



The Roles and Use of Law in Green Criminology

Matthew Hall

The University of Lincoln, UK

Abstract

This paper examines how law and legal analysis fit within the broader green criminological project. By demonstrating how legal analysis in various forms can cast significant light on key green criminological questions, the paper seeks to address the concern that green criminology – with its preponderance of ‘deep green’ viewpoints and focus on social harms which are not proscribed by formal law – precludes the application of legalistic values such as certainty and consistency. Ultimately, the goal of the paper is to demonstrate how, despite the novel challenges to the legal scholar presented by green criminology, the incorporation of a more legalistic perspective within an interdisciplinary exercise is not only desirable for green criminology but is in fact vital if the field is to realise its ambitions as a force for environmental good.

Keywords

Legal analysis; green criminology; social constructivism; interdisciplinarity.

Introduction

In recent years green criminology has blossomed into a key area of criminological debate, attracting numerous commentators and prompting a host of symposia, workshops and other events, as well as dedicated panels at major criminology and criminal justice conferences (see greencriminology.com). Like more ‘mainstream’ and established forms of criminology before it, green criminology has from the outset constituted somewhat of a ‘rendezvous’ subject (Rock and Holdaway 1997) attracting commentators from sociological backgrounds (politics, sociology, anthropology, and so on) as well as more legalistic fields (especially criminal law, international law and environmental law). Of course, the virtues of such an interdisciplinary approach are widely touted in most academic disciplines (see Matthews and Ross 2010) and for good reason. Drawing from a variety of sources and perspectives almost inevitably provides deeper understanding as well as the scope for transposing ideas and solutions between subject areas (see Lury and Wakeford 2012). The benefits of interdisciplinary work have been well recognised by criminologists (Dupont-Morales 1998; Walsh and Ellis 2007) and criminology as a whole has thus benefitted as a result of the cross-pollination between legal scholarships (and especially scholarship on criminal law) and more sociologically-derived accounts of offending and the criminal justice system in its operational context (see Doak 2007).

The argument of this paper is that, whilst similar interdisciplinary benefits will certainly accrue to the study of green criminology from a close alignment with legal fields, to some extent this may be more of a challenging proposition than was the case for many of the more established areas of criminology. This is due to the fact that in many cases the activities discussed by green criminologists are legally permitted; and in most cases are certainly not proscribed by the criminal law. Given this reality, this paper offers discussion of the place of 'law' (criminal, civil and administrative) in green criminological debate, the challenges inherent in this combination of fields, and how such a pooling of knowledges will nevertheless enhance the overall green criminological project. This paper therefore calls for further collaboration between academics from the more 'sociological' and 'legal' sides of the criminological spectrum, arguing that this continued (and further) multi-disciplinarity is not only a desirable aspect of green criminology but a vital one.

Green criminology: 'Theory' and scope

After some early disagreement concerning the labelling of 'green criminology' (see Halsey 2004; Ruggiero and South 2010) the term itself has in recent years achieved broad usage as an umbrella concept, albeit one which does not necessitate specific adherence to set theories or methods. Indeed one must be wary here of Kearon and Godfrey's warning against the academic tendency to 'force social phenomena into false chronologies' (Kearon and Godfrey 2007: 30). Arguably, it is precisely this restrictive approach that has forestalled the development and expansion of criminology along environmental lines until more recent years. Labelling a subject area 'green criminology' is useful in that it might signify a set of assumptions, theoretical underpinnings and methodological issues but, as ever, such classifications are just labels, the meanings of which are in constant flux, especially in such a new and rapidly-evolving area. Indeed, White (2013) and South (1998) argue 'there is no green criminology *theory* [emphasis in original] as such' (White 2013: 22) and 'those who are doing green criminology define it in ways that best suit their own conception of what it is they are doing' (White 2013:17).

Clearly therefore green criminology is developing as an inclusive field of interest rather than a restrictive body of scholarship adhering to set paradigms. Indeed, for White the benefit of singling out and labelling 'green criminology' lies mainly in providing a focal point for those interested in studying environmental harms and society's responses to them. This of course bodes well for an interdisciplinary approach encompassing both legal and sociological perspectives. For example, Gibbs et al. (2010) draw a key distinction between 'legalistic' understandings of environmental crimes (as violations of criminal laws designed to protect the health and safety of people, the environment or both) and the socio-legal approach, which acknowledges that the differences between 'crime', 'deviance', 'civil wrongs' and 'regulatory violations' are all socially constructed. What is difficult from a criminal law perspective however is that frequently it is in fact environmental harm rather than environmental crime we are discussing as green criminologists. This perspective is heavily influenced by the critical and radical criminological schools which, in short form, problematise the labelling of harmful activities as crimes (or not) by reference to the power inequalities endemic to society. Thus, McBarnet (1983) is heavily critical of traditional criminology's 'too-ready acceptance of official definitions of criminal and victim [which] have reinforced rather than questioned the status quo' (McBarnet 1983: 302).

To give an example of this critical perspective in action we can look to the work of Lynch and Stretesky (2001). In this seminal green criminological piece, these authors analysed the question of corporate harm and violence, utilising evidence from medical literature and related studies that focused on the health consequences associated with toxic waste, pesticide and dioxin exposure. In so doing, they argue that the significant health consequences associated with modern industrial production of toxic waste products 'can be thought of as "criminal" in

the broadest sense since alternative, nontoxic methods of production are often available' (Lynch and Stretesky 2001: 153). This is despite the fact that in the strict legalistic sense such corporations are not breaking any laws (criminal or otherwise). The critical school thus highlights that, under such circumstances, 'it is not deviance from, but adherence to, legal norms that presents itself as problematic' (Halsey 2004: 225).

More recently, Passas (2005) has offered support for the critical perspective by branding the actions of many large corporations as 'lawful but awful'. As the author contends:

By concentrating on what is officially defined as illegal or criminal, an even more serious threat to society is left out. This threat is caused by a host of company practices that are within the letter of the law and yet, they have multiple adverse social consequences. Quite often, the main reason why these practices remain legal and respected is that these industries are able to mobilize financial and other resources in order to avoid stricter regulation. (Passas 2005: 773)

Although Passas is not primarily concerned with *environmental* crime or harm in his discussion, the argument that much environmentally harmful activity (whether carried out by corporations, states or individuals) is in fact permissible under the law (or, at the very most, constitutes a legal 'grey area' (Gibbs et al. 2010)) is a recurring theme of the green criminological literature.

The above notwithstanding, in many jurisdictions there does exist a wide body of 'hard' law concerned with the environment, the functioning of which is clearly of key concern to green criminologists. Indeed, the sheer volume of such environmental laws on the statute books in most countries and at the international level is rapidly increasing (Brickey 2012). In the UK at least, *criminal* law has arguably been the traditional approach to tackling environmental degradation (Bell et al. 2013). Across the European Union (EU) as a whole, EU Directive 2008/99/EC on the protection of the environment through the criminal law specifically requires EU member states to apply criminal sanctions to enforce EU environmental law. That said, many commentators in the wider literature now contend that civil and administrative mechanisms and sanctions offer many distinct advantages over the criminal enforcement of environmental standards (see Faure and Svatikova 2012).

Of course, given the breadth of possible contributors and perspectives relevant to the debates at hand, the idea that any law (much less criminal law) can or should constitute the *sole* solution to the problems of environmental harm is surely wrong. For legal commentators, the difficulty with a field that is apparently so wide is that it sits uncomfortably with classic doctrinal legal ideals of certainty and predictability. In fact the distinction can be said to reflect traditional philosophical debates (deriving from the works of Weber (Rheinstein 1954)) in law concerning internal and external legal analysis. In the former case the law is analysed by reference to its internal workings, its consistency and its efficiency. By contrast external evaluations of law seek to place law in its social context, often by studying its operation empirically, and seeking to evaluate its *effectiveness* in that context. The socio-legal approach is clearly constituent of the latter category, which can frustrate those seeking a more analytical/internal perspective.

A good example of the tensions which can develop between legalistic and socio-legalistic approaches to the question of environmental crime/harm is drawn by Chris Williams (1996) in his green criminological (or perhaps more accurately, green *victimological*) discussion of environmental victimisation. Williams begins his argument by acknowledging the 'limits of law' (Williams 1996: 200) in addressing environmental victimisation and further notes the 'obvious need for social justices to parallel formal legal processes' (Williams 1996: 200). Nevertheless Williams is also keen to develop some form of predictable legal mechanism for responding to

environmental harms, offering a definition of 'environmental victims' reflective of this perspective:

... those of past, present, or future generations who are injured as a consequence of change to the chemical, physical, microbiological, or psychosocial environment, brought about by deliberate or reckless, individual or collective, human act or omission. (Williams 1996: 35)

Williams here purposely restricts his definition to those suffering 'injury'. This is in part a response to what he views as the shortcomings of the so-called environmental justice perspective in green criminology which emphasises the involvement of people and communities in decisions which might impact upon their environment, defined broadly to include their cultural norms, values, rules, regulations and behaviours (Bryant 1995: 6; see also Čapek 1993 and Hofrichter 1993). Williams argues that the concept of 'injury' as opposed to the wider notion of 'harm' 'creates a much narrower frame of reference than that used within the environmental justice debate' (Williams 1996: 205). The justification for this is a legalistically pragmatic one: in the context of the overall aim (as Williams sees it) to achieve a workable legal system which incorporates environmental victims, the author makes the point that 'if an aim of a victim conceptualization is to change policy, then governments are more likely to respond in relation to tight, manageable definitions, which may be stretched a little, than to "catch all" concepts that might appear to carry a host of hidden ramifications' (Williams 1996: 205).

Certainly one can appreciate the value of William's perspective. Indeed, particularly given that green criminology (like victimology) often has some pedigree in political activism (see Munro 2012) it can be argued that a major goal of the field should indeed be to elicit meaningful impact on the real world of policy making and law, which means offering proposals that would 'work' legally speaking as well as being conceptually robust. Of course, the purposeful underestimation of environmental victimisation by academics recalls the criticism of McBarnet (1983) discussed above. As in all interdisciplinary endeavours, the key is in identifying how the law and the study of the law can be used in conjunction with other forms of green criminology to produce more robust findings and impact. Indeed one of the key assertions made by Gibbs et al. (2010) is that '[g]reen criminology needs an interdisciplinary framework' (Gibbs et al. 2010: 129), a contention I will return to at the end of this paper. For these authors, the difficulty with much of the existing literature in this field is that it is value-laden and presupposes fixed conclusions to environmental problems in the form of criminalisation and regulation. In the next section this paper I will examine some examples of the application of legal rules and analysis to green criminological discussion, highlighting the barriers to a 'straightforward' application of any single legal paradigm.

Criminal, civil and administrative approaches: Which law to use?

Whilst criminologists most often work alongside criminal lawyers and criminal justice experts, in the field of green criminology other areas of law (especially civil and administrative law) are also integral, and perhaps pivotal. This is largely because to some extent criminal law and criminal justice systems tend to be ill suited to the specific problems and features of environmental 'offending' and victimisation (Brickey 1996). In short form, criminal justice processes tend to be designed to fit the problem of individual (non-corporate) offenders and singular/small groups of their human victims. By contrast, green criminologists are often concerned with the actions of corporations, victimisation to large groups of people, and (following the less anthropocentric trend of 'deep green' criminology (see Gibbs et al. 2010)) the impact on non-human animals and the ecosystem itself. In the latter instance, although the criminal law has of course been expanded in many jurisdictions to include non-human victims (animal protection and anti-trafficking laws being obvious examples), the harmful treatment of

animals can often fall within the legal grey area alluded to above (see Larsen 2013) precisely because animals have no legal standing. In the case of big business, the problem of holding corporations criminally liable has been well noted by criminologists (Bisschop 2010) and corporate actions (along with criticisms of capitalism in general) have dominated much of the green criminological discussion so far. Much has been made here of the argument that corporations may in fact be designed as 'criminogenic creatures' to remain immune from prosecution or indeed censure from any area of law (Bakan 2005).

Indeed, despite the developments in criminal law in many national and international jurisdictions, as a matter of legal theory, attributing criminal blame for an environmentally destructive activity remains a challenging proposition. For example, it is often difficult in such cases to ascribe direct (or even indirect) causation between the actions/inactions of a specific party (or state) accused of bringing about environmental harm and the undesirable outcomes themselves (Du Rées 2001). This can be particularly difficult given the typically longer timescale of environmentally destructive activities and their consequent impacts compared with most traditional forms of criminality. The problem has prompted Farber (2007) to argue that criminal justice is unlikely to be flexible enough to encompass the possibility of future harm to the environment as a whole or to humans and animals specifically as a result of environmental harms occurring in the present, and that the better solution is likely to be an administrative system based on risk (see below). Furthermore, as noted by Bell and McGillivray (2008), the extended range of perpetrators of environmental crime can seem hopelessly wide:

A diverse range of individuals and corporate bodies carry out the activities that lead to breaches of environmental law, from solo fly-tippers, to huge multinational corporations. (Bell and McGillivray 2008: 264).

In the absence of a generally recognised 'human right' to a clean and unpolluted environment in most jurisdictions and the often ambiguous status of animal rights in many criminal (although not all: for example, Ecuador, Peru and Austria,) justice systems (see DeMerieux 2001 and Larsen 2013 respectively) the basis of any criminal liability for such activities and their resulting harms at a jurisprudential level is often unclear. Indeed, Passas (2005) has highlighted the particular difficulty in relation to cross-border practices which are legal in one country but not in another. This issue can have particular resonance in the environmental field given the many examples of polluting practices literally spilling over borders:

Cross-border malpractices make the best candidates for crimes without any lawbreaking whatsoever. Whether the offenses and offenders cross-domestic state lines or international borders is immaterial. Asymmetries in legal definitions and law enforcement enable corporations to do what is prohibited at home in other jurisdictions without breaking any laws. Processes of globalization have multiplied the opportunities for that. (Passas 2005: 773-774)

Given the problems discussed above concerning the criminalisation of environmentally destructive activities, many commentators have explored and advocated the key alternative of administrative and civil sanctions. As argued by the UK Environmental Law Association:

... criminal prosecution is often too rigid an approach for all but the most serious offences. It focuses on achieving punishment rather than prevention, and the application of strict liability often leads to the imposition of unwarranted criminal blame for a pollution incident which has been caused by an oversight rather than an intentional act. (Woods 2005: 5)

In practice, much environmental legal regulation is in fact civil in nature in many jurisdictions. Of course, it is important to emphasise that, certainly from the critical criminological perspective, the distinctions between these different mechanisms are not always clear-cut: fundamentally, they are all set up to address or at least respond to social harms or to manage environmental risk (see Mann 1992). Indeed, Skinnider (2011) points out that while the term 'environmental crime' has raised much debate in many jurisdictions, the Canadian courts have established that the nomenclature of environmental 'crimes' or 'offences' or 'regulatory offences' is irrelevant for the purposes of guaranteeing the Canadian Charter of Rights and Freedoms. This means that regulatory provisions that amount to actual prohibition of blameworthy conduct are found to be constitutional under the criminal law.

Bell et al. (2013) contend that the utilisation in law of civil resolutions for environmental cases is on the increase in many jurisdictions and markedly in the UK, where a system of civil sanctions as alternatives to environmental prosecutions was rolled out in January 2011:

The criminal law, as a means of supporting traditional forms of regulation, is to an extent being supplemented by what are more administrative methods of law enforcement – the use of environmental civil sanctions being central here. (Bell et al. 2013: 265)

More recently, the further extension of civil sanctions is presently a key aspect of the UK Law Commission's strategy concerning Wildlife Crime, with similar approaches also in evidence in Australia (Ogus and Abbot 2013) and New Zealand (New Zealand Law Commission 2012). Across Europe, the development of civil sanctions for environmental harms was prompted by the introduction of the long anticipated EU Environmental Liability Directive (2004/35/EC), although this measure has been criticised both for a lack of precision in its mechanisms of determining the extent of injuries to natural resources (Paradossos 2005) and because it fails to establish any genuine EU-wide civil liability regime (Bell et al. 2013).

The primary arguments in favour of civil sanctions in environmental cases are that they allow for greater flexibility and are generally thought to be cheaper to apply than criminal prosecutions (Mann 1992). Of course, against this the argument can be put that civil resolutions do not convey the same social censure or have the same deterrence effect as criminal law (see Uhlmann 2011). Furthermore, it may be argued that the nature of civil remedy is that it responds to environmental harm but arguably does little to prevent it. Indeed, as noted by Tabbach (2012), paradigmatically civil law is usually geared around compensating private injuries rather than defending public norms. Thus the key question here on which both lawyers and sociologists may collaborate in finding answers is whether civil sanctions, whilst representing managerial and administrative benefits to the justice system, can also represent eco-centric values for the environment itself.

The above notwithstanding, whilst in theory criminal sanctions convey greater social censure, the core difficulty identified by a number of authors in practice is that criminal laws are often not rigidly enforced in the environmental field. Faure and Svatikova (2012) for example have argued:

Law and Economics scholarship has pointed to the fact that this leads de facto to many cases where the criminal law is effectively not applied at all as a result of which no sanctions follow. This results in under-deterrence. (Faure and Svatikova 2012: 2)

The authors go on to draw conclusions concerning the relative merits of criminal and administrative/civil sanctions in environmental cases based on a study of four European

jurisdictions: the Flemish Region and the UK (which have traditionally favoured the criminal route); and Germany and the Netherlands (which have traditionally used civil sanctions). Their conclusion is that the most efficient system is one that combines criminal prosecutions for the most serious environmental transgressions and administrative or civil sanctions for the majority of other cases. Such a combined system, they argue, can achieve greater deterrence effects than either system on its own. That said, this conclusion comes with some important health warnings:

... one has to be careful with generalising the conclusion that systems that allow for a more balanced use of the criminal law (by combining it with administrative law for minor or moderately serious violations) are more efficient than systems, which merely rely on the criminal law. After all, our data did not allow us to test the overall effectiveness of the differing approaches as far as the effect on environmental quality is concerned, nor on compliance with environmental regulation by firms. Moreover, economic literature has equally indicated that administrative law systems may have the disadvantage that enforcing agencies could enter into a collusive relationship with the regulated firms as a result of which also administrative agencies could not always impose efficient sanctions. (Faure and Svatikova 2012: 33)

Thus, the authors note in particular that they cannot demonstrate actual benefits to the environment itself as a result of this combination of systems.

In sum, the mounting evidence that criminal sanctions alone cannot adequately address society's problems with environmentally destructive activities is quite persuasive. Indeed, given the complexities of the links between environmental change, changes in society and changes in crime and social harms (see Hall and Farrall 2012), it would be surprising if this were the case.

Of course, the wide variance in the types of cases falling under the banner of 'environmental transgressions' means one can never draw all-encompassing conclusions. Indeed, criminal penalties, and in particular criminal-based restitution, have on occasion proven a more strategically and beneficial option for the recovery of monies from environmental offenders than civil sanctions (Richardson 2010). The example of the 1989 Exxon oil spill off the coast of Alaska is illustrative of the last point. On 24 March 1989 the Exxon Shipping Company oil tanker *Exxon Valdez* collided with a reef in the Prince William Sound off the coast of Alaska. As a result some 10 million gallons of crude oil was spilled into the sound, causing widespread ecological damage, especially to local wildlife. The US federal government sought recovery of natural resource damages to Prince William Sound 'not by pursuing a civil claim against Exxon ... but by filing criminal charges' (Richardson 2010: 4). As such, the Exxon Shipping Company was charged with criminal violations of the Migratory Bird Treaty Act (having caused the death of protected birds) and the Refuse Act. Significantly, both these crimes carried penalties that would require restitution to injured parties. In this case the injured party was deemed to be the United States, for damage to its natural environment. The criminal route was chosen because the relevant legislation in the US imposed significant limitations on the amount that could be claimed from polluters under civil law. The outcome was that Exxon pleaded guilty and a settlement was reached through negotiation with the government that involved significant financial payments to the US for use in restoring the environmental damage. Thus, certainly from an eco-centric perspective criminal law *in this case* proved the better option.

Of course, if green criminology is to offer anything new to such debates, it may be necessary to move the question of environmental regulation beyond the traditional 'criminal vs civil/administrative' dichotomy. One group of possibilities, which has received relatively little attention up till now in the literature, involves attempts made in some jurisdictions at

'environmental mediation' based on restorative principles (Amy 1983). The space is lacking in the present chapter to discuss possibilities of this type in greater detail, albeit evidence is mounting that mediation mechanisms can achieve significant results for victims of environmental harm in particular (see Shmueli and Kaufman 2006)

The contributions of legal analysis to green criminology

Where does the above discussion on the complexities of addressing environmental degradation through law, especially criminal law, leave the development of an interdisciplinary green criminology that sets out to combine the best of more legalistic and socio-legal approaches? Certainly, on the one hand, it would seem that the traditional focus of criminology on crime and criminal justice defined and internally analysed in a legalistic manner is not up to the task of representing all relevant perspectives in this debate. On the other hand, it has been noted that most of the commentators who advocate a move away from criminalisation-based responses to activities which foster environmental harm acknowledge that criminal law remains a viable option, perhaps even the preferred option for the most serious cases. As we've seen, many more of these commentators still advocate a legal response to the problem of environmental harm, albeit through civil and administrative mechanisms. In terms of legal theory, the above discussion seems to point towards a social constructivist view of the law whereby law is seen as 'an aspect or field of social experience, not some mysterious force working on it' and that law and social ordering are therefore 'mutually constituting' (Cotterell 2006: 25).

In terms of the object of such constructivist legal analysis, although clearly the concern is with the human and non-human aspects of the environment and environmental harm, it may be more beneficial for lawyers to consider the issue as a matter of environmental risk. Indeed, increasingly the general trend in most jurisdictions is for public authorities to view environmentally destructive activities as an exercise in the management of risk. For example, the Netherlands has been using environmental risk assessments as the basis of public policy in this area since at least the early 1990s (de Jongh and Morissette 1996). In the USA, according to the Environmental Protection Agency (EPA):

EPA uses risk assessment to characterize the nature and magnitude of health risks to humans (e.g., residents, workers, recreational visitors) and ecological receptors (e.g., birds, fish, wildlife) from chemical contaminants and other stressors, that may be present in the environment. Risk managers use this information to help them decide how to protect humans and the environment from stressors or contaminants. (EPA 2012: unpaginated)

The UK Environment Agency similarly emphasises the significant influence of risk-based (or 'proportional') approaches:

We develop methods for screening risk to allow the most important ones to be identified and placing each risk in its true context. When all risks are known, they can be prioritised to determine which to address first. (Environment Agency 2014: unpaginated)

In these terms the legal debate may boil down to a basic question of what combination of civil, administrative, mediation-based, criminal justice or other legal – versus extra-legal – approaches to the issue of environmental harm will minimise the risk of such harm occurring or reoccurring. Certainly environmental risk assessments (ERAs) have become a key basis on which regulatory mechanisms are developed around industrial or other activities with the potential to cause damage to the ecosystem or affect the health of animals and humans (see Kasperson and Kasperson 2013). Of course, ERAs (especially those relying on more positivistic

methodologies) can often imply a degree of certainty concerning risk, which may not be present. The risk perspective here reflects on-going debates in the legal world concerning how law reacts to scientific *uncertainty*. Many authors have contributed discussions on how policy-makers are forced to deal with scientific uncertainty in the environmental field and beyond (Harrison and Bryner 2004). For example, at the end of 2013 there was considerable scientific debate underway over the potential or lack of danger from thawing permafrost warming the Arctic Ocean and leading to a huge release of trapped methane gas in the next decade, with a significant impact on global warming and, from an anthropocentric perspective, an alleged US\$60 trillion price tag for the world economy (Dyupina and van Amstel 2013). Green criminology with a strong legalistic component therefore has much to offer towards strengthen[ing] the science-policy interface. This includes discussion of knowledge brokering (van Kammen et al. 2006) and the interface between science and law, which Houck describes as a 'tale from a troubled marriage' (Houck 2003: 1926). This is indeed often a difficult relationship given that lawyers look to scientists to provide certainty whilst scientists look to lawyers to provide the same, frequently neither party being satisfied with the outcome.

Another important feature of legal analysis in the field of environmental harm is that such analysis will always be situated in the context of far wider regulatory debates. Many criminologists have considered their subject to encompass not just the criminal law specifically but the far the wider topic of regulation. In one influential example Ayres and Braithwaite (1997) describe enforcement tactics of many jurisdictions in relation to environmental 'crime' by reference to an 'enforcement pyramid'. Essentially this pyramid puts 'persuasion' at its base as the most commonly used mechanism of environmental law enforcement. The diagram then works up the pyramid from persuasion to warning letters, enforcement notices, criminal penalties, suspension of operations licences and, at the apex (least utilised), revocation of licence. Revocation is deemed the most serious penalty under this model because revocation of a company's licence to operate is in fact far more damaging than, for example, a relatively small fine imposed by a criminal court. The pyramid represents a model of so-called 'responsive regulation' whereby different enforcement options are made available and the enforcement officer chooses the least significant one that will achieve an overriding goal of compliance (rather than punishment).

It is important to realise that such wider discussion of regulating environmental harm encompasses both legalistic as well as extra-legal responses to the problems caused by polluting activities; and that in fact the distinction between the two approaches is far from clear cut within this overriding regulatory context. Indeed, to this end the difference between 'policing' the criminal law and enforcing non-criminal and extra-legal regimes is illusory. As argued by Gill (2002):

... there is no essential difference between policing and regulation ... the analysis of contemporary policing would benefit if it was seen as one part of a broader regulatory spectrum. It is the policing of 'predatory' crime by 'the usual suspects' that comes closest to the normal view of policing as law enforcement while policing and regulatory styles are closest in the area of 'enterprise' crime. But the containment of the most destructive effects of the operations of markets (legal or illegal) and firms is actually the objective of almost all policing. (Gill 2002: 539)

By 'extra legal' I here mean responses to environmental harms falling outside the traditional criminalisation versus civil litigation paradigm, persuasion at the bottom of the regulatory pyramid being a core example. This may also include, for example, self-regulation and self-reporting schemes. Of course, such systems may actually be well grounded in statutory law. In either case, a key role of the legal scholar is to help distinguish the pros and cons as well as the operational viability of such systems both from an internal and an external legal analysis (see

above) whereas the goal of the interdisciplinary green criminological project in turn is to combine such insight with more sociological and interpretivist perspectives to arrive at findings and recommendations.

Of course, to these ends green criminology equally requires the input of a far more 'black letter' form of 'hard' legalistic analysis because, as already noted above, there is now a preponderance of hard law in many jurisdictions covering a multitude of diverse and complex environmental issues ranging from animal trafficking (Giovanini 2006) to genetically modified crops (see Von Lewinski 2008). The 'internal' analysis of case-law, statute and treaties therefore remains as vital to green criminological discussion as it has proved to longer established areas of criminological debate (see Smartt 2008). However, in the environmental sphere it might be added that it seems particularly important that lawyers of all kinds also appreciate the significance of what international lawyers call 'soft law'. Soft law is usually considered to indicate non-binding instruments, agreements and understandings that exert persuasive influence on parties (usually states). Given the regulatory landscape sketched out above, it is in fact arguable that many of the arrangements at the national and international level concerning the regulation of environmental damage constitute soft law in some shape or form. Classic examples from the international environmental law sphere include the 1972 UN Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development. Although soft law is a controversial notion for some (Birnie et al. 2009), legal researchers need to appreciate how such soft law and soft regulations can add real impetus and drive to a reform agenda (exerting genuine impact on the actions of states) despite them having little formal compulsive power. As law, the principles espoused in soft law also have a tendency to 'harden up' over time (Boyle 2006). The above two agreements for example have had significant influence on the development of environmental law and regulations (including 'hard' regulation) in most developed countries.

Finally, in this section, it would be remiss to move on without emphasising the growing importance of human rights law to the question of environmental harm. In fact the extension of 'rights' concepts to the environment and the impacts of environmental degradation is still a novel development, but one which is increasingly influential as a potential solution to some of the shortcomings of more traditional criminal or civil based resolution and redress mechanisms for environmental harm (Coomans 2003). Whilst much of the established literature and jurisprudence on this issue is focused around humans, from a philosophical/theoretical perspective, the notion of applying such rights to non-human animals and perhaps the environment itself is consistent with the broader green criminological project. So far, such 'environmental rights' as have been recognised by states and international bodies mainly constitute an extension of existing rights to cover environmental harm, especially Articles 2 and 8 of the European Convention on Human Rights. There are significant examples of distinct rights to a green environment existing in localised contexts, but these have not yet received the level of intentional acceptance required to qualify as established principles of the international legal order (Redgwell 2010). Nevertheless the concept has great potential to address many key green criminological problems. The question of how both human and non-human victims interact with the mechanism of justice intended to defend any such environmental rights is a key issue for green criminologists and one still badly in need of theoretical development from experts in human rights law.

Conclusions: Approaching green criminology from an interdisciplinary perspective

As noted at the beginning of this paper, neither calls for green criminology to pursue an interdisciplinary agenda nor arguments that lawyers can (and must) approach green criminology with a more interpretivist, socially constructive, outlook are, of themselves, especially path-breaking. The benefits of interdisciplinarity are well known; whilst the

'sociology of law' has been a topic of independent academic debate since at least the early 1900s. Nevertheless, the fact remains that, in the legal world, talk of 'deep green' perspectives, the application of law to non-human animals and, perhaps most significantly, the prevalence of activities which are not in themselves unlawful in either the criminal or civil sense may leave some legal scholars doubtful as to their ability (or willingness) to contribute to the green criminological project.

What the above discussion has tried to highlight is that, whilst the broad range of issues and perspectives which have fallen under the umbrella of green criminology so far may indeed seem to preclude the values of certainty and consistency prioritised by many lawyers, in fact the study of law and legal reasoning (criminal, civil and administrative) within the broader contexts of risk management and regulation is vital to this overall exercise. This is not least the case if green criminology is to succeed in providing workable solutions to the vast array of problems falling within the 'environmental' sphere. In contributing to such an endeavour there is in fact no requirement that legal scholars subscribe to deep green arguments: that non-humans have intrinsic worth or any of the more activist-inspired/associated perspectives concerning animal rights, animal abuse, and so on. In fact, in light of the above discussion, those sceptical of such viewpoints can still appreciate the application of legal principles to the recognition of and responses to environment harms and the effects of these on the (non-human) environment, including the availability of animal habitats, if only for the more instrumental purpose of establishing how those effects might also impact on humans, crime and law. It is clear that law and legal principles have a significant impact on the regulation of environmental harms of all kinds, just as they impact on almost all other areas of social life. In other words, many of the issues surrounding environmental risk and regulation are fundamentally *legalistic* questions even when 'official' or 'hard' legal censure is absent. This being the case, green criminology must in turn incorporate legal analysis as an essential feature of its overall project.

Correspondence: Professor Matthew Hall, Chair in Law and Criminal Justice, The University of Lincoln, School of Law, Brayford Pool, Lincoln, LN6 7TS, United Kingdom. Email: mhall@lincoln.ac.uk

Please cite this article as:

Hall M (2014) The roles and use of law in green criminology. *International Journal for Crime, Justice and Social Democracy* 3(2) 97-110. doi:10.5204/ijcjsd.v3i2.176

References

- Amy D (1983) The politics of environmental mediation. *Ecology Law Quarterly* 11(1): 1-19.
- Ayres I and Braithwaite J (1997) *Responsive Regulation: Transcending the Deregulation Debate*. Oxford: Oxford University Press.
- Bakan J (2005) *The Corporation: The Pathological Pursuit of Profit and Power*. London: Robinson Publishing.
- Birnie P, Boyle A and Redgwell C (2009) *International Law and the Environment*, 3rd edn. Oxford: Oxford University Press.
- Bell S and McGillivray D (2008) *Environmental Law*, 7th edn. Oxford: Oxford University Press.
- Bell S, McGillivray D and Pedersen O (2013) *Environmental Law*, 8th edn. Oxford: Oxford University Press.

- Bisschop L (2010) Corporate environmental responsibility and criminology. *Crime, Law and Social Change* 53(4): 349-364.
- Boyle A (2006) Soft law in international law-making. In Evans M (ed.) *International Law*, 2nd edn: 141-158. Oxford: Oxford University Press.
- Brickey K (1996) Environmental crime at the crossroads: the intersection of environmental and criminal law theory. *Tulane Law Review* 71: 507-111.
- Brickey K (2012) Perspectives on corporate criminal liability. In Bruinsma G and Weisburd D (eds) *Encyclopedia of Criminology and Criminal Justice*: pp.65-67. New York: Springer Publishing.
- Bryant B (1995) *Environmental Justice*. Boston: Island Press.
- Čapek S (1993) The environmental justice frame: A conceptual discussion and an application. *Social Problems* 40(1): 5-24.
- Coomans F (2003) The Ogoni case before the African Commission on Human and Peoples' Rights. *The International and Comparative Law Quarterly* 52(3): 749-760.
- Cotterell R (2006) *Law, Culture and Society: Legal Ideas in the Mirror of Society*. Farnham: Ashgate.
- de Jongh P and Morissette L (1996) *The Netherlands' Approach to Environmental Policy Integration*. Washington DC: Centre for Strategic and International Studies.
- DeMerieux M (2001) Deriving environmental rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Oxford Journal of Legal Studies* 21(3): 521-561.
- Doak J (2007) *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of the Third Parties*. Oxford: Hart.
- Dupont-Morales M. (1998) Constructing the case study in victimology. *Journal of Criminal Justice Education* 9(2): 293-302.
- Du Rées H (2001) Can criminal law protect the environment? *Journal of Scandinavian Studies in Criminology and Crime Prevention* 2: 109-126. Reprinted in White R (ed.) (2009) *Environmental Crime: A Reader*: 638-655. Cullompton: Willan Publishing.
- Dyupina E and van Amstel A (2013) Arctic methane. *Journal of Integrative Environmental Sciences* 10(2): 93-105.
- Environment Agency (2014) *Civil Sanctions*. Available at <http://www.environment-agency.gov.uk/business/regulation/116844.aspx> (accessed 17 June 2014).
- Environmental Protection Agency (2012) *Basic Information about Environmental Risk*. Available at: http://www.epa.gov/risk_assessment/basicinformation.htm (accessed 21 May 2014).
- Faure M and Svatikova K (2012) Criminal or administrative law to protect the environment? Evidence from Western Europe. *Journal of Environmental Law*. 24(2): 253-286.
- Farber D (2007) Compensation for victims of climate change. *University of Pennsylvania Law Review* 155: 1605-1656.
- Gibbs C, Gore M, McGarrell E and Rivers L (2010) Introducing conservation criminology: Towards interdisciplinary scholarship on environmental crimes and risks. *British Journal of Criminology* 50(1): 124-144.
- Gill P (2002) Policing and Regulation: What is the Difference? *Social & Legal Studies* 11: 523-546.
- Giovanini D (2006) Taking animal trafficking out of the shadows: RENCTAS uses the internet to combat a multi-billion dollar trade. *Innovations: Technology, Governance, Globalization* 1(2):25-35.

- Hall M and Farrall S (2012) The criminogenic consequences of climate change: Blurring the boundaries between offenders and victims. In South N and Brisman A (eds) *The Routledge International Handbook of Green Criminology*: 26-58. Abingdon: Routledge.
- Halsey M (2004) Against 'green' criminology. *British Journal of Criminology* 44(6): 833-853.
- Harrison N and Bryner G (2004) *Science and Politics in the International Environment*. Lanham: Rowman & Littlefield Publishers.
- Hofrichter R (1993) *Toxic Struggles: The Theory and Practice of Environmental Justice*. Philadelphia: New Society Publishers.
- Houck O (2003) Tales from a troubled marriage: Science and law in environmental policy. *Science* 302: 1926.
- Kasperson, J and Kasperson R (2013) *Global Environmental Risk*. Abingdon: Routledge.
- Kearon T and Godfrey B (2007) Setting the scene: A question of history. In: Walklate S (ed.) *Handbook of Victims and Victimology*: 17-36. Cullompton: Willan Publishing.
- Larsen G (2013) The most serious crime: Eco-genocide and eco-global crimes: Concepts and perspectives in eco-global criminology. In Ellefsen R, Larsen G and Sollund R (eds) *Contemporary Problems and Future Challenges*: 28-54. Farnham: Ashgate.
- Lury, C. and Wakeford, N. (2012), *Innovative Methods: The Happening of the Social*, Abingdon: Routledge.
- Lynch M and Stretesky P (2001) Toxic crimes: Examining corporate victimization of the general public employing medical and epidemiological evidence. *Critical Criminology* 10: 153-172.
- Mann K (1992) Punitive civil sanctions: The Middleground between criminal and civil law. *The Yale Law Journal* 101(8): 1795-1873.
- Matthews B and Ross L (2010) *Research Methods: A Practical Guides for the Social Sciences*. London: Longman Publishing.
- McBarnet D (1983) Victim in the witness box - Confronting victimology's stereotype. *Crime, Law and Social Change* 7: 293-303.
- Munro L (2012) Teaching & learning guide for: The animal rights movement in theory and practice. A review of the sociological literature. *Sociology Compass* 6(6): 511-518.
- New Zealand Law Commission (2012) *Civil Pecuniary Penalties*. Issues Paper 33. Wellington: New Zealand Law Commission.
- Ogus A and Abbot C (2013) Sanctions for pollution: Do we have the right regime? *Journal of Environmental Law* 25(3): 283-298.
- Paradossos J-J (2005) Planning delays, human rights and damages. *Environmental Law Review* 7(2): 85.
- Passas N (2005) 'Lawful but awful': Legal Corporate Crimes. *Journal of Socio- Economics* 24: 771-786.
- Redgwell C (2010) International environmental law. In Evans M (ed.) *International Law* 3rd edn: 687-721. Oxford: Oxford University Press.
- Rheinstein M (1954) *Max Weber on Law in Economy and Society*. Cambridge: Harvard University Press.
- Richardson N (2010) *Deepwater Horizon and the Patchwork of Oil Spill Liability Law*. Washington DC: Resources for the Future.
- Rock P and Holdaway S (1997) *Thinking About Criminology*. London: University College London Press.
- Ruggiero V and South N (2010) Green criminology and dirty collar crime. *Critical Criminology* 18(4): 251-262.

- Shmueli D and Kaufman S (2006) *Environmental Mediation*. The Center for Environmental Policy Studies Series no. 24, Jerusalem: Center for Environmental Studies.
- Skinnider E (2011) *Victims of Environmental Crime – Mapping the Issues*. Vancouver: The International Centre for Criminal Law Reform and Criminal Justice Policy.
- Smartt U (2008) *Law for Criminologists: A Practical Guide*. Thousand Oaks: Sage.
- South N (1998) A green field for criminology? A proposal for a perspective. *Theoretical Criminology*, 2 (2): 211-234
- Tabbach A (2012) Wealth redistribution and the scope and costs of crime and law enforcement. In: Harel A and Hylton K (eds) *Research Handbook on the Economics of Criminal Law*: 97-121. Cheltenham: Edward Elgar Publishing.
- Uhlmann D (2011) After the spill is gone: The Gulf of Mexico, environmental crime, and the criminal law. *Michigan Law Review*, 109: 1413-1462.
- van Kammen J, de Savigny D and Sewankambo N (2006) Using knowledge brokering to promote evidence-based policy-making: The need for support structures. *Bulletin of the World Health Organization*, 84(8): 608-12.
- Von Lewinski S (2008) *Indigenous Heritage and Intellectual Property: genetic resources, traditional knowledge and folklore*. The Hague: Kluwer Law International.
- Walsh A and Ellis L (2007) *Criminology: An Interdisciplinary Approach*. Thousand Oaks: Sage.
- White R (2013) The Conceptual Contours of Green Criminology. In: Walters R, Westerhuisand D and Wyatt T (eds.) *Emerging Issues in Green Criminology: Exploring Power, Justice and Harm*: 17-33. Basingstoke: Palgrave Macmillan.
- Williams C (1996) An environmental victimology. *Social Science* 23(1): 16-40. Reprinted in White R. (ed.) (2009) *Environmental Crime: A Reader*: 200-222. Cullompton: Willan Publishing.
- Woods M (2005) *UKELA Litigation Working Party Position Paper on Environmental Civil Penalties*. Dorking: UKELA.