904.

201. *Id.* at 905.

202. *Id.* at 903, 908.

203. *Id.* at 906-07. The court compared the liability imposed by the MBTA to the strict liability doctrine in tort law. *Id.* at 907 (citing *Rylands v. Fletcher*, 1 L.R.-Ex. 265 (Eng. 1866)). By engaging in an ultrahazardous activity, FMC invited the MBTA’s liability, even though it was not aware of the “lethal-to-birds quality” of its pond. *Id.* at 908.
Unlike the Refuse Act, the strict liability provisions of the MBTA have faced serious constitutional attack. In addition to the misdemeanor violation with which Exxon was charged, the MBTA also makes the commercial hunting of protected birds a felony. Like its misdemeanor counterpart, the felony provision originally functioned as a strict liability crime. However, in *United States v. Wulff*, the Sixth Circuit struck down the felony provision. The defendant in *Wulff* was indicted under the MBTA for selling a necklace made of red-tailed hawk and great horned owl talons. Although it examined several cases, including *Morissette v. United States*, which discuss the policy considerations that justify foregoing intent in certain criminal statutes, the district court nevertheless concluded that the felony portion of the MBTA violated the due process clause of the Fifth Amendment. The Sixth Circuit Court of Appeals affirmed the decision, distinguishing the use of strict liability for misdemeanor convictions on the basis that in such cases "the penalty is relatively small, and . . . [the] conviction does not gravely besmirch." However, the court found the MBTA's felony provision too severe in terms of penalties and damage to reputation to permit the waiver of the scienter requirement.

The Third Circuit, in *United States v. Engler*, explicitly rejected the *Wulff* analysis. In the face of the MBTA's special status as a "public welfare" statute, the court refused to draw a distinction between the misdemeanor and felony provisions. Congress responded to this conflict by amending the MBTA to accord with the *Wulff* holding, adding the modifier "knowingly" to the felony provision. Significantly, Congress limited the amendment to the felony portion of the MBTA: "Nothing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. 707(a), a standard which has

204. The felony provision originally read:
   Whoever, in violation of this subchapter, shall—
   (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or
   (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.
205. 758 F.2d 1121, 1122 (6th Cir. 1985).
206. Id.
207. 342 U.S. 246 (1952); see also supra note 156 and accompanying text.
209. Id. at 1125.
210. Id.
211. 806 F.2d 425, 434-35 (3d Cir. 1986).
212. Id. at 431-36.
been upheld in many federal court decisions." Nevertheless, as the Engler court pointed out, the difference between the misdemeanor and felony provisions is slight, raising the possibility that the misdemeanor provision also might be susceptible to constitutional attack on due process grounds.

In 1989, a district court confronted exactly this claim when it held that the misdemeanor provision of the MBTA was unconstitutionally vague as applied to the defendant in United States v. Rollins. The defendant in Rollins applied pesticides to his alfalfa crop, leading to the death of a flock of geese. The court ruled that the MBTA's elastic strict liability provision did not give the defendant fair notice of what constitutes criminal conduct, and listed in dismay a number of other ways the statute could be applied: "Thus, a homeowner could be pursued under the MBTA if a flock of geese crashed into his plate-glass window and were killed. An airplane pilot could be prosecuted if geese were sucked into his jet engines. . . . These examples make one queasy about the reach of strict liability criminal statutes." The Rollins case pinpoints the nub of the controversy over strict liability criminal statutes. However, the court in the Exxon case, citing Rollins, refused to dismiss the count, leaving to trial the issue of whether Exxon had fair notice of the MBTA's applicability. The government proposed to demonstrate Exxon's awareness of the danger to migratory birds by introducing an environmental impact statement, prepared by the U.S. Department of the Interior prior to approval of the Trans-Alaska Pipeline Project, which prophesied the threat to birds posed by oil pollution. Assuming this evidence could overcome the Rollins problem, both the ease with which the government could demonstrate the violation of a strict liability statute, and the numerous cases which have imposed such liability, make the MBTA a potent tool.

D. The Felony Provisions

Ironically, the felony counts against the Exxon defendants rested not on environmental statutes, but on marine safety provisions. The charges against Exxon under the Ports and Waterways Safety Act (the...
The PWSA and the DCA both make the knowing or willful violation of any regulation promulgated under their authority a felony.\textsuperscript{224} Count Four of the indictment, arising under the PWSA, specifically charges the defendants with violating a navigation safety regulation designed to insure that the wheelhouse of a vessel is constantly manned by competent personnel.\textsuperscript{225} The regulation requires the vessel owner, not only the master of the vessel, to assure that the ship is properly manned.\textsuperscript{226} The government charged that Exxon Shipping, by assigning Captain Joseph Hazelwood and Able-Bodied Seaman Robert Kagan to the \textit{Exxon Valdez}, failed to ensure competent control of the ship's wheelhouse.\textsuperscript{227}

\textsuperscript{222} See \textit{Final Settlement}, supra note 4.
\textsuperscript{223} In discussing the MBTA's felony provision, the Sixth Circuit, in \textit{United States v. Wulff}, noted the special stigma attaching to felony convictions. \textit{See supra} notes 209-10 and accompanying text. A felony conviction could more severely besmirch Exxon's reputation than a misdemeanor violation. \textit{See} Michael K. Glenn, \textit{The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions}, 11 \textit{AM. CRIM. L. REV.} 835, 858 (1973) ("Industrial corporations, like anyone else, want to be regarded as responsible members of the community in which they operate, and a criminal conviction for polluting is not a highly valued mark of good citizenship.").

\textsuperscript{224} The PWSA stated that "[a]ny person who willfully or knowingly violates this chapter or any regulation issued hereunder shall be fined not more than $50,000 for each violation or imprisoned for not more than five years, or both." 33 U.S.C. § 1232 (1988). The DCA provided that "[a] person willfully and knowingly violating this chapter or a regulation prescribed under this chapter shall be fined not more than $50,000, imprisoned for not more than 5 years, or both." 46 U.S.C. § 3718(b) (1988). The Oil Pollution Act of 1990 amended the PWSA and the DCA to bring them into conformance with federal sentencing classifications. Violation of either statute constitutes a "class D felony." Pub. L. No. 101-380, § 4301, 104 Stat. 536, 537 (1990).

\textsuperscript{225} Indictment, \textit{supra} note 3, at 7, 2 Oil Spill Litig. News at 1049.

\textsuperscript{226} The regulation provides that:

The owner, master, or person in charge of each vessel underway shall ensure that:

(a) The wheelhouse is constantly manned by persons who:

(1) Direct and control the movement of the vessel; and
(2) Fix the vessel's position;

(b) Each person performing a duty described in paragraph (a) of this section is competent to perform that duty.

33 C.F.R. § 164.11 (1991); \textit{see also infra} notes 231-33 and accompanying text.
The government also claimed that Exxon Shipping was liable for Hazelwood's assignment of Third Officer Gregory Cousins to sole control of the bridge, an assignment Cousins was incompetent to perform. The DCA regulation which Exxon allegedly violated is similar to the PWSA regulation, requiring that "[n]o person shall be engaged as a member of the crew on a tank vessel if he is known by the employer to be physically or mentally incapable of performing the duties assigned him."

Exxon Shipping challenged the application of the PWSA to vessel owners in a motion to dismiss. However, the language of the PWSA regulation does not distinguish between the responsibilities of the owner, master, or person in charge, but instead lists all of them. In addition, the government's use of the PWSA seems to accord with its legislative history. The Senate report on the PWSA describes it as urgently needed legislation to cope with the increasing safety hazards of maritime transportation and with pollution resulting from operation and casualties of vessels carrying oil or other hazardous substances in bulk. Comprehensive legislation is needed to protect our coastal waters and resources including fish, shellfish, wildlife, marine and coastal ecosystems and recreational and scenic values. What is most urgently needed is legislation that will put the emphasis on prevention . . . .

228. Id. at 4, 2 Oil Spill Litig. News at 2121.
230. Exxon Shipping's challenge rested on the nineteenth century maritime principle that only the master of a vessel can be held responsible for accidents at sea. Motion of Defendant Exxon Shipping Company to Dismiss Count Four for Failure to Charge an Offense at 14-16, United States v. Exxon Corp., 2 Oil Spill Litig. News (Litig. Reporting Serv.) 1981, 1984 (D. Alaska 1990) (No. A90-015 CR). See, e.g., Butler v. Boston & Savannah Steamship Co., 130 U.S. 527, 554 (1889) ("By virtue of his office and the rules of maritime law, the captain or master has charge of the ship . . . and it was his duty, and not that of the owners, to see that a competent and duly qualified officer was in actual charge of the steamer when not on the high seas."). Of course, the language of the regulation that Exxon is charged with violating explicitly makes both the owner and the master accountable for breaches. 33 C.F.R. § 164.11 (1991); see also infra notes 231-33 and accompanying text. Indeed, as originally formulated, § 164.11 applied only to the "master or person in charge" of the vessel. 41 Fed. Reg. 18,766-69 (1976). However, the final rule included the vessel owner because the owner is in a better position to ensure compliance with the regulation, thereby changing the traditional maritime rule. 42 Fed. Reg. 5956 (1977).
Upholding the plain language of the regulation promotes the goal of preventing oil spills, and the *Exxon* court accordingly refused to relieve the vessel owner of responsibility.\(^{233}\)

In order to obtain felony convictions under either the PWSA or the DCA, therefore, the government had to prove two things: (1) that the crewmembers of the *Exxon Valdez* were incompetent, and (2) that Exxon Shipping *knew* they were incompetent. The Bill of Particulars specifically singles out Captain Hazelwood, Third Mate Cousins and Able-Bodied Seaman Kagan as the crew members whose incompetent actions led to the grounding of the *Exxon Valdez*.\(^{234}\) Captain Hazelwood left Cousins as the only officer on the bridge, against Coast Guard procedure, to navigate the ship through the ice around Bligh Reef.\(^{235}\) At the helm was Kagan, whose personnel records, according to the government, demonstrated "almost unmitigated ineptitude."\(^{236}\) Soon after Hazelwood left the bridge, the oil spill occurred.\(^{237}\)

The government alleged that employees of Exxon Shipping knew of the incompetence of crew members Hazelwood and Kagan, yet assigned them to the *Exxon Valdez* anyway.\(^{238}\) Specifically, the government claimed that Exxon Shipping managers were aware that Hazelwood had an alcohol problem, and that Kagan lacked the necessary skills to perform the duties of a helmsman. Nonetheless, Exxon Shipping failed to relieve either Hazelwood or Kagan of his duties.\(^{239}\) Given the claim that Exxon Shipping's agents had actual knowledge of these inadequacies, the imputation of scienter to Exxon Shipping accords with the usual model of corporate liability.\(^{240}\)

However, the felony case against Exxon Shipping's parent, Exxon, was more problematic. The government admitted in its Bill of Particulars that it was unaware of any Exxon Corporation officers or employees who acted willfully and knowingly to violate regulations under the PWSA or DCA.\(^{241}\) Only the status of Exxon Shipping as Exxon's agent permitted the imputation of Exxon Shipping's knowledge to the parent corporation. The necessity of this series of imputations underscored the attenuated nature of the government's vicarious liability theory.

\(^{233}\) Order (Motions to Dismiss), *supra* note 22, at 34-35, 2 Oil Spill Litig. News at 2288-89.  
\(^{235}\) *DAVIDSON, supra* note 1, at 16-17.  
\(^{237}\) *DAVIDSON, supra* note 1, at 17-18.  
\(^{239}\) Response to Count Four, *supra* note 227, at 15-16, 20-21, 2 Oil Spill Litig. News at 2120, 2124-25. The government did not directly attack Cousins' competence in the same way. However, he was the only officer on the bridge at the time of the accident in violation of Coast Guard procedure. *DAVIDSON, supra* note 1, at 16-17.  
Notwithstanding the problems of the agency theory, the greatest threat to the government’s case under the PWSA and DCA was its own burden of proof: in order to convict both defendants, the government had to prove beyond a reasonable doubt not only that the relationship between Exxon Shipping and Exxon Corporation was so close that criminal acts of the former could be attributed to the latter, but also that Exxon Shipping “knew” that the crew it assigned to the Exxon Valdez was incompetent.\textsuperscript{242} The government’s proposal to demonstrate this scienter through the “cumulative conduct of [Exxon Shipping’s] officers and employees”\textsuperscript{243} would have been quite difficult under the reasonable doubt standard. However, given the uncertainty of a jury verdict and the comparative seriousness of a felony conviction, Exxon also had a strong interest in seeing the felony counts disappear. Hence, in the final settlement between the parties, the government dropped the fourth and fifth counts.\textsuperscript{244}

E. Fines and Deterrence

Given the creative combination of strict liability misdemeanor charges with the Criminal Fine Improvements Act (the CFIA), the felony counts ultimately proved more useful as bargaining chips than as sanctions. Aside from a desire to avoid the risk of felony convictions, why did Exxon and Exxon Shipping agree to plead guilty to a total of four misdemeanor counts and pay a criminal fine of $125 million in its settlement with the federal and state governments?\textsuperscript{245} On their faces, the statutes arrayed against Exxon did not pose much of a financial threat. In fact, if Exxon Corporation and Exxon Shipping both had been found guilty of all five counts, the maximum amount of fines technically would have totalled only $128,000 per defendant.\textsuperscript{246} The answer lies in the Criminal Fine Improvements Act, a federal law which substantially increases the maximum fines that can be imposed by federal judges. The CFIA allows organizations to be fined up to $500,000 for a felony, and up to $200,000 for a misdemeanor, raising each defendant’s maximum

\begin{itemize}
\item \textsuperscript{242} Order (Motions to Dismiss), \textit{supra} note 22, at 13-16, 2 Oil Spill Litig. News at 2278-79.
\item \textsuperscript{243} Bill of Particulars, \textit{supra} note 29, at 3, 2 Oil Spill Litig. News at 3.
\item \textsuperscript{244} See \textit{Final Settlement, supra} note 4.
\item \textsuperscript{245} Exxon Shipping pleaded guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act. Exxon Corporation pleaded guilty only to Count Three, the Migratory Bird Treaty Act. Parrish, \textit{supra} note 20.
liability in this case to $1.6 million. Nevertheless, $1.6 million still pales in comparison to the overall liability Exxon faced.

The true threat that the government, and the district court, held over Exxon in the criminal context derived from another provision of the CFIA, which bases the fine on the pecuniary loss caused by the defendant's criminal act:

If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

Thus, both defendants were potentially liable for twice the costs caused by the spill. Before the settlement, the government indicated that it would base its estimate of the pecuniary loss caused by the spill on the amount of claims paid by Exxon to date. Exxon had spent at least $350 million by March 1990 on the settlement of damage claims, raising the specter of at least $1.4 billion in fines, a $700 million fine per defendant. The possibility of fining each defendant $700 million may explain the government's desire to treat Exxon Corporation and Exxon Shipping separately. A further consideration for Exxon was the district court's discretion to add a restitution order to the fine, which requires the defendant to repay the victim for damages caused by the defendant's crimes. Once again, given the magnitude of the Exxon Valdez spill, the amount of any restitution order could have been huge.

In fact, both of these considerations worked their way into the settlement. The $125 million agreed upon to settle the criminal claims divided into a $25 million fine payable to the federal government and $100 million in restitution to both the state and federal governments for the restoration of Prince William Sound. Since the enhancements possible under the Criminal Fine Improvements Act allow a maximum of only


249. Jeff Berliner, Government Says Exxon Fine Should be Double Spill Damage, UPI, Mar. 1, 1991, available in LEXIS, Nexis Library, UPI File; see also Exxon Oil Spill Trial Date Set for Oct. 7, REUTERS, June 11, 1991 available in LEXIS, Nexis Library, Reuters File. The government's choice to measure damages according to the damage claims paid by Exxon offers the advantage of certainty, but was by no means the only option available. Using natural resource damages as the measure could have produced a much higher fine. Telephone Interview with Eric Jorgensen, Managing Attorney, Sierra Club Legal Defense Fund, Juneau, Alaska (Sept. 25, 1991) [hereinafter Jorgensen Interview].

250. 18 U.S.C.A. § 3663 (1985 & West Supp. 1991). "The court...may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense." Id. § 3663(a)(1).

251. Final Settlement, supra note 4.
$1.6 million in fines, the settlement negotiators must have considered the Act's pecuniary loss provision in agreeing to the $25 million fine. Furthermore, the $100 million designated for the restoration of natural resource damages could be awarded only by using the court's power of restitution.

The history of using the CFIA in criminal environmental prosecutions is sparse. However, the groundwork for the use of this statute in the Exxon Valdez case was laid in United States v. Ashland Oil, Inc. After pleading no contest to violations of the CWA and the Refuse Act, Ashland Oil was fined $2.25 million for a spill of over 700,000 gallons of diesel fuel into the Monongahela and Ohio Rivers. The CFIA has been employed in only one other unreported oil spill case, United States v. Ballard Shipping Co. In that case, not only was the defendant fined $500,000 for pleading guilty to one count under the CWA, but a further restitution order of $500,000 payable to Rhode Island was imposed.

The huge size of fines under the CFIA, especially when combined with the prospect of strict liability criminal convictions, raises serious questions about the propriety of the criminal case against Exxon. After all, the Eighth Amendment of the Constitution prohibits the imposition of "excessive fines," and $700 million per defendant for the commission of misdemeanors arguably falls in this category. In Solem v. Helm, the United States Supreme Court commented that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." However, the Supreme Court recently overruled Solem v. Helm, explicitly holding that "the Eighth Amendment contains no proportionality guar-

252. Technically, the fine portion of the settlement totalled $250 million, with $125 million forgiven in consideration of Exxon's substantial cleanup efforts. Id.
254. Arndt, supra note 132; see also supra notes 130-32 and accompanying text.
258. U.S. CONST. amend. VIII.
259. Surprisingly, the Supreme Court has never squarely examined a criminal fine to see if it could be termed "excessive." However, the Excessive Fine Clause has been held not to apply to awards of punitive damages in cases between private parties. Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257, 262 (1989).
260. 463 U.S. 277, 284 (1983) (holding that a sentence of life imprisonment for bouncing a check where defendant had other types of prior criminal convictions violated Eighth Amendment), overruled by Harmelin v. Michigan, 111 S.Ct. 2680 (1991); see also United States v. Busher, 817 F.2d 1409, 1414-15 (9th Cir. 1987) (noting that forfeiture penalty under RICO statute may exceed constitutional bounds in some cases where grossly disproportionate to the offense committed).
Thus, the government's use of the CFIA in the *Exxon* case seems to pose no constitutional problems.

The question of proportion remains central from a policy standpoint, however, in considering the legitimacy of the fines imposed for the nation's largest environmental disaster. Estimates of the damage done by the *Exxon Valdez* oil spill vary wildly, though some run as high as $15 billion.262 In addition, the spill occurred in the course of an activity—oil production—which has proved extremely profitable for Exxon. Coincidentally, on the same day the district court rejected the original settlement, Exxon announced that it had earned $2.2 billion in profit during the first quarter of 1991.263 Since Exxon is in the best position to prevent oil spills, and it profits from the exploitation of a public resource, perhaps it should suffer the consequences of its mistakes.264 In light of these considerations, fines as high as $1.4 billion do not necessarily seem excessive or disproportionate.

More troubling is the prospect of imposing a megafine on Exxon for the commission of only a misdemeanor. The Criminal Fine Improvements Act does not distinguish between misdemeanors and felonies for purposes of the special measurement employed in this case.265 Yet courts often distinguish felonies from misdemeanors, recognizing that the former type of conviction carries particular social stigma and involves higher penalties.266 In addition, the lack of a mens rea requirement under the Refuse Act and the MBTA flies in the face of the usual conception of criminal law.267 The *Solem* Court specifically identified "the culpability of the offender" as a factor that courts may employ in determining an appropriate sentence, and the Court assumed that "[m]ost would agree that negligent conduct is less serious than intentional conduct."268 Yet in this case, Exxon and Exxon Shipping could conceivably each have been found guilty of a misdemeanor for causing

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263. *Fine Rejected*, supra note 13. Also of note were the remarks of Lawrence Rawl, Exxon's chairman, when the settlement originally was announced. Rawl predicted that the $1.1 billion settlement, which included the $100 million fine, would "not have a significant effect on our earnings." *Id.*
264. Jorgensen Interview, supra note 249.
266. See, e.g., United States v. Wulff, 758 F.2d 1121, 1122 (6th Cir. 1985); supra notes 209-10 and accompanying text.
the death of migratory birds under the MBTA, without a showing of either intent or negligence, and they then could have faced fines totalling $1.4 billion.269

On the other hand, the special facts of the Exxon Valdez case may mandate that a large fine be levied in order to serve the goals of criminal punishment. Only a large fine can effectively achieve retribution and deterrence.270 The United States brought its criminal suit against Exxon at least partially in response to the public outcry over the spill.271 The decision to respond decisively in this particular case undoubtedly stemmed in large part from the notoriety of the Exxon Valdez incident. A large fine could help soothe public outrage, satisfying the perceived need for revenge through restitution.

In addition, the imposition of a large fine may mean that oil companies will take more precautions to avoid oil spills.272 The deterrence rationale served as the primary basis for Judge Holland's rejection of the original plea bargain between Exxon and the government: "[T]he fines which the agreement proposes to be imposed do not adequately achieve deterrence. I am afraid this fine sends the wrong message, suggesting that spills are a cost of business which can be absorbed."273 The availability of strict liability criminal statutes increases this deterrence effect.274 Yet in the end, Judge Holland accepted a renegotiated settlement which increased the criminal fines by only $25 million.275 In announcing his decision, Judge Holland called Exxon "a good corporate citizen," referring primarily to Exxon's cleanup efforts.276 The decision does not seem to square with the court's earlier concern over the adequacy of the settlement's deterrence effect, nor does the government's acquiescence to

269. One comment submitted to the Commerce Department by a Washington state resident criticized the settlement on exactly this point: "'Certainly no jury in the world is going to convict Exxon of bird hunting without a license, and fine 'em a $100 million.'" Rejection of Exxon Criminal Plea Bargain Casts Doubt on $1 Billion Civil Settlement, Daily Report for Executives (BNA) No. 81, at A27 (April 26, 1991). However, since the MBTA, as well as the Refuse Act, are strict liability statutes, the chances of conviction were high. Furthermore, the judge, not the jury, imposes the fine. Under the CFIA, the $1.4 billion fine could have been imposed regardless of which counts were involved.


271. Interview with John P. Dwyer, Professor of Law, School of Law (Boalt Hall), University of California at Berkeley, in Berkeley (Sept. 17, 1991); see also Paul Roberts, Exxon and the High Cost of Injustice, WASH. TIMES, Oct. 7, 1991, at D3.

272. Letter from Natural Resources Defense Counsel (and nine other environmental groups) to Walter J. Hickel, Governor of Alaska (and seven other state and federal officials) 1-2 (Sept. 26, 1991) (A huge fine "would be more commensurate with the damage done, and would send a stronger message to other polluters as well.") (on file with author).

273. Imposition of Sentence, supra note 13, 3 Oil Spill Litig. News at 3191.


275. Final Settlement, supra note 4.

276. Parrish, supra note 20.
a relatively insignificant increase in the settlement mesh with its earlier aggressiveness. Considering the maximum fines which Exxon faced, a fine of only $125 million arguably undermines much of the creative legal strategy displayed by the government in the Exxon prosecution. However, when the settlement is viewed in its political context, and its place in the history of environmental criminal prosecution is considered, its importance grows.

III

CONCLUSION

Political considerations ultimately made the settlement more palatable to all the parties. Both federal and state officials, including the Governor of Alaska, had publicly expressed their desire to resolve the Exxon litigation. As one commentator put it, "There is no logical connection between the magic number of $1 billion and the costs of ecological restoration efforts or the proposed scientific investigations. One billion dollars is simply the minimum political ante in Washington." On a more practical note, the settlement avoided the pitfalls of protracted litigation. The government, for example, believed "that the restoration of Prince William Sound and the Gulf of Alaska should not await years of legal battles over damages and liability." Exxon itself was anxious to dispense with the criminal trial, which could have been a public relations disaster. In addition, controversy over the Exxon Valdez oil spill could have severely hindered the oil industry's attempt to convince Congress to open the Arctic National Wildlife Refuge to oil exploration.

Judge Holland's apparent reversal is difficult to explain. Perhaps the judge realized that both sides lacked the desire to bargain any further, and that the interests of all parties (not least the American taxpayer) would best be served by avoiding years of costly and indeterminate litigation. In addition, the final settlement provided Alaska natives, fishermen and other independent parties legal assurances, absent in the original agreement, that the settlement would not affect

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277. In fact, the final settlement is actually worth less than the original after taxes and adjustment for inflation. This stems in part from the increase in the criminal restitution order, which unlike regular fines, is tax deductible. Study Says Exxon Will Pay Less in New Spill Pact, N.Y. TIMES, Oct. 13, 1991, at 27.

278. Keith Schneider, Exxon to Pay Higher Criminal Fines in New Pact to Settle Valdez Claims, N.Y. TIMES, Oct. 1, 1991, at A14. For example, Alaska Governor Walter J. Hickel stated, "What we don't want to do is spend years fighting this case in court. [The settlement] looks good to me, and I don't really know what else we can do." Id.


281. See Jeffreys, supra note 279.

282. Jorgensen Interview, supra note 249.
their suits against Exxon.283 Given the pressures to settle and the new protections for independent claims, Judge Holland approved the settlement, and the criminal case against Exxon ended.

But what does the Exxon Valdez case mean for future environmental criminal cases? In light of the government’s successful argument for expanded agency liability, future environmental criminal prosecutions will likely seek to hold parent corporations criminally liable for the acts of their wholly owned subsidiaries. The relative ease with which the court accepted the concept that Exxon Corporation should bear responsibility for Exxon Shipping Company’s actions suggests a fundamental change in the way corporate forms will be treated, especially where matters of public welfare are at stake. Similarly, the public nature of the environmental crimes in the Exxon Valdez oil spill emphasized the ripeness of environmental cases for using strict liability statutes. Exxon’s guilty pleas, though without the precedential force of a trial, will heighten the consciousness of the corporate community to the existence and power of strict liability environmental laws.

Aside from the expanded legal doctrines of agency and strict liability, three further lessons can be drawn from the Exxon Valdez experience. First, the size of the fine settled upon bolsters the government’s credibility in this nascent area of criminal law. As has been demonstrated, the fine in this case could theoretically have been much higher.284 Yet the fact that the $125 million fine in this case surpasses the total of all previous environmental prosecutions must not be overlooked. As the government asserted, “By any measure, the fine in this case is off the charts.”285 Indeed, the fact that the fine could have been larger has been little consolation to conservative commentators, who fret that strict liability environmental crimes represent “a radical trend that places environmental values above traditional standards of justice.”286 Hence, although the amount of the fine could have been greater, it retains the appearance of substantiality, which for purposes of deterrence is of course crucial. In addition, this case may have opened the door for even larger fines in the future.

Second, the Exxon Valdez case illustrates the growing trend toward punishing irresponsible environmental behavior with criminal sanctions. As former Attorney General Richard Thornburgh has written, “Criminal enforcement of environmental laws is not merely a goal, it is a priority—one that has been developing progressively over the past two
Indeed, total environmental penalties imposed by the federal government, which did not exceed $1 million in any year until 1986, grew to $30 million in 1990. Hence, though the size of the Exxon Valdez oil spill and its resulting fine are unprecedented, the case follows a pattern, as advertised by the Department of Justice, of more vigorous criminal enforcement. This trend did not arise in a vacuum, but is a response to increased public awareness and concern over environmental damage. The Exxon Valdez case is emblematic of the heightened priority the public now places on environmental values.

Finally, the Exxon Valdez settlement demonstrates that though it has the tools to impose massive criminal fines through strict liability offenses, the government will probably not press forward with reckless criminal prosecutions. Strict liability crimes challenge the traditional requirement of intent in criminal cases, and the government’s use of such statutes as the Migratory Bird Treaty Act in the Exxon Valdez case led one commentator to assert that “[b]y distorting the law, the Justice Department injures the concept of ‘justice’ more severely than the oil spill injured the coastline of Prince William Sound.” Yet contrary to this assertion, the government did not blindly apply criminal sanctions. Instead, the government acknowledged Exxon’s “substantial efforts,” estimated at $2.5 billion, to remedy the spill. The government cited these efforts as its reason for not seeking an even higher fine, thus “sending a message to the public that the government will take into account steps voluntarily taken by responsible parties to correct the consequences of acts that constitute environmental crimes.” The Exxon Valdez case therefore represents not only the growing importance of criminal prosecutions in environmental enforcement, but the reconciliation of environmental values with other realities.

In the absence of well developed statutory or case law for dealing with environmental crimes, the government molded existing law in an attempt to fashion an effective deterrent. From agency theory to strict liability, and from extension of the Clean Water Act to the Criminal Fine Improvements Act, the government built a house of cards which, for the most part, worked. Yet a question remains: Why pursue a criminal rather than a civil case? A $125 million fine “is a drop in the bucket” for a corporation like Exxon, and in fact any fine may be insufficient to give oil companies a credible economic incentive to improve the safety precautions they take. The answer is not so much economic as it is social.

287. Thornburgh, supra note 247, at 776.
289. Jeffreys, supra note 279.
291. Jorgensen Interview, supra note 249.
In the criminal context, the message sent is not simply that oil spills are an unwise business practice, but that oil spills are not acceptable behavior. In the absence of statutes which explicitly criminalize oil spills, only further creative aggressiveness can impress the importance of environmental issues on corporations like Exxon.