# Environmental Enforcement Excesses: Overcriminalization and Too Severe Punishment

by Benjamin S. Sharp

*Editors' Summary: Congress created the U.S. Sentencing Commission in 1984 to eliminate the disparity in sentences for federal criminal offenses by reducing judicial discretion to vary from prescribed sentences for each stated offense. In May 1991, the Commission forwarded to Congress proposed sentencing guidelines for organizational offenses. The Commission has expressly stated that the proposed organizational guidelines do not apply to environmental offenses, yet the sentencing guidelines for organizational offenses raise material issues concerning violations of environmental statutes.*

*This Article examines whether punishing some environmental offenses as criminal is likely to deter socially desirable behavior and to inhibit conduct that is environmentally beneficial. The author argues that imprisonment for environmental offenses places too much emphasis on the utilitarian value of general deterrence while displacing retributivist concepts of moral culpability and proportionality. The author concludes that the sentencing guidelines for environmental offenses should be amended to decrease their severity and to encourage mitigation or restoration instead of imprisonment. Further, the author argues that criminal prohibitions in the environmental statutes are overinclusive and that only the wise exercise of prosecutorial discretion will cure this overinclusiveness. Reducing judicial discretion to impose sentences tailored to the offender's particular circumstances has shifted the choice of penalty to the prosecutor and heightens the necessity for prosecutors to weigh demonstrable environmental harm against the need to punish and deter morally culpable behavior.*

Congress and administrative agencies have regularly amended and revised environmental laws and regulations, with the effect of increasing the penalties for environmental offenses. The statutes have been changed to provide for longer periods of imprisonment and greater monetary penalties for virtually any violation of environmental regulations. The prevailing enforcement policies of the U.S. Department of Justice and the U.S. Environmental Protection Agency (EPA) favor criminal enforcement through slavish adherence to the theory of general deterrence.

This Article argues that once enforcers elect to proceed with criminal prosecution, the sentencing guidelines for environmental offenses mandate unduly harsh penalties. Consequently, some infractions of environmental regulation are treated as criminal behavior when they should not be, and many criminal infractions are punished too severely relative to other federal offenses or the harm to society. This trend is perverse. The commitment to criminalization too often sacrifices such socially desirable goals as remediation of environmental harm and implementation of initiatives to benefit the environment. Moreover, overcriminalization and excessive punishment are themselves harms to society.

The excesses of enforcement are illustrated by categories of environmental offenses that simply are not well suited for harsh punishment or effective deterrence:

a) punishment of bad attitudes, which is not based on environmental harm;

b) offenses lacking evident moral culpability but punishable on theories of negligence, strict liability, or reduced standard of intent; and

c) technical violations that criminalize beneficial conduct in the name of harmful potential.

The fairness and efficacy of environmental enforcement would be measurably improved if Congress amended the sentencing guidelines for environmental offenses to decrease their severity and to allow mitigation instead of imprisonment for many offenses. Amendment of the guidelines is necessary but not sufficient to cure the problem. Prosecutors ought to determine, in the exercise of prosecutorial discretion, whether to proceed criminally by ascertaining the extent of demonstrable environmental harm, moral culpability, the likelihood of general deterrence, and a preferred disposition. Various formulations of the factors to be considered in the exercise of prosecutorial discretion already include some or most of the questions listed above.[1] Yet, these factors often are misunderstood or ignored by prosecutors.

## The System Favors Punishment by Imprisonment

### *The Statutes and the Prosecutor*

Unlike common law criminal offenses, environmental laws use a wholly statutory scheme to address white collar crime.

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1. *See, e.g.*, EPA, Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies 4-5 (Aug. 28, 1987).

The statutes set forth a complex web of regulatory prohibitions, and violating any single prohibition may state a criminal offense if the violation is committed with the requisite level of knowledge or intent. As each of the statutes covering specific environmental media (i.e., land, water, and air was initially enacted) it contained either no criminal penalties or only misdemeanor penalties. Through subsequent amendment, Congress has uniformly shown a desire to increase the severity of punishment by adding criminal provisions or changing the penalties from misdemeanors to felonies.[2] Currently almost all environmental statutes have criminal provisions, although some carry only misdemeanor penalties.

Also unlike common law criminal offenses that prohibit specific acts, environmental statutes often provide for criminal penalities for *any* violation of regulations. The statutory breadth is thus overinclusive and sweeps within the criminal prohibition regulatory infractions that should seldom or never be subject to criminal sanction.

The criminal provisions of the Federal Water Pollution Control Act (FWPCA) are typical of the inclusive nature of the prohibition. For example, §309(c)(2)(A) of the Act lumps together a myriad of regulatory infractions of disparate severity and public concern and treats them the same.[3] Notice to the potential offender is complex and unclear, since one must comprehend the entire regulatory system to know what conduct is prohibited. Further, the argument that criminal procedure and the requirement of proof in traditional standards of criminal intent prevent abuse of prosecutorial discretion under this statute is unconvincing. FWPCA §309(c)(1) provides for a crime of negligently violating any of the regulatory provisions included in §309(c)(2).[4] Moreover, §309(c)(6) defines the "person" who may be held liable by these criminal provisions as including "any responsible corporate officer," a concept that arguably makes these strict liability crimes.[5]

While the congressional trend toward toughening penalties for environmental offenses is clear, discretion for bringing criminal charges remains solely with the prosecutor. There is little doubt that federal and state environmental enforcement officials strongly support criminal prosecution of environmental offenses based on the belief that criminal prosecution and stiff penalties directly deter the commission of similar offenses. Virtually every utterance by enforcement officials trumpets that intention and a belief in the efficacy of deterrence through criminal enforcement. An example of this policy is found in a 1987 statement of then U.S. Assistant Attorney General for Land and Natural Resources: "It has been, and will continue to be, Justice Department policy to conduct environmental criminal investigation with an eye toward identifying, prosecuting, and convicting the highest ranking truly responsible corporate officials."[6]

Similarly, a 1987 EPA memorandum states that the major value of criminal prosecution in an environmental enforcement context is its ability to deter others from doing the same type of act for fear of being prosecuted themselves.[7] This enforcement policy holds that for deterrence to be effective, others similarly situated must become aware of the prosecution. Further, in a recent article, Paul Thompson, EPA's Deputy Assistant Administrator for Criminal Enforcement, stated that "[j]ail time is one cost of doing business that cannot be passed along to the consumer. That makes the EPA criminal enforcement program an effective deterrent . . . ."[8] Each year the U.S. Department of Justice publishes its environmental crimes conviction record, showing ever-increasing numbers of indictments, pleas and convictions, fines imposed, and jail terms sentenced.[9]

It is undebatable that both Congress in writing the statutes, and the Executive Branch in administering them, have chosen criminal enforcement for environmental offenses as the preferred remedy for addressing environmental problems.

### *The Sentencing Guidelines*

Congress enacted the Comprehensive Crime Control Act in 1984,[10] creating a Sentencing Commission charged to write numeric guidelines to control the sentencing of individuals convicted of any federal criminal offense.[11]

It is not entirely clear who ultimately bears responsibility for the sentencing guidelines—Congress for enacting legislation creating a Sentencing Commission, the independent Commission for writing guidelines covering environmental offenses, or the U.S. Department of Justice and EPA for ghostwriting or recommending the appropriate guidelines for environmental offenses. In any event, Congress may

2. Some examples illustrate the point: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675, ELR STAT. CERCLA 001-075, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), converted existing misdemeanor provisions into felony offenses. The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6992k, ELR STAT. RCRA 001-050, was amended in 1984 to convert misdemeanor provisions into felony offenses and to add additional felony offenses. The Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§1251-1387, ELR STAT. FWPCA 001-071, was amended in 1987 to change existing penalties from misdemeanors to felonies and to add additional felony provisions. The Clean Air Act, 42 U.S.C. §§7401-7671q, ELR STAT. CAA 1-186, was amended in 1990 to convert misdemeanor offenses to felony offenses and to add additional felony offenses.

3. FWPCA §309(c)(2)(A) reaches any person who knowingly violates §§301-302, 306-308, 311(b)(3), 318, or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued. 33 U.S.C. §1319(c)(2)(A), ELR STAT. FWPCA 039.

4. 33 U.S.C. §1319(c)(1), ELR STAT. FWPCA 039 (citing 33 U.S.C. §1319(c)(2), ELR STAT. FWPCA 039).

5. 33 U.S.C. §1319(c)(6), ELR STAT. FWPCA 041. The responsible corporate officer doctrine was enunciated in United States v. Park, 421 U.S. 658 (1975). The Court concluded that it was appropriate to hold criminally liable without specific intent those corporate officers in a position to prevent or correct unsafe conditions in industries whose services and products affect the health and safety of the general public. The doctrine migrated to the environmental laws through judicial decision, United States v. Johnson & Towers, 741 F.2d 662, 14 ELR 20634 (3d. Cir. 1984), *cert. denied sub nom.* Angel v. United States, 469 U.S. 1208 (1985), and by statute in 1987.

6. Habicht, *The Federal Perspective on Environmental Criminal Enforcement*, 17 ELR 10478, 10480 (Dec. 1987).

7. EPA, ENVIRONMENTAL CRIMINAL CONDUCT COMING TO THE ATTENTION OF AGENCY OFFICIALS AND EMPLOYEES (Sept. 21, 1987).

8. Thompson, *Doing Time for Environmental Crimes*, ENVTL. F., May-June 1990, at 32-33.

9. Rich, *Getting Tough on Environmental Crime*, RESOURCES, Oct. 1989, at 9, 11.

10. 28 U.S.C. §§991-998 (1982 & Supp. 1987).

11. The sentencing guidelines raise many issues concerning environmental offenses that are beyond the scope of this Article. *See* Sharp & Shen, *The (Mis)Application of Sentencing Guidelines to Environmental Crimes*, 5 TOXICS L. REP. (BNA) 189 (July 11, 1990).

have had an ill-conceived idea in requiring that the guidelines be drafted, but it did not mandate that the Commission draft bad guidelines or accept poor proposals from enforcement agencies.

By all assessments, the guidelines significantly increase penalties for environmental offenses over punishments given before the guidelines' effective date. It is more likely than not that environmental offenders will receive a term of imprisonment if convicted. Violations that result in or involve a substantial likelihood of death or serious bodily injury will almost always be punished by imprisonment. Those violations that do not pose such a threat but are knowingly committed will usually be punished by imprisonment. Negligent violations, without a departure from the guidelines, are likely to be punished with some term of imprisonment.

The Comprehensive Crime Control Act instructed the Sentencing Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ."[12] It is questionable whether a misdemeanor violation or a felony violation that does not entail a threat to public health or safety should be considered a "crime of violence or otherwise serious offense." Yet, the guidelines call for imprisonment, and judges have imprisoned first offenders convicted of such offenses.

Whether the sentencing guidelines provide for appropriate levels of punishment or are generally too severe must be answered under specific fact patterns.[13] For purposes of this Article, it is enough to note that the guidelines make no provision for alternatives to incarceration for individual offenders and are silent on the issue of remediation or mitigation of environmental harm. Once a prosecutor elects to proceed criminally, the flexibility to consider dispositions other than imprisonment is essentially gone. Thus, the court, prosecutor, and defendant are severely constrained in creative efforts to achieve a disposition, whether through a plea agreement or after trial.

By reducing judicial discretion to impose sentences tailored to the particular circumstances of the offender, the guidelines have to a significant degree shifted the choice of penalty to the prosecutor.[14] The exercise of prosecutorial discretion to proceed with criminal rather than civil charges or to charge a felony rather than a misdemeanor—all are possible for identical violations—effectively gives the prosecutor the choice of remedies. Although some courts have questioned this shift of power from the judicial to the executive department, no constitutional challenge has been upheld.[15] Paradoxically, the shift of power to the prosecutor maintains the very disparity of treatment the guidelines were designed to avoid.

The Commission recently met its May 1, 1991, statutory deadline by forwarding to Congress sentencing guidelines for organizational offenses. The guidelines automatically become effective November 1, 1991, unless Congress revises them or votes to reject them. Since an organization cannot be jailed, the primary sanction of the organizational guidelines is a criminal fine. The basic referent for choosing an appropriate fine from a fine table is the offense level determined under the sentencing guidelines for individuals. The Commission has expressly stated that the proposed organizational guidelines do not apply to environmental offenses.[16] This is so, in some measure, because the Commission acknowledges that the environmental guidelines applicable to individuals require revision.

## Harms

It is easy to posit types of conduct detrimental to the environment where addressing the environmental harm may be socially preferable to punishing the offender. In some cases, the government might choose to forego punishment or find that criminal prosecution is compromised if it is attempted after remediation is accomplished. In other cases, a parallel civil or administrative action and a criminal investigation may be possible, but this process is fraught with so many difficulties that prosecutors generally wish to avoid it.[17]

Presumably, if the prosecutor recognizes an imminent threat to health or safety caused by the environmental harm, civil or administrative relief may be sought first, even if it jeopardizes the criminal case.[18] Subordination of the criminal case is the exception, however. The exception demands a high standard, yet the decision will be made by a prosecutor with less technical expertise than desirable for assessing imminent risk to health, safety, or the environment. The decision also must be made at an early stage in the fact-

12. 28 U.S.C. §994(j).

13. There is strong evidence that the guidelines applicable to environmental offenses provide for severe penalties. For example, §2Q1.1 (Knowing Endangerment Resulting from Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) provides for a sentence of 51-63 months in jail for a first offender, if no injury occurred. If death or serious bodily injury resulted, the sentence could be up to 15 years. Section 2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) provides for a sentence of between 21-33 months for knowingly placing topsoil without a permit on private property containing wetlands. *See* United States v. Pozsgai, No. 88-00450 (E.D. Pa. 1989), *aff'd*, 897 F.2d 524 (3d. Cir. 1990), *cert. denied*, 111 S. Ct. 48 (1990) (27 months); United States v. Mills, No. 88-03100 (N.D. Fla. 1989), *aff'd*, 904 F.2d 713 (11th Cir. 1990) (21 months).

14. The objection of federal trial judges to this change from historical practice has been quite strong. *See, e.g.*, United States v. Rodriguez, 724 F. Supp. 1118, 1122 (S.D.N.Y. 1989).

15. Mistretta v. United States, 488 U.S. 361 (1989), upheld the guidelines in the face of a separation of powers challenge. Some lower courts have questioned the "de facto transfer" of sentencing power to the prosecutor on due process grounds. United States v. Smith, 727 F. Supp. 1023 (W.D. Va. 1990); United States v. Roberts, 726 F. Supp. 1359 (D.D.C. 1989), *rev'd*, 1991 U.S. App. Lexis 1857 (D.C. Cir. 1991).

16. United States Sentencing Commission, Guidelines for Sentencing of Organizations, §8C2.1.

17. The Environment and Natural Resources Division of the U.S. Department of Justice is the division with authority over criminal environmental issues. The Division's Directive 5-87, Guidelines for Civil and Criminal Parallel Proceedings (Oct. 13, 1987) [hereinafter Directive 5-87], mandates that criminal matters precede civil actions "because of Speedy Trial Act considerations, the more substantial deterrent and punitive effects of criminal sanctions, because courts may reduce criminal sentences after civil penalties have already been imposed, and because conviction in a criminal case can be used as collateral estoppel . . . ." *See* Marzulla, *Lands Division Confronts the Emerging Need for Civil and Criminal Environmental Enforcement*, Nat'l Envtl. Enforcement J., Dec. 1987-Jan. 1988, at 3.

18. Directive 5-87, *supra* note 17, recognizes an exception to the criminal priority if "violations are ongoing and of such concern to the public health or environment . . . ."

gathering process or once the criminal investigation has acquired a life of its own. The policy subordinates present environmental concerns to the goal of deterring future environmental harm. Even the EPA civil penalty policy places resolution of the environmental problem as the third goal behind the first goal of deterrence.[19]

What available remedies may be sacrificed by government policies that fixate on deterrence through criminal prosecution and mandatory sentencing guidelines? The short answer is the full range of negotiable remedies available in civil and administrative dispositions, including restoration, mitigation, land swaps, deeding of land affected, conservation easements, covenants for public access, and educational programs. These remedies may now be available for corporate violations and some individual violations. If the system will not permit these remedies as substitutes for imprisonment or as a ground for substantially reducing punishment, the individual offender will not or cannot pursue them.

Several cases illustrate possible remedies that place redress of current environmental harms as a higher priority than punishment. In *United States v. Key West Towers,*[20] violations of the FWPCA involving discharge of fill material into a pond and adjacent wetlands were remedied by reducing the fine assessed in return for the defendant's deeding the pond and a buffer zone to a public charity. In substituting mitigation for the fine, the court justified its decision based on its "primary concern of protecting the pond and providing a pollution-free habitat for the migratory birds and wildlife."[21] A similar benefit was achieved in *United States v. Cumberland Farms of Connecticut,*[22] where $390,000 of a $540,000 fine was remitted, conditioned on completed restoration of wetlands.

*United States v. Lambert*[23] demonstrates quite clearly the tension between the objectives of criminal deterrence and mitigation. Pursuant to a plea agreement, Lambert restored wetlands filled on his own property, deeded five areas of woodland to the state, paid a $20,000 fine, and was placed on probation. The case is noteworthy because it involved conduct occurring before the effective date of the guidelines and the defendant was intentionally charged and pled to allow a preguidelines disposition. It is highly probable that under the sentencing guidelines and current government policy, Lambert would have been imprisoned. If he were imprisoned, what would have been the fate of the filled wetlands or the likelihood that the state would have obtained title to valued land?

That question was answered by *United States v. Pozsgai.*[24] John Pozsgai was imprisoned for the same offense, filling wetlands on his own property. Pozsgai, an auto mechanic, was sentenced to 27 months and fined $200,000 under the sentencing guidelines. After he serves 27 months, without parole, and pays the fine, he must restore the filled wetlands as a condition of probation. One might reasonably ask why, if the wetlands are so valued as to require 27 months imprisonment for harming them, is their restoration subordinated to a relative afterthought that is of doubtful accomplishment.

These examples of remedies that place redress of current environmental harms as a higher priority than punishment lead to several conclusions. First, there are instances where an environmental violation will pose health and safety threats that require that remediation of the harm take precedent over punishment of the offender. Second, there are other violations, where there may be no health or safety risk, for which the inherent environmental values suggest that restoration of the harm may be a higher priority than punishment of the offender. Third, in many, if not most, instances, proceeding with criminal prosecution will subordinate present environmental values to the benefits of prevention of future harms through deterrence. This dilemma requires at least a cursory review of the philosophical underpinnings of concepts of general deterrence.

Historically, rationales or justifications for criminal punishment have included retribution, general deterrence, special deterrence, incapacitation, and rehabilitation.[25] One renowned academic, H. L. Packer, concluded:

> In my view, there are two and only two ultimate purposes to be served by criminal punishment: the deserved infliction of suffering on evil doers and the prevention of crime. It is possible to distinguish a host of more specific purposes, but in the end all of them are simply intermediate modes of one or the other of the two ultimate purposes. These two purposes are almost universally thought of as being incompatible; and until recently, moral philosophers, who are the arbiters as well as the combatants in this struggle, have tended to assume that one or the other of these purposes must be justifiable to the exclusion of the other. My main point here is that, not simply as a description of existing reality but as a normative prescription for legal action, the institution of criminal punishment draws substance from both of these ultimate purposes; it would be socially damaging in the extreme to discard either.[26]

Whether one generally accepts Packer's conclusion, it is clear that punishment of environmental offenses, and even most white collar crimes, cannot be justified on the grounds of incapacitation, rehabilitation, or, probably, specific deterrence. The question remains whether the retributive or deterrent rationale, or both, justifies imprisonment for environmental offenses.

19. EPA, Policy on Civil Penalties, Feb. 16, 1984, ELR Admin. Materials 35083.

20. 720 F. Supp. 963, 20 ELR 20005 (S.D. Fla. 1989).

21. Id. at 966, 20 ELR at 20006.

22. 644 F. Supp. 319, 17 ELR 20301 (D. Mass. 1986), *aff'd,* 826 F.2d 1151, 17 ELR 21270 (1st Cir. 1987).

23. No. 89-53-01 (D.N.H. 1990).

24. No. 88-00450 (E.D. Pa. 1989), *aff'd,* 897 F.2d 524 (3d. Cir. 1990), *cert. denied,* 111 S. Ct. 48 (1990).

25. H.L. Packer, The Limits of Criminal Sanction 35-58 (1968). Packer defines each rationale: Retribution "rests on the idea that it is right for the wicked to be punished: because man is responsible for his actions, he ought to receive his just deserts." *Id.* at 37. General deterrence is premised on the thought that more good will result from inflicting punishment than withholding it; that good is the prevention or reduction of more crime through example. *Id.* at 39. Special deterrence is the concept that punishment reduces or eliminates the propensity to commit future crimes by the person being punished. *Id.* at 45. Incapacitation restrains the offender during the period of imprisonment and thus behaviorally prevents the individual from committing crime. *Id.* at 48. Rehabilitation is a second form of behavioral prevention that posits that by changing the personality of and reforming the offender, he will conform to the dictates of law. *Id.* at 53.

26. *Id.* at 36-37.

Government policy favoring criminal punishment for environmental offenders appears wholly predicated on the theory of general deterrence. The theory has ancient origins, traceable to Greek philosophy and the Bible.[27] Its purist utilitarian form holds that individuals are punished solely for the good of society. Since there is a single purpose of punishment, society need not be concerned with the culpability of the offender or, at least in principle, with making punishment proportionate to the offense. After all, deterrence is achieved if society believes an entirely innocent offender committed the offense and the offense is punished. Guilt and innocence are irrelevant to general deterrence. The more severe the punishment, the greater the deterrence, so punishment that is proportionate to the gravity of the offense is also of little moment to the utilitarian.

Pure utilitarianism is generally seen as objectionable because it would justify unfair results of punishing the innocent or too harshly punishing those guilty of minor offenses. One classical utilitarian, Jeremy Bentham, sought to answer the objection that punishment was not proportional to guilt, by imposing a form of cost/benefit analysis to assure that punishment would be inflicted only when it is worthwhile or profitable to do so. Society would not punish if the sum of the harm it causes is greater than the crime it seeks to prevent.[28] If we could do the calculation Bentham requires, we could avoid disproportionately harsh punishment for minor offenses. Even so, the theory does not answer the objection to punishing the innocent as a means of deterring others.[29]

The other theory of punishment, retributivism, may be defined as "the application of the pains of punishment to an offender who is morally guilty."[30] Retributivism is often explained as an expression of society's need for revenge and the criminal's need to atone for his crime.[31] Punishment is no more or less than that which is deserved for the offense. The retributivist requires a correlation between punishment and desert and a moral fit between the amount of punishment and the crime. The difficulty in application of the theory is in the ranking of wrongful acts in order of their moral gravity and punishments in order of their severity.[32] The theory is generally criticized on the ground that revenge is a morally bankrupt justification for punishment and that the theory ignores both the needs of the offender and the needs of society.[33]

Neither theory alone works to justify imprisonment for environmental offenses. The problem is that too little attention is paid to retributivist concepts of moral culpability and proportionality, while too much emphasis is placed on the utilitarian value of general deterrence. In addition, some offenses punished as criminal are likely to deter socially desirable behavior or to inhibit conduct that is not environmentally harmful. The following section recites several examples where the actual punishment fails to fit the theory of punishment.

## Categories of Environmental Offenses That Should Not Be Severely Punished

The examples given here are intended to be hypothetical unless a case is cited. Many of the hypotheticals are from actual cases that were resolved by one means or another with little public disclosure.

### *The Punishment of Bad Attitudes Rather Than Environmental Harm*

Wetlands cases are unlikely to be prosecuted criminally unless there is a government perception that the offender ignored advice to obtain a permit or showed disrespect for authority—specifically the Army Corps of Engineers. Criminal intent is derived almost wholly from the defiance of authority, and the defiance, not the environmental harm, dictates which cases involve criminal behavior.

The typical wetlands case involves the placement of nontoxic, nonhazardous fill material (i.e., topsoil) on private property to enhance the owner's use of this property. The owner receives notice, either orally or through the issuance of a cease and desist letter, that the property contains wetlands subject to the jurisdiction of the Army and he must stop work until he obtains a §404 permit. The owner ignores or misunderstands the warning and continues to place fill material, perhaps with some well chosen remarks that the government should not interfere with private property. More than likely, the project could be completed pursuant to a permit, possibly with some alteration or accommodation.

Assuming that wetlands exist on the property and that they received some dirt or fill, a felony offense of knowingly violating the FWPCA has occurred. The offense is subject by statute to up to three years imprisonment and results in a guidelines calculation of an offense level of 16, equivalent to 21-27 months, without additional aggravating characteristics or grounds for departure. The government need not prove environmental harm to obtain a conviction.

Conformance to the command of authority is not a trivial matter; however, it may become trivialized when defiance or bad attitude is the primary basis for criminal enforcement of environmental laws. Wetlands can be legally filled under regulatory authority, pursuant to a permit. For the government to say that John Pozsgai is serving 27 months for the harm to society of filling wetlands is fundamentally wrong, because he is punished essentially for his bad attitude. Significantly greater quantities and quality of wetlands are filled every day by individuals who have obtained a permit

27. Plato's *Laws* (xi, 934) may contain the oldest statement:

> Punishment is not retribution for the past, for what has been done cannot be undone; it is imposed for the sake of the future and to secure that both the person punished and those who see him punished may either learn to detest the crime utterly or at any rate to abate much of their old behavior.

*See Deuteronomy* 21:21.

28. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1961). Judge Richard Posner appears to be a modern adherent of utilitarian theory. R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977).

29. *See* M. GOLDING, PHILOSOPHY OF LAW 69-83 (1975). It can be argued that if robbery and murder receive the same punishment, the robber has no disincentive from murdering his victim. Assuming a rational calculation by the criminal mind, deterrence fails if there is not a degree of proportionality that serves to deter the more serious offense through setting the punishment of the lesser offense. R. POSNER, *supra* note 28, at 171.

30. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 9 (1968).

31. PACKER, *supra* note 25, at 38.

32. M. GOLDING, *supra* note 29, at 86.

33. *Id.* at 84.

or by those who were contrite and abated when told that they had filled wetlands without a permit. Pozsgai's imprisonment subordinates the restoration of wetlands to the goal of deterrence, since the wetlands will not be restored, if at all, until he is freed. Moreover, 27 months in prison for a first offender is a disproportionately harsh sentence to force compliance with legal authority.[34]

Other areas of environmental law involve decisions, predicated on the attitude of the regulated party, to punish rather than to mitigate, restore, or enhance through civil or administrative action. Most manufacturing facilities in the country have violated the treatment, storage, disposal, labelling, or recordkeeping requirements of the Resource Conservation and Recovery Act (RCRA).[35] Far too often, the government's approach to addressing RCRA infractions depends on bad attitude or the perception of defiance.

There are several consequences of punishing bad attitudes:

(1) When similar environmental harms are punished differently based on attitude alone, there is a likelihood of deterring the attitude rather than the harm;

(2) When attitude rather than environmental harm is punished with the penalty intended for the harm, it is likely that the punishment will be too severe or inappropriate;

(3) When the environmental laws are used to exact compliance with the command of authority, it may constitute an abuse of the goals of these laws; and

(4) When punishment is a higher government priority than restoration or mitigation, present environmental values are subordinated to the prevention of future harm.

*Offenses Lacking Moral Culpability*

Most environmental laws contain misdemeanor criminal offense provisions. Many of the laws, by judicial decision or statutory provision, hold liable for criminal offenses a responsible corporate officer. This concept is sometimes characterized as strict liability, but it is a theory of reduced criminal intent for environmental crime. The following hypotheticals show that criminal punishment can be imposed for conduct that lacks conventional attributes of moral culpability.

In the first hypothetical, a manufacturing facility maintained an above ground storage tank of industrial detergent, a compound that is not considered hazardous by characteristic or as a listed substance under RCRA. The tank was kept in a storage yard of a bottling plant and the yard was used to store pallets of bottles that are moved around by forklift. One day while stacking pallets, a forklift operator negligently pierced the tank with a fork spilling the entire contents on neighboring residential lawns that were upslope from a popular fishing stream. The detergent killed grass and plants and ultimately, after it rained, fish in the stream.

This negligent act constitutes the discharge of a pollutant into waters of the United States without a permit and is a violation of FWPCA §309(c)(1)[36] punishable by fine or imprisonment of up to one year. Guideline §2Q1.3 is applicable. A calculation under the guideline results in an offense level of 14 (15-21 months) before a downward departure is taken for the fact that negligent, not knowing, conduct is involved. With a departure, the offense level would likely be reduced to, at least, a level 10 (6-12 months), which would result in a three month confinement.[37]

This hypothetical demonstrates that to mete out criminal punishment for negligent behavior is inappropriate, particularly for inadvertence or ordinary negligence, as contrasted with theories of wanton, gross, or reckless negligence. Inadvertence emphasizes the exclusion of intention to do harm and of the appreciation of the risk.[38] Traditionally, concepts of more serious degrees of negligence require a disregard for a fully appreciated risk (e.g., drunken driving). A judgment on the gravity of the conduct differentiates between the degree of disregard and the magnitude of the risk. These considerations separate ordinary or civil negligence from those required for criminal liability. Perhaps, if the tank in the hypothetical contained some dangerous, noxious chemical, the risk would be more foreseeable and a protective barrier to avoid the negligent act would be expected.

Environmental laws in the hypothetical and in areas of recordkeeping, notification, and reporting too frequently punish as criminal behavior ordinary or civil negligence. The theoretical consequences are as follows:

(1) Fewer of society's resources would be expended and diverted from more important tasks if ordinary negligence were left to civil resolution, and, in the hypothetical, to private dispute resolution. Civil resolution is simply more efficient.

(2) Arguably, criminal punishment is unfair or unjust if it results from ordinary negligent acts, because the acts do not involve the moral culpability usually associated with criminal punishment.

(3) Despite a degree of flexibility to avoid confinement as punishment for criminal negligence, goals of environmental remediation or restoration may be sacrificed by the desire to punish.

A second hypothetical involves a large manufacturing concern with headquarters in Chicago, which operated plants in Florida, New Jersey, and Texas. The Florida facility remanufactured automobile generators and air condi-

34. *See* 28 U.S.C. §994(j) (1982 & Supp. 1987), which says that imprisonment is inappropriate for first offenders who have not committed a violent or otherwise serious offense. Few federal offenses are analogous to the defiance of authority in this example. Offenses involving public officials, covered by chapter 2, part C of the sentencing guidelines, similarly do not involve violence, but corruption of authority. Most of these offenses are misdemeanors subject to less than one year imprisonment; only bribery or extortion involving large amounts of money would likely result in a sentence as severe as Pozsgai's.

35. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA 001-050.

36. 33 U.S.C. §1319(c)(1), ELR STAT. FWPCA 039.

37. Although the sentencing guidelines mandate an arithmetical calculation, the application of specific offense characteristics and departures leaves a degree of discretion with the prosecutor and probation officer in their recommendations and the court in its sentencing decision. More often than not a first offender misdemeanant will most likely not receive a penalty of confinement, but reaching that end may require some contortions under the guidelines. Certainly the guidelines permit confinement for such an offense if the court so chooses.

38. H.L.A. HART, *supra* note 30, at 137.

tioners by buying used and abandoned parts, and cleaning and rebuilding them for resale in the replacement market. The process used several cleaning solvents that were designated hazardous wastes under RCRA regulations. The Florida plant manager had in the past collected used solvents in drums and shipped them to a disposal facility that suddenly went out of business. Knowing that a new disposal facility had to be hired, the plant manager wrote a memorandum to the vice president of operations at headquarters with a copy to the president of the company explaining that a new disposal facility must be located. The president wrote on his copy of the memorandum, "Please take care of this," and sent it to the vice president. The vice president developed a serious illness and, as a consequence, the Florida plant manager never received authorization from headquarters to hire another disposal facility. The drums accumulated and were stored in a loading area exposed to the weather. After some months, the drums began to leak solvents. These RCRA violations were discovered in an EPA inspection. Since there had been prior notice to the Florida plant manager regarding other RCRA infractions, the matter was referred for criminal investigation.

Subsequently, criminal charges were brought against the company, the Florida plant manager, and the president (the vice president had died) for knowing violations of RCRA, subject to five years imprisonment for individual offenders. How appropriate is the liability of the president who did not know that the issue had gone unresolved and did not know that drums were stored or had leaked? He, of course, did know that a problem existed.

Environmental enforcement policy seeks conviction of the highest ranking responsible corporate official.[39] Case law supports the proposition that a corporate officer unaware of wrongdoing may be held criminally responsible. In *United States v. Dotterweich*, the U.S. Supreme Court stated that "[i]n the interest of the larger good, [legislation] puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger."[40] Although its first articulation did not occur in an environmental case, the responsible corporate officer doctrine imposes a positive duty to seek out and remedy violations or to assure that they are prevented.[41] Breach of that duty can result in criminal liability without knowledge or intent, based primarily on corporate position.[42] Environmental cases discussing the responsible corporate officer doctrine do not acknowledge that it constitutes strict criminal liability, but have strained to infer knowledge from factual circumstances.[43]

In the hypothetical, and in the facts of the few decided cases, it is arguable that morally culpable acts were not the basis of the punishment imposed. Even scholars who reject the moral prerequisite of the retributivist theory of punishment might, nonetheless, "require that punishment should be only of an offender for an offense."[44] To require less is seen as simply unjust. The only justification for punishment in the absence of culpability is the purely utilitarian objective of deterrence, and that is not sufficient alone.

*Violations for Desirable Conduct*

Complex regulation often suffers from arbitrary cutoffs or draconian measures to prevent abuse or circumvention of regulatory requirements. Reasoned enforcement would avoid problems at the margin or aberrational instances of technical noncompliance. If, by contrast, enforcement is vigorous at the margin or overly literal in application, there is danger of preventing or deterring conduct that is socially desirable or punishing conduct that is not culpable.

A number of mining processes employ acid to extract valuable minerals. A waste product of those processes is highly acidic water, categorized as hazardous under RCRA because of the acidic characteristic. Mining companies are expected to dispose of the wastewater, at great cost, at a licensed hazardous waste disposal facility (TSD facility) that most likely will inject the solution into deep wells. Detinning Company *A* engaged in removal of tin from tin plated products such as tin cans by using a caustic soda wash process. The waste product of company *A* was a caustic solution that is highly basic. Mining Company *B* decided to ship its acidic solution to Detinning Company *A* to neutralize its basic solution. When mixed in equal parts in a qualified impoundment tank, the resulting water had a ph of 7 (i.e., like drinking water) and was used for irrigation. The companies reached a bargain that saved each significant sums of money and wholly eliminated two hazardous waste products.

Assuming the acid solution was shipped with required hazardous waste manifests by a certified hazardous waste carrier, both companies, nonetheless, committed felonies in devising this socially beneficial solution. Mining Company *B* violated RCRA, §3008(d)(1)[45] by shipping hazardous waste to a facility that did not have a permit; Detinning Company *A* violated RCRA §3008(d)(2)[46] by treating hazardous waste without a permit. The statute carries a monetary penalty of $50,000 per day of violation and imprisonment of up to five years. The penalty under §2Q1.2 of the guidelines is, at least, an offense level of 18 (27-33 months), without adjustments for possible aggravating factors.

Some would argue that the environmentally beneficial result can still be achieved by compliance with the regulations. The detinning company could obtain a permit to treat its own waste and the waste of the mining company. The

39. *See* Habicht, *supra* note 6, at 10480.

40. 320 U.S. 277, 280-81 (1943).

41. United States v. Park, 421 U.S. 658, 672 (1975).

42. At least one court, resisting notions of strict liability crime, suggested that a distinction existed between "responsible relationship," the phrase actually used in *Dotterweich*, and corporate position alone. United States v. New England Grocers Supply Co., 488 F. Supp. 230, 232-33 (D. Mass. 1980). Generally in a corporate structure, the relationship of an individual to various corporate functions is dictated by the responsibilities of the position held. While it may be true that a vice president for finance usually has no direct responsibility for operations, presumably a president, chief executive officer, member of the board of directors, or some senior vice presidents have a "responsible relationship" to all corporate activities.

43. United States v. Hayes Int'l Corp., 786 F.2d 1499, 16 ELR 20717 (11th Cir. 1986) (knowledge of lack of permit inferred from supposed below market price for hazardous disposal service); United States v. Johnson & Towers, 741 F.2d 662, 14 ELR 20634 (3d. Cir. 1984), *cert. denied sub nom.* Angel v. United States, 469 U.S. 1208 (1985) (knowledge of hazardous nature of substances and regulator requirements inferred from corporate positions held).

44. H.L.A. Hart, *supra* note 30, at 9.

45. 42 U.S.C. §6928(d)(1), ELR Stat. RCRA 021.

46. 42 U.S.C. §6928(d)(2), ELR Stat. RCRA 021.

cost of obtaining this permit or conforming to regulations as a permitted facility, however, may be prohibitive. This Article questions not what is possible through an administrative resolution, but whether criminal enforcement for this conduct is wise. It is unwise because of the following consequences:

(1) Minimizing the generation of hazardous waste is a primary goal of environmental laws. This hypothetical reflects an admirable effort at reducing disposable waste. Punishment for that effort deters socially desirable behavior.

(2) Since the conduct is well intentioned and economically efficient, it should not be as severely punished as the statute and guidelines would punish the effort.

(3) Criminal punishment sacrifices the preferable and environmentally beneficial remedy of assuring the ability to minimize hazardous waste by requiring a permit for the conduct. Having been subject to criminal sanction, the company may be ineligible for a permit or disinclined to subject itself to regulations that may result in a second criminal charge.

## Conclusion

To avoid the perverse nature of some environmental enforcement, several steps should be taken. The Sentencing Commission is now engaged in a revision of the sentencing guidelines applicable to environmental offenses. Early signals suggest that the Commission may correct some deficiencies, although fundamental changes are needed to endow the guidelines with the necessary flexibility and fairness. Guidelines should be revised so that each covers only environmental offenses of similar harm and gravity. This system would reduce the likelihood of disproportionate punishment. Revised guidelines might also encourage mitigation and restoration as substitutes or grounds for reductions of punishment.

This Article is critical of the environmental statutes, because prohibitions in the complex environmental regulatory system are overinclusive and forbid conduct at the margin. The statutes' penalties are probably appropriate for some sets of facts covered by their prohibitions. Overinclusiveness may be inevitable, but curable by the wise exercise of prosecutorial discretion.

Prosecutors considering whether to proceed criminally might ask the following questions:

(1) In light of the reduction of judicial discretion through mandatory guidelines, is there a remedy preferable to criminal punishment that should be pursued in place of or before punishment?

(2) Is there demonstrable environmental harm or potential harm that should be punished?

(3) Does the offense involve morally culpable wrongdoing by an offender who deserves to be punished?

(4) Will punishment deter socially undesirable behavior without risk of discouraging desirable behavior?

It is difficult to overstate the power and responsibility of prosecutors. If the potential for abuse in the current structure of environmental criminal penalties is to be constrained and the desirable application of sanctions achieved, prosecutors will have to exercise their power with a broad vision of the mission of environmental enforcement. Narrow-minded pursuit of jail time must give way to the realization that environmental crimes are, for the most part, anomalous. Failure to take this into account will result not only in palpably unfair punishment, but also in lost opportunities to achieve creative, yet punitive, outcomes that both advance environmental goals and conform to the philosophical tenets underlying traditional notions of criminal sanction.