

# DISCRETION AND THE CRIMINALIZATION OF ENVIRONMENTAL LAW

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## ABSTRACT

Enforcement of federal environmental law is complex. Central to the efficacy of enforcement is the role of prosecutors and judges in exercising their discretion over which violations to prosecute and what sanctions to impose. In the context of the Clean Water Act (“CWA”), discretion is exercised in an institutional framework of marginal deterrence, criminal sanctions, broad prosecutorial discretion, and judicial discretion constrained by the Federal Sentencing Guidelines. After a description of the CWA institutional framework for enforcement, a review of legal, economic, and criminal justice dimensions of exercising discretion is provided. It is concluded that while broad prosecutorial discretion is justified on economic efficiency grounds, extending criminal sanctions to outcomes lacking violator intent or control is likely to result in the overcriminalization of environmental law. Equally troubling, if judicial discretion is used to impose significant downward departures from the Federal Sentencing Guidelines, the trivialization of CWA enforcement is inevitable. Thus, overzealous prosecution runs the risk of creating over-deterrence and stripping criminal sanctions of their moral stigma, while lax criminal sanctioning undermines deterrence objectives and minimizes the importance of violating federal environmental law itself. Policy implications of recent sanctioning trends, as well as future research needs, are also explored.

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## I. INTRODUCTION

Discretion exists wherever the law leaves a public official free to make a choice.<sup>1</sup> Put another way, to the extent that discretion exists, legal outcomes are underdetermined by the letter of the law. Discretion may therefore be thought of as the “wobble room” that the system leaves for the disparate or individualized treatment of parties before the law. The law may expressly delegate discretionary authority or it may exist *de facto*, due to a lack of review.

While we aspire to an objective system of “laws not men,” some measure of discretion is inevitable; The absolute and automatic enforcement of the law is practically impossible and would, in any case, be both unconscionably harsh and prohibitively expensive. Discretion allows room for judgment. Of course, wherever there is room for judgment, there is room for bias. Discretion therefore remains a persistent chink in the law’s armor; A chink that invites attack by anyone who seeks to call the objectivity of the law into question.

So much of the legal system is discretionary that some critics have gone as far as to conclude that the law amounts to no more than a “ritual dance,”<sup>2</sup> the performance of which may be manipulated by prosecutors and courts to produce any substantive outcome they desire. The solemn observance of the dance’s formalities, they hold, serves merely to consecrate the “myth of due process.”<sup>3</sup> Although this radical critique is directed at the legal system as a whole, similar (though somewhat less stringent) charges have recently been leveled against the enforcement of environmental crime, specifically.

While it is not immediately clear that these criticisms have merit, it is easy to see why environmental law is particularly susceptible to them. Environmental crimes are relatively new to the American legal landscape and attitudes toward them are still far from uniform. While many believe criminal law to be an uncommonly effective means of environmental regulation, society has yet to reach any consensus about the seriousness of environmental offenses. Some feel that harms to the environment lack the moral weight of crimes committed against human beings, and should therefore be addressed only through regulatory sanctions like compliance orders, injunctions and money damages. At the other end of the spectrum are those who

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1. See generally Burton Atkins & Mark Pogrebin, *Discretionary Decision-Making and the Administration of Justice*, in *THE INVISIBLE JUSTICE SYSTEM* (Burton Atkins ed., 1982).

2. Arthur Rossett, *Discretion, Severity, and Legality in Criminal Justice*, in *THE INVISIBLE JUSTICE SYSTEM* 16, 18 (Burton Atkins ed., 1982).

3. Atkins & Pogrebin, *supra* note 1, at 3.

judge the scale of environmental damage so large and its consequences so grave that even accidental violations may merit prison time.

Given the general disagreement, the broad language of the statutes, and the short history of environmental criminal law, prosecutors and judges will inevitably differ in their approaches to the prosecution, conviction, and sentencing of environmental offenders. Commentators on both sides of the environmental law debate have warned that there is too much discretion in the system, allowing (and perhaps even forcing) public officials to impute their own values. They caution that the law as it stands leaves a dangerously wide gap for variance in the charges, settlements, and plea bargains sought by the government. They fear that this gap allows two identical acts of environmental harm to be dealt with quite differently. When all is said and done, some violators may receive jail time while others, who have in substance committed the same crime, receive a “slap on the wrist” or are even consciously ignored.<sup>4</sup>

Some argue that this variability leaves the violator no hope of anticipating the government’s response.<sup>5</sup> Worse still, available sanctions may be so harsh and discretion so broad that even innocent defendants are effectively forced to take a guilty plea *in terrorum*.<sup>6</sup> Still others believe that the government has been lax in its enforcement of environmental crimes,<sup>7</sup> and that courts have refused to take them seriously.

Our discussion focuses primarily on two types of discretion in the criminal justice system: (1) prosecutorial discretion and (2) judicial discretion.

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4. See generally Jane Barrett, *Sentencing Environmental Crimes under the United States Sentencing Guidelines: A Sentencing Lottery*, 22 ENVTL. L. 1421 (1992).

5. Keith A. Onsdorff, *The Double Standard of Prosecutorial Discretion in Environmental Cases: Why Adopting Objective Standards is Crucial to Affirming the Rule of Law*, 158 N.J. L.J. 255, 256 (1999).

6. David A. Barker put it this way:

Overly broad statutes do not just ease the burden of proof at trial, they increase the chance that prosecutors will get convictions while avoiding trial altogether. As Professor Stuntz explains, this occurs for two reasons. First, the ease of proof at trial will alter the defendant’s plea-bargaining calculus. Without access to highly litigable issues such as subjective mental state as to a complicated statute, or the reasonableness of reliance on advice of counsel, both the prospects for government victory go up, and the expected length and cost of the trial go down, further eroding the defendant’s bargaining position.

David A. Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1412 (2002).

7. Richard Caplan, U.S. PUBLIC INTEREST RESEARCH GROUP, *PERMIT TO POLLUTE: HOW THE GOVERNMENT’S LAX ENFORCEMENT OF THE CLEAN WATER ACT IS POISONING OUR WATERS* (2002).

### A. *Prosecutorial Discretion*

Indisputably, no consensus exists among regulators, enforcers, prosecutors or within the general public on how federal and state enforcement authorities should respond to environmental violations . . . infractions addressed by one agency with the proverbial “slap on the wrist” . . . will be handled by a different agency in another locale by seeking to prosecute the alleged violator under a felony criminal statute.

Keith A. Onsdorff<sup>8</sup>

In the United States, environmental administrators and the prosecutors to whom they refer criminal cases together enjoy very broad prosecutorial discretion,<sup>9</sup> limited primarily by the Constitution and the rules of prosecutorial ethics.<sup>10</sup> Although this discretion<sup>11</sup> encompasses countless interpretations, judgments and decisions made at both the Environmental Protection Agency (“EPA”) and the Department of Justice (“DOJ”),<sup>12</sup> for our purposes, it may be usefully reduced to a few discrete decisions.

The criminal enforcement process usually begins at EPA. Administrators are free to deal with any criminally serious violation through administrative or civil sanctions but to obtain criminal sanctions they must exercise their discretion to refer the case to DOJ. At DOJ, the prosecutor may exer-

8. Onsdorff, *supra* note 5, at 257.

9.

In general, legislatures and courts rarely have taken steps to interfere with the prosecutorial exercise of discretion in the charging function; as a result, particularly in regard to review autonomy, prosecutors act with nearly unfettered independence. Many justifications have been articulated for this maximization of the prosecutor's decision-making. Those advanced or identified by courts, other public officials, and commentators can be grouped in four categories: constitutional separation of powers theories, grounded in the commonly-held view that the prosecutorial function lies in the executive branch of government; deference to prosecutorial expertise; administrative necessity; and individualized justice. According to the proponents of broad discretion, the positive public benefits derived from it dictate that the most appropriate mechanism for monitoring and curbing abuse of the charging function is the electoral process, not legal regulation.

Peter Krug, *Prosecutorial Discretion and its Limits*, 50 AM. J. COMP. L. 643, 645 (2002).

10. For the ethical rules of federal prosecutors, see Citizens Protection Act of 1998, 28 U.S.C. § 530(B) (2000).

11. We analyze both the EPA's (administrative and investigative) discretion and DOJ's (truly “prosecutorial”) discretion together as “prosecutorial discretion.”

12.

In determining whether to charge and what to charge, the prosecutor must assess whether a particular set of facts fits within the criminal code, weighing the strengths of the case and determining whether the alleged perpetrator is guilty or innocent. Even when the circumstances point to guilt, prosecutors must consider the sufficiency of the evidence to sustain a conviction. And even if the evidence proves sufficient, the determination must be made whether criminal sanctions are appropriate or criminal prosecution is in the community's best interest.

Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 376 (2000).

cise discretion both in charging a violator and in seeking particular charges or sanctions against him.<sup>13</sup> Both EPA and DOJ may exercise discretion to ignore violations altogether.<sup>14</sup>

When a violation is chosen for enforcement, the type and severity of sanctions sought are largely within the discretion of the administrator and/or prosecutor. The breadth in the range of sanctions available for a given defendant will determine the government's leverage to negotiate a plea bargain or a civil settlement. Since plea bargains have traditionally accounted for ninety percent of all criminal convictions,<sup>15</sup> prosecutorial discretion is hugely influential on criminal outcomes. Moreover, discretion's influence is increasing. Fewer cases are going to trial today than ever before: only five percent of cases went to trial in 2002, down from fifteen percent in 1962.<sup>16</sup>

Discretion to decline to enforce the law is even broader. Although the enforcement section of the Clean Water Act ("CWA") states that the EPA "shall" initiate enforcement action whenever it discovers a violation, courts have refused to compel it to do so.<sup>17</sup> Courts have called that discretion to decline prosecution "absolute," citing the "unsuitability" of the decision for judicial review.<sup>18</sup>

The government's discretion in the prosecution of environmental crimes is not explicitly wider than its discretion to prosecute federal crimes

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13. Krug, *supra* note 9, at 645.

14. Karen M. McGaffey et al., *Enforcement*, in *THE CLEAN WATER ACT HANDBOOK* 196 (Parthenia B. Evans ed., 1994).

15. McGaffey et al., *supra* note 14, at 196.

16. *Id.*

17. *Id.*

18.

This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. See *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454, 456 (1869). This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balance of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

*Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

generally.<sup>19</sup> However, the contentious nature of environmental crime leads some commentators to suggest that prosecutors in this area have too much power and too few constraints.<sup>20</sup> It is clear that vagueness in the statutes themselves, civil and criminal penalties which largely overlap, and a lack of moral consensus or clear prosecutorial guidance with respect to these crimes forces prosecutors to make choices which, inevitably, impute their own values.<sup>21</sup> As such, critics argue, environmental laws are particularly susceptible to arbitrary, and politicized, enforcement.<sup>22</sup>

Other commentators, accepting this general picture, argue that the problem is further aggravated by the erosion of criminal intent requirements from environmental crimes.<sup>23</sup> It is widely held that environmental crimes have become crimes of strict liability.<sup>24</sup> Crimes of strict liability, which did not exist at common law and are still very unusual, are crimes that may be committed without any intent to do so, as no showing of intentional wrongdoing is required to sustain a conviction under them. These critics find this erosion of intent in two judicial doctrines: the "public welfare" doctrine and its corollary the "Responsible Corporate Officer" ("RCO") doctrine.<sup>25</sup> By abolishing intent they hold, these doctrines have erased the threshold between civil and criminal sanctions and written prosecutors a blank check to seek any sanctions they please.<sup>26</sup>

Critics contend environmental law is vague and its interpretation is left to the prosecutor's discretion. This sends the regulated community no

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19. See generally Joshua D. Yount, *The Rule of Lenity and Environmental Crime*, 1997 U. CHI. LEGAL F. 607, 620 (1997) (discussing how prosecutions under criminal environmental statutes are similar to those used in traditional common law).

20. See *id.* at 623 ("[A]mbiguity permits selective and arbitrary enforcement. In the environmental realm, where enforcement is committed to agencies accustomed to administering civil provisions with nearly unfettered discretion, protection from overzealous, unpredictable, and politically motivated prosecutions is necessary.")

21. See Barker, *supra* note 6, at 1412 (discussing these overly broad criminal statutes that outlaw much more conduct than is desired to see prosecuted).

22. See, e.g., *id.* (discussing the abuses possible in typical law enforcement situations as a result of these type of environmental laws that give broad prosecutorial discretion).

23. See Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, 15 TEMP. ENVTL. L. & TECH. J. 161, 180 (1996) (discussing removal of intent).

24. See Kepten D. Carmichael, *Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint*, 71 IND. L.J. 729, 740 (1996) (discussing the large number of "public welfare offenses" in environmental area that are a form of strict criminal liability).

25. See *id.* at 749-50 (discussing responsible corporate officer doctrine as involving corporate executives who are responsible for the activities regulated by public welfare statutes).

26. See Barker, *supra* note 6, at 1413 (discussing how eliminating a relevant element such as knowledge makes environmental statutes overly broad and gives broad prosecutorial power).

clear signals; they may not even know when they have broken the law,<sup>27</sup> much less anticipate a potential sentence. Overbroad statutes, overlapping penalties and lowered standards of criminal intent combine to allow the threat of criminal penalties to be held over even petty violators. This gives the EPA and DOJ overwhelming leverage at the both the civil settlement and plea bargaining tables<sup>28</sup> and may induce even innocent defendants to settle or plead rather than risk taking a case to trial. Additionally, critics argue, when the line is blurred between civil and criminal proceedings, suspected violators stand in danger of losing the additional evidentiary and procedural protections afforded to criminal defendants.<sup>29</sup> These critics call for limits on prosecutorial discretion<sup>30</sup> and a return to common law notions of criminal intent.<sup>31</sup>

Do environmental prosecutors wield too much power? A look at the case law of the Clean Water Act suggests that the criticism may have some merit. One way of measuring whether the potential for abuse exists is to see if prosecutions have been uniform or arbitrary. Early studies of enforcement of the Clean Water Act suggested that it was being applied inconsistently as between jurisdictions and similarly situated offenders.<sup>32</sup>

In *United States v. Wells Metal Finishing*,<sup>33</sup> prosecutors sought criminal charges. John Wells and his metal finishing company were convicted of

27. See Lynch, *supra* note 23, at 165. (citing Don J. DeBenedictis, *Hazardous Advice*, A.B.A. J., Sept. 1991, at 16: "The explosion of vaguely written environmental rules has spawned a notorious civil liability minefield for the business community. The criminalization of violations of those regulations is making the terrain so treacherous that even lawyers are having difficulty remaining on the right side of the law.")

28. See Barker, *supra* note 6, at 1412.

29.

[The] pretextual crime problem is potentially applicable to environmental crimes. EPA inspectors regularly show up for inspections without a warrant and simply ask for consent to inspect the facilities since consensual searches do not require warrants. Once the inspector has shown his credentials and is lawfully admitted to the property, anything in "plain view" is admissible evidence, and could quickly turn a routine inspection into a preliminary tour for a full-blown criminal investigation.

*Id.* at 1419-20.

30. See, e.g., Lynch, *supra* note 23. To see how this might be achieved, consider the case of the Oregon Environmental Crimes Act ("OECA"), which includes language aimed at constraining prosecutorial discretion:

[S]ection 468.961 of the Oregon Revised Statutes requires that the Attorney General, together with local district attorneys, develop legally prescribed guidelines for prosecution. Furthermore, prosecutors bringing a felony charge under the OECA must submit certification to the court that they followed the guidelines.

See Gregory A. Zafiris, Comment, *Limiting Prosecutorial Discretion under the Oregon Environmental Crimes Act: A New Solution to an Old Problem*. 24 ENVTL. L. 1674 (1994).

31. See Barker, *supra* note 6, at 1396-1401.

32. See, e.g., Barrett, *supra* note 4.

33. 922 F.2d 54 (1st Cir. 1991).

knowingly discharging hazardous pollutants in violation of CWA provisions.<sup>34</sup> The discharge contained levels of zinc and cyanide in excess of federal pretreatment limits.<sup>35</sup> These high concentrations of contaminants inhibited the sludge processing at the City of Lowell's municipal treatment plant, which empties into the Merrimack River, "a drinking supply for numerous downstream communities."<sup>36</sup> Wells was found guilty of systematically discharging wastewater into the municipal water system and was sentenced to fifteen months of imprisonment and one year of supervised release.<sup>37</sup> No fine was imposed.<sup>38</sup>

In contrast, in *United States v. Gienger Farms*,<sup>39</sup> farm managers "discharged approximately 1.3 million gallons of manure-laden wastewater" into ditches draining into Oregon's Tillamook Bay without a permit. In addition to polluting the environment with abnormally high levels of nutrients like nitrate and phosphorus, animal waste may contain pathogens directly dangerous to humans, like *giardia* and *cryptosporidium*.<sup>40</sup> In this case, however, the EPA chose to deal with the matter administratively and the farm was assessed a \$20,000 penalty.<sup>41</sup>

An even more troubling scenario involves arbitrary enforcement combined with diminished criminal intent under the responsible corporate officer doctrine. In this situation, liability for the act in question is not only increased from civil to criminal, but imputed to a corporate officer, with no actual knowledge of the conduct, merely on the basis of his or her position in the company.<sup>42</sup> In criminal CWA cases, when harm has been inflicted by a corporation, prosecutors may choose, under the "responsible corporate officer doctrine," to pursue criminal charges against the officers of the corporation.<sup>43</sup> In the early years of the CWA, all of the criminal offenses for

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34. *Id.* at 56.

35. *Id.*

36. *Id.* at 57.

37. *Id.* at 56.

38. Dennis Cory & Anna Rita Germani, *Criminal Sanctions for Agricultural Violations of the Clean Water Act*, 4 WATER POL'Y 491 (2002).

39. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, FY 1996 END OF YEAR ENFORCEMENT & COMPLIANCE ASSURANCE REPORT (1997).

40. See PETER H. RAVEN & LINDA R. BERG, ENVIRONMENT 513-15 (3d ed. 2001).

41. Cory & Germani, *supra* note 38, at 505.

42. See generally Rachel Glickman et al., *Environmental Crimes*, 40 AM. CRIM. L. REV. 413, 421 (2003) (discussing how some courts have inferred the knowledge requirement in utilizing the corporate officer doctrine).

43. See *id.* (discussing how individual liability can be imposed on officers who have authority to correct violation as opposed to those who actually committed act).



which this “operator” liability was available were misdemeanors.<sup>44</sup> In 1987, however, the CWA was amended to effectively allow felony convictions of responsible corporate officers.<sup>45</sup> The possibility now exists that the officers of an offending corporation could *serve time* in one jurisdiction for conduct which, in another jurisdiction, would have attracted only a fine to the corporation itself.

This also appears to have some support in the case law. For example, in *United States v. Johnson*,<sup>46</sup> Johnson Properties failed to maintain its wastewater treatment plants. Failure to maintain such plants according to CWA requirements can lead to the release of harmful levels of *Escherichia coli* bacteria and other microscopic organisms which cause intestinal illness in humans and harm aquatic organisms and wildlife. Prosecutors sought criminal charges against Glenn Kelly Johnson, general manager and president of Johnson Properties. He was convicted of failing to maintain the plants and knowing discharge of pollutants. The court sentenced Johnson to thirty-six months in prison, three years of probation, and a \$500,000 fine.

Again, by way of contrast, in *United States v. Rockview Farms*,<sup>47</sup> a California corporation which owned and operated a dairy farm in Nevada illegally discharged 1.7 million gallons of dairy wastewater contaminated with urine and feces. While fecal coliform does not pose a direct health risk to humans or animals, its presence is a strong indicator of the existence of dangerous sewage-bourn pollutants like hepatitis A, typhoid and dysentery (all harmful to humans)<sup>48</sup> as well as cadmium, mercury and polychlorinated biphenyls (all harmful to aquatic life).<sup>49</sup> At sentence, Rockview Farms was fined \$250,000 and was ordered to upgrade the dairy to prevent future dis-

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44. *United States v. Iverson*, 162 F.3d 1015, 1024 (9th Cir. 1998) (“In 1987, after the Supreme Court decided *Park*, Congress revised and replaced the criminal provisions of the CWA. (Most importantly, Congress made a violation of the CWA a felony, rather than a misdemeanor.”).

45. *Id.*; 33 U.S.C. § 1319 (2000).

46. See U.S. ENVIRONMENTAL PROTECTION AGENCY, WATER ENFORCEMENT BULLETIN: OCTOBER 1998 – JUNE 1999 CASES IN REVIEW 37 (1999) (discussing *United States v. Johnson*, 1999 U.S. Dist. LEXIS 12380) available at <http://www.epa.gov>.

47. Press Release, U.S. Environmental Protection Agency, Nevada Dairy Sentenced for Clean Water Act Offense (May 6, 1999) available at <http://www.epa.gov> [hereinafter EPA, Nevada Dairy].

48. U.S. Environmental Protection Agency, *Fecal Coliform*, at <http://www.epa.gov/maiahtml/fecal.html> (last visited Nov. 30, 2004).

49. See Standards for the Use or Disposal of Sewage Sludge, 58 Fed. Reg. 9259 (Feb. 19, 1993) (to be codified at 40 C.F.R. pts. 257, 403 & 503) (stating that cadmium, mercury and polychlorinated biphenyls can bioaccumulate and “may produce toxic effects in aquatic life”); see generally NOEL GOLLEHON ET AL., CONFINED ANIMAL PRODUCTION AND MANURE NUTRIENTS, Economic Research Service, U.S. Department of Agriculture, Agriculture Information Bulletin, No. 771, 35 (June 2001) (discussing the effects of animal waste on water quality).

charges; The manager was fined \$5000 and given only three years of probation.<sup>50</sup>

### B. *Judicial Discretion*

Prior to 1984, federal judges enjoyed wide discretion in sentencing decisions.<sup>51</sup> Concerns over unconstrained judicial discretion and sentence disparities for similar crimes provided the impetus for the Sentencing Reform Act of 1984.<sup>52</sup> This Act established sentencing guidelines to limit the range of acceptable sentences federal judges could impose on convicted defendants.<sup>53</sup> Under the Guidelines, a judge must apply the sentence corresponding to the particular criminal offense for which the defendant has been convicted; a judge's discretion to determine the length of a sentence is limited to the narrow range set out by these federal guidelines.<sup>54</sup>

In April 2003, Congress sought to reduce federal judicial discretion in sentencing criminals from this range through the passage of the PROTECT Act.<sup>55</sup> A section of this Act, termed the Feeny Amendment, limits the federal judiciary's power to depart and requires reports to Congress on any judge who departs downward from the sentencing guidelines.<sup>56</sup> In his 2003 year-end report on the federal judiciary, Chief Justice William Rehnquist lamented the judiciary's loss of sentencing authority, and warned that cataloging sentencing data could be "an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties."<sup>57</sup> Rehnquist further noted that Congress enacted these changes without any consideration of the views of the judiciary, resulting in a break down of "the traditional interchange between the Congress and the Judiciary."<sup>58</sup> Similarly, in a speech to the American Bar Association, Justice An-

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50. EPA, Nevada Dairy, *supra*, note 47.

51. Barrett, *supra* note 4, at 1422; John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551, 551 (1993).

52. Sentencing Reform Act of 1984, Pub. L. No. 980-473, 98 Stat. 1987, (codified as amended at 18 U.S.C. §§ 2551 – 3742, 991 – 998).

53. U.S. SENTENCING GUIDELINES MANUAL § 2Q1.1-2Q2.1 (1998).

54. These ranges are six months or 25% of the minimum, unless the minimum exceeds thirty years. 28 U.S.C. § 994(b)(2) (2000).

55. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act, Pub. L. No. 108-21 (2003).

56. See David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 230-36 (2004) (discussing the Feeny Amendment).

57. William H. Rehnquist, *2003 Year-end Report on the Federal Judiciary*, Jan. 1, 2004, available at <http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html> (last visited Dec. 16, 2004).

58. *Id.*

thony Kennedy echoed these concerns, arguing that mandatory sentencing, a related constraint on judicial sentencing authority, results in unacceptably harsh punishments.<sup>59</sup>

This debate is not limited to the field of traditional criminal law. Seven federal environmental statutes currently contain provisions for criminal penalties. Sentencing of these environmental crimes committed by individuals is governed by Chapter 2, part Q of the Guidelines.<sup>60</sup> The recommended sentence reflects a grading system based primarily on the severity of harm caused by the violation and the mental state of the violator.<sup>61</sup> This scheme creates three categories of environmental offenses: knowing endangerment, knowing or willful violations of regulatory requirements, and negligence.<sup>62</sup> The sentence, however, can be enhanced or reduced at the discretion of the court based on specific characteristics provided by the sentencing guidelines.<sup>63</sup>

Nevertheless, the limits on judicial discretion provided by these guidelines appear to have created inconsistent results for seemingly similar offenses. For example, Allen H. Frey discharged petroleum-based pollutants into the sewer system.<sup>64</sup> These pollutants released fumes inside the local sewage treatment plant, causing employees to become ill with headaches and nausea. The plant then discharged to an unnamed tributary. It is unknown, however, whether pollutants were released into the water system. Because of his action, Frey was charged with two counts of negligently violating the Clean Water Act; He pled guilty to both counts and the court sentenced him to a \$5000 federal fine.

Similarly, Harry E. Washut discharged sewage from a campground RV dump station into a tributary of the Buffalo Fork River, which flows through the Grand Teton National Park just a few miles from the campground.<sup>65</sup> For this act, Washut was charged with two counts of negligently

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59. Anthony M. Kennedy, *Address at the American Bar Ass'n. Annual Meeting* (Aug. 9, 2003), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-09-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html) (last visited Dec. 16, 2004).

60. SUSAN F. MANDIBERG & SUSAN L. SMITH, *CRIMES AGAINST THE ENVIRONMENT* 552 (1997).

61. *Id.*

62. *Id.* at 529-30; see Gary S. Lincenberg, *Sentencing of Environmental Crimes*, in *THE ENVIRONMENTAL CRIMES CASE: FROM PRETRIAL PROCEEDINGS TO SENTENCING GUIDELINES* 118-121 (Gary S. Lincenberg & David S. Krakoff eds., 1999).

63. See Zlotnick, *supra* note 56, at 218.

64. This discussion of Allen H. Frey's case was taken from the EPA's *Summary of Criminal Prosecutions*, available at [http://cfpub.epa.gov/compliance/criminal\\_prosecution/index.cfm](http://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm) (last visited Dec. 11, 2004). The case was docketed as *United States v. Frey*, No. CR: 99-0497 (E.D. Pa. June 16, 1999).

65. This discussion of Harry E. Washut's case was taken from the EPA's *Summary of Criminal Prosecutions*, available at [http://cfpub.epa.gov/compliance/criminal\\_prosecution/index.cfm](http://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm) (last visited

violating the Clean Water Act. He pled guilty to one of these counts and was sentenced to twelve months probation and a \$2500 fine.

Finally, Leon Baker, a supervisor at a waste water treatment plant, allowed untreated wastes to be discharged directly to the Potomac River.<sup>66</sup> Although Baker was not directly responsible for the discharge, he knew about the ongoing discharge and did not attempt to prevent it. For his part, Baker received six months of home incarceration, twenty-four months of probation, a fine of \$2000, and a \$25 special assessment fee.

In all three of these cases, the defendant was charged under 33 U.S.C. § 1319(c)(1) with negligently introducing a pollutant into the sewer that the defendant knew or should have known could cause personal injury or property damage. For this negligent violation, the Clean Water Act requires a minimum penalty of \$2500 for each day the violation persists.<sup>67</sup> And, because these violations constitute criminal acts, they are subject to the Federal Sentencing Guidelines. Under the federal guidelines, the defendants' acts were given an offense level of three; This offense level accords the sentencing judge a range of zero to six months incarceration if the defendant does not have an extensive criminal history.<sup>68</sup> Accordingly, the possible sentence in each of these cases ranges from a \$2500 fine to six months in prison plus a \$2500 fine for each day the violation occurs.<sup>69</sup>

Despite the Federal Sentencing Guidelines, these seemingly similar defendants received disparate sentences. Fray received the minimum sentence possible of \$2500 per violation and no jail time. Washut also received the minimum \$2500 fine for the single violation, but was placed on probation for twelve months. Baker received the strictest sentence possible: six months home incarceration, twenty-four months probation, and a total \$2025 in fines. This general comparison suggests that, despite the Federal Sentencing Guidelines, judicial discretion may affect the sentencing of similarly situated individuals convicted of crimes against the environment.

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Dec. 11, 2004). The case was docketed as *United States v. Buffalo Valley Resort, Inc.*, No. CR: 98-01 (D. Wyo. Sept. 14, 1998).

66. This discussion of Leon Baker's case was taken from the EPA's *Summary of Criminal Prosecutions*, available at [http://cfpub.epa.gov/compliance/criminal\\_prosecution/index.cfm](http://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm) (last visited Dec. 11, 2004). The case was docketed as *United States v. Baker*, No. CR: 98-2007 (W.D. Ark. Mar. 12, 1998).

67. 33 U.S.C. § 1319(c)(1)(B) (2000).

68. MANDIBERG & SMITH, *supra* note 60, at 544.

69. *See id.* at 536, 544.

### C. *Summing Up*

As noted above, sentences for significant violations of the CWA have varied dramatically, suggesting that criminal outcomes under CWA were largely a function of discretion. This paper analyzes the concept of prosecutorial and judicial discretion in environmental law, focusing specifically on violations of the CWA. First, we survey the legal and policy debates over discretion. We then examine the role of discretion in the federal environmental criminal justice system through the dual prisms of economics and criminal justice.

We find that the system, as it exists today, is one of broad prosecutorial discretion and narrow judicial discretion. We argue that this is a highly efficient combination of discretionary elements and explain why this is so. We then consider criminal justice objections to this discretionary regime and conclude that, although some serious justice concerns persist, meaningful safeguards are built into the system.

## II. ENFORCEMENT UNDER THE CLEAN WATER ACT

The stated aim of the Federal Water Pollution Control Act,<sup>70</sup> commonly known as the Clean Water Act, is to “restore and maintain the chemical, physical and biological integrity of the navigable waters of the United States.”<sup>71</sup>

The pollution control provisions of the Act seek to control (1) the dredging and filling of wetlands and (2) the discharge of water pollutants.<sup>72</sup> The former are dealt with through the dredge and fill permit program of section 404.<sup>73</sup> Pollution is managed by splitting its sources into two categories, “point” and “non-point,” and dealing with each separately.<sup>74</sup>

Point source pollution can be traced to a single discrete source (e.g. a drainpipe). Section 402 addresses point source pollution through the National Pollutant Discharge Elimination System (“NPDES”).<sup>75</sup> NPDES is the regulatory scheme under which permits to discharge pollutants are issued, subject to compliance with effluent quality standards and conditioned on

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70. 33 U.S.C. § 1344 (2000).

71. 33 U.S.C. § 1251(a) (2000).

72. 33 U.S.C. § 1344 (2000); *see also* DAVID GETCHES, WATER LAW IN A NUTSHELL, 379-88 (3d ed. 1997) (1984).

73. 33 U.S.C. § 1344 (2000); GETCHES, *supra* note 72, at 386.

74. *Id.* at 380.

75. *Id.*; 33 U.S.C. § 1342 (2000); *see also* 33 U.S.C. § 1362(14) (2000) (defining point source as “any discernible, confined and discrete conveyance”).

the implementation of pollution control technology. NPDES has been very effective at reducing the amount of point source water pollution.

Non-point source pollution comes from less definite sources (e.g. city streets) often in the form of diffuse runoff.<sup>76</sup> Under sections 208, 303, and 319, the CWA has attempted to deal with this sort of pollution by mandating the use of “best management practices” (“BMPs”) at potentially polluting facilities,<sup>77</sup> establishing of “total maximum daily loads” (“TMDLs”) of pollutants in given water bodies, and calling on states to adopt and implement water quality standards.<sup>78</sup> Due to the uncertainties inherent in non-point source pollution, however, this effort has been largely unsuccessful.<sup>79</sup>

#### A. *The Enforcement Pyramid*

Under section 309(c) of the Clean Water Act, criminal liability can arise from (1) any negligent or knowing violation of the Act, (2) knowing endangerment of another person while violating it, (3) false statements made in the reporting required by the Act, and (4) tampering with monitoring equipment required by the CWA.<sup>80</sup> Felony convictions are at least nominally conditioned on the “knowing” violation of the Act,<sup>81</sup> though, as we shall shortly discuss, this knowledge requirement is diminished in certain important ways.

However, criminal enforcement is but one aspect of the Clean Water Act. The environmental legal system is characterized by its flexibility in enforcement of the Act, which may be enforced by a variety of different parties through an array of different vehicles, ranging from state-level administrative penalties,<sup>82</sup> to compliance orders,<sup>83</sup> to lawsuits by private parties.<sup>84</sup> EPA, DOJ, or both acting together may choose to proceed with a combination of these actions, in what is known as a “parallel proceeding.”<sup>85</sup>

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76. THOMAS F.P. SULLIVAN, *THE ENVIRONMENTAL LAW HANDBOOK* 284 (16th ed. 2001).

77. GETCHES, *supra* note 72, at 383-85.

78. JOSEPH L. SAX ET AL., *THE LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 898 (3d ed. 2000).

79. *Id.*

80. McGaffey et al., *supra* note 14, at 207-08.

81. *Id.*; *see also* 33 U.S.C. § 1319(c)(2) (imposing larger fines and longer terms of incarceration for criminal violations that are knowing as compared to merely negligent); MANDIBERG & SMITH, *supra* note 60, at 151-52 (indicating that negligent violations result in only misdemeanor liability, while knowing violations constitute a felony).

82. The Act provides that the federal government will defer to the state's enforcement for 30 days. 33 U.S.C. § 1319(a)(1).

83. *Id.* § 1319(a)(3)

84. 33 U.S.C. § 1365.

85. U.S. DEP'T. OF JUSTICE, *U.S. ATTORNEYS' MANUAL* tit. 5, § 11.112 (2003).

Similarly, a civil action may be pursued jointly by state and federal departments.<sup>86</sup> However, the DOJ retains exclusive authority to prosecute criminally.<sup>87</sup> Prosecution decisions at all levels will be influenced by negotiations with the violator and the government's discretion to reduce penalties<sup>88</sup> or drop charges as part of a settlement, a plea bargain, or a combined "global" settlement of both criminal and civil liability.<sup>89</sup>

The primary enforcement actions can be organized into a pyramid descending from criminal referrals (the most rare) to administrative penalties (the most common).<sup>90</sup> Most often, a CWA case is raised when the offense in question comes to the attention of a regulatory agency, either the EPA or a state environmental agency. The agency has wide discretion in choosing how to enforce the law. Both administrative and civil penalties are available without any showing of negligence or fault by the violator.<sup>91</sup> Subject to loose administrative guidance, the EPA may choose which cases to decline to pursue, which to leave to state and local enforcement, which to deal with administratively, which to refer to the DOJ for civil action, and which to refer for criminal charges.<sup>92</sup> As noted above, once a civil or criminal action has been referred, the DOJ has discretion to decline to prosecute.<sup>93</sup>

Table 1 indicates the maximum penalties available for a given violation. The actual assessment of administrative and/or civil penalties is discretionary, but that discretion is subject to official administrative policy, set forth in the guidelines.<sup>94</sup> The assessment is made according to a specific list of factors, including the seriousness of the offense and the offender's culpability.<sup>95</sup> These factors are determined for each case, then manipulated and

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86. *See generally* U.S. DEP'T. OF JUSTICE IN COOPERATION WITH THE NAT'L ASS'N OF ATTORNEYS GENERAL, GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVTL ENFORCEMENT LITIGATION (2003), available at [http://www.naag.org/issues/pdf/env-joint\\_enf\\_guidelines-full.pdf](http://www.naag.org/issues/pdf/env-joint_enf_guidelines-full.pdf).

87. *Id.* at 325.

88. U.S. ENVTL PROTECTION AGENCY, OFFICE OF COMPLIANCE AND ENFORCEMENT, CIVIL PENALTY POLICY FOR SECTION 311(b)(3) AND SECTION 311(j) OF THE CLEAN WATER ACT 3 (1998), available at <http://www.epa.gov/compliance/resources/policies/civil/cwa/311pen.pdf> [hereinafter CIVIL PENALTY POLICY].

89. MANDIBERG & SMITH, *supra* note 60, at 506.

90. *See generally* Cory & Germani, *supra* note 38.

91. SULLIVAN, *supra* note 76, at 305.

92. MANDIBERG & SMITH, *supra* note 60, at 14.

93. *Id.* at 323.

94. *See, e.g.*, CIVIL PENALTY POLICY, *supra* note 88, at 1 (providing "general guidelines on administrative civil penalty pleading practices under Sections 311(b) and (j) of the Clean Water Act"); *see also* 33 U.S.C. § 1319(g)(1) (indicating that the EPA Administrator or Army Corps of Engineers Secretary may assess a civil penalty).

95. McGaffey et al., *supra* note 14, at 213; *see also* 33 U.S.C. § 1319(g)(3) (requiring that the agency consider factors that include the seriousness of the violation, the defendant's history of prior violations, their degree of culpability, and the benefit derived from the violation).

adjusted according to a uniform administrative rubric, producing a bottom line penalty figure.<sup>96</sup> While the specific calculation and the bottom line figure in each case are kept confidential for settlement leverage, the procedure itself is of public record and is published by the EPA.<sup>97</sup>

The EPA may pursue any violation with an administrative order mandating compliance and/or assigning a penalty to the violation.<sup>98</sup> EPA will usually pursue the least resource-consumptive route to enforcement of a given offense, and in most cases this is an administrative order.<sup>99</sup> An administrative compliance order (“ACO”) details the violation and commands the offender to return to compliance immediately.<sup>100</sup> Administrative fines are tailored proportionally to the scale of the offense. Administrative penalties are tailored proportionally to the violation<sup>101</sup> and may run up to \$125,000.<sup>102</sup> Typical administrative offenses include industrial and agricultural toxic leaks and corruption of wetlands in construction projects.<sup>103</sup> Typical cases involve sole proprietors, often municipal sewers, construction contractors, and dry cleaners.

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96. *Id.*

97. See CIVIL PENALTY POLICY, *supra* note 88, at 5-19 (articulating the official procedure for determining the minimum settlement amount in a civil case arising under section 311 of the Clean Water Act); see also 33 U.S.C. § 1321(b)(6)(c) (requiring that public notice be given prior to the issuance of a Class II penalty for an illegal oil spill).

98. 33 U.S.C. § 1319(a)(1), (3).

99. SULLIVAN, *supra* note 76, at 304.

100. See 33 U.S.C. § 1319(a) (setting out the requirements of a compliance order).

101. 33 U.S.C. § 1319(g)(3).

102. Administrative penalties are found in two parts of the Act: section 309, which deals with permit violations generally and is codified at 33 U.S.C. § 1319(g)(2), and section 311, which deals with the discharge of oil and hazardous substances, and is codified at 33 U.S.C. 1321(b)(6). Under these sections, penalties are divided into two classes. Class I violations may be assessed a penalty up to \$10,000 per violation, but no more than \$25,000 in the aggregate. Class II violations may be assessed up to \$10,000 per day, but no more than \$125,000 total. Violators who receive a Class II penalty cannot be subject to a civil judicial action for the same underlying violation. U.S. Environmental Protection Agency, *Penalties for Oil Discharge*, at <http://www.epa.gov/oilspill/penalty.htm#Administrative> (last visited December 9, 2004).

103. The Senate Report accompanying the 1987 Amendments suggests that administrative enforcement was intended for use in smaller cases, for uncontested offenses, and for past violations. See S. REP. No. 99-50, at 25-27 (1985) *referenced in* 1987 U.S.S.C.A.N. 5, 5 (discussing the purposes of creating administrative enforcement concurrent with civil enforcement).



**Table 1**<sup>104</sup>  
**Clean Water Act Criminal Provisions**

<b>Penalties</b>	<b>Fine (per day)</b>	<b>Imprisonment</b>	<b>Both</b>
Any Permit Violation	Up to \$25,000	Not available	No
Any Negligent Violation	\$2,500 - \$25,000	<1 year	Yes
Second Negligent Violation	Up to \$50,000	<2 years	Yes
Any Knowing Violation	\$5,000 - \$50,000	<3 years	Yes
Knowing Endangerment by Individuals	<\$250,000	<15 years	Yes
Second Knowing Endangerment	<\$500,000	<30 years	Yes
Knowing Endangerment by Organizations	<\$1,000,000	n/a	n/a
Knowing False Statement	<\$10,000	<2 years	Yes

Factors like a substantial harm, a sophisticated offender, or a repeat offender, may magnify the penalty assessed beyond the scope of administrative penalties.<sup>105</sup> If the penalty-assessment rubric produces a bottom-line figure which exceeds the amount available via administrative order, the EPA will refer the case to the DOJ for judicial enforcement.<sup>106</sup>

DOJ may then proceed against the violator with a civil suit and/or criminal charges. In civil cases the offender is typically an institution and the offense is often multifaceted. While a single leaky pipe might only merit an administrative sanction, an aging factory causing multiple harms might warrant civil damages. Civil sanctions are intended to remedy the environmental harm with money damages and fund any clean-up efforts. The Department strives to make them proportional to the harm caused.

104. See Cory & Germani, *supra* note 38.

105. 33 U.S.C. § 1319(d); see also 33 U.S.C. § 1321(b)(8) (indicating that in determining the amount of the penalty, the agency must consider the seriousness of the violation, its economic benefit to the violator, their culpability and history of violations, the success of any efforts to mitigate the harm, and the economic impact to the violator that the penalty would have); CIVIL PENALTY POLICY, *supra* note 88 (identifying the factors that may be considered in establishing acceptable amounts for settlement of civil penalties).

106. CIVIL PENALTY POLICY, *supra* note 88, at 4.

## B. *Broad Discretion in Criminal Enforcement*

Serious “knowing” violations of the Act may call for criminal sanctions. Criminal enforcement discretion is generally quite broad. It ordinarily is exercised as three discrete decisions. The EPA makes the decision to refer, and the DOJ must then first make the decisions to prosecute and then to select particular charges.<sup>107</sup> Both EPA and DOJ may exercise discretion to ignore violations altogether (“discretion to decline to prosecute”).<sup>108</sup>

Both EPA and DOJ have adopted guidelines for administrators and prosecutors to ensure that enforcement is consistent and that it comports with the goals of the CWA.<sup>109</sup> While these guidelines do constrain each bureaucracy internally, courts have generally held that administrative guidance is not legally enforceable.<sup>110</sup> They are, however, illustrative of the goals of enforcement: to prosecute only the most egregious offenses and offenders; to deter the violations; and to foster an environment of cooperation and compliance.

In 1994, EPA Director of the Office of Criminal Enforcement Earl Devaney issued a memorandum detailing criteria to be used in making the decision to seek criminal investigation.<sup>111</sup> The “Devaney Memo” remains the EPA’s primary administrative directive in making the decision to refer a case for criminal enforcement.<sup>112</sup> The Devaney Memo makes clear that

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107. *Id.* at 72. Although the names are different, the choices made at each level are very similar. We will therefore consider them both under the umbrella of “prosecutorial discretion.”

108. McGaffey, *supra* note 14, at 196.

109. *See, e.g.*, CIVIL PENALTY POLICY, *supra* note 88, at 10 (noting that a sophisticated offender is assumed to have a greater degree of culpability, resulting in increased fines); *see also* U.S. DEPARTMENT OF JUSTICE *Principles of Federal Prosecution*, in UNITED STATES ATTORNEYS’ MANUAL § 9-27.110(B) (2d ed. 2000) [hereinafter 2000 UNITED STATES ATTORNEYS’ MANUAL], available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm) (“Since Federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of the fair and effective administration of justice in the Federal system, that all Federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities.”); Memorandum from Director Earl E. Devaney, to all EPA employees working in or in support of the Criminal Enforcement Program (January 12, 1994), available at <http://www.epa.gov/Compliance/resources/policies/criminal/exercise.pdf>. [hereinafter Devaney Memo] at 2 (“[T]he Office of Criminal Enforcement has an obligation to the American public, to our colleagues throughout EPA, the regulated community, Congress, and the media to instill confidence that EPA’s criminal program has the proper mechanisms in place to ensure the discriminate use of the powerful law enforcement authority entrusted to us.”).

110. Both DOJ and EPA guidelines are published with warnings that are for internal use only and do not have the force of law. Courts have consistently held that these guidelines are intended to convey no legal rights. *See, e.g., United States v. Blackley*, 167 F.3d 543, 548-49 (D.C. Cir. 1999).

111. Devaney Memo, *supra* note 109.

112. *See id.* The Devaney Memo is one of only two EPA guidance documents covering criminal prosecution. Moreover, EPA’s website indicates that the Memo “establishes case selection criteria for

the EPA's discretion is not discretion to charge a defendant, but merely to initiate an investigation and perhaps refer the case to DOJ.<sup>113</sup> Further, the memo stresses that criminal investigations are to be initiated sparingly. Explicitly acknowledging a scarcity of enforcement resources, the memo calls on the Agency to "maximize its presence and impact through discerning case selection."<sup>114</sup>

The Devaney Memo sets forth two criteria for selecting cases for criminal investigation: significant harm and culpable conduct.<sup>115</sup> It breaks these criteria down into factors for consideration. Significant harm may be found if any of the following four factors are found: (1) actual harm, (2) the threat of harm, (3) failure to report an actual or threatened harm, and (4) illegal conduct which "represents a trend or common attitude within the regulated community whereby criminal prosecution may provide a significant deterrent incommensurate with its singular environmental impact."<sup>116</sup> Culpable conduct, in turn, breaks down into the following four indicating factors: (1) repeat violations; (2) deliberate misconduct resulting in violation; (3) concealment of misconduct or falsification of records; and (4) business operation of pollution-related activities without a permit or license.<sup>117</sup>

The Devaney Memo leaves unclear which of these conditions are necessary and which are sufficient. While these guidelines arguably set some boundaries for administrators and give structure to EPA decisions, they do not allow the regulated community to anticipate the EPA's action or abstention.

The DOJ's charging decision is also subject to administrative guidance. According to the *Principles of Federal Prosecution*,<sup>118</sup> criminal prosecutions are forbidden without probable cause to believe a federal crime has been committed.<sup>119</sup> Prosecution should proceed only if there is probable cause to believe such a crime has been committed and the evidence is likely to sustain a conviction.<sup>120</sup> The *Principles* authorize the following seven factors for consideration in the decision to proceed: (1) fed-

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cases investigated by EPA's Office of Criminal Enforcement, Criminal Investigation Division." U.S. Environmental Protection Agency, *Criminal Enforcement: Policies and Guidelines*, at <http://www.epa.gov/Compliance/resources/policies/criminal/index.html> (last visited Dec. 16, 2004).

113. Devaney Memo, *supra* note 109, a 3.

114. *Id.*

115. *Id.*

116. *Id.* at 4.

117. *Id.* at 4-5.

118. 2000 UNITED STATES ATTORNEYS' MANUAL, *supra* note 109, at § 9-27.000.

119. *Id.* § 9-27.200.

120. *Id.*

eral law enforcement priorities; (2) the nature and seriousness of the offense; (3) the deterrent effect of prosecution; (4) the offender's culpability; (5) the offender's criminal history; (6) the offender's willingness to cooperate; and (7) the offender's probable sentence or other consequences of conviction.<sup>121</sup> Specifically with regard to the decision to prosecute environmental crimes, DOJ guidelines consider the following four factors: (1) voluntary disclosure of a violation or other cooperation with the authorities; (2) the entity's level of noncompliance; (3) the existence of preventative measures and compliance programs; and (4) whether the entity pursues its own internal disciplinary actions and produces subsequent compliance.<sup>122</sup>

A criminal defendant may only challenge the decision to charge under the Constitution, on equal protection (in the case of "selective prosecution") or due process grounds<sup>123</sup> ("vindictive prosecution"). These challenges very rarely succeed. Moreover, prosecutors enjoy immunity from civil liability for all charging decisions.<sup>124</sup> Thus, even if a prosecutor's decision is shown to be unconstitutional, the charges will merely be dropped with no further recourse to the defendant. The acquitted defendant may win attorney's fees for his troubles, but only if he shows that decision in question was "vexatious, frivolous, or in bad faith."<sup>125</sup>

The decision to select particular criminal charges is apparently unconstrained by guidance.<sup>126</sup> The prosecutor must have probable cause to believe that the underlying activity took place, but the choice between the most serious charge applicable and a lesser-included or overlapping offense is within prosecutors' discretion.<sup>127</sup>

While the discretion to decline to enforce the law is to some extent voluntarily ceded by stated administrative policy, the inherent power of the executive branch to decline appears to be limited only by the dissatisfaction

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121. *Id.*

122. SULLIVAN, *supra* note 76, at 73.

123. Krug, *supra* note 9, at 645.

124. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

125. The "Hyde Amendment," codified at 18 U.S.C. § 3006(A), provides that: "[A] court, in any criminal case may award to a prevailing party a reasonable attorney's fee and other litigation expenses, where the court finds that the [government's] position . . . was vexatious, frivolous, or in bad faith, unless . . . [it] finds that special circumstances make such an award unjust.

126. It is entirely possible that additional guidance exists, but is not available to the public. In *Jordan v. United States Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978), the court held that for purposes of the Freedom of Information Act, 5 U.S.C. § 552, documents relating to the exercise of prosecutorial discretion by the United States Attorney are not "administrative staff manuals," releasable to the public under § 552(a)(2).

127. Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 713 (1998).

of the electorate.<sup>128</sup> Courts have gone so far as to call discretion to decline prosecution “absolute,” citing the “unsuitability” of the decision for judicial review.<sup>129</sup> Although the enforcement section of the Clean Water Act states that the government “shall” initiate enforcement action whenever it discovers a violation, courts have refused to compel it to do so.<sup>130</sup> Under the *Principles*, prosecutors are officially granted discretion to decline to prosecute if (1) no “substantial federal interest” would be served, (2) the violator is subject to effective prosecution in another jurisdiction, or (3) adequate non-criminal alternatives to prosecution exist.<sup>131</sup> This grant covers a lot of territory and without judicial review this guidance is arguably toothless.

Despite the existence of constraining guidance, under this regime a violator would be hard pressed to predict his fate with precision. However, as discretion blunts the law’s expressive detail, it amplifies its volume. The stated enforcement policies stridently command the regulated community to collaborate closely with the government, police itself internally, stray from compliance at its peril and, when it finds itself out of compliance, step forward and confess its sins.

### C. *The Impact of Judicial Discretion on the Sentencing Process Under the Federal Sentencing Guidelines*

Once an offender has been convicted or has pled guilty before the court, the judge will sentence the offender to the appropriate penalty under the Federal Sentencing Guidelines. The sentencing process under the federal guidelines is composed of three elements: (1) pre-sentencing investigation by the probation officer; (2) pre-sentencing report created by the probation officer; and (3) a sentencing hearing.<sup>132</sup>

Federal probation officers are required to make a pre-sentence investigation of the defendant.<sup>133</sup> When conducting the pre-sentence investigation, the probation officer looks at the various factors required by the Federal Sentencing Guidelines. The officer considers the history and characteristics

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128. To be sure, § 1319(a)(1) requires that the Administrator, on finding a violation, respond with a compliance order or sanction within thirty days. 33 U.S.C. § 1319(a)(1). This could be identified as a limitation on the discretion to decline enforcement. In practice, however, it is not clear that this provision acts as a substantial constraint. See WILLIAM H. ROGERS, JR. ENVIRONMENTAL LAW: AIR AND WATER 591-592 (1986) (“The compulsion in the process does not take hold, of course, until there has been a “finding” of a violation, and most courts are reluctant to force the EPA’s hand on the matter.”).

129. See *supra* note 18, quoting *Heckler v. Chaney*, 470 U.S. 821 (1985).

130. McGaffey et al., *supra* note 14, at 196.

131. *Id.*

132. See MANDIBERG & SMITH, *supra* note 60, at 585.

133. 18 U.S.C. § 3552(a); FED. R. CRIM. P. 32(b)(1).

of the offender.<sup>134</sup> The officer also looks at the classification of the offense as well as the classification of the defendant under the sentencing guidelines.<sup>135</sup> Regarding environmental crimes, the officer will likely consider prior environmental compliance and any subsequent environmental performance.<sup>136</sup>

After the probation officer completes her investigation, she will compile her research into a pre-sentence report. This report will provide the courts with the information needed to sentence the offender under the Federal Sentencing Guidelines.<sup>137</sup> Although the report may contain any information that might help the court in its decision, several elements must be included. These critical components include any conclusions regarding appropriate classification of the offense and defendant, the level of sentence assigned to the offense under the Guidelines and the corresponding range of the penalty, references to any relevant commission policy statement, and an explanation of any factors that suggest that deviation from the Guidelines is appropriate.<sup>138</sup> The report may also contain the history and characteristics of the offender, including any prior criminal record, and the offender's financial condition.<sup>139</sup> Nevertheless, the report may not contain any information that might result in harm to the defendant.<sup>140</sup>

The pre-sentence report must be disclosed to both parties thirty-five days prior to the sentencing hearing.<sup>141</sup> The parties then have fourteen days to file objections to any material information included in the report, such as the classification of the offense and consequent range of the sentence or the inclusion of information the party deems irrelevant.<sup>142</sup> Based on these objections, the probation officer may agree to meet with the party objecting and even conduct further research to correct any discrepancy.<sup>143</sup> The final report must be submitted to the court and parties at least seven days before the sentencing hearing.<sup>144</sup>

At the sentencing hearing, the court must allow the parties to comment on the probation officer's determinations on any other matters that pertain

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134. FED. R. CRIM. P. 32(b)(4).

135. FED. R. CRIM. P. 32(b)(4).

136. *See* MANDIBERG & SMITH, *supra* note 60, at 587.

137. *Id.*

138. *See* FED. R. CRIM. P. 32(b)(4).

139. MANDIBERG & SMITH, *supra* note 60, at 587.

140. *See* FED. R. CRIM. P. 32(b)(4).

141. FED. R. CRIM. P. 32(b)(6)(A).

142. FED. R. CRIM. P. 32(b)(6)(B).

143. *See* MANDIBERG & SMITH, *supra* note 60, at 588.

144. *See* FED. R. CRIM. P. 32(b)(6)(C).

to an appropriate sentence.<sup>145</sup> The court, in its discretion, may receive testimony or documentary evidence on behalf of either the offender or the state.<sup>146</sup> After considering all submitted information, the court will sentence the offender according to the Federal Sentencing Guidelines. If the court chooses to depart from the Guidelines, it must state the specific reasons for the modified sentence.<sup>147</sup> Both the offender and the government have a right to appeal the sentence to the next highest court, generally the federal circuit courts.<sup>148</sup>

### III. THE LEGAL AND POLICY DEBATES OVER DISCRETION

#### A. *Prosecutorial Discretion and Strict Liability: A Dangerous Combination?*

As we have discussed, environmental violators may be held strictly liable for administrative and civil violations. It is commonly argued that violators may also be held strictly liable for both misdemeanor and felony criminal violations, that environmental crimes are crimes of strict liability.<sup>149</sup> If true, environmental crimes represent a deviation both from basic principles of fairness and the common law.<sup>150</sup> Intuitive fairness seems to tell us that criminal penalties entail moral punishment, and are not appropriate in the absence of an immoral choice. Moreover, at common law, criminal conviction required a positive showing of fault. Procedurally, strict liability eliminates that showing, lowering the burden for prosecutors.<sup>151</sup> By making convictions in this area much easier to obtain, it is argued, Congress and the courts have unreasonably broadened both the

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145. MANDIBERG & SMITH, *supra* note 60, at 589.

146. *Id.*

147. 18 U.S.C. § 3553(c).

148. 18 U.S.C. § 3742; *see* MANDIBERG & SMITH, *supra* note 60, at 591 ("Applications of the Guidelines are reviewed *de novo* as to legal issues and on a clearly erroneous standard as to factual issues. Mixed questions of law and fact are reviewed under the clearly erroneous standard.")

149. *See generally* Joseph E. Cole, *Environmental Criminal Liability: What Federal Officials Know (or Should Know) Can Hurt Them*, 54 A.F.L. REV. 1 (2004).

150. *See* WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* 340 (2d ed. 2003) ("For several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more types of fault (intention, knowledge, recklessness, or—more rarely—negligence).")

151. *See id.* at 341 ("Doubtless with many such crimes the legislature is aiming at bad people and expects that the prosecuting officials, in the exercise of their broad discretion to prosecute or not to prosecute, will use the statute only against those persons of bad reputation who probably actually did have the hard-to-prove bad mind, letting others go who, from their generally good reputation, probably had no such bad mental state.")

*Id.* at 382.

prosecutor's power and possible range of outcomes available to a given offender.<sup>152</sup>

### 1. *Mens Rea* and the Evolution of Strict Criminal Liability

At common law, conviction of a criminal offense required both a criminal act, or *actus reus*, and a criminal state of mind, or *mens rea*. *Mens rea* ("guilty mind") was the chief distinguishing characteristic of criminal law. While tort law was intended to remedy merely undesirable acts and occurrences, criminal law sought to punish immoral behavior.<sup>153</sup> Generally, *mens rea* was thought to exist when the prosecutor could show that the accused had committed the crime in question with some degree of "vicious will."<sup>154</sup>

In the 20<sup>th</sup> Century, Congress and courts adopted strict liability for some crimes,<sup>155</sup> particularly regulatory crimes, including at least some environmental crimes.<sup>156</sup> They departed from the *mens rea* principle of common law under two new doctrines, the "public welfare" and "responsible corporate officer" doctrines.<sup>157</sup> Both of these doctrines, it is alleged, assign criminal liability without regard to knowledge or intent; the public welfare doctrine by imposing strict liability and RICO via the imposition of vicarious liability.

Strict liability is liability triggered by an act or occurrence without regard to mental state. A "true" strict liability offense would require no mental state for conviction and permit none as a defense. In common usage, however, "strict liability" often means merely that the relevant mental state

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Suppose a criminal statute contains the elements *ABC*; suppose further that *C* is hard to prove, but prosecutors believe they know when it exists. Legislatures can make it easier to convict offenders by adding new crime *AB*, leaving it to prosecutors to decide when *C* is present and when it is not.

William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531 (2001).

153. LAFAVE, *supra* note 150, at 14.

154. *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 492 (E.D.N.Y. 1993) (citing Blackstone's Commentaries).

155. See LAFAVE, *supra* note 150, at 340-41 ("Usually, but not always, the statutory crime-without-fault carries a relatively light penalty—generally of the misdemeanor variety. Often, this statutory crime has been created in order to help the prosecution cope with a situation wherein intention, knowledge, recklessness, or negligence is hard to prove, making convictions difficult to obtain unless the fault element is omitted.").

156. It is not clear that all of the environmental crimes are public welfare offenses. See Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1203-04 (1995) (stating that environmental law is comprised of both "public welfare offenses" as well as "innocent activity offenses").

157. See Cole, *supra* note 149, at 6.



will be presumed by the court, and this presumption is sometimes rebuttable.

Vicarious liability is the imputation of liability from an agent to his supervisor.<sup>158</sup> Today, under the doctrine of *respondeat superior*, employers are liable for the tortious conduct of their employees, if those employees were acting within the scope of their employment.<sup>159</sup> Vicarious liability reflects a utilitarian judicial decision to force business to bear the risks of its conduct by allocating liability to those in the best position to adopt and enforce safe practices.<sup>160</sup> From the perspective of the supervisor, vicarious liability is also necessarily strict liability. However, unless the activity to which it attaches is itself strict liability activity,<sup>161</sup> the supervisor's liability will still be conditioned on the *agent's* mental state.

Both strict and vicarious liability evolved in tort law. Strict liability has been a feature of tort since the 19th Century.<sup>162</sup> Vicarious liability may in fact have ancient origins,<sup>163</sup> but it entered the English common law of tort in the early 18th Century.<sup>164</sup> In tort, these doctrines are today relatively uncontroversial.<sup>165</sup>

In criminal law, however, both strict liability and vicarious liability are extremely controversial.<sup>166</sup> Although its constitutionality has been up-

158. See LAFAVE, *supra* note 150, at 353 (stating that some criminal statutes generally containing no language of fault, specifically impose criminal liability upon the employer for the bad conduct of his employee).

159. STEVEN F. GIFIS, *BARRON'S LAW DICTIONARY* 543 (1996).

160. Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *YALE L.J.* 1231, 1235 (1984) ("Empirically, principals are usually better risk bearers than their agents. Agents are often individuals of limited means who may be quite risk averse as to the prospect of even modest financial losses. Principals, by contrast, are often wealthier individuals, and intuition suggests that aversion to risk of a given magnitude often declines as wealth increases.").

161. It is argued that this is the case with public welfare offenses and the CWA.

162. See Jed Handelsman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 *YALE L.J.* 333 (2000).

163. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 500 (5th ed. 1984) ("Not only the torts of servants and slaves, or even wives, but those of inanimate objects were charged against their owner.").

164. Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 *S. CAL. L. REV.* 1739, 1746 (1996) ("[Vicarious liability] seems to have entered the common law of England only around 1700 through a series of opinions, most of them authored by Justice Holt.").

165. *Id.* at 1745. (stating that "there is now a consensus among those Americans who think about tort law that vicarious liability is an essential element in the tort system. Any idea of repealing vicarious liability would seem to us preposterous, inconceivable," but going on to argue that repeal is, in fact, conceivable).

166.

The consensus may be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the

held,<sup>167</sup> strict criminal liability has, according Professor Alan Michaels, been “bemoaned”<sup>168</sup> by critics since its inception, enduring “decades of unremitting academic condemnation.”<sup>169</sup> The controversy exists even though the vast majority of strict liability crimes are misdemeanors.

## 2. Regulatory Crimes and the Public Welfare Doctrine

*Mens rea* was not problematic at the common law because the acts that constituted crimes (*e.g.* intentionally killing someone) were assumed to be morally wrong *a priori*.<sup>170</sup> It was generally assumed that anyone who violated the common criminal law was doing conscious evil, and therefore had full-blown *mens rea*.

However, the growth of the government’s role as a regulator during the latter half of the 19th Century brought with it a new class of purely regulatory crimes.<sup>171</sup> Legislatures and Congress passed laws criminalizing behavior which, while detrimental to public welfare, was not inherently evil,<sup>172</sup> raising the possibility that the defendant would be unaware of his or her wrongdoing.<sup>173</sup> Though the ancient maxim holds that “ignorance of the law is no excuse,”<sup>174</sup> regulatory crimes for the first time made the good faith “mistake of law” a credible defense.<sup>175</sup>

Courts struggled with *mens rea* in this context. Those adhering to traditional notions of criminal law and moral punishment found *mens rea* only on a showing that the defendant had both the “general intent” to act and the

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future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventative or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.

Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109.

167. LAFAVE, *supra* note 150, at 388.

168. See Allen Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 844 (1999).

169. *Id.* at 831.

170. Mandiberg, *supra* note 156, 1177-78 (1995).

171. See generally NANCY FRANK, FROM CRIMINAL LAW TO REGULATION: A HISTORICAL ANALYSIS OF HEALTH AND SAFETY LAW (1986).

172. This discrepancy gave rise to the new classifications of crimes as either “*mala in se*” (intrinsically morally wrong) and “*mala prohibita*” (wrong merely because it has been prohibited). See *id.* at 176-77, 208 (discussing *mala prohibita* and *mala in se*).

173. See *id.* at 208 (quoting a working paper by Louis Schwartz and Paula Markowitz: “Use of penal sanctions to enforce regulation involves substantial risk that a person may be subjected to conviction, disgrace, and punishment although he did not know that his conduct was wrongful.”).

174. Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 117 (1998) (“Every student of the criminal law knows that ignorance of the law is no excuse.”).

175. RICHARD G. SINGER & JOHN Q. LAFOND, CRIMINAL LAW EXAMPLES AND EXPLANATIONS 84, 100 (2d ed. 2001).

“specific intent” to violate the law. This, in effect, legitimized mistakes of law. Courts of a more utilitarian mindset, aiming solely at deterrence, eliminated *mens rea* for these crimes entirely and imposed strict criminal liability, disregarding both mistakes of law and mistakes of fact.<sup>176</sup>

In the first half of the 20<sup>th</sup> Century, the consensus of scholars and courts turned against strict criminal liability.<sup>177</sup> Since the 1950s, the Supreme Court has searched for a jurisprudence of regulatory crime that is capable of addressing the full range of regulated conduct, while still respecting the moral agency of criminal defendants.<sup>178</sup> Distilling a line of cases that begins with *Morissette v. United States*,<sup>179</sup> Susan Mandiberg summarizes the contemporary doctrine:

Some regulatory crimes are “public welfare offenses.” These are crimes in which “a reasonable person should know” that [the proscribed activity] is subject to stringent public regulation and may seriously threaten the community’s health or safety.” For ambiguous statutes in this category, the Court presumes that the government must prove the defendant’s awareness of those aspects of the proscribed activity that provide notice of probable regulation: danger and uncommonness.<sup>180</sup>

Today, traditional *mens rea* applies to regulatory crimes generally. For these crimes, ignorance of the law may be an excuse. However, since the reasonable person knows that “dangerous” and “uncommon” activities are very likely regulated, these activities may qualify as “public welfare offenses.” Designation as a public welfare offense triggers the relaxed *mens rea* requirement of “general intent.” That is, to satisfy the statutory requirement of “knowing” conduct, prosecutors must show only the defendant’s “general intent” to act and not “specific intent” to violate the law. Splitting the difference between the traditionalist and utilitarian rules discussed above, the contemporary public welfare doctrine presumes knowledge of the law when a mistake of law would be unreasonable.<sup>181</sup>

While the public welfare doctrine has diminished common law *mens rea*, and thereby broadened enforcement discretion, it does not impose true strict liability.<sup>182</sup> Public welfare convictions still require proof of the defen-

176. See Mandiberg, *supra* note 156, at 1185 (stating that some early courts used utilitarian reasoning to find regulatory crimes to be strict liability)

177. FRANK, *supra* note 171, at 223-24 (noting that legal scholars in the 1930s, 1940s, and 1950s rejected strict liability).

178. Mandiberg, *supra* note 156, at 1167.

179. 342 U.S. 246 (1953).

180. See Mandiberg, *supra* note 156, at 1203.

181. *But see* Michaels, *supra* note 168, at 828 (rejecting the “mistake-of-fact/mistake-of-law” distinction, and arguing instead for an underlying principle of “constitutional innocence”)

182. Mandiberg, *supra* note 156, at 1242.

dant's intentional *action*, though not its immorality or illegality. The doctrine merely diminishes the standard of *legal* knowledge by moving from a subjective standard of legal knowledge (e.g., did the offender actually know hand grenades are illegal) to an objective one (would a reasonable person have known hand grenades are illegal).<sup>183</sup>

### 3. Vicarious Liability and the Responsible Corporate Officer Doctrine

Critics of corporate criminal liability in environmental law point out as particularly problematic the erosion of the *mens rea* required for corporate liability, the artificial nature of the "guilt" imputed to corporate officers, and the unfairness engendered by virtually unlimited prosecutorial discretion enjoyed by the DOJ's Environmental Crimes Section.

David C. Fortney<sup>184</sup>

The responsible corporate officer or "responsible share" doctrine is usually associated with the public welfare doctrine and is applicable to public welfare offenses if the statute so authorizes.<sup>185</sup> Under RCO, a corporate officer may be held criminally liable for actions committed by her agent without her knowledge.<sup>186</sup> The doctrine requires that prosecutors show that the officer held a position that conferred the authority to prevent or correct the violation.<sup>187</sup> Once this is shown, the defendant bears the burden of demonstrating that he was in fact "powerless" to prevent or correct the violation.<sup>188</sup> Officers who cannot meet this burden may be presumed to have had both knowledge of the violation itself and the applicable law. Officers who can prevent and control the violation are presumed to have knowledge of the law.<sup>189</sup>

In establishing the doctrine, the Supreme Court cited the public welfare cases as support for the notion that criminal law had become a legitimate and necessary means of forcing to industrial decision makers to manage risks that would otherwise be borne by the public. The Court reasoned that the statute in question, the Federal Food, Drug, and Cosmetic Act

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183. *Id.*

184. David C. Fortney, *Thinking Outside the Black Box: Tailored Enforcement in Environmental Criminal Law*, 81 TEX. L. REV. 1609, 1611 (2003).

185. See Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681, 706-07 (2003) (discussing RCO doctrine, vicarious liability, and the CWA).

186. Where the offense is also a public welfare offense, the agent will be presumed to have known the law.

187. *United States v. Park*, 421 U.S. 658, 673-74 (1975).

188. ELLEN S. PODGOR & JEROLD H. ISREAL, *WHITE COLLAR CRIME IN A NUTSHELL* 32-33 (2d ed. 1997).

189. *Id.* at 53.

(FDCA), touched “phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.”<sup>190</sup> It was “clear” to the Court that that the mere violation of the FDCA triggered criminal liability “without any conscious fraud at all”<sup>191</sup> and that liability could be imputed to anyone the statute authorized without regard to their own knowledge. The responsible corporate officer doctrine is thus a doctrine of both strict and vicarious liability.

Today, even after *Dotterweich*, the RCO applies only to misdemeanors under FDCA.<sup>192</sup> The environmental laws, on the other hand, authorize *felony* criminal liability; and the statute expressly authorizes vicarious liability for responsible corporate officers. “If the doctrine were strictly followed as the Supreme Court originally formulated,” states Dean Miller, “it would result in a form of strict criminal liability. A corporate official could be convicted of a felony based merely on the official’s position in the company.”<sup>193</sup>

### B. *The Policy Debate: Judicial Discretion and Sentencing Uniformity*

In an effort to remedy the previously non-directed criminal sentencing process, Congress enacted the Comprehensive Crime Control Act of 1984.<sup>194</sup> This legislation empowered the United States Sentencing Commission to create the Federal Sentencing Guidelines, which became effective November 1, 1987.<sup>195</sup> The Guidelines, formulated for the express purpose of controlling judicial discretion, had three basic policy goals: honesty, uniformity, and proportionality.<sup>196</sup>

Under the previous sentencing scheme, judges had discretion to impose any sentence from probation to the statutory maximum; they did not have to provide reasons for a particular sentence nor was the given sentence subject to appellate review.<sup>197</sup> Under the new system, a judge must

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190. *United States v. Dotterweich*, 320 U.S. 277, 280 (1943).

191. *Id.* at 281.

192. Office of Consumer Litigation, United States Department of Justice, *The Federal Food, Drug, and Cosmetic Act (FDCA)*, at <http://www.usdoj.gov/civil/ocl/monograph/fdca.htm> (last visited November 15, 2004).

193. Dean C. Miller, *Hazardous Acts: Awareness of Pitfalls is Essential for Corporate Officers to Avoid Jail Time*, COLO. J., at <http://www.dgslaw.com/articles/111114.html> (November 15, 2004).

194. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, *codified as amended* at 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998.

195. *See* 18 U.S.C. § 3551 (1988); U.S. SENTENCING GUIDELINES MANUAL (1988).

196. U.S. SENTENCING GUIDELINES MANUAL, ch. 3, pt. D, introductory comment to n. 3.

197. Walker, *supra* note 51, at 551, 553.

impose a sentence within a narrow range set by the Guidelines.<sup>198</sup> Although the judge may depart from this narrow range, such departure is permitted only under extraordinary circumstances, must be justified in writing, and is subject to review and even reversal by an appellate court.<sup>199</sup>

### 1. Judicial Discretion Allows Individualized Sentences

Not surprisingly, those who had the most to lose under the new sentencing scheme became its harshest critics. Jose Cabranes, a U.S. district judge for the District of Connecticut, has been one of the most outspoken critics of the Federal Guidelines. Cabranes believes that the exercise of discretion by a federal judge at sentencing is not a major or reparable weakness, but instead one of its strengths.<sup>200</sup> He questions the effectiveness of the basic tenet of the Guidelines: that the human element of the sentencing process should be replaced by the “clean, sharp edges of a sentencing slide rule.”<sup>201</sup> Thus, in his oft-cited address to Yale, he critically noted that “the sentencing guidelines are a failure—a dismal failure.”<sup>202</sup>

Although not as scathing or openly critical, many other judges agree with Judge Cabranes’ assessment that the Guidelines will not succeed without the human element. William Schwarzer, a U.S. district judge for the Northern District of California, observes that the sentencing Guidelines have reduced the sentencing process to a mechanical formula in order to eliminate discretion from sentencing.<sup>203</sup> Although the goal was to produce consistency and predictability in the sentencing process, it did so by creating the expectation that a correct and just answer is provided by the Guidelines.<sup>204</sup> The search for that answer proves illusory since the factors involved do not lend themselves to being reduced to a precise, objective formula.<sup>205</sup> Based on his experience, Judge Schwarzer concludes that by taking away judicial discretion, the Guidelines open the door to arbitrary results, thereby creating a justice system that cannot be depended on to produce results that are fair and reasonable.<sup>206</sup>

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198. See 28 U.S.C. § 994(b)(2) (stating maximum range of imprisonment shall not exceed the minimum in such range by more than the greater of 25% or 6 months).

199. Walker, *supra* note 51, at 553.

200. Jose A. Cabranes, *A Failed Utopian Experiment*, NAT’L L.J., July 27, 1992, at 17.

201. *Id.*

202. Jose A. Cabranes, *Sentencing Guidelines, a Dismal Failure*, N.Y. L.J., Feb. 11, 1992, at 2.

203. William W. Schwarzer, *Judicial Discretion in Sentencing*, 159 PRACTICING LAW INST. CRIM. 15, 20 (1991).

204. *Id.*

205. *Id.*

206. *Id.* at 28.

Several academics argue that the commission's limitation on judicial discretion has also had the unintended impact of creating disparity rather than limiting it. One of the Guideline's first critics, Charles Ogletree, argues that the Guidelines are "flawed" because they fail to consider, among other things, the personal characteristics of the individual offender.<sup>207</sup> Until such flaws are remedied, he argues that the federal judiciary must continue to depart from the Guidelines simply to ensure fairness and "remedy the incidences of disparity" created by the mechanical nature of the Guidelines.<sup>208</sup> Ogletree concludes that "[t]he Sentencing Commission's obsession with justice in the aggregate, with identical treatment regardless of individual differences, will eviscerate our more refined notions of individual justice."<sup>209</sup>

Similarly, David Freed argues that the Guidelines have placed federal judges in the quandary of choosing between injustice and an infidelity to the Guidelines.<sup>210</sup> Freed notes that a "sense of justice is essential to one's participation in a system for allocating criminal penalties" and that "[w]hen the penalty structure offends those charged with the daily administration of the criminal law, tension arises" between the judge's beliefs and the law.<sup>211</sup> This choice has created hidden disparity—wherein judges may be avoiding the rigors of the guideline system and the perceived injustice resulting from them through informal non-compliance.<sup>212</sup> Freed argues that instead of increasing the "sentencing visibility and reducing 'unwarranted' disparity, the guidelines have tended to reduce visibility and to produce 'intentional' disparity."<sup>213</sup>

Finally, Steve Koh notes that, despite the mechanistic nature of the Guidelines, judges still maintain their own philosophies regarding sentencing.<sup>214</sup> Those judges who prefer leniency will look for opportunities to depart while those "disposed to rigidity defer" to the established sentencing range.<sup>215</sup> The result is that the "sentence a defendant receives can still depend largely upon which judge presides at sentencing—precisely the situa-

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207. Charles J. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1953 (1988).

208. *Id.* at 1960.

209. *Id.*

210. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1705 (1992).

211. *Id.* at 1687.

212. *Id.* at 1726-27.

213. *Id.* at 1718.

214. Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109, 1124 (1992).

215. *Id.*

tion the Guidelines were designed to eliminate.”<sup>216</sup> Thus, Koh argues, “[n]ot only did the sentencing process lose the potential benefits of discretion, but the process became skewed in a way that promoted new, and arguably more troubling, forms of disparity.”<sup>217</sup>

In sum, these judges and academics recognize that each sentencing hearing “involves unique offenders and circumstances that need to be assessed by experienced professionals exercising human judgment.”<sup>218</sup> The Guidelines take an impersonal mathematical approach to what many consider one of the most significant jobs in the justice system.<sup>219</sup> Not only do the Guidelines ignore the experience and instinct of the trial judge, but also this limitation actually creates sentencing disparity when judges utilize their little remaining discretion to ameliorate the mandated sentence. Thus, according to its critics, the Guidelines have failed in their prescribed goals: to provide sentences that are honest, uniform, and proportional.

## 2. Reducing Judicial Discretion Promotes Sentencing Uniformity

Despite the criticisms that the sentencing guidelines have received from the judiciary, some judges approve of the guidelines and limitation on judicial discretion. Stewart Dalzell, a judge for the Eastern District of Pennsylvania, readily admits to being in the minority of his judicial colleagues “in preferring the current sentencing regime to the one it replaced.”<sup>220</sup> Although he acknowledges that this acceptance may be because he never knew the pre-Guideline era,<sup>221</sup> he firmly states that he cannot support the old regime that gave “lawless power to judges” with no recourse except the parole board.<sup>222</sup> Instead, Judge Dalzell finds comfort in applying the “readily ascertainable law” of the guidelines,<sup>223</sup> and notes that over one-half of the sentences he has imposed were not constrained by the grid.<sup>224</sup> He also applauds the SRA provision allowing for appellate review of sentences imposed under the system.<sup>225</sup> As a result, Dalzell believes that the sentencing guidelines are “measures to improve rationality and consistency

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216. *Id.*

217. *Id.* at 1134.

218. Freed, *supra* note 210, at 1705.

219. See, e.g., Shari L. Kaufman, *The Federal Sentencing Guidelines: A Formulaic and Impersonal Approach to Dispensing Justice*, Nev. Law., Sept. 1999, at 18, 20.

220. Stewart Dalzell, *One Cheer for the Guidelines*, 40 VILL. L. REV. 317, 317 (1995).

221. *Id.* at 328.

222. *Id.* at 322-23 (quoting Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2044 (1992)).

223. Dalzell, *supra* note 220, at 323.

224. *Id.* at 322.

225. *Id.* at 324-25.



in the way discretion is used and to ensure adequate redress when it goes astray.”<sup>226</sup>

Other members of the judiciary disagree with its critics because they do not believe that the Guidelines have completely removed their discretion. For example, John Walker, a U.S. Judge for the Second Circuit, believes the criticism that the Guidelines “virtually abolish consideration of the defendant’s character” has become a self-fulfilling prophecy.<sup>227</sup> Walker notes that when the commission created the Guidelines, it was aware “that a single set of guidelines could not accommodate the panoply of imaginable human conduct.”<sup>228</sup> As a result, the guidelines empower a judge to consider a defendant’s characteristics and depart from the Guidelines if “the defendant or offense diverges in relevant ways from the ‘heartland’ of typical cases foreseen and accounted for by the Guidelines.”<sup>229</sup> Similarly, Patti Saris, a judge for the District Court of Massachusetts, argues that appellate and district judges have failed to recognize that “not all seemingly similar offenders are in fact similar, and there are atypical situations when justice is best served by different sentences for different people.”<sup>230</sup> Thus, Saris agrees that judges should more vigilantly exercise their existing discretion “by departing from the Guidelines based on permitted factors.”<sup>231</sup>

Paul Robinson supports the notion that the Guidelines allow for departures if the judges feel that the case falls outside the paradigm predicted by the Commission.<sup>232</sup> Robinson, who acted as Counsel to the U.S. Senate Subcommittee on Criminal Laws and Procedures during the drafting of the SRA, notes that judicial constraint detailed by the Guidelines reflects a mechanism for the balance of power between judges and the Commission.<sup>233</sup> Each of the more than one thousand federal judges has the same guidelines from which to work.<sup>234</sup> Yet each of these judges maintains the

226. *Id.* at 325 (quoting SIR LEON RADZINOWICZ & JOAN KING, *THE GROWTH OF CRIME: THE INTERNATIONAL EXPERIENCE* 327-28 (1977)) (internal quotations omitted).

227. Walker, *supra* note 51, at 558.

228. *Id.*

229. *Id.*; *see also* Koon v. United States, 518 U.S. 81, 92 (1996) (allowing for judicial discretion in the implementation of the Guidelines).

230. Honorable Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1907, 1929 (1997).

231. *Id.* at 1062; *see also* Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 549 (1999) (noting that judges use their limited discretion to individualize in only approximately 10% of the cases, while 70% are sentenced within their sentencing range).

232. Paul H. Robinson, *The Federal Sentencing Guidelines: Ten Years Later*, 91 NW. U. L. REV. 1231, 1235 (1997).

233. *Id.*

234. *Id.*

authority to depart from these guidelines if she believes a particular case is outside the circumstances envisioned by the Commission.<sup>235</sup> And the threat of judicial review provides the incentive for a judge to depart only when she deems necessary and not solely on a whim.<sup>236</sup> Based on his experience, Robinson believes that this balance of power is what Congress envisioned when it drafted the SRA.<sup>237</sup>

Thomas N. Whiteside is another academic who defends the Guidelines, arguing that the Guidelines have “maintained significant judicial discretion over sentences” while eliminating the judge’s “unbridled sentencing discretion.”<sup>238</sup> Whiteside notes that as offense severity rises, the judge’s authority to impose probation is limited; but at low offense levels, a judge has more discretion to only impose probation or a mix of probation with prison time.<sup>239</sup> And the court’s discretion was further enhanced by the 1994 policy amendments that allow departure in some extraordinary circumstances.<sup>240</sup> As a result, Whiteside concludes that “a court’s discretion has not been eliminated under the Federal Sentencing Guidelines,” but “that discretion must be exercised with due diligence.”<sup>241</sup>

Frank Bowman further notes that federal judges are not barred from setting criminal sentences based on the individual characteristics of defendants; They may consider all the factors which were appropriate before the advent of the Guidelines.<sup>242</sup> Nevertheless, unlike the previous sentencing scheme, judges cannot sentence “based on factors as whimsical as dress or hairstyle or a ‘gut feeling’ that this defendant was good and that one was bad.”<sup>243</sup> Under the new regime, “judges can indulge their own idiosyncratic theories of penology only within the narrowly circumscribed limits of the applicable Guideline range.”<sup>244</sup> Because the Guidelines have greatly reduced unwarranted discretion, Bowman concluded that “Cabranes is wrong, absolutely wrong in declaring the Guidelines a failure.”<sup>245</sup>

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235. *Id.*

236. *Id.*

237. *Id.*

238. Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574, 1591 (1997).

239. *Id.* at 1593.

240. *Id.* at 1596.

241. *Id.* at 1593.

242. Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 713-14 (1996).

243. *Id.* at 686.

244. *Id.* at 702.

245. *Id.* at 680.

Despite the intense opposition from federal judges and academics alike, several judges acknowledge the structure and uniformity that the Guidelines have brought to the sentencing process. In addition, academics argue that judicial discretion has not been extinguished, but simply limited to those particular situations that fall outside of the consideration of the commission. Although the defenders of the Guidelines admit the Guidelines are far from perfect, they believe the Guidelines have reached a reasonable and relatively stable balance between uniformity and individualization.

### 3. Discretionary Guidelines as an Alternative

As shown from the above analysis, judges and academics continue to debate the role of judicial discretion in criminal sentencing. Nevertheless, “[e]ven the critics of the current sentencing guidelines system support some theoretical structure to constrain extreme exercises of judicial discretion,”<sup>246</sup> and some have even suggested the need for discretionary guidelines. For example, although Judge Schwarzer argues that the current sentencing guidelines have reduced the sentencing process to a mechanistic formula, he recognizes that discretionary guidelines would be useful in “giving judges a yardstick against which to measure the exercise of their discretion.”<sup>247</sup> In addition, Shari Kaufman observes that, as a mandated set of rules, the Guidelines have created a plethora of litigation and have fallen short of the goal of uniformity in sentencing they were designed to achieve; but if the Guidelines were truly guidelines rather than a simple mathematical calculation, they would be “useful tools for all of those involved in the federal criminal justice system.”<sup>248</sup> Accordingly, even the critics of the Federal Sentencing Guidelines acknowledge that, in and of themselves, the Guidelines are beneficial because they provide a national standard on which judges can rely when sentencing a defendant.

In support of a more discretionary model, Lisa Rebello notes that “Congress did not expect that the Sentencing Guidelines would completely eliminate judicial discretion and did not suggest that judges apply the Guidelines mechanically.”<sup>249</sup> Although Congress did have the authority to establish mandatory sentences for all criminal statutes, it instead chose to retain an element of judicial discretion in sentencing, thus recognizing the

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246. Roy K. Little, *Proportionality as an Ethical Precept for Prosecutors in their Investigative Role*, 68 *FORDHAM L. REV.* 723, 770 n.139 (1999).

247. Schwarzer, *supra* note 203, at 27-28.

248. Kaufman, *supra* note 219, at 20 (1999).

249. Lisa Rebello, Note, *Sentencing Under the Federal Sentencing Guidelines: Five Years of "Guided Discretion"*, 26 *SUFFOLK U. L. REV.* 1031, 1037 (1992).

importance of the judge's role in the sentencing process; in fact, the "[p]reservation of discretion is consistent with the primary goal of the [Sentencing Reform] Act—to allow sentencing judges to address the needs of individual offenders."<sup>250</sup> Accordingly, Congress intended that a judge's discretion in imposing a sentence should be guided but not eliminated.

These sentiments regarding the positive nature of discretionary guidelines were echoed in a survey of federal judiciary officials. Nine years after the Guidelines went into effect, the Federal Judicial Center conducted a survey on the attitudes of the judiciary regarding the results of the Guidelines.<sup>251</sup> Approximately seventy percent of district or circuit judges believed that mandatory guidelines were not "necessary to direct the sentencing process."<sup>252</sup> Although the majority of these judges were willing to work within a guidelines system, they would prefer a system where judges are "accorded more discretion."<sup>253</sup> Furthermore, most respondents indicated that they would prefer advisory guidelines over both mandatory and decision-based sentencing.<sup>254</sup> As noted by one of the survey participants: "it is the mandatory nature [of the Guidelines] which creates the unfairness."<sup>255</sup>

#### 4. The Environmental Debate<sup>256</sup>

As noted above, some critics have denounced the Federal Sentencing Guidelines for preventing judges from imposing individualized sentences.<sup>257</sup> Others have praised the Guidelines for bringing uniformity and

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250. Ryan M. Zenga, Note, *Retroactive Law or Punishment for a New Offense?—The Ex Post Facto Implications of Amending the Statutory Provision Governing Violations of Supervised Release*, 19 W. NEW ENG. L. REV. 499, 505 (1997).

251. MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY (1997) available at [http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/\\$File/gssurvey.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$File/gssurvey.pdf).

252. *Id.* at 3.

253. *Id.*

254. *Id.* at 3 – 4.

255. *Id.* at 4.

256. The current federal sentencing guidelines only apply to individual offenders and not to corporations or professional organizations. Although organizational guidelines have been proposed, *see generally* Robert L. Kracht, Comment, *A Critical Analysis of the Proposed Sentencing Guidelines for Organizations Convicted of Environmental Crimes*, 40 VILL. L. REV. 513 (1995) (examining guidelines proposed by the Advisory Working Group on Environmental Sanctions), we limit our discussion in this paper only to those guidelines that have the force of law.

257. *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21 (2000 – 2001) (criticizing the prevailing jurisprudential attitude towards departure).

consistency to criminal law.<sup>258</sup> Although much of this debate focuses on the sentencing of traditional criminal acts, several authors have imported the guidelines dispute to the field of environmental law.

Prior to the advent of the sentencing guidelines, those convicted of environmental crimes rarely, if ever, served significant prison terms for their crimes.<sup>259</sup> According to Judson Starr and Thomas Kelly, Jr., practitioners of environmental law, the sentencing guidelines now require judges to view environmental crimes far more seriously than they have in the past.<sup>260</sup> Starr and Kelly note that, "in what used to be a highly subjective process," the Guidelines "remove nearly all discretion that judges have traditionally enjoyed at the sentencing stage."<sup>261</sup> Therefore, if a defendant pleads guilty or is convicted of certain environmental crimes, he or she is not subjected to the "jurisdictional lottery" that was common under the previous process.<sup>262</sup> And because the Guidelines require judges to follow strict measures under the sentencing process, Starr and Kelly contend that those who violate environmental regulations may now face significant prison sentences.<sup>263</sup>

Nevertheless, assistant U.S. attorney Helen Brunner contends that, despite the significant changes in the creation of the Guidelines, not much has changed with regard to the severity of the punishment.<sup>264</sup> She notes that the "vast majority of environmental offenders receive only minimum jail time or probation."<sup>265</sup> Assistant U.S. attorney Jane Barrett places the blame for the lenient sentencing of environmental crimes on the discretion and flexibility afforded to the sentencing court.<sup>266</sup> Barrett contends that the sentencing guidelines for environmental crimes are often accompanied by application notes that suggest circumstances that may warrant a departure, and that these application notes "act as a broad invitation for sentencing courts to

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258. See Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1078 (1992) (positing guidelines as "the best way to achieve proportionality and uniformity").

259. See Benjamin S. Sharp, *Environmental Enforcement Excess: Overcriminalization and Too Severe Punishment*, C617 A.L.I.-A.B.A. 179, 186 (1991).

260. Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and it is Hard Time*, 20 ENVTL. L. Rep. 10096, 10096 (1990).

261. *Id.*

262. *Id.* at 10097.

263. *Id.*

264. See Helen J. Brunner, *Environmental Criminal Enforcement: A Retrospective View*, 22 ENVTL. L. 1315, 1341 (1992) (noting that "the cases are still not viewed as traditional crimes" and asserting that the pursuit of corporate officers has led to a reluctance "to impose the harsher sanctions that the sentencing guidelines demand").

265. *Id.* at 1340.

266. See Barrett, *supra* note 4, at 1428-29 (alleging that in some circumstances, key determinations are left "entirely to the discretion of the district judge").

depart from the prescribed offense level.”<sup>267</sup> She concludes that the judicial discretion in environmental guidelines should be reevaluated with “the goal of balancing the need for flexibility in sentencing with the need to eliminate the variances in sentencing ranges that has allowed defendants convicted of similar crimes to receive disparate sentences.”<sup>268</sup>

### C. *Summing Up*

Since their inception in 1987, the Federal Sentencing Guidelines have been the center of a policy debate between judicial independence and sentencing uniformity. Many judges find the system demoralizing and demeaning; although judges may not approach sentencing with identical philosophies and value systems, they all approach it with a very serious sense of responsibility. In contrast, advocates of the federal guidelines believe that the Guidelines are a great improvement over the previous system because the Guidelines have reduced unwarranted disparity, resulting in uniform sentences for similarly situated defendants. Accordingly, the need to achieve a balance between equality and predictability in sentencing with the need for fairness to the individual remains a challenge.

## IV. ENFORCEMENT AND THE EFFICIENT EXERCISE OF DISCRETION: ECONOMIC CONSIDERATIONS

Enforcement of federal environmental law is complex. The EPA is simultaneously monitoring the behavior of hundreds of potential violators; determining which violators to prosecute and whether to pursue violations at the administrative, civil or criminal levels; and constantly adjusting monitoring and prosecutorial procedures to changing economic and technological conditions.<sup>269</sup> Out of this complexity, four institutional characteristics emerge as particularly pertinent in assessing the roles of prosecutorial and judicial discretion in efficient enforcement: (1) sanctions for violations vary directly with the level of expected harm; (2) serious violations of regulatory requirements have been criminalized; (3) prosecutors enjoy broad discretion in determining which violations to prosecute and at what level; and (4) sanctions for criminal prosecutions are constrained by the Federal Sentencing Guidelines.

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267. *Id.* at 1429.

268. *Id.* at 1448.

269. *See* Brunner, *supra* note 264, at 1315 (reviewing the history of the EPA regarding criminal investigations).

### A. *Marginal Deterrence*

In the economic approach to law enforcement, the level of deterrence for a specific act is assumed to depend, *ceteris paribus*, on the expected sanction faced by persons considering a prohibited act.<sup>270</sup> The expected sanction, in turn, is simply the product of (1) a monetary or imprisonment sanction and (2) the probability of detecting, convicting, and actually punishing offenders.<sup>271</sup> In this framework, deterrence can be increased by either increasing the sanctions, increasing the probability of sanctioning, or both.<sup>272</sup> In general, cost-effective production of additional deterrence will require an optimal combination of the two.<sup>273</sup>

In a seminal article published in 1968,<sup>274</sup> Gary Becker examined the economics of crime. Since the publication of Becker's article, the following "conundrum has plagued the literature: [I]f law enforcement is costly but crimes are socially undesirable and potentially deterrable, then efficiency requires that for all crimes the probability of apprehension be set arbitrarily low and the sanction arbitrarily high."<sup>275</sup> Setting the probability of apprehension and the sanction in such a way is a solution that "imposes no costs on society as long as the expected sanction is high enough to deter all crime."<sup>276</sup>

Becker's benchmark prescription is clearly inapplicable when the harm done far exceeds individual wealth. More importantly, the efficiency of a low-probability, maximal-fine system of sanctioning only applies when individuals are considering whether to commit a single harmful act. In the more general setting, where several harmful acts are being considered, "undeterred individuals will have no reason to commit less rather than more harmful acts if expected sanctions rise with harm."<sup>277</sup>

270. See generally Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. CRIM. L. & CRIMINOLOGY 1054 (1992).

271. *Id.*

272. *Id.*

273. For a discussion of optimal penalties and an exposition on the use of expected penalties in deterrence, see generally *id.* at 1063-63 and STEVEN C. HACKETT, *ENVIRONMENTAL AND NATURAL RESOURCES ECONOMICS* 147-49 (1st ed. 1998).

274. Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

275. Louis L. Wilde, *Criminal Choice, Non-monetary Sanctions, and Marginal Deterrence: Normative Analysis*, 12 INT'L REV. L. & ECON. 333, 333 (1992) (citing R.A. CARR-HILL & N.H. STERN, *CRIME, THE POLICE AND CRIMINAL STATISTICS* (1979)).

276. *Id.*

277. Steven Shavell, *A Note on Marginal Deterrence*, 12 INT'L REV. L. & ECON. 345, 345 (1992). The classic situation is described in an old English proverb, of unknown origin, first recorded in JOHN RAY, *A COLLECTION OF ENGLISH PROVERBS* (1678): "As good be hanged for a sheep as a lamb." Imagine a thief has an opportunity to carry off one animal from a flock. If the penalty is the same for which-

The idea of marginal deterrence, a term generally credited to George Stigler,<sup>278</sup> refers to the tendency of an individual to be deterred from committing a more harmful act owing to the difference, or margin, between the expected sanction for it and for a less harmful act.<sup>279</sup> In the context of enforcing environmental law, the regulated community can commit several different sorts of violations and choose among them based, in part, on the expected cost of being caught and punished. The central question, then, is how optimal punishment varies with the damage done.

David Friedman and William Sjostrom<sup>280</sup> have evaluated this sanctioning challenge in a context that seems particularly relevant to the enforcement of federal environmental law generally and to the CWA specifically. The authors demonstrate that sanctions should rise with the harm done by various violations if the following conditions hold: (1) the benefits to the violator vary directly with the harm done, and (2) enforcement effort is of a general nature, affecting in the same way the probability of apprehension for committing different harmful acts.<sup>281</sup> Under these circumstances the punishment should fit the crime.<sup>282</sup>

Under the CWA, point sources of pollution are subject to NPDES permit regulations.<sup>283</sup> Regardless of the size of a permitted facility, viola-

ever animal he chooses, he might as well take the most valuable. See David Friedman & William Sjostrom, *Hanged for a Sheep—The Economics of Marginal Deterrence*, 22 J. LEGAL STUD. 345, 345-47 (1993) (examining how the setting of punishment effects criminal agency).

278. George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

279. Early writers have discussed the notion as well. In 1770, Cesare Beccaria argued that "the severity of punishment itself emboldens men to commit the very wrongs it is supposed to prevent; they are driven to commit additional crimes to avoid the punishment for single one." CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS*, (Henry Paolucci trans., 1st ed. 1963). Similarly, in 1789, Jeremy Bentham stated that an object of punishment is "to induce a man to choose always the least mischievous of two offences; therefore where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less." Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in *THE UTILITARIANS* 171 (1961).

280. Friedman & Sjostrom, *supra* note 277, at 345-47.

281. Dilip Mookherjee and I.P.L. Ping derive similar results showing that when the level of an activity is a continuous variable and individuals derive heterogeneous benefits the result should be that "marginal expected penalties be everywhere less than marginal harm, but that there should be no enforcement at all against acts below some *threshold*." Dilip Mookherjee & I.P.L. Ping, *Marginal Deterrence in Enforcement of Law*, 102 J. POL. ECON. 1039, 1040 (1994).

282. A potentially important caveat for this result has been demonstrated in John Henderson & John P. Palmer, *Does More Deterrence Require More Punishment? [Or Should the Punishment Fit the Crime?]*, 13 EUR. J. L. & ECON. 143 (2002). When the regulated community has heterogeneous tastes and preferences across violators, aggregation can lead to a backward-bending expansion path in the production of deterrence. Under these conditions, it may not be optimal for the punishment to fit the crime. *Id.* at 154. The authors cite the example of the crime of assassinating a political leader. *Id.* at 155. While this result is clearly of theoretical interest, such an outcome seems unlikely in the context of enforcing federal environmental law.

283. See 33 U.S.C. § 1342; see also 33 U.S.C. §§ 1362(12)(A) and (14).



tion of effluent discharge limits or other NPDES requirements can trigger a variety of enforcement actions and related sanctions.<sup>284</sup> CWA violations can range from routine record keeping irregularities to tampering with monitoring equipment to negligent disposal of hazardous materials with the associated economic benefit rising accordingly.<sup>285</sup> On the enforcement side, any number of violations can be discovered as part of a comprehensive system of CWA monitoring, reporting, and testing protocols. In practice, “large numbers of relatively minor violations are handled through administrative actions, a smaller number of more serious violations handled through civil proceedings, and a small number of very serious violations are prosecuted criminally.”<sup>286</sup>

A close inspection of CWA enforcement practices illustrates its institutional congruencies with the Friedman-Sjostrom prescription. Specifically, violator benefits tend to vary directly with harm done while enforcement tends to be of a general nature. On economic grounds then, the CWA practice of having the punishment fit the crime by using a system of marginal deterrence seems well justified.

### B. *Criminal Sanctions*

Society designates certain harmful acts as criminal and provides harsher sanctions when they occur.<sup>287</sup> One major category of acts that are treated as criminal includes acts that are intended to do substantial harm.<sup>288</sup> In the context of the CWA, a straightforward example would be the intentional dumping of hazardous waste into a body of water. In this case, the violator intends for harm to occur, although in general, the act will be treated as criminal even if harm does not actually occur but intent was present.<sup>289</sup> On the other hand, if harm is intended but small in magnitude, then the act will not usually be considered criminal.<sup>290</sup>

A second category of acts that is often considered criminal involves acts that are concealed, even if substantial harm was not intended.<sup>291</sup> The key characteristic in this category of criminal acts is the offender attempt-

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284. McGaffey et al., *supra* note 14, at 196 (discussing methods of enforcement and related case law).

285. See 33 U.S.C. §§ 1319(c)(1) and 1319(c)(4).

286. MANDIBERG & SMITH, *supra* note 60, 13 (1997).

287. For a comprehensive discussion of the law and economics of criminal sanctions, see generally STEVE SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, chs. 20-24 (2003).

288. See *generally id.* at 540-68.

289. See *id.*

290. See *id.*

291. See *id.*

ing to conceal or evade his responsibility such as a firm covering up the violation of a safety regulation. An example under the CWA is the provision of criminal sanctions for knowingly submitting a false statement in any application, record, or report.<sup>292</sup>

A variety of sanctions are available for punishing criminal acts. For purposes of enforcing federal environmental law, a combination of criminal fines and imprisonment is typical.<sup>293</sup> Imprisonment, of course, is a sanction that is unique to criminal law. In contrast, fines can be imposed for either civil or criminal violations of environment law but criminal fines are typically larger, uninsurable, and not deductible for tax purposes.<sup>294</sup> In the context of the CWA, criminal sanctions can be imposed when NPDES regulated activities are negligently conducted.<sup>295</sup> As shown in Table 1, sanctions can be severe, ranging up to two million dollars and thirty years of imprisonment.<sup>296</sup>

The core justification for the application of criminal sanctions for particular violations of environmental law is the need for cost-effective, additional deterrence.<sup>297</sup> Clearly non-monetary sanctions are costly to impose. As a result, strict liability is generally a disadvantageous form of criminal liability compared to fault-based liability since fault-based liability reduces the incidence of socially costly punishment.<sup>298</sup> More generally, non-monetary sanctions should not be used unless monetary sanctions alone cannot adequately deter. A harmful act will be more difficult to deter with

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292. 33 U.S.C. § 1319(c)(4).

293. See, e.g., U.S. Environmental Protection Agency, *Criminal Enforcement Highlights FY-2004*, available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2004/2004criminalhighlights.html> (showing enforcement actions for fiscal year 2004).

294. See generally SHAVELL, *supra* note 287, at 540-568.

295. 33 U.S.C. §1319(c)(1)(A).

296. See *supra* note 104 and accompanying Table.

297. Three other justifications have traditionally been given for imposing criminal sanctions on acts with the potential to do significant harm: (1) incapacitation, preventing individuals from engaging in undesirable acts by removing them from society; (2) rehabilitation, attempting to induce a reduction in a person's propensity to commit undesirable acts; and (3) retribution, the desire of individuals to see wrong doers punished. See generally WILLIAM SPELMAN, *CRIMINAL INCAPACITATION* (1994) (discussing incapacitation); RICHARD A. WRIGHT, *IN DEFENSE OF PRISONS* (1994) (discussing rehabilitation); Jack Hirshleifer, *Natural Economy Versus Political Economy*, 1 J. SOC. & BIOLOGICAL STRUCTURES 319 (1978) (discussing retribution).

298. Louis Kaplow, *A Note on the Optimal Use of Nonmonetary Sanctions*, 42 J. PUB. ECON. 245, 245-47 (1990). With other factors held constant, it is likely that fault-based liability will reduce socially costly punishment. A comprehensive evaluation of the relative merits of strict liability and negligence liability rules is well beyond the scope of this discussion. A variety of complicating factors would have to be considered in such an analysis including attitudes toward risk aversion, the judgment-proof problem, administrative and enforcement costs, incentives for settlement, and legal error. For a comprehensive discussion, see Shavell, *supra* note 277.

monetary sanctions alone when benefits to the violator are high, harm is substantial, the probability of imposing sanctions is low, and/or the level of violator assets is modest compared to harm done. Under these circumstances, criminal sanctions may be necessary to provide adequate deterrence.

One implication from an efficiency-based evaluation of criminal sanctions is that non-monetary sanctions should not be employed before exhausting the efficacy of monetary sanctions. That is, non-monetary sanctions should only be used as a supplement to maximal monetary sanctions.<sup>299</sup> Another related implication is that sanctions should be minimal for violations with small harm. In the CWA case, an example would be issuing a notice of violation for trivial violations of reporting protocols.

The role of criminal sanctions in enforcing federal environmental law and promoting deterrence can be well established on efficiency grounds. The extent or scope of criminal sanctions in optimal deterrence is much more controversial. The concern among some analysts is that environmental law may have become over-criminalized with high penalties leading to over-deterrence for activities that society does not wish to prohibit entirely.<sup>300</sup> That is, a balance must be struck between reducing environmental harm on the one hand, and promoting socially beneficial activities on the other. If sanctions for violating environmental regulations are set too high, the regulated community will respond by adopting excessive levels of abatement, precaution, or care. As a result, over-deterrence becomes inevitable.

Imposing criminal liability for incidents not intentional or not controllable by the liable party is a controversial proposition. Once held liable, the Federal Sentencing Guidelines mandate serious punitive sanctions. If over-deterrence and over-criminalization result, then criminal law itself might become trivialized with the resulting lack of moral stigma. Additionally, over-investing limited enforcement resources in criminal proceedings prevents the pursuit of other productive avenues for reducing environmental harms.<sup>301</sup>

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299. An interesting, and perhaps troubling, sociological implication of cost-effective deterrence involves the relationship between a person's wealth and sanctions. If an individual's wealth is above the threshold at which deterrence with monetary sanctions will be adequate, the sanction should be entirely monetary. Given the threshold level, as wealth decreases, the need for and magnitude of non-monetary sanctions increases. See Steven Shavell, *Criminal Law and the Optimal Use of Non-monetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236-38 (1985).

300. Cohen, *supra* note 270, at 1104.

301. Mark A. Cohen, *Theories of Punishment and Empirical Trends in Corporate Criminal Sanctions*, 17 MANAGERIAL & DECISION ECON. 399 (1996).

### C. *Prosecutorial Discretion and Selective Enforcement*

In the context of the enforcement of Federal environmental laws, prosecutorial discretion appears to be exercised in ways that vary dramatically from conventional prescriptions of economic deterrence theory. First, when the EPA observes violations, it often chooses not to pursue the violator.<sup>302</sup> Second, the expected penalty faced by a violator who is pursued is small compared to the cost of compliance.<sup>303</sup> Paradoxically, in spite of these prosecutorial policies, firms are compliant a significant proportion of the time.<sup>304</sup> Other EPA studies have estimated that regulated sources were in violation of standards only about nine percent of the time.<sup>305</sup> That is, compliance rates seem to be higher than would be justified by the expected penalties for noncompliance.

Winston Harrington has provided one efficiency justification for selective enforcement based on the idea of creating “penalty leverage” by encouraging the regulated community to comply with environmental requirements.<sup>306</sup> The rationale is based on a dynamic game-theoretic model of enforcement and compliance when penalties are restricted.<sup>307</sup> The strategy is to divide the regulated community into two groups: a group that was in compliance with the last inspection and a second group that was not. This state-dependent enforcement regime then creates additional compliance leverage. Agents in the noncompliant group now have two incentives to come into compliance: (1) avoiding the maximal sanctions imposed on repeat offenders and (2) receiving possible reinstatement into the compliant group. In essence, prosecutors use a “carrot-and-stick” approach to en-

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302. Winston Harrington, *Enforcement Leverage when Penalties Are Restricted*, 37 J. PUB. ECON. 29, 29 (1988).

303. When a violation is discovered, by far the most common response is for the agency to send a notice of violation (NOV) and then take no further action. *See generally* U.S. E.P.A., PROFILE OF NINE STATE AND LOCAL AIR POLLUTION AGENCIES (1998). Moreover, when penalties are imposed, the average size of the penalty is much smaller than compliance costs. The magnitude of this discrepancy is illustrated in a survey of state enforcement activity over the decade from 1973 to 1983 conducted by Winston Harrington. Harrington, *supra* note 302, at 30.

304. Harrington, *supra* note 302, at 31.

305. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, CHARACTERIZATION OF AIR POLLUTION CONTROL EQUIPMENT OPERATION AND MAINTENANCE PROBLEMS (1981).

306. Harrington, *supra* note 302.

307. Restricted penalties often characterize environmental enforcement. For example, under the CWA, limits are placed on fines, *see supra* Table 1, and the Federal Sentencing Guidelines impose constraints on criminal sanctions. In theory, however, the EPA probably does possess sufficient power to force compliance with regulations. An example of a draconian measure might be seeking an injunction to shutdown a non-compliant plant completely. In practice, there is considerable reluctance to pursue extreme sanctions because it is costly and the outcome is uncertain. *See generally* SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1982).

forcement, the threat of harsh sanctions coupled with the bribe of reinstatement.

More recently, an efficiency justification for selective enforcement has been proposed by Anthony Heyes and Neil Rickman.<sup>308</sup> Leveraging penalties has the impact of increasing compliance over time when sanctions are restricted.<sup>309</sup> Prosecutors must also be concerned with the spatial dimensions of enforcement.<sup>310</sup> Frequently the EPA interacts with regulated agents in more than one enforcement context. Examples would include multi-plant firms, firms with branches in several geographical regions, or firms that are subject to multiple regulatory regimes such as air, water, and noise requirements enforced simultaneously. Given restricted penalties and limited enforcement resources, maximal enforcement will not necessarily result in maximal compliance. That is, in regulating “repeat players,” strategic tolerance of noncompliance in selected areas may improve aggregate performance. Such an approach to prosecution is known as “regulatory dealing,” the policy of tolerating noncompliance in some contexts to induce increased compliance in others.<sup>311</sup> As a result, the infrequent imposition of significant sanctions is not necessarily a sign of lax enforcement.<sup>312</sup> Bargaining between regulatory officers and polluters is a necessary component of efficient enforcement when both enforcement penalties and resources are constrained. In fact, having the discretion to not maximally sanction a violation becomes a prosecutor’s major bargaining resource.

Dynamic enforcement considerations and penalty leveraging, as well as spatial enforcement considerations and regulatory dealing, provide an efficiency basis for allowing EPA prosecutors wide latitude in sanctioning violations of environmental law.<sup>313</sup> Much more contentious, however, is the process of defining non-compliance in the first place. As Mark Cohen points out, expanding the grounds of liability, particularly criminal liability, runs the dual risks of creating incentives for over-deterrence with the resulting misallocation of compliance resources, as well as the possibility of trivializing regulatory law itself.<sup>314</sup>

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308. Anthony Heyes & Neil Rickman, *Regulatory Dealing—Revisiting the Harrington Paradox*, 72 J. PUB. ECON. 361 (1999).

309. See Harrington, *supra* note 302, at 48-52.

310. See, e.g., Heyes & Rickman, *supra* note 308, at 361.

311. *Id.* at 372.

312. See generally *id.* at 372-73.

313. Naturally, there are other explanations of compliance without penalties. Informal sanctions such as facing bad publicity, being forced to attend time-consuming meetings, or conducting additional maintenance operations may also play an important role. See generally PAUL DOWNING, *ENVIRONMENTAL ECONOMICS AND POLICY* (1984).

314. See Cohen, *supra* note 270, at 1102-04.

#### D. *Judicial Discretion and the Federal Sentencing Guidelines*

In the efficiency analysis of deterrence, harm is assumed to be monetized and the optimal fine equals the costs incurred by society as a result of the harmful act divided by the probability that the injurer will have to pay the fine.<sup>315</sup> Under the Federal Sentencing Guidelines, the applicable range of fines is not determined in any systematic way by considerations of monetized costs of harms or probabilities of detection. Instead a damage schedule is employed, based on a categorical assessment of the severity of the offense and the violator's criminal history.<sup>316</sup>

The use of a predetermined fixed schedule for sanctioning guidelines can be justified in a variety of ways.<sup>317</sup> First, current methods of estimating monetary values are limited and there is little widespread agreement that they provide dependable and consistent valuations,<sup>318</sup> particularly in the case of environmental losses, or reductions in losses, for which the compensation measure of value rather than the willingness to pay measure is appropriate.<sup>319</sup> Second, and perhaps more importantly, the use of damage schedules can be more universally and less expensively employed than case-by-case monetized estimates of harm, while providing more consistent deterrence incentives, restitution for harms, resource allocation guidance, and greater fairness of similar treatment of similar losses.<sup>320</sup>

Perhaps the greatest strength of setting sanctions through the use of a damage schedule instead of through case-specific damage assessments is

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315. See generally Shavell, *supra* note 277, at 492-514.

316. See generally Lincenberg, *supra* note 62, at 114-18.

317. Ratana Chuenpagdee et al., *Environmental Damage Schedules: Community Judgments of Importance and Assessment of Losses*, 77 LAND ECON. 1 (2001).

318. Brian R. Binger et al., *Contingent Valuation Methodology in the Natural Resource Damage Regulation Process: Choice Theory and the Embedding Phenomenon*, 35 NAT. RESOURCES J. 443 (1995); Daniel Kahneman et al., *Economic Preferences or Attitude Expression? An Analysis of Dollar Responses to Public Issues*, 19 J. RISK & UNCERTAINTY 220 (1999).

319. Jack L. Knetsch et al., *Reference States, Fairness, and Choice of Measure to Value Environmental Changes*, in ENVIRONMENT, ETHICS AND BEHAVIOR: THE PSYCHOLOGY OF ENVIRONMENTAL VALUATION AND DEGRADATION (Max H. Bazerman et al. eds., 1997); Jack L. Knetsch, *Environmental Policy Implications of Disparities Between Willingness to Pay and Compensation Demanded Measures of Value*, 18 J. ENVTL. ECON. & MGMT. 227 (1990). In an effort to appraise the validity of contingent valuation ("CV") measures of economic value, a distinguished panel of social scientists, chaired by two Nobel Laureates, was established by the National Oceanic and Atmospheric Association ("NOAA") to critically evaluate the validity of CV measures of nonuse value. See Report of the NOAA Panel on Contingent Valuation, 58 Fed. Reg. 4602-14 (January 15, 1993). The report was highly critical; For a rebuttal see Discussion Paper 96-20 published by Resources for the Future: RICHARD T. CARSON ET AL., WAS THE NOAA PANEL CORRECT ABOUT CONTINGENT VALUATION? (1996).

320. Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49 (1998); Murray B. Rutherford et al., *Assessing Environmental Losses: Judgments of Importance and Damage Schedules*, 22 HARV. ENVTL. L. REV. 51, 56-61 (1998).

that violators will know with greater certainty the general magnitude of sanctions for various violations. Clearly individual behavior is not affected by the actual probability and magnitude of sanctions, but by the perceived levels of these variables. Erratic sanctioning based on controversial monetized assessment of damage may well exacerbate perception problems, resulting in private assessments of the magnitude of sanctions greatly at odds with expected outcomes. The well-advertised use of the Federal Sentencing Guidelines and CWA enforcement provisions can alleviate problems of gross misperception.

To achieve deterrence objectives, operators must face full liability for CWA violations. Operators are made aware of the consequences of CWA violations once information on the CWA sanctions and the Federal Sentencing Guidelines is provided. Given the probability of detection, the CWA regulated community can then base compliance decisions on sanctioning information and on the likelihood that violations will be prosecuted appropriately by the EPA and adjudicated rigorously by judges. Judicial laxity concerning the appropriate imposition of criminal sanctions undermines marginal deterrence and compliance objectives. Recent legal trends suggest that judicial discretion is steadily moving toward imposing full liability, so that CWA enforcement is well positioned to pursue deterrence objectives efficiently.<sup>321</sup>

#### E. *Summing Up*

By comparing individual incentives created by a variety of enforcement activities with incentives necessary to promote social welfare, an efficiency analysis of discretion can derive a set of results applicable to evaluating current enforcement practices. Specifically, efficient enforcement of federal environmental law is characterized by the following:

1. Fines should be employed to the maximum extent feasible before resort is made to imprisonment. Fines are socially costless to impose, whereas imprisonment is socially costly, so deterrence should be achieved through the cheaper form of sanction first.<sup>322</sup>
2. Sanctions can be imposed either on the basis of the commission of a dangerous act that increases the chance of harm or on the basis of

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321. A recent study confirms the general, recent legal trend of the continuous increase in criminal penalties; that is, the trend toward fines and total penalties for corporations or organizations, convicted of federal crimes, being higher under the sentencing guidelines than they were previously well documented. Cindy Alexander et al., *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J. L. & ECON. 393 (1999).

322. For a discussion and illustration of the use of fines and imprisonment, see THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW*, 292-93 (2004). For a full explication, see A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. of PUB. ECON. 89 (1984).

the actual occurrence of harm. In principle, either approach can achieve optimal deterrence.

3. Enforcement is said to be general when several different types of violations may be detected by an enforcement agent's activity. When enforcement is general, the optimal sanction rises with the severity of the harm and is maximal only for relatively high harms.
4. In many circumstances, an individual may consider which of several harmful acts to commit, for example, whether to release only a small amount of a pollutant into a river or a large amount. Such individuals will have a reason to commit less harmful rather than more harmful acts if expected sanctions rise with harm. Deterrence of a more harmful act because its expected sanction exceeds that for a less harmful act is referred to as marginal deterrence.
5. Imprisonment sanctions usually will be required to maintain a tolerable level of deterrence of acts classified as criminal.
6. The standard of liability when imprisonment sanctions are imposed is typically fault-based. This is socially desirable because fault-based liability reduces the use of socially costly sanctions.
7. The use of selective enforcement in prosecution of regulatory violations can increase compliance over time by creating penalty leveraging when penalties and enforcement resources are constrained.
8. The use of selective enforcement in prosecution of regulatory violations can increase compliance across the regulated community by using regulatory dealing when penalties and enforcement resources are constrained.
9. The federal sentencing guidelines can be viewed as a valid second-best approach to criminal sanctioning when monetary estimates of harm are suspect and expensive, and consistent and predictable deterrence incentives are required for efficacious enforcement.

As illustrated by the CWA, these deterrence prescriptions are generally descriptive of contemporary enforcement of federal environmental law. Unfortunately, two troubling discretionary problems remain largely unresolved: (1) overzealous prosecution and (2) lax criminal sanctioning. Basing criminal prosecutions on the grounds of strict liability, negligence, or vicarious liability, when the elements of intent and control are missing, runs the risk of promoting over-deterrence and trivializing criminal law. Similarly, significant downward departures for criminal sanctions from those provided under the Federal Sentencing Guidelines can result in promoting under-deterrence and the trivialization of environmental law.

At the heart of debates over the exercise of prosecutorial and judicial discretion in the enforcement of federal environmental law is a concern about criminal justice. Critics are concerned about the fairness of imprisoning violators who lacked intent or were unable to exercise control over the regulatory outcome. On the judicial side, critics worry that punishing envi-



ronmental violators on par with serious crimes against persons and property is overreaching. Thus, in addition to the deterrence implications of the use of discretion, complex issues of treating individual violators justly must be addressed.

## V. IMPLICATIONS FOR CRIMINAL JUSTICE

From an efficiency perspective, this picture looks clear. Given that the prosecutor's goal is compliance, there are strong efficiency arguments for broad enforcement discretion and narrow judicial discretion. Before adopting this regime, however, we must take two considerations into account. First, we must recognize the fundamental tension that exists between the efficiency of the legal regime and what has been called distributive justice.

### A. *Efficiency vs. Distributive Justice*

#### 1. Utilitarianism and Economics: Serving the Interests of the Group

Economics is an excellent tool for choosing which policies best serve the interests of the group or society as a unit. Classical economics is generally considered as a subset of the philosophy of utilitarianism. Pure utilitarianism rests on the principle that there is no intrinsic good<sup>323</sup> other than happiness<sup>324</sup> and that the aggregate happiness<sup>325</sup> of the group is the only standard of value.<sup>326</sup> In keeping with the maxim "the ends justify the means," utilitarianism's goal is a state of affairs in which the "greatest good for the greatest number" is satisfied.<sup>327</sup> On the classic formulation,<sup>328</sup> utilitarianism judges only the amount of happiness in the relevant group and is unconcerned with the fairness of the procedures that produce happiness or its distribution within the group.

323. Or at least that no such good can be known.

324. In this context, happiness is specifically understood as the satisfaction of preferences.

325. Exactly *whose* aggregate happiness is not always clear. The boundaries of the relevant community are not a matter of consensus. According to some utilitarians, for example, the happiness of animals is also to be considered in calculating the aggregate happiness. *See generally* PETER SINGER, *ANIMAL LIBERATION* (2001).

326. *See* CONCISE ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 909 (2000) (discussing utilitarianism); ALLEN BUCHANAN, *ETHICS, EFFICIENCY, AND THE MARKET* 55 (1988) (discussing utilitarianism).

327. *See generally* BUCHANAN, *supra* note 326, at 55.

328. Today, scholars commonly distinguish between two forms of utilitarianism: act-utilitarianism and rule-utilitarianism. According to act-utilitarianism, an act is just "if and only if, it would produce the best consequences among all the acts the agent can perform." According to rule-utilitarianism, acts are right "if, and only if, they are prescribed by rules which are in turn justified by the consequences of their being adopted or conformed to." Rule utilitarianism attempts to account for the seeming impossibility of building general moral principles like honesty and procedural fairness from instantaneous cost-benefit judgments. FRED R. BERGER, *HAPPINESS, JUSTICE, AND FREEDOM* 64 (1984).

Economics is subject to similar limits. While economics prescribes *efficient* means to the group's ends, it does not address procedural fairness or distributive justice.<sup>329</sup> For example, criminal procedural safeguards have no obvious economic benefit.<sup>330</sup> Every conviction thrown out due to an illegal search represents costs to the group in the form of squandered law enforcement resources. Yet cost savings are presumably not sufficient grounds to repeal the Fourth Amendment. Regardless of their utility, such safeguards are integral to our concept and system of criminal justice.

## 2. Criminal Justice and Fairness to the Individual

Our everyday notions of criminal procedure and individual rights find no obvious support in economics, but they are supported both by a wide social consensus and by other theories of justice. What those theories all share in common is a focus on means; a notion that certain rights of individuals may not be violated in pursuit of the group's goals. We must therefore ask: does the efficient regime of environmental criminal enforcement also honor the rights of the individual?

### a. Public Welfare Doctrine: Regulation and the Reasonable Person

As we discussed above, the public welfare doctrine presumes knowledge of the law in those cases in which the reasonable person would have known their activity was probably regulated. Though not technically an instance of strict liability, the doctrine diminishes *mens rea*, heightens liability and broadens prosecutorial discretion. Economics seems to approve of the reasonable person (or "objective") standard; society's interest is to deter all reasonable people from violating environmental law. When applied correctly, to activities which are inherently dangerous and uncommon, the public welfare doctrine is also fair.

The doctrine offers less protection to a defendant than is available under general regulatory crime but, when it is appropriately applied to truly dangerous and uncommon activities, it offers at least as much as existed at common law. We recall that, at common law, knowledge of the law was presumed and no mistake of law, reasonable or otherwise, was an affirmative defense. By excusing legal ignorance in the context of regulatory crime, courts initially *heightened* the standard of criminal intent. By

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329. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 80 (1981) ("The main point, however, is that the specific distribution of *wealth* is a mere by-product of the distribution *rights* that is itself derived from the wealth-maximization principle. A just distribution of wealth need not be posited.").

330. While one can imagine economic arguments accounting for rules prohibiting certain means *ex post facto* (for instance, that fear of arbitrary law enforcement chills the market), economics is unconcerned with justice *per se*.

diminishing this heightened standard, the public welfare merely stems a legal ignorance defense that could otherwise be subject to abuse.<sup>331</sup> Without the doctrine, Christine Wettach writes, “individual wrongdoers could take advantage of the system by remaining deliberately ignorant of the law or simply failing to acknowledge the law or their knowledge of its existence.”<sup>332</sup>

Truly, the individual who is unreasonably ignorant of the law will be punished for his or her mistake, but unreasonable mistakes are punished in other areas of criminal law. In contemporary criminal law generally, when a mistake of fact is asserted as a defense, that mistake must be reasonable in order to excuse the defendant. If the defendant who makes an unreasonable mistake of fact will not be acquitted, should the person who makes a mistake of law be held accountable?

The commonsense question is whether, given the activity, a presumption of knowledge is truly reasonable or not; What would the reasonable man *actually* have known? The real danger lies not in the doctrine itself, but in its misapplication to activities that are not inherently “uncommon” or “dangerous.” As Supreme Court Justice Clarence Thomas put it:

Although provisions of the CWA regulate certain dangerous substances, . . . the CWA also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities. This fact strongly militates against concluding that the public welfare doctrine applies. . . . I think we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations.<sup>333</sup>

The proper application of the doctrine is ultimately a question of judicial, not prosecutorial discretion. Activities which are not dangerous or uncommon give no plausible notice of the law and courts should not apply the doctrine to them.

b. The RCO: Control, Prevention, and the Duty to Know the Law

The RCO is more properly considered a doctrine of strict liability. Looking back, we recall that strict liability will be an efficient component of enforcement discretion if and only if the regulated entity is in a position to control and prevent violations. The RCO tracks this model almost exactly, requiring that prosecutors demonstrate the authority to prevent viola-

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331. Christine L. Wettach, *Mens Rea and the "Heightened Criminal Liability" Imposed on Violators of the Clean Water Act*, 15 STAN. ENVTL. L.J. 377, 399-400 (1996).

332. *Id.* at 399.

333. *Hanousek v. United States*, 528 U.S. 1102, 1102 (2000) (Thomas, J., dissenting from denial of *certiorari*).

tions. The RCO therefore meets the efficiency standard and goes no further. In effect, the RCO places a duty on corporate officers (a) to know the law that regulates their industry and (b) to control the actions of their subordinates, exactly to the extent that they have the power to do so.<sup>334</sup> In the event that the defendant had no authority, the prosecutor will be unable to make her showing. If the defendant had the official authority, but not the actual power, he will be acquitted. Moreover, in at least one Circuit, proof of the officer's position in the company, while sufficient to infer knowledge of the law, is "not an adequate substitute for direct or circumstantial proof of knowledge [of the violation]."<sup>335</sup>

c. Prosecutorial Leverage and the Right to Trial

Broadening prosecutorial discretion itself may be of concern from a fairness standpoint. Arguably, the broadening of prosecutorial discretion under certain statutes fundamentally alters the balance and separation of powers in our criminal justice system, redistributing power from courts (and the law itself) to prosecutors.<sup>336</sup> As power shifts to prosecutors, law enforcement is increasingly achieved by threat, and not by trial. Overwhelming risk of jail time could effectively deny environmental defendants Sixth Amendment rights and other protections of the courtroom.<sup>337</sup> This is perhaps the most troubling implication of criticism of broadening prosecutorial discretion under the environmental laws.

B. *Criminal Justice and the Interests of the Group: Constraining Judicial Discretion*

Effective criminal justice requires a balance between prosecutorial discretion and judicial discretion. As noted above, prosecutorial discretion focuses on fairness to the individual and seeks to ensure that each offender receives just treatment within the judicial system. In contrast, judicial discretion focuses on the effect an offender's sentence has on society. Although a guilty individual may be treated fairly in the events prior to sentencing, a judge may choose to impose a sentence other than what is

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334. See generally *United States v. Park*, 421 U.S. 658 (1975); Kushner, *supra* note 185.

335. *United States v. MacDonald & Watson Oil Co.*, 933 F.3d 35, 55 (1st Cir. 1991).

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In this system of separated powers, each branch is supposed to check the others. That does not happen. Instead, the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones.

Stuntz, *supra* note 152, at 510.

337. *Barker*, *supra* note 6, at 1418.

prescribed by the sentence guidelines. Such a sentence is inherently unfair to society because it either creates a financial burden from the increased incarceration or creates a sense of injustice if the offender receives a lesser punishment than what society believes is deserved. Accordingly, to be economically efficient, criminal justice requires equitable sanctioning to the individual and society.

The prosecution and sentencing of a criminal defendant is a multi-dimensional process. Prior to the indictment, a prosecutor has discretion to decide whether to charge the individual, and if so, what charges to pursue.<sup>338</sup> Once the offender has been convicted or has pled guilty, a probation officer will compile a pre-sentence report detailing the criminal history and characteristics of the offender as well as the classification of the offense.<sup>339</sup> After considering all this information, including any testimony the court may allow, the trial judge will then sentence the offender based on the Federal Sentencing Guidelines.<sup>340</sup>

Although some critics argue that the Guidelines have reduced the sentencing process to “a stringent mathematical formula,”<sup>341</sup> the above discussion supports the notion that the sentencing process remains the thoughtful, comprehensive procedure that existed before the enactment of the Guidelines. However, as with the pre-guidelines era, the final sentence is determined by individual judges, each with their own belief as to what constitutes a just sentence.<sup>342</sup> Accordingly, disparate sentencing of environmental crimes may continue to exist

#### 1. Judicial Discretion and the Trivialization of Environmental Crimes

When Congress empowered the sentencing commission to implement the sentencing guidelines, one of its goals was to reduce the disparity in sentences between those convicted of white-collar crimes and those convicted of conventional street crimes.<sup>343</sup> Environmental crimes, considered a subset of white-collar crime, were targeted with this goal by the enactment of section Q<sup>344</sup> designed to regulate the sentencing of environmental crimes.

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338. *See infra* Part II.B.

339. *See infra* Part II.C.

340. *See infra* Part II.C.

341. Kaufman, *supra* note 219, at 18.

342. Koh, *supra* note 214, at 1124.

343. Barrett, *supra* note 4, at 1423. A white-collar crime is a nonviolent crime, usually involving cheating and dishonesty in commercial matters. BLACK'S LAW DICTIONARY 1590 (7th ed. 1999).

344. Barrett, *supra* note 4, at 1426.

Nevertheless, for several years after the implementation of the environmental guidelines, environmental criminals continued to receive rather light sentences of either straight probation or incarceration of less than one year.<sup>345</sup> Jane Barrett blames this continued disparity on the application notes that accompany the environmental sentencing guidelines.<sup>346</sup> These application notes, frequently included in the commentary accompanying the Guidelines, often suggest circumstances that “may warrant a departure from the guidelines.”<sup>347</sup> Barrett argues that such departures may allow a judge to undercut the adjustments for aggravating factors required by the specific offense characteristics of the particular crime, resulting in lower sentences for those convicted of environmental crimes.<sup>348</sup>

Although these application notes may provide the mechanism for departures, the motivation for such departures may be the result of criticism that the current Guidelines “overcriminalize” environmental crimes. These critics believe that environmental violations—as a type of white-collar crime—are different than street crimes such as robbery and theft and, thus, polluters should receive either fines or probation rather than face prison time.<sup>349</sup> Some critics also lament that Congress has amended the law to allow offenders with reduced moral culpability to be sentenced for longer periods of imprisonment with greater monetary penalties.<sup>350</sup> As a result, some critics believe that “some infractions of environmental regulations 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.”<sup>351</sup> As a consequence, judges may use their authority to depart from the prescribed sentence as an attempt to remedy these perceived inequities.

One such remedy to the perceived overcriminalization of environmental crime is for a judge to permit a lower sentence for what she might consider a “trivial” offense.<sup>352</sup> Under the current guidelines, a violation that results in a substantial likelihood of death or bodily injury will almost al-

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345. *Id.* at 1427-29; *see also Panel I: Environmental Ethics*, 21 *ECOLOGY L.Q.* 417, 424-25 (1994) (“It is rare for an environmental criminal to serve any time for an environmental crime.”).

346. Barrett, *supra* note 4, at 1428.

347. *Id.* at 1428.

348. *Id.* at 1429.

349. *See* Cindy Johnson, Note, *For Better or Worse: Alternatives to Jail Time for Environmental Crimes*, 26 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 265, 297 (2000).

350. *See id.* at 277-78.

351. Sharp, *supra* note 259, at 181.

352. *See* Paula de Prez, *Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions*, 12 *J. ENVTL. L.* 65, 75 (2000).

ways be punished by imprisonment.<sup>353</sup> But the Guidelines may also call for imprisonment of negligent or misdemeanor violations that do not create a threat to public health or safety.<sup>354</sup> In addition, the Guidelines make no provision for alternatives to incarceration for these misdemeanor offenses.<sup>355</sup> Because a downward departure may be the only means of reaching a seemingly just punishment, a judge may depart from the sentence prescribed by the federal guidelines if she believes that the crime is insignificant and the harm to the environment is negligible.<sup>356</sup>

For example, in *United States v. Ellen*,<sup>357</sup> a jury convicted the defendant on five felony counts of illegally filling wetlands. The court arrived at an adjusted offense level of twelve, but, using its authority to depart, made a 2-level downward departure because the fill was not hazardous nor was there any specific damage to human or animal health.<sup>358</sup> The court also applied the specific offense characteristic relating to discharge without a permit, but again made a 2-level downward departure for essentially the same reasons.<sup>359</sup> Similarly, in *United States v. Osborne*,<sup>360</sup> the defendant pled guilty to one count of knowingly permitting a discharge of sewage pollutants into a natural creek. After finding that the violation did not cause significant harm, the court departed from the Guidelines.<sup>361</sup> In each of these cases, the defendant either pled or was found guilty of intentionally violating the Clean Water Act. Despite the defendants' obvious guilt, the court reduced the defendants' sentences because the crimes did not create a threat to public health or safety. In essence, the court trivialized the defendants' crimes against the environment.

Even if done for what appears to be an equitable reason, the trivialization of certain environmental crimes can be detrimental to the enforcement of environmental law. "Our system for punishing criminal environmental offenses is supposed to send a deterrent message."<sup>362</sup> But this method of de-

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353. Sharp, *supra* note 259, at 185.

354. *Id.*

355. *See id.* at 186 (discussing how environmental offenders usually receive an incarceration sentence when convicted).

356. *See* Freed, *supra* note 210, at 1726-27; Jack Weinstein, Note, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 357, 364-65 (1992); *see also* de Prez, *supra* note 352, at 72-75.

357. 961 F.2d 462 (4th Cir. 1992).

358. *Id.* at 468.

359. *Id.*

360. No. 90-38-S (E.D. Ky. Jan. 7, 1991).

361. *Id.*

362. David B. Spence, *Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21st Century*, 20 COLUM. J. ENVTL. L. 145, 173 (1995) (quoting Donald A. Carr, *Prosecutors Out of Control*, ECO, June 1993, at 56).

terrence will only function if courts indicate their intent to impose punitive sanctions against all violators; “[E]ven the most law-abiding are likely to reduce their compliance efforts if they perceive the absence of enforcement against offenders.”<sup>363</sup> Furthermore, judges consistently issuing low sanctions likely will perpetuate the idea that such crimes are trivial and, inappropriately, not jailable offenses.<sup>364</sup> This trivialization can only impede enforcement of environmental offenses as a whole because if an offender’s sentence is consistently reduced or even suspended, future offenders will no longer fear the threat of prosecution.<sup>365</sup> In trivializing environmental crimes by sentencing offenders for less than the law requires, the legal system has breached its obligation to society.

## 2. Recent Trends in the Sentencing of Environmental Crimes

With the recent corporate fraud scandals such as ImClone, Enron, and Halliburton, public outcry has motivated lawmakers to enact tougher standards that require the incarceration of white-collar criminals. Environmental crime has followed this trend of increased potential penalties, more frequent incarceration of violators, and longer prison sentences for those convicted.<sup>366</sup> This trend appears to result from congressional acts passed in the mid-1990s, which expanded the definition of criminal environmental behavior as well as harsher sanctions set out by the sentencing guidelines.<sup>367</sup> Under this expanded definition, a criminal offender may include both first-time violators and purely regulatory offenders.<sup>368</sup> A criminal offender may also include an offender whose conduct may be contrary to the law, but whose actions have not actually harmed the environment.<sup>369</sup> Furthermore, the sentencing guidelines significantly increased the penalties for those convicted of environmental offenses.<sup>370</sup>

In the years following the enactment of the sentencing guidelines, the criminal penalties imposed totaled less than twenty million dollars per

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363. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2452 (1995) (discussing the significance of incarceration in determining penalties for environmental offenses).

364. De Prez, *supra* note 352, at 65.

365. *Id.* at 76.

366. See generally Alexander et al., *supra* note 321, at 416 (arguing that corporations pay higher criminal fines since the adoption of the Guidelines).

367. See Lauren A. Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 FORDHAM ENVTL. L.J. 42, 48-51 (1993) (discussing how Guidelines now allow first-offenders to be subject to criminal sanctions, and how various factors can lead to enhancement of the base offense).

368. *Id.* at 50-51.

369. *Id.*

370. *Id.* at 48-51.



year.<sup>371</sup> But because of the congressional acts, this number increased in the mid-1990s, averaging close to sixty million dollars, with the annual sum of criminal fines collected exceeding 100 million dollars in 1997 and 2000.<sup>372</sup> The terms of incarceration of criminal offenders have also increased. In 1999, EPA announced that a record 208 years of total jail time was imposed on criminal defendants.<sup>373</sup> This record was quickly surpassed in both 2001 and 2002.<sup>374</sup> Recent reports indicate a decline in criminal penalties and jail time imposed. Some attribute this trend to the recent shift of U.S. governmental manpower from environmental enforcement to issues of homeland security.<sup>375</sup> This decline may well have resulted from the decreased personnel dedicated to enforcement purposes, as agency manpower was redirected towards homeland security, and not necessarily from a decreased interest in prosecuting offenders.<sup>376</sup> Accordingly, despite this recent decline, the overall trend indicates an increase in criminal enforcement, fines, and incarceration of environmental offenders, reflecting the government's increasing interest in criminal prosecution of environmental offenders. Thus, an environmental offender who is convicted is increasingly likely to receive a term of imprisonment.<sup>377</sup>

Moreover, if this trend of higher criminal sanctioning continues, serving prison time for environmental crimes will become the norm, rather than the exception. And, as these penalties become commonplace, society may no longer view imprisonment for environmental crimes as overly harsh. Thus, the moral need for a judge to depart from the guidelines to remedy any perceived overcriminalization of these white collar crimes will be reduced. As a result, sentencing disparity resulting from judicial discretion

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371. OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. 300-R-00-005, ANNUAL REPORT ON ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS IN 1999, 6 (2000) [hereinafter 1999 COMPLIANCE ASSURANCE] (on file with Duke Environmental Law & Policy Forum)

372. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, FY 2003 END OF YEAR ENFORCEMENT & COMPLIANCE ASSURANCE RESULTS, 3, 12 (2003), available at <http://www.epa.gov/compliance/resources/reports/endofyear/> [hereinafter 2003 COMPLIANCE ASSURANCE].

373. 1999 COMPLIANCE ASSURANCE, *supra* note 371, at 5.

374. 2003 COMPLIANCE ASSURANCE, *supra* note 372, at 12.

375. The amount of criminal fines collected in 2002 by the EPA declined approximately 34% or almost eight million dollars from the previous year. Kenneth Reich & Seth Handy, *Environmental Crimes: Penalties are Down but the Beat Goes on*, 34 A.B.A. SEC. ENV'T, ENERGY, & RESOURCES NEWSL. 10, 10-11 (2003).

376. See 2003 COMPLIANCE ASSURANCE, *supra* note 372, at 12 (showing a decrease in the number of defendants charged in 2002 and 2003 with the decline in 2003 being much greater).

377. Sharp, *supra* note 259, at 185.

will decrease as judges impose sentences within the prescribed range of the sentencing guidelines.

The Federal Sentencing Guidelines simultaneously address two goals of just enforcement. First, society is protected from excessive environmental harm by the establishment of clear deterrents. Consistent and predictable deterrents are created for environmental crimes in the form of statutorily-grounded criminal sanctions, resulting in similar penalties being imposed on similarly-situated offenders. For society to realize the benefits of sanctioning consistency and cost-effective deterrence, sentences need to be anticipated and predictable and not based solely the discretion of the sentencing judge.

Second, defendants are protected from arbitrary, unanticipated sanctioning. The sentencing process itself remains thoughtful and comprehensive, and judges retain the latitude to impose sentences within a prescribed range. More specifically, the sentencing judge will impose a sentence within the guideline range, unless the court finds that there exists “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”<sup>378</sup> In this case, with appropriate written motivations, the judge can adopt a departure upward or downward from the guideline range.<sup>379</sup> In the vast majority of cases, the court will apply the range resulting from the sentencing table by matching the pertinent offence level and criminal history category.<sup>380</sup> In determining the type of sentence to impose, the sentencing judge considers the nature and seriousness of the conduct, the statutory purpose of sentencing, and the pertinent offender characteristics. Within the applicable range, the judge has full discretion to pick the sentence from any point and to choose different sentencing options that combine fines,<sup>381</sup> probation,<sup>382</sup> supervised release,<sup>383</sup> imprisonment and imprisonment substitutes such as home detention, community confinement, and intermittent confinement.<sup>384</sup>

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378. 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0.

379. For a summary of departures approved and disapproved by appellate courts, see UNITED STATES SENTENCING COMMISSION, *GUIDELINE DEPARTURES 1989-1999* (2000).

380. It is important to note that if a specific statute prescribes different minimum or maximum term of imprisonment, the guideline range is consequently adjusted to fit the statutory provisions. *See* U.S.S.G. § 5G1.1.

381. U.S.S.G. § 5E.

382. U.S.S.G. § 5B.

383. U.S.S.G. § 5D.

384. U.S.S.G. § 5C.

In summary, the institutional framework created by the Federal Sentencing Guidelines promotes both society's interest in deterrence and harm reduction, and defendants' interests in due process and equal treatment. An efficiency analysis of the Federal Sentencing Guidelines provides support for those legal practitioners and academics who defend the guidelines in either their mandatory or discretionary form. Accordingly, despite their numerous criticisms, the Federal Sentencing Guidelines provide an efficient approach to balancing criminal justice concerns in the sentencing of environmental offenders.

## VI. CONCLUSIONS

The use of criminal sanctions to enforce environmental laws can be justified on a variety of grounds including the pursuit of such goals as incapacitation, rehabilitation, and retribution. While these motivations may well play some part in the recent trend toward criminalizing egregious violations of federal environmental law, it is clear that the core rationale is one of deterrence. EPA investigators and prosecutors have attempted to create a compliance framework wherein the regulated community has clear incentives to adopt all cost-justified precautions so that expected environmental harms can be efficiently abated. Acts by the regulated community that result in environmental harm, or increase the probability of environmental harm, will be more difficult to deter with monetary sanctions alone when benefits to the violator are high, harm is substantial, the probability of imposing sanctions is low, and/or the level of violator assets is modest compared to harm done. As a result, criminal sanctions are an integral part of a marginal deterrence approach to the enforcement of environmental law. Violations that create "significant environmental harm" are the particular focus of the EPA's Criminal Investigation Division.<sup>385</sup>

### *A. Prosecutorial Discretion and the Overcriminalization of Environmental Law*

In practice, a given environmental violation can result in a variety of sanctions, ranging from a simple notice of violation, to a substantial civil penalty, or even to criminal sanctions depending on the response of gov-

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385. The 1994 EPA Guidance directs agents to focus on violators causing "significant environmental harm" which is defined by four factors: (1) actual harm that has an identifiable and significant harmful impact on human health or the environment; (2) the threat of significant harm by an actual or threatened discharge, release or emission; (3) the failure to report an actual discharge, release, or emission, coupled with actual or threatened environmental harm; and (4) a single violation that represents a "trend or common attitude within the regulated community." See Steven P. Solow, *Preventing an Environmental Violation from Becoming a Criminal Case*, 18 NAT. RESOURCES & ENVTL 19, 20 (2004).

ernment prosecutors. The choice between administrative, civil, or criminal proceedings rests with prosecutors in their exercise of prosecutorial discretion. As a matter of public policy, dynamic enforcement considerations and penalty leveraging, as well as spatial enforcement considerations and regulatory dealing, provide the rationale for allowing EPA prosecutors wide latitude in sanctioning violations of environmental law. On the other hand, while society has an important interest in reducing pollution and deterring illegal environmental activities, society also has an interest in ensuring that the requirements for complying and the penalties for not complying are not so severe that firms are inhibited from engaging in socially beneficial activities.

In the case of businesses subject to environmental regulations, prosecutorial discretion can be influenced negatively by a variety of factors including the way in which a company responds to an investigation, fails to prepare effectively for inspections, complies with search warrants, or develops a pattern of poor record management. Similarly, the Federal Sentencing Guidelines themselves suggest ways to favorably influence prosecutorial discretion and subsequent sanctioning. "Under the existing Guidelines, a culpable organization with an effective program to prevent and deter violations of law can earn a three-point credit to mitigate the penalties it would otherwise receive."<sup>386</sup> Organizational compliance programs have developed in direct response to this incentive. More generally, penalty policies allow for consideration of cooperation, mitigating factors, response, prevention of recurrence, and employee training when considering ultimate sanctions.<sup>387</sup> A carefully considered response by the regulated entity to a criminal investigation can have a major impact on the ultimate sanctioning outcome.<sup>388</sup>

As factors that influence prosecutorial discretion are clearly communicated to the regulated community, resources will be diverted from the production of goods and services valued by society to activities that reduce exposure to criminal liability. This diversion of resources is welfare-enhancing from society's perspective to the extent that it results in significant reductions in enforcement costs and/or expected environmental damages. Accordingly, the implications for the efficient exercise of prosecutorial discretion are clear: discretion should be wide, transparent, and

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386. *Id.* at 21.

387. See Joseph W. Martini & Karen Mignone, *Minimizing Client Exposure to Criminal Enforcement for Environmental Violations*, 18 NAT. RESOURCES & ENV'T, 27, 31 (2004).

388. See *id.* (discussing the "significant opportunity for counsel of entity to participate in the process with the goal of persuading the authorities that a particular case is not worthy of criminal prosecution").

targeted. First, considerable latitude in pursuing and resolving violations of environment law is necessary if prosecutors are to achieve an acceptable level of deterrence in a cost-effective manner. Second, clear signals need to be sent to the regulated community concerning discretionary criteria so that potential violators can organize their precaution activities effectively. Third, factors and procedures that can affect prosecutorial discretion must be selected judiciously such that the regulated community responds by channeling resources into activities that effectively reduce expected environmental harm, enforcement costs, or both. If prosecutorial guidelines are selected inefficiently, the regulated community will be encouraged to adopt sanction-minimizing activities that are divorced from the adoption of cost-justified precautions. That is, environmental law may be overcriminalized.

The final point to emphasize concerning the relationship between prosecutorial discretion and the potential to overcriminalize environmental law involves criminal justice considerations. Commentators have warned that federal environmental criminal statutes permit an unacceptably broad range of variance in the charges and plea bargains sought by prosecutors. They hold that this picture is further aggravated by the imposition of strict liability under the public welfare doctrine and the responsible corporate officer doctrine. A review of case law confirms that these variances did indeed manifest in the first few years that the law authorized felony punishment. However, even as the sentencing trend is "tightening up," additional safeguards have been added at the prosecutorial level in the form of prosecutorial guidelines.

Critics are correct to point out that the requisite criminal intent in this area has been modified, and to some extent diminished, as compared with common law crimes. However, the critics' fear of strict liability is unfounded. Substantial defenses and procedural safeguards exist. The danger of wrongful conviction is no greater in this area than in many other areas of criminal law. An unresolved and perhaps a more serious question is whether increased prosecutorial leverage conferred by overlapping felony penalties alters the administrative or civil defendant's plea bargaining calculus so much as to effectively deprive him of his defenses in court.

#### *B. Judicial Discretion and the Trivialization of Environmental Law*

New sentencing guidelines for criminal sanctions were established in 1987 with the passage of the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984. Under this legislation, courts were required to impose sentences which reflect the seriousness of the offense, provide just punishment for the offense, and afford adequate deterrence to criminal conduct. The Federal Sentencing Guidelines went into effect No-

vember, 1987 and apply to all federal crimes committed on or after that date. Sanctions under the Guidelines are based on an evaluation of the gravity of the criminal offense and the defendant's criminal history.

Commentators have trumpeted the imposition of the Federal Sentencing Guidelines as both the boon and bane of criminal justice reform. Some argue that the Guidelines have reduced the sentencing process to an impersonal and mechanistic function, while others praise the Guidelines for limiting unwarranted disparity in the sentencing process. On economic grounds, the use of a predetermined, fixed schedule for sanctioning can be justified in a variety of ways. Current methods of estimating monetary values on a case-by-case basis for environmental damages are limited and problematic, as well as expensive and time-consuming to provide. Moreover, the use of sanctioning schedules may provide more consistent deterrence incentives, restitution for harms, resource allocation guidance, and greater fairness, by according similar treatment to those who cause similar harm. In the end, however, while efficiency arguments can support the use of the Federal Sentencing Guidelines in sanctioning violations of environmental law, important problems of implementation and criminal justice remain.

From the perspective of individual defendants, sanctioning outcomes under the Federal Sentencing Guidelines are still based on a thoughtful, considered process of review. Prior to the indictment, a prosecutor has discretion to decide whether to charge the individual, and if so, what charges to pursue. Once the offender has been convicted or has pled guilty, a probation officer will compile a pre-sentence report detailing the criminal history and characteristics of the offender as well as the classification of the offense. After considering all of this information, including any testimony the court may allow, the trial judge will then sentence the offender based on the Federal Sentencing Guidelines. In short, the sentencing process remains the systematic, comprehensive procedure that existed before the enactment of the Guidelines.

From a public policy perspective, however, the enforcement/deterrence implications of sanctioning outcomes under the Federal Sentencing Guidelines are much more contentious. In the early 1990s, reviews of the application of the Guidelines to environmental crimes concluded that "the sentences imposed in the majority of cases reflected the reluctance of judges to impose significant incarceration for violations of environmental laws."<sup>389</sup> The practice of lenient sentencing of environmental criminals was well documented in selected districts. As a result, im-

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389. Barrett, *supra* note 4, at 1421.

plementation of the Guidelines had not entirely eliminated lack of proportionality in sentencing with criminal violators continuing to receive sentences of straight probation and/or incarceration of less than one year, even for the commission of substantive environmental crimes.

The judicial motivation for departures that resulted in lenient sentencing may well have been the result of the criticism that the Guidelines “overcriminalized” environmental violations of the law. If so, some infractions of environmental regulations might be inappropriately treated as criminal, while actual criminal infractions may be punished too severely. Despite laudable judicial motivations involving the balancing of deterrence and overcriminalization concerns equitably, the result of systematic lenient sentencing of significant violations was to undermine the deterrent value of environmental enforcement and to trivialize environmental law itself. Central to effective enforcement is the idea that sanctioning is likely, predictable, and proportional to harm done.

A recent statistical study of the Federal Sentencing Guidelines has documented that sentencing disparity has been reduced for defendants found guilty of similar criminal conduct.<sup>390</sup> That is, implementation of the Guidelines has been successful in reducing interjudge nominal sentencing disparity. Disparity reduction reinforces the expressive function of sentencing by documenting that sanctions are not simply the personal judgment of the sentencing judge, but more of a direct measure of the offense to the community. Additionally, recent trends in the sentencing of environmental crimes per se suggest that judges and prosecutors are less and less likely to trivialize environmental crimes. Since the inception of the Federal Sentencing Guidelines, criminal sanctions in terms of both monetary penalties and months of incarceration have risen dramatically, annually averaging well over \$100 million dollars and 200 total years of jail time in recent years.<sup>391</sup> To the extent that recent trends in the reduction of sentencing disparity and the imposition of significant criminal sanctions when appropriate are representative of current environmental enforcement policy, society’s interests in providing consistent, predictable, and proportionate deterrence are promoted.

### C. *Implications for Future Research*

The exercise of prosecutorial and judicial discretion plays a pivotal role in implementing criminal sanctions as part of a comprehensive system

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390. See generally Alexander et al., *supra* note 321, at 418 (arguing that corporations pay higher criminal fines since adoption of the Guidelines).

391. See *supra* notes 372 and 373 and accompanying text.

of marginal deterrence in the enforcement of federal environmental law. The connection between prosecutorial discretion and the potential for over-criminalizing environment law deserves further investigation. Both survey documentation of the extent to which discretion criteria are understood by the regulated community, as well as case studies concerning how resources are reallocated in response to these perceptions, would be very helpful in updating current enforcement policies. Similarly, the connection between judicial discretion and the potential to trivialize environmental law deserves further investigation. Narrowly focused statistical studies on the impact of the Federal Sentencing Guidelines in reducing sentencing disparity for environment crimes, as well as updated case law analyses of judicial sanctioning practices, are pragmatic and useful research arenas for assessing the extent to which uniform and determinant sentencing goals are being met in environmental law.