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The Oil Pollution Act's Criminal Penalties: On a Collision Course with the Law of the Sea

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THE OIL POLLUTION ACT'S CRIMINAL PENALTIES: ON A COLLISION COURSE WITH THE LAW OF THE SEA

*Stephen J. Darmody**

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INTRODUCTION

On January 5, 1993, a single-hulled oil tanker named Braer ran aground in the Shetland Islands, ten miles off the coast of Scotland. The vessel drifted inland, coming to rest at the base of rocky, 100-foot cliffs in a sheltered cove known as Garth's Nest. There, the Braer threatened to break apart and release its cargo of twenty-five million gallons of oil, more than twice that of the Exxon Valdez. That night, a knowledgeable journalist and conservationist reported the story through an American radio network and concluded, "Under international law, I don't believe the Captain can be charged, but one must question the prudence of his seamanship."[1]

Major oil spills of this nature occur periodically. Each time they do, attention is focused on the threat of marine pollution. Some incidents have forced international legal scholars to address the issue.[2] Others have stirred the Congress to act after decades of inaction.[3] More often,

[1] *All Things Considered: Interview with Mr. Jonathan Wills* (National Public Radio broadcast, Jan. 5, 1993) [hereinafter *Wills*].

[2] *See* JOHN W. KINDT, MARINE POLLUTION AND THE LAW OF THE SEA 42 (1986) (describing reaction to Campeche Bay oil rig blow out in 1979 (citing *Mexican Oil Blowout Signals Massive Find, Hazards for Ecology*, WASH. POST, June 10, 1979, § A, at 20)); Alan T. Leonhard, *Ixtoc I: A Test for the Emerging Concept of the Patrimonial Sea*, 17 SAN DIEGO L. REV. 617 (1980); Jordan J. Paust, *The Mexican Oil Spill: Jurisdiction, Immunity, and Acts of State*, 2 HOUS. J. INT'L L. 239 (1979); F. Daniel Leventhal, Comment, *The Bay of Campeche Oil Spill: Obtaining Jurisdiction Over Petroleos Mexicanos Under the Foreign Sovereign Immunities Act of 1976*, 9 ECOLOGY L.Q. 341 (1980); William N. Hancock & Robert M. Stone, Note, *Liability for Transnational Pollution Caused by Offshore Oil Rig Blowouts*, 5 HASTINGS INT'L & COMP. L. REV. 377 (1982); Note, *Domestic and International Liability for the Bay of Campeche Oil Spill*, 6 INT'L TRADE J. 55 (1981).

[3] *See* Benjamin H. Grumbles, *The Oil Pollution Act of 1990: Mixing Oil, Water, and Hazardous Waste*, 4 GEO. INT'L ENVTL. L. REV. 151 (1991) (describing the Congressional response to the *Exxon Valdez* spill of 1989).

the public attention given to these disasters fades as the ocean assimilates the pollution.[4]

Dealing with the pollution problems caused by spills is further complicated by the jurisdictional issues inherent in the international law of marine pollution.[5] When the Congress passed the Oil Pollution Act of 1990,[6] it was responding to the environmental disaster caused by the Exxon Valdez Spill.[7] On its surface, the Oil Pollution Act seems to have solved the jurisdictional problems under international law by ignoring the rules.[8] Upon more careful analysis, however, the views of Hugo Grotius, often referred to as the "Father of International Law,"[9] appear to be more accurately reflected in the Oil Pollution Act than in the United Nations Convention on the Law of the Sea.[10]

This article presents the view that the economic effects of maritime oil spills justify the Oil Pollution Act's broad scope and use of criminal penalties. Moreover, enforcing criminal penalties against foreign vessels in U.S. waters is provided in the statute, is necessary to implement the congressional purpose, is permissible under recent judicial interpretations of international law principles, and would more accurately reflect the intent of Hugo Grotius than the approach taken in the U.N. Convention on the Law of the Sea. Such an interpretation will require the United States to lead the world toward a new interpretation of the law of the sea. The time to do so is now.

The first part of this article briefly reviews the marine transportation of oil, the history of the international law of the sea,[11] the tradi-

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[4] KINDT, *supra* note 2, at 42.

[5] *Id.* at 8.

[6] Pub. L. No. 101–380, 104 Stat 484 (codified as amended at 33 U.S.C. §§ 2701–2761 (1991) and in various sections throughout titles 16, 26, 43, and 46 of the U.S. Code) [hereinafter OPA].

[7] Grumbles, *supra* note 3, at 153–54; KINDT, *supra* note 2, at 4 (indicating that protective legislation following catastrophic oil spill is a "prime example" of immediate action taken to forestall pending ecological disaster (citing D. J. Cusine, *Liability for Oil Pollution Under the Merchant Shipping (Oil Pollution) Act 1971*, 10 J. MAR. L. & COM. 105 (1978))); John L. Pedrick, Jr., *Tankship Design Regulation and Its Economic Effect on Oil Consumers*, 9 J. MAR. L. & COM. 377 (1978); Frank E. Sisson III, *Oil Pollution Law of the Limitation of Liability Act: A Murky Sea for Claimants Against Vessels*, 9 J. MAR. L. & COM. 285 (1978); Comment, *A Comprehensive Oil Pollution Liability and Compensation Act: How Super is the "Superfund"?*, 1978 DET. C.L. REV. 277.

[8] *See* OPA § 4301(c); *Cf. United Nations Convention on the Law of the Sea, opened for signature*, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982) *reprinted in* 21 I.L.M. 1261 (1982), [hereinafter UNCLOS or Convention].

[9] KINDT, *supra* note 2, at 8. For a discussion of Grotius' views, see *infra* notes 34–55 and accompanying text.

[10] As Justice Cardozo observed, "[T]he tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of history." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

[11] On the theory that "the effect of history is to make the path of logic clear." *Id.* at 51.

tional methods used to accommodate pollution control measures within the law of the sea, and the limits of the current approach. Part two discusses the methods Congress chose before 1990 to control marine pollution and the weaknesses of those methods. Part three discusses a few recent developments in the criminal enforcement of environmental law, the crimes adopted in the Oil Pollution Act, and the conflict between the use of those criminal provisions and international law. Part four analyzes recent developments and shows how developing trends support the use of the Oil Pollution Act as a catalyst to bring about a new interpretation of the law of the sea, bringing it closer to the original intent of its framers and more in accord with the needs of today's world.

I. THE PROBLEM OF POLLUTION THAT CROSSES JURISDICTIONAL BOUNDARIES

A. The Maritime Transportation of Oil

Each day more than three thousand oil tankers are somewhere on the world's oceans.[12] Each is carrying part of the 1.7 billion gallons of crude oil and oil products shipped each year by sea.[13] More than one third of this oil is transported through U.S. waters, with an average of nearly five tankers a day calling on the port of Houston and four a day calling on New York.[14] Projections show the volume of this traffic will increase in the future due to growing U.S. demand for imported oil.[15]

Although the world has benefitted from the growth of industrial technology for almost two hundred years,[16] society has tended to ignore the increased risks associated with that technology.[17] It has chosen instead to garner the benefits and delay paying for them.[18] It is only in the past twenty years that governments have begun to address these risks.[19] During those years, the world has heard the

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[12] NATIONAL RESEARCH COUNCIL, TANKER SPILLS: PREVENTION BY DESIGN 2 (1991) [hereinafter NRC].

[13] *Id.; accord* NATIONAL RESEARCH COUNCIL, OIL IN THE SEA: INPUTS, FATES, AND EFFECTS ch.2 (1985); ROBERT B. CLARK, MARINE POLLUTION 33 (1989).

[14] *Id.* (citing data provided by Lloyd's Maritime Information Services, Ltd.).

[15] *Id.* at 2–4. *Accord* OIL ON THE SEA (David P. Hoult ed., 1969).

[16] *Id.* at 23.

[17] *Id.* at 23–24. *See also* SEBASTIAN A. GERLACH, MARINE POLLUTION: DIAGNOSIS AND THERAPY 1–4 (1981).

[18] *Id. See also* EDWARD D. GOLDBERG, THE HEALTH OF THE OCEANS 24–27 (1976). JEFFREY POTTER, DISASTER BY OIL 247–48 (1973).

[19] NRC, *supra* note 12, at 24.

names *Amoco Cadiz*,[20] *Torrey Canyon*,[21] *Mega Borg*,[22] *Exxon Valdez*,[23] and *Argo Merchant*[24] and has come to view oil spills as tragic accidents that require better control over petroleum transport.[25] While some commentators have cited statistics that indicate 99.995 percent of oil arrives safely at its destination,[26] an analysis of accident data indicates that the current level of risk involved in transporting oil by sea is significantly greater than the risks society is willing to accept in other activities.[27]

The consequences of society's failure to address the risks of oil transport on the ocean are not fully known. Certainly, the economic and social costs of spills can be very large,[28] and the ecological impact on the immediately surrounding area can be devastating.[29] More important are the as yet unknown,[30] but potentially devastating, effects[31] on the ocean's ecosystem from the cumulative impact of many major oil spills through the years.

B. *The History of Maritime Regulation*

The clash of two conflicting principles has governed the law of the sea since man first took to the sea in boats.[32] One is the right of the

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[20] Spilling 1,628,000 barrels of crude oil off the coast of France in 1978. *Id.* at 16–19.

[21] Spilling 909,000 barrels of crude oil into the English Channel in 1967. *Id.*

[22] Spilling 14,000 tons of crude oil and catching fire in the Gulf of Mexico in 1990. *Id.* at 15.

[23] Spilling 267,000 barrels of crude oil into Prince William Sound, Alaska, in 1989. *Id.*

[24] Spilling 225,000 barrels of crude oil into the Atlantic Ocean in 1976. *Id.*

[25] *Id.* at 1, 26.

[26] *See, e.g.*, Edgar Gold, *Marine Pollution Liability After Exxon Valdez: The U.S. All or Nothing Lottery!*, 22 J. MAR. L. & COM. 423, 427 (1991).

[27] *See* NRC, *supra* note 12, at 24–26 (comparing the risk of an oil tanker spill at 3.32×10^{-5} [3.3 gallons lost per 100,000 gallons transported] to the risk of an airliner's landing being aborted at less than 1×10^{-7} per landing and concluding there is reason to try to reduce the risk of pollution).

[28] JOINT GROUP OF EXPERTS ON THE SCIENTIFIC ASPECTS OF MARINE POLLUTION, THE STATE OF THE MARINE ENVIRONMENT 40 (1990) (noting that the social costs of the *Amoco Cadiz* wreck were estimated at between $200 and $300 million in 1978).

[29] *Id.* (noting that the Exxon Valdez spill contaminated over 550 kilometers of coastline, killing birds and sea mammals and endangering the future of shrimp, herring, and salmon fisheries).

[30] *Cf.* Gold, *supra* note 26, at 441 (quoting LAW OF THE SEA—PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT: REPORT OF THE SECRETARY-GENERAL, U.N. Doc. A/44/461 (18 Sept., 1989) for the proposition that "petroleum pollution does not now represent a severe threat to marine habitats and organisms").

[31] KINDT, *supra* note 2, at 5 (noting that as in the case of Lake Erie, environmental systems "do not deteriorate gradually but, rather, are able to maintain the basic integrity of their character virtually until the point of collapse . . . at which point the processes of decay could no longer be feasibly arrested"). *Accord* Max Blumer, *Oil Pollution of the Ocean*, *in* OIL ON THE SEA, *supra* note 15, at 10–11.

[32] LOUIS B. SOHN & KRISTEN GUSTAFSON, THE LAW OF THE SEA IN A NUTSHELL xvii (1984); *see also* Yvonne L. Tharpes, *International Environmental Law: Turning the Tide on Marine Pollution*, 20 U. MIAMI INTER-AM. L. REV. 579, 614 (1988–89).

coastal state to control the sea closest to its coast; the other is the freedom of navigation and fishing on the high seas.[33]

Early Roman law supported the freedom of the seas and the concept of common ownership of ocean resources.[34] As European countries explored the oceans and developed empires, however, they also claimed dominion over large portions of the world's oceans.[35] When Spain and Portugal had conflicting claims, they turned to Pope Alexander VI to arbitrate their dispute.[36] The Pope awarded large portions of the oceans to each.[37] Spain then claimed the Pacific Ocean and the Gulf of Mexico, while Portugal claimed the Atlantic Ocean south of Morocco and the Indian Ocean.[38] Both claimed the right to exclude foreigners from navigating or entering those waters.[39]

In spite of those claims, the Dutch established settlements at Mauritius, Java, and Malaccus.[40] As vessels from the Dutch East India Company plied the waters, trading with the East Indies, they had to deal with Portuguese galleons trying to stop them.[41] In 1602, the captain of a vessel employed by the Dutch East India Company captured a Portuguese vessel in the straits of Malacca.[42] The capture of the vessel and its sale as a prize were so controversial among members of the Dutch East India Company that some of them refused their shares of the prize.[43] Some tried to leave the company and reform it elsewhere.[44] The company responded to the controversy by retaining the international lawyer, Hugo Grotius. He drafted an argument to justify the capture of the Portuguese galleon,[45] as well as to refute the claims of Spain and Portugal to the high seas and the concomitant right to exclude foreigners from them.[46] This argument came to be known as "Mare Liberum," or Freedom of the Seas. In this now famous argument, Grotius declared his purpose, saying:

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[33] SOHN & GUSTAFSON, *supra* note 32, at xvii; Tharpes, *supra* note 32, at 614.

[34] Forest L. Grieves, *Classical Writers of International Law and the Environment*, 4 B.C. ENVTL. AFF. L. REV. 309, 312 (1975); HUGO GROTIUS, THE FREEDOM OF THE SEAS vii (1608) (Ralph V.D. Magoffin trans. & James B. Scott ed., 1916).

[35] Jan Schneider, *Something Old, Something New: Some Thoughts on Grotius and the Marine Environment*, 18 VA. J. INT'L L. 147, 148 (1977); GROTIUS, *supra* note 34, at 15.

[36] *Id.*

[37] GROTIUS, *supra* note 34, at 15.

[38] England had similar claims to its south and east. *Id.* at vii–viii.

[39] *Id.*

[40] *Id.* at vii.

[41] *Id.* at vi–vii.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at viii.

> My intention is to demonstrate briefly and clearly that the Dutch . . . have the right to sail to the East Indies, as they are now doing, and to engage in trade with the people there. I shall base my argument on the following most specific and unimpeachable axiom of the law of nations, called a primary rule or first principle, the spirit of which is self evident and immutable, to wit: every nation is free to travel to every other nation and to trade with it.[47]

The very next sentence of Grotius' argument confronted the Pope's division of the seas between Spain and Portugal.[48] Declaring the source and strength of his argument, Grotius wrote, "God himself says this, speaking through the voice of nature; and inasmuch as it is not His will to have nature supply every place with all the necessities of life, He ordains that some nations excel in one art and others in another."[49]

Grotius began with a general discussion of property, and explained that nature has created, and the law has treated, some things as available for the use of all, using these words:

> Now as there are some things which every man enjoys in common with all other men, and as there are other things which are distinctly his and belong to no one else, just so has nature willed that some of the things which she has created for the use of mankind remain common to all, and that others through the industry and labor of each man became his own. Laws moreover were given to cover both cases so that all men might use common property without prejudice to anyone else and in respect to other things so that each man having control with what he himself owns might refrain from laying his hands on the property of others.[50]

Grotius then explained the characteristics that identify common property in this way:

> It seems certain that the transition to the present distinction of ownership did not come violently, but gradually, nature herself pointing out the way. For since there are some things, the use of which consists in their being used up, either because having become part of the very substance of the user they can never be used again, or because by use they become less fit for future use,

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[47] GROTIUS, *supra* note 34, at 7.

[48] Although Grotius accepted the Pope's role as arbiter between Spain and Portugal and did not dispute the fact that his decisions should bind those two countries between themselves, he also cleverly limited the Pope's role by noting that while the Pope may be the vicar of Christ on earth, Jesus himself declared that His kingdom was not of this world. *Id.* at 16 (citing *Luke* 12:14; *John* 17:36). Therefore, Grotius reasoned, the Pope's authority should be limited to Christ's kingdom. *Id.* at 16.

[49] *Id.*

[50] GROTIUS, *supra* note 34, at 2.

> it has become apparent, especially in dealing with the first category . . . that a certain kind of ownership is inseparable from use.[51]

He further reasoned that property which nature has given the inherent characteristics of common property should always be treated that way:

> All that which has been so constituted by nature that although serving one person it still suffices for the common use of all other persons, is today and ought in perpetuity to remain in the same condition as when first created by nature . . . [a]nd all things which can be used without loss to anyone else come under this category.[52]

He then expressed the view that, "therefore, the sea can in no way become the private property of anyone, because nature not only allows but enjoins its common use."[53]

Having determined that the sea must be treated as common property, Grotius explained that a person who limits another's use of the sea has no support in law,[54] and he concluded that, "[s]ince navigation cannot harm anyone except the navigator himself . . . it is only just that no one either can or ought to be interdicted therefrom."[55]

Grotius' arguments were countered by two English scholars, John Selden[56] and William Welwood.[57] Acknowledging Grotius' work, Welwood criticized it as a position fortified by the opinions and sayings of some old poets, orators, and philosophers, "that land and sea . . . hath been and should bee common to all and proper to none."[58] Welwood began his response by declaring his intent to draft

> . . . a simple and orderly recitation of the Holy Spirit, concerning the first condition natural of Land and Sea from the very beginning; at which time God having and so carefully toward men disposed . . . the Earth and Water [and] God saith to man, Subdue the earth and rule over the fish . . . which could not be, but by a subduing of the waters also.[59]

To Welwood, it followed naturally that as the population of the earth divided, "the waters became divisible, and requir[ed] a partition in

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[51] *Id.* at 24.
[52] *Id.* at 27.
[53] *Id.* at 30.
[54] *Id.* at 44.
[55] *Id.* at 53.
[56] JOHN SELDEN, MARE CLAUSUM (M. Needham trans. 1972); JOHN SELDEN, MARE CLAUSUM SEU DE DOMINO MARIS (1635).
[57] WILLIAM WELWOOD, AN ABRIDGEMENT OF ALL SEA-LAWES (1613), *reprinted by* De Capo Press, Inc. (1972).
[58] WELWOOD, *supra* note 57, at 61.
[59] *Id.* at 62.

like manner with the earth."[60] To other classical writers, however, the connection was not quite as logical,[61] and Grotius' views prevailed.[62]

For nearly 350 years, the general theory of Grotius has governed the law of the sea, with recurrent questions regarding the breadth of the territorial sea.[63] In spite of calls from third world countries in 1982 for an international organization to govern all ocean uses,[64] the United Nations Convention on the Law of the Sea largely adopted the views of Grotius, reaffirming the freedom of the seas.[65] The convention was adopted in December 1982 by more than 120 countries, but the United States declined to sign it.[66] In spite of the United States' failure to sign the convention, respected commentators believe many of the convention's provisions simply declare the state of customary international law.[67] If they do, they bind all nations whether or not the convention is ratified.[68]

The inadequacy of the law of the sea to deal effectively with the fast pace of developments in modern life is well recognized, however, and the risk of unilateral action outside the law's boundaries leading to international conflict has been viewed as inevitable.[69] While some scholars view customary international law as a concept that grows

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[60] *Id.* at 63.

[61] *See* Grieves, *supra* note 34, at 321 n.24 (indicating that the writers Richard Zoucke, Cornelius van Bynkenshoek, and Christian Wolff supported Grotius' position).

[62] KINDT, *supra* note 2, at 11.

[63] *Id.*; *see* Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809 (1984) (indicating that communications between the Soviet Union and the United States in 1966 and 1967 concerning the expansion of the permissible breadth of the territorial sea without prejudice to the continued mobility of vessels in international straits led to the 1982 United Nations Convention on the Law of the Sea).

[64] *Id.* at 861.

[65] *Id.*; United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

[66] SOHN & GUSTAFSON, *supra* note 32, at xix; Oxman, *supra* note 63, at 863.

[67] SOHN & GUSTAFSON, *supra* note 32, at xx; Oxman *supra* note 63, at 810. Customary international law is, along with treaties and general principles, one of the three main sources of international law. It is created by consistent and uniform state practice, which is followed out of a sense of legal obligation; *see* Daniel Bodansky, *Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond*, 18 ECOLOGY L.Q. 719 (1991).

[68] The Paquete Habana, 175 U.S. 677, 700 (1900) (indicating that international law is a part of our law, and where there is no treaty and no controlling executive or legislative act or judicial decision, reference must be made to the custom and usage of civilized nations); Oxman, *supra* note 63, at 810 (indicating the factors used to determine whether a particular provision actually declares customary international law and noting that some provisions of UNCLOS may not have that status).

[69] Arvid Pardo, *An Opportunity Lost, in* LAW OF THE SEA: U.S. POLICY DILEMMA 13, 25 (Bernard H. Oxman et al. eds., 1983). "These words are as true now as they were [in 1970]. The present [1982] convention is not the end but rather the beginning of a long process that must eventually lead to a more rational and efficient use of our environment and a more equitable world order." (citing *U.S. Policy for the Seabed*, U.S. DEP'T ST. BULL. 737 (1970)).

slowly and only after ensuring mutual consent before action,[70] others believe the concept is one that simply allows states obsessed with self interest to manipulate the law to their own advantage,[71] and are not as cautious. Indeed, one commentator has observed that, "[w]hile it may seem paradoxical at first, unilateral action can play an important role in regime construction. Indeed, traditionally, the unilateral actions of great powers were major sources of regime formulation. . . . Leadership often requires someone to go first."[72]

C. The Economics of Maritime Regulation

Grotius' freedom of the seas concept has evolved through the years to the point that the freedom of navigation has come to mean, the "uninhibited liberty to transport oil and other goods over the common resource, the oceans, with each vessel being subject only to the jurisdiction of its flag state for all purposes on the high seas. Incidents of free navigation, such as pollution from ballasting and deballasting, [and] oil spills from collisions and stranding of ships, [become] a liability to be borne by the international community as a whole. . . ."[73] Each nation has been free to pursue its own self interest on the oceans with no centralized decision-making.[74]

Under such circumstances, each decision maker has an incentive to exploit the resources of the common area until those resources are

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[70] *See, e.g.*, Louis B. Sohn, *The Law of the Sea: Customary International Law Developments*, 34 AM. U.L. REV. 271, 279 (1985)

> If in the last decades of the twentieth century [states] should decide that a consensus at a conference plus signature by a vast majority of the participants creates a general norm of international law, this new method of creating new principles and rules of international law would thereby become a legitimate method of law creation. *Id.*

[71] Cheng-Pang Wang, *A Review of the Enforcement Regime for Vessel-Source Oil Pollution Control*, 16 OCEAN DEV. & INT'L L. 305, 307–08 (1986) (noting that the identification and interpretation of customary international law has been manipulated due to nations' obsession with self-interest).

[72] Joseph S. Nye, Jr., *Political Lessons of the New Law of the Sea Regime*, *in* LAW OF THE SEA: U.S. POLICY DILEMMA 113, 123 (Bernard H. Oxman et al. eds., 1983). Mr. Nye observes also that "the United States is the leading state in an era in which there can only be leadership without hegemony. As a great power we can still take unilateral initiatives, particularly if they are designed to help move others in the direction of multiple leadership." *Id.* at 122.

[73] David M. Dzidzornu & B. Martin Tsamenyi, *Enhancing International Control of Vessel-Source Oil Pollution Under the Law of the Sea Convention, 1982: A Reassessment*, 10 U. TASMANIA L. REV. 269, 270 (1991).

[74] *Cf.* Oxman, *supra* note 63, at 861 (indicating that before UNCLOS "[t]here were widespread calls for a global organization with comprehensive powers over all ocean uses, pressures for the declaration of zones of peace, demands for seabed demilitarization and restrictions on submarines, nuclear power, and nuclear weapons, and bold assertions (paraphrasing Shakespeare) that we came to bury Grotius, not to praise him."

completely exhausted.[75] This motivation and its concomitant results present such a classic problem in the field of economics that it has a commonly understood name, "the tragedy of the commons."[76] This phenomenon leaves "all decision makers worse off than they would have been had they been able to agree collectively on a different set of policies."[77]

A corollary of the tragedy of the commons principle is that the costs of pollution are often "externalized."[78] This occurs whenever the decisions of one economic actor directly affect the utility of others.[79] By its nature, the use of environmental resources causes complex externalities.[80] When a pollution problem occurs within one jurisdiction, domestic legislation can usually force the polluter to "internalize the externalities,"[81] or assume the burden of "indirect social costs associated with the production of goods or services."[82]

More serious problems develop, however, when pollution has its source in one country and its environmental effects in another.[83] In

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[75] John W. Kindt, *International Environmental Law and Policy: An Overview of Transboundary Pollution*, 23 SAN DIEGO L. REV. 583, 584 (1986).

[76] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

[77] Natural Resources Defense Council v. Costle, 568 F.2d 1369, 1378 n.19 (D.C. Cir. 1977) (quoting Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211 (1977), and indicating that the solution lies in some mandate, from a superior power or by agreement, with sanctions to compel performance).

[78] Kindt, *supra* note 75, at 587. By this process, polluters shift the costs of avoiding or cleaning up pollution to others. *See id.*

[79] WERNER Z. HIRSCH, LAW AND ECONOMICS 10–11 (1979).

[80] HIRSCH, *supra* note 79, at 234–35; *see* JOSEPH P. TOMAIN & JAMES E. HICKEY, JR., ENERGY LAW AND POLICY 36 (1989) (indicating that pollution is a classic example of a harmful externality that imposes costs on society).

[81] HIRSCH, *supra* note 79, at 234. Perhaps the principal method used to date is the response proposed by English economist Arthur C. Pigou in which a tax on each unit produced should be imposed equal in size to the damage being generated. ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE 197 (1952). Pigou reasoned that:

> Divergences between private and social net product of the kind we have so far been considering cannot . . . be mitigated by a modification of the contractual relations between any two contracting parties, because the divergence arises out of a service or disservice rendered to persons other than the contracting parties. It is, however, possible for the state if it so chooses, to remove the divergence in any field by extraordinary encouragements or extraordinary restraints upon investment in that field. The most obvious forms which these encouragements and methods may assume are, of course, those of bounties and taxes. *Id.*

See CHARLES S. PEARSON, INTERNATIONAL MARINE ENVIRONMENT POLICY: THE ECONOMIC DIMENSION 19–21 (1975) (describing how moving from a common property regime to private property regime can have same effect).

[82] Barbara White, *Coase and the Courts: Economics for the Common Man*, 72 IOWA L. REV. 577 (1987).

[83] WILHELMUS A. HAFKAMP, ECONOMIC-ENVIRONMENTAL MODELING IN A NATIONAL-RE-

these cases, the countries must accept their collective responsibilities to each other and enter into regional environmental arrangements to solve transboundary pollution problems.[84] This arrangement has become commonplace.[85] While the agreements undoubtedly benefit the global environment, an individual country may have reasons not to cooperate.[86]

More importantly, the international agreements that exist to protect the maritime environment are difficult, if not impossible, to enforce.[87] Additionally, U.S. laws enacted to deal with water pollution have been carefully circumscribed by these international conventions,[88] and may be further limited by a presumption that they apply only within the territorial jurisdiction of the United States.[89] This presumption has been interpreted to apply very stringently when questions of environmental law are addressed.[90]

GIONAL SYSTEM (1984); KINDT, *supra* note 2, at 588 (indicating that developing countries are unlikely to impose strict environmental regulations because they prefer to encourage shipping interests); *see* Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542, 545 (1985) (stating that third world countries often have limited resources or ability to control the activities of multinational corporations); Stephen J. Darmody, Note, *An Economic Approach to Forum Non Conveniens Dismissals Requested by U.S. Multinational Corporations—The Bhopal Case*, 22 GEO. WASH. J. INT'L L. & ECON. 215 (1988) (recommending that U.S. courts refuse to grant *forum non conveniens* dismissals when requested by U.S. multinational corporations whose tortious behavior has imposed externalities in a third world country).

[84] KINDT, *supra* note 2, at 588. *Accord* National Resources Defense Council v. Costle, 56 F.2d at 1378. *Cf.* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (arguing that private negotiation will lead to the most economically efficient result but recognizing that when there is a large number of injured persons, the transaction costs involved make it unworkable); PEARSON, *supra* note 81, at 22–23 (arguing that under such circumstances it is appropriate to extend some national rights over ocean resources).

[85] Robert W. Hahn & Kenneth R. Richards, *The Internationalization of Environmental Regulation*, 30 HARV. INT'L L.J. 421 (1989).

[86] *See id.* at 429 (explaining how the "prisoner's dilemma" may operate to provide any individual country with a competitive advantage in industrial production by "enjoying the benefits of other countries' environmental protection activities, while taking limited action at home" and identifying a number of other factors that may play a part); KINDT, *supra* note 2, at 587 (citing Walter, *Environmental Management and the International Economic Order*, *in* THE FUTURE OF THE INTERNATIONAL ECONOMIC ORDER: AN AGENDA FOR RESEARCH 324–25 (C. Bergsten ed., 1973) (indicating that the pressure on developing countries to industrialize rapidly causes them to intentionally sacrifice their ecosystems)).

[87] *See, e.g.*, Dzidzornu & Tsamenyi, *supra* note 73.

[88] Bodansky, *supra* note 67, at 764–71; Dzidzornu & Tsamenyi, *supra* note 73, at 280–87.

[89] *See* Equal Opportunity Employment Comm'n v. Arabian American Oil, 111 S. Ct. 1227, 1230 (1991) (requiring congressional intent to be clearly expressed before applying a law extraterritorially); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (same).

[90] Jonathan Turley, *"When In Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 629–32 (1990) *analyzing* Natural Resources Defense Council v. Nuclear Regulatory Commission, 647 F.2d 1345 (D.C. Cir. 1981).

II. The Law Before the Oil Pollution Act of 1990

A. The 1958 Convention on the High Seas

From 1633 to 1958 Hugo Grotius' freedom of the seas governed; the only restraint was the concept of "abuse of rights," which ensures that states use the seas reasonably with due consideration to the rights of other users.[91] In 1958, when the Geneva Conference codified the law of the sea,[92] ocean pollution and its concomitant economic consequences were not recognized as costs that nations must eventually assume.[93] Instead, the 1958 Convention of the High Seas simply acknowledged the right of each state to extend its nationality to ships flying its flag.[94] In so doing, it gave the "flag state" sole jurisdiction to institute legal processes against its vessels if they were involved in an incident on the high seas.[95] Coastal states were allowed to protect the living resources of the sea[96] but only because those resources were subject to exploitation by all states.[97] The convention ensured that the coastal state would not "abuse its rights."[98]

B. The International Convention for the Prevention of Pollution From Ships (MARPOL)

1. The Convention

After the 1958 Convention was completed, those in charge of its negotiation asked the Intergovernmental Maritime Consultative Organization (IMCO), now the Intergovernmental Maritime Organization (IMO), to develop a set of rules and standards capable of working within the international law regime to prevent marine oil pollution from vessels.[99] The IMO responded by amending a pre-existing convention, the 1954 Convention for Prevention of Pollution of the Sea

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[91] Dzidzornu & Tsamenyi, *supra* note 73, at 272.

[92] Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) (containing a preamble that declares it is "generally declaratory of established principles of international law") [hereinafter 1958 Convention].

[93] Dzidzornu & Tsamenyi, *supra* note 73, at 273; John W. Kindt, *Prolegomenon to Marine Pollution and the Law of the Sea: An Overview of the Pollution Problem*, 11 ENVTL. L. 67, 90–92 (1980–81).

[94] Dzidzornu & Tsamenyi, *supra* note 73, at 272 (citing 1958 Convention, *supra* note 92, art. 5, at 2314).

[95] *Id.* (citing 1958 Convention, *supra* note 92, arts. 10–11, at 2316).

[96] *Id.* at 273.

[97] *Id.*

[98] *See id.* at 274.

[99] *Id.* at 275.

by Oil (OILPOL 54), several times.[100] OILPOL 54 was eventually superseded by the 1973 International Convention for the Prevention of Pollution by Ships and its 1978 Protocol (MARPOL).[101]

MARPOL defines its goals as achieving the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and minimizing the accidental discharge of such substances.[102] To meet these goals, MARPOL established in its Annex I, twenty-five complex regulations governing the construction, design, and equipment of vessels.[103] One of these regulations requires states of registry to issue certificates of compliance with the requirements of Annex I.[104] The Convention then requires each party to pass domestic laws prohibiting violations of the Convention and providing sanctions for those violations.[105] Whenever a ship required to hold a certificate is in a foreign port, it is subject to inspection by port state officials.[106] That inspection is limited to verifying that there is a valid certificate on board when there are clear grounds to believe the ship does not meet the requirements for the certificate.[107] Parties to the Convention are required to cooperate in the detection of violations and the enforcement of the Convention.[108] A port state that finds a violation is required to report its findings to the vessel's flag state.[109]

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[100] *Id.* OILPOL 54 was the first multilateral instrument concluded with the prime objective of protecting the environment and preserving the seas and coastal environment from pollution. *See* International Convention for the Prevention of Pollution From Ships, Nov. 2, 1973, *reprinted in* 12 I.L.M. 1319 (1973) [hereinafter MARPOL 73].

[101] MARPOL 73, *supra* note 100, at 1319; *see* Protocol of 1978 Relating to the International Convention for the Prevention of Pollution From Ships, 1973, Feb. 16, 1978, *reprinted in* 17 I.L.M. 546 (1978) [hereinafter MARPOL]. The 1973 Convention was never ratified by the United States or by a sufficient number of other states to allow it to come into force by itself. It was, however, modified by and incorporated into the 1978 Protocol, which was adopted on February 17, 1978, and ratified by the Senate on July 2, 1980. H.R. Rep. No. 1224, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4849, 4850.

[102] H.R. Rep. No. 1224 at 2–6.

[103] MARPOL 73, *supra* note 100, Annex I, at 1335–71.

[104] *Id.*, Annex I, ch. I, reg. 5, at 1340–42.

[105] *Id.*, art. 4, at 1322.

[106] *Id.*, art. 5, at 1322–23.

[107] *Id.*, art. 6, at 1323–24. If this is the case, the ship shall not be allowed to sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment. *Id.*

[108] *Id.*

[109] *Id. But see id.*, art. 5(3) (indicating that when a party acting as a port state denies a foreign ship access or "takes any action against such a ship for the reason that the ship does not comply with the present Convention, the party shall immediately inform the consul or diplomatic representative of the Party whose flag the ship is entitled to fly"). This leaves open the question of what "action" may be taken by the port state and under what circumstances. Other provisions of the Convention, though, indicate that the term "jurisdiction" in MARPOL "shall be construed in . . . light of international law in force at the time of application or interpretation of the present [c]onvention." *Id.*, art. 9(3). These provisions also indicate that nothing in MARPOL shall

If the port state unduly delays the ship, it will be liable for any losses or damages suffered.[110]

The 1954 Convention and the IMO regimes combined to strengthen Grotius' concept of the freedom of the seas, deferring to the jurisdiction of a vessel's flag state at every opportunity.[111] The limited port state and coastal state jurisdictions have never become effective enforcement tools, largely because many of these states became "flag of convenience" states and adopted lax anti-pollution measures.[112]

2. United States Implementation

There are inherent weaknesses in MARPOL. Perhaps the greatest of these is its absolute deference in enforcement to the individual flag states.[113] In addition to MARPOL's limits, the nations of the world must work within the restrictions imposed on them by the international law of the sea. Unlike the vessel-source pollution standards established by international agreement, the jurisdictional rights and duties of states have been defined primarily by customary international law.[114] It was the limitations of international law that led Congress to pass a cautious interpretation of MARPOL, the Act to Prevent Pollution From Ships.[115] That Act applies to ships of the United States wherever located,[116] ships registered in a country that is party to the MARPOL Protocol while in the navigable waters of the United States,[117] and, as amended in 1987 with respect to regulations governing the disposal of garbage, those same ships within the navigable waters or the exclusive economic zone of the United States.[118]

Moreover, the criminal provisions of the Act require a knowing

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prejudice either the development of the law of the sea by the U.N. Conference (which eventually led to the U.N. Convention on the Law of the Sea), or "the present or future claims and legal views of any [s]tate concerning the law of the sea and the nature and extent of coastal and flag [s]tate jurisdiction." *Id.*, art. 9(2).

[110] *Id.*, art. 7.

[111] Both OILPOL and MARPOL were adopted in part to reduce the threat of unilateral coastal state regulation. Bodansky, *supra* note 67, at 727.

[112] Mark L. Boos, *The Oil Pollution Act of 1990, Striking the Flags of Convenience?* 2 COLO. J. INT'L ENVTL. L & POL'Y 407 (1991); Dzidzornu & Tsamenyi, *supra* note 73, at 279.

[113] MARPOL 73, *supra* note 100, art. 4.

[114] Bodansky, *supra* note 67, at 727; *see* the discussion of customary international law, *supra* notes 67–72, and accompanying text.

[115] 33 U.S.C. §§ 1901–1911 (1988).

[116] 33 U.S.C. § 1902(a)(1) (1988).

[117] 33 U.S.C. § 1902(a)(2) (1988).

[118] 33 U.S.C. § 1902(a)(3) (1988). Before 1987, this section read "(3) a ship registered in or of the nationality of a country not a party to the MARPOL Protocol . . . while in the navigable waters of the United States." *See* the discussion of the exclusive economic zone, *infra* notes 140–48 and accompanying text.

violation of the MARPOL protocols before the person who has committed the violation may be found guilty.[119] As required by MARPOL, the Act also provides for referring violations of ships registered in a country that is party to the MARPOL Protocol back to that country rather than taking enforcement action in the United States.[120]

C. The 1982 U.N. Convention on the Law of the Sea

MARPOL specifically provides for changes in the international law framework within which its protocols are interpreted.[121] This is true whether the growth occurs as a result of the then-pending U.N. Convention on the Law of the Sea (UNCLOS or 1982 Convention)[122] or through the legal interpretations of any state regarding the nature and extent of coastal state jurisdiction.[123]

Negotiations leading to UNCLOS began during the Nixon administration in 1971.[124] The Convention was completed in 1982[125] but has never been signed by the United States[126] and has not yet come into force.[127] While some of the Convention's provisions have been accepted as declaratory of customary international law,[128] substantial questions remain on certain provisions,[129] especially regarding the limits imposed on coastal states' rights.[130] Nevertheless, the Conven-

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[119] 33 U.S.C. § 1908(a) (1988 & Supp. II 1990).

[120] This section merely provides, however, that the Secretary *may* refer the matter to the flag state. 33 U.S.C. § 1908(f) (1988).

[121] *See supra* note 107.

[122] MARPOL 73, *supra* note 100, art. 9(2).

[123] *Id.*, art. 9(3).

[124] *But see supra* note 63 (indicating that informal communications began in 1966 and 1967).

[125] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982) *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter UNCLOS or 1982 Convention].

[126] Bodansky, *supra* note 67, at 723.

[127] *Id.* at 723 n.11 (explaining that only fifty of the sixty states required for the Convention to come into force had ratified it by March, 1991).

[128] *Id.* at 723 n.12 (explaining that the Third Restatement of Foreign Relations Law says UNCLOS's provisions on the protection of the marine environment reflect customary international law but citing others who disagree).

[129] *See* William T. Burke, *Customary Law of the Sea: Advocacy or Disinterested Scholarship?* 14 YALE J. INT'L L. 508, 509–12 (1989); *see also* Jose L. Vallarta, *Protection and Preservation of the Marine Environment and Marine Scientific Research at the Third United Nations Conference on the Law of the Sea*, 46 LAW & CONTEMP. PROBS. 147 (1983).

[130] For the view that the growth of coastal state powers included in the 1982 Convention have gained consensus for changes in the customary international law of the sea but that there is no similar consensus on the limits of coastal states' rights imposed by UNCLOS, and that, "[t]hese provisions can spell the difference between enjoying and losing high seas freedoms of navigation . . . in forty percent of the world's oceans," see Nye, *supra* note 72, at 119 (quoting Ambassador Elliot Richardson).

tion has become a common reference point for discussions of marine environmental jurisdiction.[131]

One of the most pervasive themes of the Convention is the freedom of high seas navigation. Indeed, the United States made it known that it would not accept any agreement that did not ensure the freedom of passage through international straits.[132] This position was largely justified by the United States' national security interests in protecting itself and projecting its naval power around the world.[133] Before 1970, the United States preferred to maintain a world-wide rule of three-mile territorial seas[134] to ensure that no coastal state could interfere with the navigation of U.S. vessels. It learned, however, that a proposed new conference on the law of the sea could lead to the compromise of navigation freedoms, which the United States believed ran counter to its interests.[135]

To preserve navigational freedoms, President Nixon proposed a package in the spring of 1971 in which the United States agreed to extend territorial seas to twelve miles in exchange for a guarantee that wherever two nations' territorial seas overlapped in international straits, the right of free transit through those straits would be preserved. On that condition, he agreed to engage in an effort to draft a new law of the sea treaty.[136]

The 1982 Convention provides that the specific obligations assumed by states under special conventions such as MARPOL should be carried out in a manner consistent with UNCLOS.[137] It then codifies the duties of flag states, coastal states, and port states[138] and provides a framework within which these states may regulate to protect and preserve the marine environment.[139] Significantly, the Convention defines an area beyond the territorial sea as the exclusive economic

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[131] Bodansky, *supra* note 67, at 723.

[132] Horace B. Robertson, Jr., *Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 VA. J. INT'L L. 801 (1980).

[133] *See id.* at 801 n.2 (noting that while he will not dispute this concern, others have observed that the improved range and sophistication of U.S. submarines would allow our defenses to function without compromise even absent guarantees of passage); *see also* H. Gary Knight, *The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits*, 51 OR. L. REV. 759, 776–82 (1972).

[134] The territorial sea of a coastal nation is that band of ocean surrounding the nation over which the nation may exercise complete sovereignty. *See* UNCLOS, *supra* note 65, arts. 2, 3.

[135] *See* Robertson, *supra* note 132, 802–05; *see also* Knight, *supra* note 133.

[136] Robertson, *supra* note 132, at 806 (citing the President's Statement on United States Ocean Policy, 6 Weekly Comp. of Pres. Doc. 677, 678 (May 25, 1970)).

[137] UNCLOS, *supra* note 65, art. 237.

[138] *See generally id.*, Part II; *see also* Dzidzornu & Tsamenyi, *supra* note 73, at 280–87.

[139] *See generally* UNCLOS, *supra* note 65, arts. 192–237.

zone, in which the coastal state has sovereign rights to conserve and manage natural resources.[140] The United States has claimed an exclusive economic zone of 200 miles in breadth.[141]

Within the exclusive economic zone, the coastal state has jurisdiction to control pollution through prescriptive and enforcement mechanisms.[142] That jurisdiction must be exercised, however, with due regard for the rights and duties of other states[143] and is specifically subject to the paramount freedom of navigation on the high seas.[144]

The Convention establishes an enforcement scheme for violations of pollution laws and regulations.[145] Each vessel's flag state retains primary enforcement responsibility and must ensure that vessels flying its flag comply with applicable rules and standards, wherever a violation occurs.[146] Flag states are required under MARPOL to issue certificates of compliance with applicable law. UNCLOS, in turn, requires other states to accept those certificates as evidence of the condition of the vessel, unless there are clear grounds to believe the vessel's condition does not correspond with the certificate.[147] UNCLOS also adopts the MARPOL system of referring complaints to a vessel's flag state for investigation.[148]

Port state authority is more specific under UNCLOS.[149] Port states have specific authority to investigate and institute proceedings against vessels voluntarily within their ports or at offshore terminals, when evidence indicates that the vessel has caused an unlawful discharge outside the internal waters, territorial sea, or exclusive economic zone of that state.[150] These proceedings may only be initiated at the request of the state in whose waters the discharge occurred, the vessel's flag state, or a state damaged or threatened by the unlawful discharge.[151] Further, if the coastal state desires to pursue the investigation, the port state must transmit all its evidence, and any financial security posted by the vessel, to the requesting state.[152]

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[140] *See generally id.*, Part IV.

[141] UNCLOS Art. 57; Proclamation No. 5030 (Mar. 10, 1983), *reprinted in* 1983 U.S.C.C.A.N. A18–29.

[142] Dzidzornu & Tsamenyi, *supra* note 73, at 280.

[143] *Id.* at 273.

[144] UNCLOS, *supra* note 65, arts. 58, 87, 211(4).

[145] *See generally id.* arts. 217, 218, 220.

[146] *Id.* art. 217(1).

[147] *Id.* art. 217(3).

[148] *Id.* art. 217(4)–217(8).

[149] UNCLOS, *supra* note 65, art. 218.

[150] *Id.* art. 218(1).

[151] *Id.* art. 218(2).

[152] *Id.* art. 218(4).

Perhaps most significant in the enforcement scheme is the recognition and delimitation of the coastal state's role in enforcement proceedings under UNCLOS. Article 220 first gives the coastal state authority to institute proceedings against a vessel that is voluntarily within a port or at an offshore terminal of that state for any violation of its laws or regulations. If those laws are designed to address violations occurring in the coastal state's territorial sea or exclusive economic zone, the laws must be adopted either in accordance with UNCLOS or other applicable international rules and standards for the prevention, reduction, and control of pollution from vessels.[153]

The Convention then carefully circumscribes the authority it grants. Specifically, before a coastal state may physically inspect a vessel navigating in its territorial sea, the state needs clear grounds to believe the vessel violated either laws and regulations adopted by the coastal state in accordance with UNCLOS or the applicable international rules and standards. Only if the evidence discovered during that inspection so warrants may the coastal state detain the vessel and institute proceedings against it.[154] Similarly, if a coastal state has clear grounds for believing a vessel navigating in its territorial sea or exclusive economic zone violated applicable law while in the exclusive economic zone, the state may only require the vessel to give information regarding its identity, port of registry, last and next ports of call, and other relevant information needed to determine whether a violation has in fact occurred.[155]

When a state has clear grounds for believing a ship committed a violation in the exclusive economic zone resulting in a "substantial discharge causing or threatening significant pollution of the marine environment," and the vessel either refuses to provide information or provides information at variance with the evident facts, that state may physically inspect the vessel.[156] Under similar circumstances, if the violation results in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal state, or to any resources of its territorial sea or exclusive economic zone, that state may institute proceedings, including detention of the vessel.[157]

All of these coastal state enforcement measures are subject to the limits of Articles 223 through 234. These articles provide, among other

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[153] *Id.* art. 220(1).
[154] *Id.* art. 220(2).
[155] *Id.* art. 220(3).
[156] *Id.* art. 220(5).
[157] *Id.* art. 220(6).

things, that states shall not delay a foreign vessel longer than is essential for any authorized investigation,[158] and that investigations shall be conducted within certain limits that are generally deferential to flag state authority.[159] These articles further provide that the flag state shall be notified whenever a coastal state takes any enforcement measures against a foreign vessel,[160] and that only monetary penalties may be imposed for pollution violations beyond the territorial sea[161] or those within the territorial sea unless there is evidence of a willful and serious act of pollution in the territorial sea.[162]

D. Enforcement of U.S. Pollution Laws

Before the Oil Pollution Act of 1990, United States domestic law reflected the international law's deference to regulation by the flag state. United States law, however, was not as well coordinated. It offered a haphazard collection of laws, none of which was tailored to adequately address a marine oil spill.[163] It was with these inadequate tools that the Justice Department was asked to prosecute Exxon after the *Exxon Valdez* oil spill.[164] During the *Exxon Valdez* litigation, the weaknesses of our then-existing legal system became evident.[165] Among the most significant weaknesses were the absence of oil within the Clean Water Act's definition of "pollutant"[166] and the absence of a criminal provision in the Clean Water Act punishing those who spill oil.[167]

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[158] *Id.* art. 226(1).

[159] *Id.*

[160] *Id.* art. 231.

[161] *Id.* art. 230(1).

[162] *Id.* art. 230(2).

[163] S. Rep. No. 94, 101st Cong., 1st Sess. 3–4 (1989) (discussing the Clean Water Act, the Outer Continental Shelf Lands Act Amendments, the Deepwater Ports Act, the Trans-Alaska Pipeline Authorization Act, and the Limitation of Liability Act, and observing how they provide varying and uneven liability standards and scopes of coverage for cleanup costs and damages).

[164] *See generally* Stephen Raucher, *Raising the Stakes for Environmental Polluters: The Exxon Valdez Criminal Prosecution*, 19 ECOLOGY L.Q. 147 (1992).

[165] Due to the weaknesses in the Clean Water Act, Exxon was charged with committing two strict liability misdemeanors by violating the Refuse Act, 33 U.S.C. §§ 401–467n (1988), and the Migratory Bird Treaty Act, 16 U.S.C. §§ 701–718 (1988). Then, using the Criminal Fine Improvements Act, 18 U.S.C. § 3571, the government was able to threaten Exxon with the potential for billions of dollars in criminal liability. *Id.* at 148.

[166] 33 U.S.C. § 1362(6) (1988).

[167] *See* 33 U.S.C. § 1319(c) (1988) (providing criminal penalties for any person who violates 33 U.S.C. §§ 1311, 1316, 1317, 1318, 1328, 1345, or any permit conditions under 1342 or 1344). It was not until the Oil Pollution Act of 1990 that § 1319(c) was amended to provide a criminal penalty for violating 1321(b)(3). *See* Oil Pollution Act of 1990, Pub. L. No. 101-380, § 4301(c), 104 Stat. 484, 537.

The absence of oil in the definition of pollutant is only understandable after realizing that what is now codified as the Clean Water Act, 33 U.S.C. §§ 1251–1386, incorporated as 33 U.S.C. § 1321, the former Water Quality Improvement Act of 1970.[168] The Water Quality Improvement Act preceded the Federal Water Pollution Control Act and created a system to ensure responsible parties paid to clean up the oil and hazardous materials they spilled into U.S. waters. Its only provision for criminal liability was for a failure to report an oil spill.[169] Section 1321 does provide, however, for strict liability for oil spills[170] from vessels[171] whether they occur within the navigable waters of the United States or beyond the territorial sea.[172] The Act only provides for monetary penalties, however, in accordance with both UNCLOS and MARPOL.[173]

The Clean Water Act, in contrast, developed along a different path. The Federal Water Pollution Control Act of 1972 (FWPCA) was the culmination of a series of frustrating attempts to balance federal control of clean water with states' rights.[174] As passed, the Act incorporated the Rivers and Harbors Act's prohibitions and permit requirements and the Water Quality Improvement Act of 1970. The federal government assumed a dominant role in directing the water pollution control program in the country.[175]

The FWPCA has been amended and refined by the Clean Water Act of 1977[176] and the Water Quality Act of 1987.[177] Since 1972, how-

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[168] This statute was enacted largely in response to the oil spill from an oil production platform off the coast of Santa Barbara in January 1969. Russell V. Randle, *The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects*, 21 ENVTL. L. REP. 10119 n.3 (1991). Under this section, the predecessor of the present Superfund scheme, the person responsible for a spill of oil or hazardous substances must notify the federal government, which is authorized to remove the pollution, assess the costs of removal to the owner or operator, and assess civil penalties. CHARLES OPENCHOWSKI, A GUIDE TO ENVIRONMENTAL LAW IN WASHINGTON, D.C. 171 (1990).

[169] 33 U.S.C. § 1321(b)(5) (1988 & Supp. II 1990).

[170] 33 U.S.C. § 1321(a)(1), (f) (1988 & Supp.II 1990).

[171] 33 U.S.C. § 1321(a)(2), (a)(3), (b)(3), (b)(5) (1988 & Supp. II 1990).

[172] 33 U.S.C. § 1321(b) (1988 & Supp. II 1990).

[173] 33 U.S.C. § 1321(b)(6), (b)(7), (e), (f), (i) (1988 & Supp. II 1990); *see supra* notes 122–23 and accompanying text.

[174] *See* Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (requiring public hearings to resolve disputes but providing no civil or criminal penalties); Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498 (strengthening the states' role); Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (imposing heavy burdens of proof on the federal government that made it difficult to enforce the law).

[175] Pub. L. No. 92-500, 86 Stat. 816.

[176] Pub. L. No. 95-217, 91 Stat. 1566.

[177] Pub. L. No. 100-4, 101 Stat. 7.

ever, it has focused on prohibiting the discharge of any pollutant by any person, except as prescribed by a permit issued under the National Pollution Discharge Elimination System (NPDES). Section 309[178] punishes unpermitted discharges with civil and criminal sanctions.[179]

In prosecuting Exxon for the *Valdez* spill, the government was forced to turn its back on section 1321, the section that clearly deals with oil spills, since that section provided no criminal penalties.[180] Instead, the United States argued that the discharge of oil violated the section 301[181] prohibition on the discharge of pollutants without a permit.[182] By doing so, the government hoped to take advantage of the fact that section 309[183] makes the negligent violation of section 301[184] a misdemeanor.[185] The principal legal hurdles were whether oil could be considered a pollutant, the discharge of which is prohibited by section 301, and whether a vessel could be considered a point source.[186]

While oil is clearly listed as a prohibited substance in section 311,[187] it is not included in the Clean Water Act's general definition of a pollutant.[188] Despite this omission, the only court to have dealt with the question directly read the term pollutant to include oil.[189] The court in the *Exxon Valdez* case relied on the *Hamel* court's reasoning and found that oil is a pollutant for purposes of section 301.[190]

The next question for the *Exxon Valdez* court was whether a vessel is a point source under the law. Because vessels are specifically listed

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[178] 33 U.S.C. § 1319 (1988 & Supp. II).

[179] 33 U.S.C. §§ 1311, 1319, 1342 (1988 & Supp. II 1990).

[180] 33 U.S.C. § 1321 (1988 & Supp. II 1990). This was necessary because § 1319 did not make a violation of § 1321 a criminal offense.

[181] 33 U.S.C. § 1311 (1988).

[182] Raucher, *supra* note 164, at 157–58.

[183] 33 U.S.C. § 1319 (1988 & Supp. II 1990).

[184] "Except as in compliance with this section and section . . . 1342 . . . the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311 (1988).

[185] "Any person who negligently violates section 1311 . . . shall be punished by a fine . . . or by imprisonment . . . ." 33 U.S.C. § 1319(c)(1)(A) (Supp II 1990).

[186] Raucher, *supra* note 164, at 158.

[187] 33 U.S.C. § 1321(b) (1988).

[188] 33 U.S.C. § 1362(6) (1988) (defining "pollutant" to mean dredged spoil, solid waste incinerator residue, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into the water).

[189] United States v. Hamel, 551 F.2d 107, 109–11 (6th Cir. 1977) (reasoning that oil is a "biological material" and that the Clean Water Act was intended to be at least as inclusive in its prohibitions as the Rivers and Harbors Act of 1899, 33 U.S.C. § 407, which includes oil). *See United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

[190] 33 U.S.C. § 1311 (1988). *See* Raucher, *supra* note 164, at 159 (citing 2 OIL SPILL LITIG. NEWS at 2280–81.

as point sources in the statute,[191] the court refused to grant Exxon's motion to dismiss on these grounds.[192]

Thus, while courts such as the *Exxon Valdez* court have been able to surmount the technical details[193] of the Clean Water Act's confusing structure to support the Act's objective,[194] doing so has required them to overlook the reality that the NPDES permit system and section 311[195] were designed independently to serve different needs.[196] Once a court has ruled that section 301[197] covers oil spills, any such spill must be addressed in an NPDES permit. Because it seems extraordinarily unlikely that a vessel would request, or that EPA would issue, an NPDES permit for an accidental oil spill of an unknown substance, such a reading carried to its logical limits requires a court to find that section 301[198] covers all unintentional spills. Without a permit, any unintentional spill will violate section 301.[199] This interpretation imposes, in effect, strict criminal liability for unintentional oil spills from vessels.[200]

Perhaps the greatest shortcoming of this construction of the statute, however, is that it leads to inconsistent results under different circumstances.[201] Specifically, because the statute provides that the term "discharge of a pollutant" includes any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft,[202] vessels could not be criminally liable for any spill beyond three miles from shore. Under the *Hamel* and *Exxon Valdez* interpretation of the statute, however, ships are subject to strict criminal liability for unintentional oil spills in the internal waters or the territorial sea of the United States.[203]

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[191] 33 U.S.C. § 1362(14) (1988)).

[192] Raucher, *supra* note 164, at 160 (citing 2 OIL SPILL LITIG. NEWS at 2281–82).

[193] Some would put it more strongly. *See* Randle, *supra* note 168, at 10131 (indicating that until 1990, the only criminal charge that could be brought for discharges into the navigable waters was that of discharging without a permit).

[194] To restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a) (1988).

[195] 33 U.S.C. § 1321 (1988).

[196] The *Exxon* court specifically rejected this argument. *See* Raucher, *supra* note 164, at 161 *citing* 2 OIL SPILL LITIG. NEWS at 1958–59.

[197] 33 U.S.C. § 1311 (1988).

[198] *Id.*

[199] Raucher, *supra* note 164, at 161.

[200] *Id.* (observing that "if Congress intended this fairly draconian result . . . it chose a particularly circuitous route to achieve its goal").

[201] *Compare* 33 U.S.C. § 1362(14) (1988) (relied upon by the *Hamel* and *Exxon* courts) *with* 33 U.S.C. § 1362(12) (1988).

[202] 33 U.S.C. § 1362(12) (1988).

[203] Assuming Congress intended the courts to interpret the Clean Water Act as it was interpreted by the *Hamel* and *Exxon* courts, the results would closely mirror those required

The most appropriate statute for addressing marine oil spills, however, the Water Quality Act of 1970, now codified in 33 U.S.C. § 1321, provides a comprehensive scheme for regulating oil spills in all waters subject to U.S. jurisdiction that is consistent with international law.[204]

III. Recent Developments in U.S. Law

A. *New Criminal Provisions for the Clean Water Act*

1. The Oil Pollution Act of 1990

Whatever problems or weaknesses the Clean Water Act might have had in dealing with oil spills were solved with the passage of the Oil Pollution Act.[205] That Act was the culmination of a nearly fifteen year effort to consolidate the federal response mechanisms for oil spills.[206] For a number of reasons, Congress had been unable to reach a consensus on the best approach to take.[207] When the *Exxon Valdez* ran aground on Bligh Reef and began spilling 10.8 million gallons of crude oil into Prince William Sound in Alaska, public outrage broke the Congressional deadlock and led to one of the United States' most significant environmental statutes,[208] with the unmistakable purpose of preventing future *Valdez*-style disasters.[209]

The Oil Pollution Act has nine main elements:

1) a comprehensive federal liability scheme, addressing all discharges of oil to navigable waters, the exclusive economic zone, and shorelines;[210]

2) a single, unified federal fund, called the Oil Spill Liability Trust Fund, to pay for the cleanup and other costs of federal response to oil spills;[211]

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by international law. International law allows a coastal state to impose more than monetary penalties for violations committed by other nations' vessels in the coastal states territorial sea but not beyond. *See supra* note 161 and accompanying text. Under UNCLOS, however, that liability must be premised upon willful and serious acts of pollution, not strictly imposed criminal liability. *See supra* note 162 and accompanying text.

[204] *See* 33 U.S.C. § 1321(b)(3) (1988) (adopting a regulatory regime that deals with oil spills in the various areas of the ocean according to the requirements of the international law of the sea).

[205] Oil Pollution Act of 1990 §§ 1001–9002; 33 U.S.C. §§ 2701–2761 (Supp. II 1990).

[206] Including the Clean Water Act, 33 U.S.C. § 1321 (1988 & Supp. II 1990), The Deepwater Port Act, 33 U.S.C. §§ 1501–1524 (1988 & Supp. II 1990), the Trans Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651–1655 (1988), the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1374 (1988), and CERCLA, 42 U.S.C. §§ 9601–9675 (1988 & Supp. III 1991). Randle, *supra* note 168, at 10119.

[207] Grumbles, *supra* note 3, at 158–63 (1991); Randle, *supra* note 168, at 10119.

[208] Grumbles, *supra* note 3, at 153–55.

[209] Randle, *supra* note 168, at 10119–20.

[210] Oil Pollution Act, §§ 1001–1020 (1990).

[211] *Id.* § 9001.

3) stronger federal authority to order removal action or to conduct the removal action itself;[212]

4) new controls for prevention of spills and plans to control spills that must be drafted by the owners or operators of onshore facilities, offshore facilities, and vessels;[213]

5) tougher criminal penalties;[214]

6) higher civil penalties for spills of oil and hazardous substances;[215]

7) tighter standards and reviews for licensing crews of tank vessels, and for equipment and operations of tank vessels, including the requirement of double hulls;[216]

8) no preemption of state laws and an endorsement of the United States' participation in a stringent international oil spill liability and compensation scheme;[217] and,

9) several provisions pertinent to Prince William Sound, to Alaska at large, and to other portions of the United States.[218]

2. The Structure of the Criminal Provisions

Perhaps the most significant aspect of the Oil Pollution Act is its adoption of tougher criminal penalties.[219] Equally important is the manner Congress chose to implement them.[220] With one sentence in the Oil Pollution Act, Congress changed the nature of liability for oil spills in the United States, and possibly the world.[221] That simple

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[212] *Id.* § 4201.

[213] *Id.* § 4202.

[214] *Id.* § 4301.

[215] *Id.* §§ 4301, 4302.

[216] *Id.* §§ 4101–4115.

[217] *Id.* § 1018.

[218] *Id.* §§ 5001–5007.

[219] Arguably adopted because:

> The penalties available to the federal government under section 311 (33 U.S.C. § 1321) to punish unpermitted discharges of oil and hazardous substances had not been significantly amended since the early 1970s. Given the damages inflicted by the *Valdez* spill, the available penalties looked too weak, especially in comparison with other penalties of the Clean Water Act and other environmental statutes.

Randle, *supra* note 168, at 10130.

[220] Oil Pollution Act of 1990, § 4301(c). The Conference report for this provision reads:

> Section 4301(c) of the Conference substitute provides that violations of the prohibition of oil or hazardous substances are subject to criminal penalties established under section 309(c) of the Federal Water Pollution Control Act [the Clean Water Act]. These penalties are $2,500–$25,000/one year in prison for negligent violations, $5,000–$50,000/three years for knowing violations, and up to $250,000 and 15 years for knowing endangerment.

H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. § 430–431 at 154 (1990) *reprinted in* 1990 U.S.C.C.A.N. (101 Stat.) 779, 833.

[221] *See supra* notes 91–110 and accompanying text. *See also infra* Part IV and accompanying text.

sentence reads, "Section 309(c) of the Federal Water Pollution Act (33 U.S.C. 1319(c)) is amended by inserting after '308,' each place it appears the following: 311(b)(3)."[222]

With this amendment from the Oil Pollution Act, the criminal provision of the Federal Water Pollution Act[223] would read as follows:

(c) Criminal penalties

(1) Negligent violations

Any person who . . . negligently violates section . . . 1321(b)(3) . . . of this title . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.[224]

(2) Knowing violations

Any person who . . . knowingly violates section . . . 1321(b)(3) . . . of this title . . . shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.[225]

(3) Knowing endangerment

Any person who . . . knowingly violates section . . . 1321(b)(3) . . . of this title . . . and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fines and imprisonment.[226]

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[222] Oil Pollution Act of 1990, Pub. L. No. 101-380 § 4301(c), 104 Stat. 484, 537.

[223] In the unofficial codification process, § 311(b)(3) of the Federal Water Pollution Control Act became known as 33 U.S.C. § 1321(b)(3). The Oil Pollution Act's directive regarding § 311(b)(3) is thus referred to as § 1321(b)(3) in the codified version. *See* 33 U.S.C.A. § 1319(c)(1) (West Supp. 1992).

[224] 33 U.S.C. § 1319(c)(1) (Supp.II 1990).

[225] *Id.* § 1319(c)(2).

[226] *Id.* § 1319(c)(3)(A).

Thus, through one simple sentence in the Oil Pollution Act, the Congress caused severe criminal sanctions to attach to violations of 33 U.S.C. § 1321(b)(3). That section provides:

(3) The discharge of oil or hazardous substances

(i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(ii) . . . which may affect natural resources belonging to, appertaining to, or under the exclusive management of the United States (including resources under the Magnuson Fishery Conservation and Management Act[227]) in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection is prohibited, except

(A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 and

(B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.[228]

3. The Breadth of the New Provisions

By virtue of the manner in which Congress adopted criminal penalties for oil spills, incorporating section 1321(b)(3) from the old Water Quality Improvement Act[229] into section 1319(c) of the Federal Water Pollution Control Act,[230] it grafted one well-developed body of law onto another.[231]

Certain principles have evolved through interpreting each section that are worth noting.[232] The first is that under section 1321(b)(3) the

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[227] 16 U.S.C. §§ 1801–1882 (1988) (providing jurisdiction over the living resources of the continental shelf out to 200 nautical miles).

[228] 33 U.S.C. § 1321(b)(3) (1988).

[229] *See supra* notes 168–74 and accompanying text.

[230] *See supra* notes 174–77 and accompanying text.

[231] *See, e.g.*, 33 U.S.C.S. § 1321 (Law Co-op. 1987) and the interpretive notes following.

[232] *Id.*

quantity of oil determined to be harmful is that amount that creates a sheen on the surface of the water.[233] Second, section 1321 has its own definitions section, which defines terms somewhat differently than they are defined in the remainder of the Clean Water Act. Under this section, the term "discharge" includes, but is not limited to, "any spilling, leaking, pumping, pouring, emitting, emptying, or dumping" but excludes discharges associated with permits issued under section 1342.[234] The term "person" under section 1319 means an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, any interstate body,[235] or a responsible corporate officer.[236]

B. The Expansion of Criminal Liability for Environmental Violations

1. Reasons for Labeling Conduct Criminal

a. The Policy

The use of criminal penalties to enforce the substantive provisions of the Oil Pollution Act reflects a government-wide trend towards adopting, strengthening, and vigorously enforcing criminal provisions to protect the environment. In the 1970s, the cost of violating environmental laws seemed small compared to the cost of compliance.[237] In the entire decade, only twenty-five environmental crimes cases were prosecuted.[238] In comparison, during the seven years between 1983 and 1990, the Department of Justice secured 569 criminal indictments from which 432 convictions or guilty pleas resulted.[239] In 1990 alone, 134 indictments were returned, ninety-eight percent of which named corporations, presidents, owners, vice presidents, directors, and managers as defendants.[240] These data reflect the facts that Con-

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[233] *See, e.g.*, Chevron v. Yost, 919 F.2d. 27 (5th Cir. 1990); Orgulf Transport Co. v. United States, 711 F. Supp. 344, 347 (W.D. Ky. 1989).

[234] 33 U.S.C. § 1321(a)(2) (1988). *Cf. supra* note 202 and accompanying text.

[235] 33 U.S.C. § 1362(5) (1988).

[236] *Id.* § 1319(c)(6) (1988).

[237] Dick Thornburg, *Criminal Enforcement of Environmental Laws—A National Priority*, 59 GEO. WASH. L. REV. 775 (1991).

[238] F. Henry Habicht, II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. REP. 10478, 10479 (1987).

[239] Susan A. Bernstein, *Environmental Criminal Law: The Use of Confinement for Criminal Violators of the Federal Clean Water Act*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 107, 107 n.6 (1991).

[240] Thornburg, *supra* note 237, at 778 n.21.

gress enacted additional environmental legislation to control the careless disposal of toxic waste and that the public favored vigorous enforcement efforts.[241] One commentator has observed that this trend reflects the emergence of a "New Environmental Paradigm" that focuses on the criminal law's ability to condemn those who violate society's increasingly stringent efforts to protect the environment.[242]

Until Congress added a felony penalty to the Resource Conservation and Recovery Act (RCRA) in 1980, environmental crimes tended to be relatively minor offenses associated with conservation laws.[243] Since then, however, virtually every major environmental statute has adopted felony penalties.[244] Within this array of new laws, prosecutions have been pursued vigorously[245] based on the concept that the environment is a crime victim.

Former Attorney General Richard Thornburg believes the emphasis on criminal enforcement in environmental law puts the issue of pollution in its proper context. "It says that we believe as a nation and as prosecutors that a polluter is a criminal who has violated the rights and the sanctity of a living thing—the largest living organism in the known universe—the earth's environment."[246]

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[241] Habicht, *supra* note 238, at 10479; Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law,* 59 GEO. WASH. L. REV. 889 (1991) (indicating that more than seventy percent of the American public favors the use of jail terms when companies are found guilty of deliberately violating pollution laws).

[242] Hedman, *supra* note 241, at 889–90 (observing that the burst of environmental legislation in the 1970s represented an effort to change social norms about the environment).

[243] Robert Abrams, *The Maturing Discipline of Environmental Prosecution,* 16 COLUM. J. ENVTL. L. 279, 280–81 (1991) (citing N.Y. Envtl. Conserv. Law § 71-0921 (McKinney's 1984) prohibiting the shooting of a deer out of season).

[244] *See, e.g.,* Clean Water Act, 33 U.S.C. §§ 1251, 1319 (1990) (felony); Clean Air Act, 42 U.S.C. §§ 7401, 7413 (Supp. III 1990) (felony); Toxic Substances Control Act 15 U.S.C. §§ 2601, 2615 (1986) (misdemeanor); Resource Conservation and Recovery Act 42 U.S.C. §§ 6901, 6928 (1986) (felony); Comprehensive Environmental Response, Conservation, and Liability Act, 42 U.S.C. §§ 9601, 9603, 9612 (1980) (felonies); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1362(b)(1) (1988) (misdemeanor).

[245] *See* James P. Calve, *Environmental Crimes: Upping the Ante for Non-Compliance with Environmental Laws,* 133 MIL. L. REV. 279, 284–90 (1991); Anthony J. Celebrezze, Jr. et al., *Criminal Enforcement of State Environmental Laws: The Ohio Solution,* 14 HARV. ENVTL. L. REV. 217, 219–20 (1990); Mary Ellen Kris & Gail L. Vannelli, *Today's Criminal Environmental Enforcement Program: Why You May Be Vulnerable and Why You Should Guard Against Prosecution Through an Environmental Audit,* 16 COLUM. J. ENVTL. L. 227, 229–32 (1991); Roger J. Marzulla & Brett G. Kappel, *Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s,* 16 COLUM. J. ENVTL. L. 201, 204–09 (1991).

[246] R. Christopher Locke, *Environmental Crime: The Absence of Intent and the Complexities of Compliance,* 16 COLUM. J. ENVTL. L. 311, 313 (1991) (quoting remarks made by Richard Thornburg, Attorney General of the United States, before the National Association of District Attorneys, Portland, Maine 1–2 on July 19, 1989)).

This view has been implemented in Justice Department policy which has one principal goal: deterrence.[247] The Department believes that the stigma associated with a criminal conviction and the dislocation of incarceration combine to make the threat of criminal prosecution a major tool to improve the rate of compliance with the nation's environmental laws.[248] The EPA and the Justice Department believe that this threat will make it less likely for a member of the regulated community to consider willful or calculated evasion of the environmental laws.[249] Toward that end, investigations into alleged environmental crimes are conducted with the intent of identifying, prosecuting, and convicting the highest ranking, truly responsible corporate officials.[250]

b. The Theory

The threat of criminal punishment is a powerful factor in persuading people not to impose economic externalities on society at large. This view finds strong support in the recent literature on economics and law.[251] As discussed earlier,[252] the costs of pollution may simply be viewed as economic externalities or costs that a polluter imposes on society at large. The burden then falls upon society to avoid these costs by forcing the polluter, through regulation, to internalize its costs. In the eyes of economists, criminal sanctions have been justified on the premise that they protect certain rights from encroachment and the ensuing externalities.[253]

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[247] Habicht, *supra* note 238, at 10480.

[248] *Id.*

[249] Habicht, *supra* note 238, at 10480; *see* Marzulla & Kappel, *supra* note 245, at 201–02 (quoting Attorney General Thornburg as saying, "We are finding that nothing so concentrates the mind . . . upon the environment as our putting their . . . pocketbooks and persons in jeopardy . . the realization that . . . [actions] might actually result in jail time concentrates the mind even more.").

[250] Habicht, *supra* note 238, at 10480; *see also* The Department of Justice Manual, § 5–11.311 (1990-91 Supp.) (citing 33 U.S.C. §§ 1319(c)(3) (1990) and 1362(5) (1990) and noting the Congressional intent that unlawful acts be traced to individual officers and employees and requiring that intent to be given serious consideration in the development of prosecutions for environmental crimes).

[251] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 357 (1973) (citing JEREMY BENTHAM, THEORY OF LEGISLATION 325–26 (R. Hildreth ed., 1864) and indicating that Bentham's deterrence theory of criminal punishment is "just a special case of a broader economic theory of legal remedies . . . to impose costs on people who violate rules"). *See also* Hedman, *supra* note 241, at 895 (finding support for the development of environmental criminal sanctions in the writings of Jeremy Bentham).

[252] *See supra* notes 78–82 and accompanying text.

[253] HIRSCH, *supra* note 79, at 212; *see also* POSNER, *supra* note 251, at 205–06 (indicating that a criminal is someone who chooses to engage in criminal activity because he believes the

The ability of economics to deal with these externalities has grown through the years. Early formulations, as espoused by Arthur Pigou, reasoned that imposing taxes or other monetary penalties to account for the costs borne by society as a result of certain unwanted behavior would serve as an appropriate disincentive to crime.[254] After Pigou, Nobel laureate Gary Becker dealt with the criminal solution to unwanted behavior more directly.[255] He assumed criminals were economically rational and argued that they weigh the costs and probability of getting caught against the probability and benefits of succeeding.[256] While Becker believed the chances of getting caught weigh more heavily than the potential penalty in a criminal's mind, he also believed that there was a trade-off between the penalty and the probability of being apprehended.[257] Specifically, he believed that raising the potential penalty for a violation could allow enforcement costs to be reduced because the increased penalty would allow society to maintain the optimal level of deterrence while lowering the probability of detection.[258]

Other scholars have tried to use the tools of economics to explain criminal law,[259] but these attempts have generally been criticized for failing to address important aspects of criminal law.[260] Perhaps the

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expected utility of that activity is greater than that of alternate legitimate activities, even after accounting for the expected costs of each activity).

[254] *See supra* note 81 and accompanying text.

[255] Beth Belton, *Does Crime Pay? Economist's Answer Wins*, USA TODAY, October 14, 1992, at 4B.

[256] *See id.*

[257] *See id.*

[258] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968), *as in* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 76–84 (1983).

[259] *See, e.g.*, POSNER, *supra* note 251, at 207–09 (indicating that criminal fines are a cheap and effective remedy as long as the fine exceeds the costs society wants to impose for the violation and that incarceration is a useful punishment for violators with no assets because it imposes pecuniary costs on the violator by reducing his income while he's confined and by reducing his earning capacity after his release).

[260] *See, e.g.*, Guido Calebresi & A. Douglas Malamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1125 (1972) (arguing that society imposes criminal penalties to prevent persons from converting property), *criticized in* Coleman, *Crime, Kickers, and Transaction Structures*, in NOMOS XXVII: CRIMINAL JUSTICE 319 (J. Pennock & J. Chapman eds., 1985), for failing to adequately account for the moral aspects of criminal law. *See also* Richard Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1195–96 (1985) (arguing that criminal penalties exceed damages to encourage people to engage in voluntary activities rather than involuntary activities), *criticized in* Kenneth Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 34, for not considering the distributional and other justice criteria considered by Calabresi and Malamed. *Accord* POSNER, *supra* note 251, at 362–64 (experiencing difficulty with the concept of using incarceration as something other than a substitute for monetary penalties).

greatest flaw in these earlier analyses, though, has been disagreement about the question of which externalities should be treated as crimes in the first place.[261] The penetrating analysis of a recent award winning article[262] effectively addresses this question, dealing with the usual criticisms and offering a convincing economics-based rationale for the criminal law. In that article, Professor Kenneth Dau-Schmidt identifies crime as an externality, specifically, an action through which one person realizes his preferences and imposes costs on those with incompatible preferences.[263] Those costs may take the form of frustrating other people's preferences or requiring them to take precautionary measures to avoid the effects of the criminal activity.[264] Dau-Schmidt reviews the traditional solutions to these problems such as Pigouvian taxes, damages, and subsidies,[265] and rejects them as merely creating an incentive to choose one permissible course of action over another permissible action. In his words, these are merely opportunity shaping policies as opposed to preference shaping policies that create an incentive for an individual to choose a particular course of action because another possible action is impermissible.[266]

Dau-Schmidt's new solution to the problem is that criminal sanctions should be used to shape people's preferences for a particular behavior so that an individual's preferences are compatible with society's and no externalities are imposed.[267] He explains that the threat of corporal punishment, in which the person experiences pain, or similarly, incarceration, in which the person experiences isolation, is a more costly but more effective way to shape preferences than is the threat of imposing a financial penalty.[268] In the same vein, he observes that merely witnessing someone else's reward or punishment for a behavior can affect a person's preferences toward a behavior.[269]

Dau-Schmidt explains that society must determine what it views as the social welfare before it begins to shape people's preferences.[270] Using its political process, each society must develop a social welfare function by determining which values will be preferred over others.[271]

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[261] *See* Dau-Schmidt, *supra* note 260 at 27–29.

[262] *Id.* Professor Dau-Schmidt's article was the 1990 winner of the Association of American Law Schools' 1990 Scholarly Paper Competition. *Id.*

[263] *Id.* at 8.

[264] *Id.*

[265] *Id.* at 10.

[266] *Id.* at 21.

[267] *Id.* at 14–15.

[268] *Id.* at 16.

[269] *Id.*

[270] *Id.* at 17.

[271] *Id.*

Once a society knows which values it prefers, it may adopt a preference-shaping policy to encourage those values and discourage incompatible values.[272] Because opportunity-shaping policies such as damages, taxes, and subsidies[273] are less expensive for society to administer than preference-shaping policies such as criminal fines, probation, and imprisonment,[274] preference shaping should be reserved for dealing with externalities in which the social benefits expected from criminal punishment exceed the higher social costs. Indeed, Dau-Schmidt believes preference-shaping policies should be reserved for those instances in which there is a significant disparity in the utility society derives from the competing incompatible preferences.[275] Society's choice of punishment should then also consider the disincentives of existing opportunity-shaping policies.[276]

This preference-shaping view of the criminal law is the only economically-based theory that explains why criminal law is less concerned with addressing harm to the victim than it is with the intent of the accused.[277] Similarly, it is the only such theory capable of explaining why imprisonment, rather than fines,[278] is viewed as the strongest form of punishment. In sum, Professor Dau-Schmidt believes the criminal law is a useful tool to persuade people to avoid imposing externalities on society. Because of their great costs, however, Dau-Schmidt believes activities that create those externalities should only be labeled as crimes when there is a grave disparity in the respective values society assigns to the utility derived from two incompatible preferences.[279]

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[272] The social costs consist, among other things, of benefits that would have been achieved if certain actors' behavior had not been changed. *Id.* at 18.

[273] *See supra* note 265 and accompanying text.

[274] Dau-Schmidt, *supra* note 260, at 23 (citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 193 (1968) (indicating that the higher costs flow from the higher burden of proof and people's resistance to paying criminal fines because of the condemnation attached to them).

[275] *Id.*

[276] *See id.* at 24.

[277] This is perhaps most clear in the case of a failed attempt to commit a crime, in which the accused may be found guilty absent any harm. *Id.* at 27 (citing Rex v. Scofield, Caldecott 397 (K.B. 1784); W. LAFAVE, A. SCOTT, CRIMINAL LAW 495 (2d ed. 1986) and explaining how the opportunity-shaping theories developed by Becker and others have difficulty explaining this concept).

[278] Under the opportunity-shaping theories, if criminal punishment is the price levied to discourage criminal activity, then it should make no difference whether the price is paid in dollars or in the pain of imprisonment. Dau-Schmidt, *supra* note 260, at 31 (citing Becker, *supra* note 258, at 193, and observing that Becker has even argued that society should prefer fines to imprisonment because fines are less expensive to administer).

[279] Dau-Schmidt, *supra* note 260, at 38. In layman's terms, society should only label an activity criminal when it chooses to convey its moral outrage. Hedman, *supra* note 241, at 899.

2. Modern Interpretations of Environmental Crime Provisions

The criminal provisions of modern environmental statutes have been read expansively by the courts. This broad interpretation, as well as the growing number of environmental statutes providing for criminal penalties and the Justice Department's aggressive pursuit of the violators, have been widely noticed and analyzed in academic literature.[280] Several themes recur in commentators' analyses. These include concerns that: the scope of the definition of conduct subject to criminal sanctions is expanding;[281] the courts are relaxing the standard of proof needed to prove the accused possessed the requisite *mens rea*;[282] and inappropriate tools are being used to impose criminal liability on persons who would normally be beyond the reach of criminal law.[283]

Each of these concerns flows from the view that environmental statutes are designed to protect the public from risks of which it is either unaware or unable to protect itself. This is known as the public welfare philosophy and has been the source for a body of law that has developed under somewhat similar statutes.[284] *United States v. Dotterweich* is the principle case upon which this public welfare philosophy rests.[285] In that case, Dotterweich, the president of Buffalo Pharmaceutical Company, was prosecuted for two misdemeanor violations of the Federal Food, Drug, and Cosmetic Act (FFDCA).[286] The presi-

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[280] *See, e.g.*, Abrams, *supra* note 243, at 279; Calve, *supra* note 245; Celebrezze, et al., *supra* note 245, at 219; Locke, *supra* note 246; Christopher Harris, et al., *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203 (1988); Kris & Vannelli, *supra* note 245; Marzulla & Kappel, *supra* note 245; Paul G. Nittoly, *Environmental Criminal Cases: The Dawn of a New Era*, 21 SETON HALL L. REV. 1125 (1991); Ruth Ann Weidel, et al., *The Erosion of Mens Rea in Environmental Criminal Prosecutions*, 21 SETON HALL L. REV. 1100 (1991); Robert A. Milne, Note, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFF. L. REV. 307 (1989); Susan A. Bernstein, Note, *Environmental Criminal Law, The Use of Confinement for Criminal Violations of the Federal Clean Water Act*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 107 (1991).

[281] *See* Celebrezze, et al., *supra* note 245, at 219–20; Locke, *supra* note 246, at 311–14; Marzulla & Kappel, *supra* note 245, at 204–09.

[282] *See* Calve, *supra* note 245, at 290–96; Locke, *supra* note 246, at 320–25; Weidel, et al., *supra* note 280, at 1105–13; Milne, *supra* note 280, at 329–35.

[283] *See* Abrams, *supra* note 243; Harris, et al., *supra* note 280, at 227–35; Nittoly, *supra* note 280, at 1146–47; Keith A. Ornsdorff, James M. Mesnard, *The Responsible Corporate Officer Doctrine in RCRA Criminal Enforcement: What You Don't Know Can Hurt You*, 22 Envtl. L. Rep. 10099 (1992); Weidel, et al., *supra* note 280, at 1101–05.

[284] *See* Calve *supra* note 245, at 290–96 (discussing public welfare offenses and how the concept has evolved in environmental crimes).

[285] 320 U.S. 277 (1943).

[286] 21 U.S.C. §§ 301–392 (1988).

dent's corporation had purchased drugs from a manufacturer, repacked them, and shipped them interstate under its own label. He was convicted of misbranding drugs in interstate commerce and shipping an adulterated drug.[287]

Dotterweich appealed, arguing that the only "person" subject to prosecution under the FFDCA was the corporation.[288] The Supreme Court reviewed the statute, observing that its purpose was to regulate activities that, "touch phases of lives and health of people which . . . are largely beyond self-protection . . . . [And i]n the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger."[289] The Court then agreed that the statute identifies the corporation as the "person" which may be found guilty of the misdemeanor of misbranding or adulterating drugs.[290]

To reach corporate officers and managers, the Court relied on the historic conception of a misdemeanor under which any person aiding or assisting in the commission of a misdemeanor is also guilty of the misdemeanor.[291] Applying this principal, the Court found that while the statute technically implicated only the corporation for the misdeed, "[A]ll persons who aid and abet its commission are equally guilty."[292] Thus, the offense is committed by all who have a responsible share in the furtherance of the transaction that the statute outlaws.[293]

The *Dotterweich* case set the stage for *United States v. Park*,[294] in which the president of Acme Markets, a food distributor, was charged with violating section 301 of the FFDCA. Park was tried and convicted for failing to prevent exposure of food in his company's ware-

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[287] Under the statute, shipments like those at issue in *Dotterweich* are "punished by the statute if the article is misbranded [or adulterated] . . . [even if that is done] without any conscious fraud at all." 320 U.S. at 281.

[288] *See id.* at 279.

[289] *Id.* at 280–81.

[290] *Id.* at 281.

[291] *Id.* (citing United States v. Mills, 32 U.S. (7 Pet.) 138, 141 (1833) (holding that one who assists a mail carrier in destroying mail is guilty of the misdemeanor as a principle)); 18 U.S.C. § 550 (1909) (amended 1948) (indicating that doctrine had been given general application in the penal code). *Mills* further cites United States v. Gooding, 25 U.S. (12 Wheat.) 460 (1827). Gooding was convicted of the misdemeanor of trading slaves, although the evidence showed he merely encouraged and assisted a ship captain to do so. In upholding Gooding's conviction, the Court reasoned that "[i]n cases of misdemeanors, all those who are concerned in aiding and abetting, as well as in perpetrating the act, are principles." Gooding, 25 U.S. (12 Wheat.) at 475.

[292] 320 U.S. at 284 (reasoning further that whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial). The Court deferred to the jury's evaluation of the evidence. *Id.* at 285.

[293] *Id.* at 284.

[294] 421 U.S. 658 (1975).

house to rodent contamination.[295] The evidence at trial showed the Federal Food and Drug Administration had sent letters to Park warning him of the problem and indicating that it viewed Park as the individual responsible to correct the situation. Park trusted subordinates to take appropriate actions, but they did not.[296]

Park appealed his conviction. The question presented to the Supreme Court on appeal was whether the government must show a defendant's "wrongful action" before he may be convicted on a "responsible relationship" theory under *Dotterweich*.[297] The Court decided that the government does not have to show a wrongful action, but that under *Dotterweich*, "responsible share" does imply some measure of blameworthiness.[298] The Court reasoned that, "[T]he public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors."[299] It requires food distributors to be the strictest censors of their merchandise.[300] The FFDCA punishes "neglect where the law requires care, or inaction where it imposes a duty."[301] In short, the Court held that the Act permits conviction of those responsible corporate officials who, in light of this standard of care, have the power to prevent or correct violations of its provisions.[302]

Dotterweich and *Park* have been the grist for thought provoking commentary on the nature of the criminal justice system.[303] More importantly, the Supreme Court's view that the special purpose of the

[295] *Id.*

[296] *Id.* at 663–65.

[297] *Id.* at 673.

[298] *Id.*

[299] *Id.* at 671 (quoting Smith v. California, 361 U.S. 147, 152 (1959)).

[300] *Id.*

[301] *Id.* (quoting Morissette v. United States, 342 U.S. 246, 255 (1952)).

[302] *Id.* at 676. *Cf.* 421 U.S. at 678 (Stewart, J., dissenting) (interpreting the Court's holding as requiring the prosecution to "at least show that by reason of an individual's corporate position and responsibilities, he had a duty to use care to maintain the physical integrity of the corporation's food products").

[303] *See, e.g.*, Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 U.C.L.A. L. REV. 463 (1981) (arguing that the two cases are sufficiently imprecise to allow some culpability to be shown before a corporate official may be convicted for the strict liability crimes of the corporation, and that such a reading is proper even when the statute's purpose is to maintain an adequate condition of cleanliness and health in society). *Cf.* Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337 (1982) (arguing that the two cases are properly interpreted as requiring strict liability for a corporate official who holds a position that carries responsibility and authority to prevent and correct such violations and as requiring proof that he failed to properly exercise that authority, when his act or omission causes a violation of a substantive statute designed to protect the public health or welfare).

Food, Drug, and Cosmetic Act[304] justified the conviction of responsible corporate officers, has been the basis for attempts to extend the responsible corporate officer principle to environmental crimes.[305] Specifically, prosecutors have used the *Dotterweich* and *Park* decisions as the basis for arguments to minimize the *scienter* requirement needed to prove violations of an environmental crime.[306]

Such attempts to extend the FFDCA cases to environmental crimes have been made in a number of courts based upon a number of statutes.[307] To date, though, courts have been reluctant to reduce the *scienter* requirements mandated by Congress[308] or to impose liability upon more individuals than those whose acts and mental state satisfy the requirements of the law.[309]

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[304] *See supra* notes 291–93, 299–300 and accompanying text.

[305] *See* Calve, *supra* note 245, at 292–93 (indicating that environmental crimes have at their foundation the same essential purpose as public welfare offenses and noting that to avoid due process problems, when the crime is a felony rather than a misdemeanor, knowledge is required; this latter class of cases is known as "public welfare hybrids"); Kris & Vannelli, *supra* note 245, at 239 (citing recent case examples); Ornsdorff & Mesnard, *supra* note 283, at 10102 (observing that doctrine applied to RCRA); Milne, *supra* note 280, at 323–24 (observing that the Refuse Act is a public welfare statute that imposes strict criminal liability on violators and noting attempts to apply the doctrine to environmental statutes containing *scienter* requirements).

[306] *See* Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After United States v. Dee*, 59 GEO. WASH. L. REV. 862, 872 (1991) (written by the prosecuting attorneys in the *Dee* case); Marzulla & Kappel, *supra* note 245, at 212 (citing United States v. Johnson Towers, 741 F.2d 662 (3d Cir. 1984) *cert. denied sub nom* Angel v. United States, 469 U.S. 1208 (1985) and United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986) as examples of courts eviscerating the *scienter* requirement); Locke, *supra* note 246, at 321, 324–25 (citing United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990); United States v. Hayes Int'l Corp., 786 F.2d at 1499; United States v. Johnson & Towers, Inc., 741 F.2d at 662 as examples of relaxed standards of proof); Harris, et al., *supra* note 280, at 224–27 (citing Johnson & Towers as an example); Weidel, et al., *supra* note 276, at 1104 (citing United States v. Frezzo Bros., 602 F.2d 1123, but acknowledging the contrary precedent of United States v. White, 766 F. Supp. 873 (E.D. Wash. 1991)); Milne, *supra* note 280, at 330–35 (citing Johnson & Towers).

[307] *See* United States v. Hoflin, 880 F.2d at 1034–40; United States v. Hayes Int'l Corp., 786 F.2d at 1500–07; United States v. Johnson & Towers, 741 F.2d at 663–70; United States v. Frezzo Bros., 602 F.2d at 1124–30; United States v. White, 766 F. Supp. at 877–85.

[308] *See* United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 53–55 (1st Cir. 1991) (requiring proof of corporate officers' knowledge and distinguishing *Johnson & Towers* because there the court simply allowed an inference of knowledge of the law but required the government to prove knowledge of acts relative to violations charged); United States v. Dee, 912 F.2d 741, 745 (9th Cir. 1990) (holding that a knowing violation of RCRA may occur even if the defendant was ignorant of the law if he knew the wastes he was handling were hazardous); United States v. Hoflin, 880 F.2d at 1036–39 (holding that the government need not prove knowledge of the law); United States v. Hayes Int'l Corp., 786 F.2d at 1501 (knowledge may be inferred when evidence supports the inference); United States v. Johnson & Towers, 741 F.2d at 669 (requiring the government to prove "knowingly" as to all elements of an offense and allowing the jury the unexceptional ability to infer knowledge of the law).

[309] *See* United States v. MacDonald & Watson Waste Oil Co., 933 F.2d at 50–55; United States v. Hoflin, 880 F.2d at 1035 (defendant directed employees to dispose of paint improperly); United

Nevertheless, with the increasing number of environmental crimes enacted by Congress,[310] the heightened efforts of DOJ and the EPA in pursuing convictions,[311] and the express inclusion of a responsible corporate officer provision within the Clean Water Act,[312] the law in this area will likely see future developments.

C. *The Extraterritoriality of United States Criminal Law*

The use of criminal penalties to protect the environment not only changes behavior domestically, but should also change behavior beyond the United States, leading to a reversal of the trend in which courts only hesitatingly give extraterritorial effect to environmental statutes.[313] The criminal provisions in environmental statutes have been interpreted broadly,[314] and recent judicial interpretations of international law principles may allow these broad interpretations to reach beyond United States borders and have a broader international effect.[315] While these interpretations remain controversial,[316] the recent high profile prosecution of General Manuel Antonio Noriega

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States v. Johnson & Towers, 741 F.2d at 670 (finding that the statute applies to "any person" and inferring in dicta that knowledge of a responsible officer could be inferred); United States v. White, 766 F. Supp. at 894–95 (holding that a corporate official may not be held criminally liable solely for the environmental violations of his employees and identifying contrary language in *Johnson & Towers* as "clearly dicta").

[310] *See supra* notes 241–44 and accompanying text.

[311] *See supra* notes 245–50 and accompanying text.

[312] 33 U.S.C.A. § 1319(c)(6) (1988).

[313] *See* Turley, *supra* note 90, and accompanying text.

[314] *See supra* notes 280–84 and accompanying text.

[315] *See* United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193–97 (1992) (permitting the abduction of a Mexican national from his home to stand trial in the United States for the murder of a DEA agent); United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1061–66 (1991) (relaxing the Fourth Amendment protections available to nonresident aliens outside the territorial limits of the United States); United States v. Yunis, 681 F. Supp. 896, 900–01 (D.D.C. 1988) (finding the court had authority to assert jurisdiction over a Lebanese terrorist who seized an American during the hijacking of a Jordanian aircraft in the Middle East and who, after being lured out of his country, was transported to the United States by the U.S. Navy). *See also* Jose v. Fir Grove, 801 F. Supp. 349, 356–57 (D. Ore. 1991) (following Noriega's extraterritorial application of RICO).

[316] For a discussion of the relative merits of the recent developments, see generally Abraham Abramovsky, *Extraterritorial Abduction: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991); Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293 (1991) (arguing that the United States will have to recommit itself to cooperation instead of unilateralism); Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281 (1991) (supporting the action's lawfulness); Ruth Wedgwood, *The Use of Armed Forces in International Affairs: Self Defense and the Panama Invasion*, 29 COLUM J. TRANSNAT'L. L. 609 (1991) (arguing that the United States must abide by international law).

provides a well reasoned example of a federal trial court implementing the developing law.[317]

Prosecutors alleged that General Noriega used his position as Commander in Chief of the Panamanian Defense Forces to protect cocaine shipments from Colombia, through Panama, to the United States.[318] Noriega was charged with conspiring to distribute and import cocaine into the United States in violation of 21 U.S.C. § 963;[319] distributing, and aiding and abetting the distribution of cocaine with the intent that it be imported into the United States in violation of 21 U.S.C. § 959 and 18 U.S.C. § 2;[320] conspiring to manufacture cocaine, with the intent to import it into the United States in violation of 21 U.S.C. § 963;[321] causing interstate travel and use of facilities in interstate commerce to promote an unlawful activity in violation of 18 U.S.C. § 1952(a)(3) and 18 U.S.C. § 2[322]; and engaging in a racketeering activity in violation of the Racketeer Influenced and Corrupt Organization (RICO) statutes, 18 U.S.C. §§ 1962(c) and 1962(d).[323]

These charges were brought while General Noriega was the de facto leader of Panama.[324] Shortly after the charges were brought, Noriega declared a state of war between Panama and the United States.[325] Five days later, President Bush ordered American troops into combat in Panama with several goals. One of those goals was to take Noriega into custody to stand trial for the charges pending against him.[326] Noriega eventually surrendered himself to U.S. officials and was flown to Florida where he was formally arrested by U.S. drug enforcement agents.[327]

In the course of resolving several complex questions flowing from the unusual circumstances of this case, the *Noriega* court was asked to determine whether it could properly exercise jurisdiction over actions taken by the general in Panama.[328] The court addressed the question by first breaking it into two subissues. First, may the United States reach the conduct under traditional principles of international

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[317] United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990).
[318] *Id.* at 1510.
[319] *Id.*
[320] *Id.*
[321] *Id.*
[322] United States v. Noriega, 746 F. Supp. 1506, 1510 (1991).
[323] *Id.*
[324] *Id.* at 1511.
[325] *Id.*
[326] *Id.*
[327] United States v. Noriega, 746 F. Supp. 1506, 1511 (1991).
[328] *Id.* at 1512.

law? Second, do the statutes under which the defendant was charged apply extraterritorially?[329]

In response to the first question, the court quoted Justice Holmes for the proposition that "acts done outside a jurisdiction, but intended to produce or producing effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."[330] The court also observed that one of the factors to be considered in assessing the reasonableness of extraterritorial jurisdiction is the character of the activity to be regulated. This includes the importance the regulating state places on regulating that activity and the degree to which the desire to regulate is generally accepted.[331] The court resolved this factor in favor of maintaining jurisdiction because the United States has the requisite interest in controlling its drug epidemic, it issues its regulations pursuant to an international convention,[332] and Panama has not objected to the United States' regulation of drug trafficking.[333]

Having determined that the direct effect of Noriega's conduct within the United States made extraterritorial jurisdiction appropriate as a matter of international law, the court turned to the question of whether the statutes under which Noriega was charged were intended to apply to conduct outside the United States.[334] The court noted that 21 U.S.C. § 959's prohibition on the distribution of narcotics with the intent of importing them into the United States specifically

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[329] *Id.* These two questions must be answered to determine whether Congress granted the court both prescriptive and subject matter jurisdiction. Turley, *supra* note 90, at 636.

[330] 746 F. Supp. at 1513 (quoting Strassheim v. Daily, 221 U.S. 280, 285 (1911), (citing Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804)) for the proposition that, "[a nation's] power to secure itself from injury may certainly be exercised beyond the limits of its territory.") It is worth noting that getting such a person within the United States' power may not be as problematic in the 1990s as Justice Holmes envisioned. *See* United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1060–66 (1990) (apparently abolishing the application of the Fourth Amendment to federal law enforcement activities directed against non-citizens on foreign soil). But see Mark H. Alcott, et al., New York State Bar Association International Litigation Committee, Commercial and Federal Litigation Section, *The Fourth Amendment Rights of Non-Resident Aliens*, 27 STAN. J. INT'L L. 493 (1991); Richard Downing, Recent Development, *The Domestic and International Legal Implications of the Abduction of Criminals From Foreign Soil*, 26 STAN. J. INT'L L. 573 (1990); Mindy A. Oppenheim, Comment, *United States v. Verdugo-Urquidez: Hands Across the Border—The Long Reach of United States Agents Abroad and the Short Reach of the Fourth Amendment*, 17 BROOK. J. INT'L L. 617 (1991), for the storm of criticism this decision raised.

[331] 746 F. Supp. at 1515 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403(1)(c)(X)).

[332] 746 F. Supp. at 1515 (citing the Single Convention on Narcotic Drugs, 18 U.S.T. 1409, T.I.A.S. No. 6298, New York, March 30, 1961, ratified by the United States, 1967, *amended* 26 U.S.T. 1441, T.I.A.S. No. 8118).

[333] 746 F. Supp. at 1515.

[334] *Id.*

states that it "is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States"[335] and thus found that this statute does apply extraterritorially. None of the other statutes under which Noriega was charged state an express intention to assume extraterritorial effect.[336]

When a statute's language is silent as to its extraterritorial reach, the court observed, a presumption against such application generally applies.[337] The presumption will be rebutted, though, if the nature of the law permits extraterritorial reach and Congress intends the same.[338] The *Noriega* court then used this analysis to determine with little discussion that 21 U.S.C. § 952's prohibition on the importation of "narcotics into the United States from any place outside thereof" applies to conduct that begins abroad.[339] Any contrary interpretation, the court reasoned, would render the statute meaningless.[340] The court then used the same reasoning to retain jurisdiction over the conspiracy to import and the aiding and abetting charges.[341]

The more challenging issues for the court involved determinations of whether the RICO statutes, or the statutes prohibiting the use of interstate travel or facilities used in interstate travel to promote an unlawful activity,[342] should be given extraterritorial effect. The court observed that section 1962(c) makes it unlawful for "*any* person associated with *any* enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity."[343] Similarly, section 1962(d) makes it unlawful for "*any* person to conspire to violate" section 1962(c).[344] The court viewed this language as being all inclusive, not suggesting parochial application,[345] and observed that while Congress' purpose and findings speak

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[335] *Id.* (quoting 21 U.S.C. § 959(c) (1988)).

[336] 746 F. Supp. at 1515.

[337] *Id.* (citing United States v. Benitez, 741 F.2d 1312, 1316–17 (11th Cir. 1984) *cert. denied* 471 U.S. 1137 (1985)).

[338] 746 F. Supp. at 1515 (quoting United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980)) (observing further that the exercise of that power may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved). *Cf.* Turley, *supra* note 90, at 630–31 (indicating that in cases not involving market regulation, such as this, Congress must clearly express its intent that a law apply extraterritorially).

[339] 746 F. Supp. at 1516.

[340] *Id.*

[341] *Id.*

[342] 18 U.S.C. § 1952(a)(3) (1988 & Supp. III 1991).

[343] 746 F. Supp. at 1516.

[344] *Id.*

[345] 746 F. Supp. at 1516.

only of criminal activity in the United States, RICO should be given extraterritorial effect.[346] In doing so, the court reasoned:

> Keeping in mind Congress' specific instructions that RICO be applied liberally to effect its remedial purpose the Court cannot suppose that RICO does not reach such unlawful conduct simply because it is extraterritorial in nature. As long as the racketeering activities produce effects or are intended to produce effects in this country, RICO applies.[347]

The *Noriega* court similarly found that the Travel Act applied extraterritorially. The court reasoned that "by creating a federal interest in limiting the interstate movement needed to conduct certain activities, criminal conduct beyond the reach of local officials could be controlled."[348] Reading the Act broadly, the court believed it "constitutes an effect to deny individuals who act for criminal purposes access to the channels of commerce."[349] Even though Noriega's location was different than the typical defendant under the Travel Act, the court reasoned that "the nature and effect of the alleged activity is the same, and implicates the same congressional desire to reach conduct which transcends state lines."[350] Finding no statutory language that "suggests a restriction based upon the locus of conduct other than that it result in activity crossing state lines,"[351] the court reasoned that "where, as here, the defendant causes interstate travel or activity to promote an unlawful purpose, § 1952(a)(3) applies, whether or not the defendant is physically present in the United States."[352]

After determining that U.S. criminal law proscribed Noriega's conduct in Panama, the court denied his due process claims based on alleged U.S. violations of international law. Noriega asserted that the U.S. invasion of Panama violated the due process clause of the U.S. Constitution, as well as international law.[353] The court cited the *Ker-Frisbie* doctrine and ruled in accordance with it that a court is not deprived of jurisdiction to try a defendant just because the defendant's presence before the court was procured by unlawful means.[354]

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[346] *Id.* at 1517 (citing RICO Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970) 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 1073).

[347] *Id.*

[348] *Id.* at 1518 (quoting United States v. Nardello, 393 U.S. 280, 290 (1969)).

[349] *Id.* (quoting Erlenbaugh v. United States, 409 U.S. 239, 246 (1972)).

[350] *Id.*

[351] *Id.* at n.9 (quoting 18 U.S.C. § 1952 (1988 & Supp. III 1991)).

[352] *Id.* at 1519.

[353] *Id.* at 1529.

[354] *Id.* (citing Ker v. Illinois, 119 U.S. 436 (1880) and Frisbie v. Collins, 342 U.S. 549 (1952), and quoting United States v. Winter, 509 F.2d 975, 985–86 (5th Cir.) *cert. denied*, 444 U.S. 825 (1975)). Here the court followed United States v. Winter, in which the Fifth Circuit declared:

Noriega also argued that the invasion violated international treaties and customary international law.[355] The court again relied on the *Ker-Frisbie* doctrine for the proposition that violations of international law do not deprive a court of jurisdiction over a defendant in the absence of specific treaty language to that effect.[356] The court viewed President Bush's decision to invade Panama as a political question involving foreign policy with which it would not interfere.[357] It also ruled that because treaties are designed to protect the sovereign interests of nations,[358] Noriega had no standing to challenge a violation of international law in the absence of a protest by the sovereign involved.[359]

When this case is viewed as representing a trend in U.S. criminal law that extends the law's reach beyond U.S. borders, the growth in the number of environmental statutes providing for criminal penalties becomes significant. The potential for expanding criminal liability to shape the preferences of those persons whose environmental misdeeds occur beyond U.S. borders but affect the United States is nearly palpable. The analysis that follows argues that the Oil Pollution Act's crimes are an appropriate first step in extending the reach of U.S. environmental law beyond its traditional reach.

IV. Analysis

A. *Existing International Conventions Do Not Reflect the Economic and Environmental Realities of Marine Transportation Today*

Since 1633 the seas have been generally governed by the theories of Hugo Grotius, who advocated freedom on those seas.[360] When the United States saw an advantage in encouraging those freedoms, it

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> We are convinced that under well-established case law of the Supreme Court and this Circuit, a defendant in a criminal trial whether citizen or alien, whether arrested within or beyond the territory of the United States, may not successfully challenge the District Court's jurisdiction over his person on the grounds that his presence was unlawfully secured.

United States v. Winter, 509 F.2d 975, 985–86 (5th Cir.) *cert. denied,* 444 U.S. 825 (1975).

[355] *Id.* at 1532.

[356] *Id.* at 1533 (citing United States v. Postal, 589 F.2d 862 (5th Cir.) *cert. denied* 444 U.S. 862 (1979)).

[357] *Id.* at 1538 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) and Baker v. Carr, 369 U.S. 186 (1962)).

[358] *Id.* at 1533 (citing United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988)).

[359] *Id.* (citing United States v. Hersel, 699 F.2d 18, 30 (1st Cir.) *cert. denied* 461 U.S. 958 (1983)).

[360] *See supra* notes 42–65 and accompanying text.

made every effort to shape international law to its advantage.[361] Environmental concerns on the ocean have thus far bowed to the theories of Grotius[362] as implemented in MARPOL and UNCLOS, applying their complicated systems of flag state enforcement. It is only recently that a combination of several previously unrelated developments in law,[363] legal theory,[364] and policy[365] may coalesce to allow a reexamination of questions regarding the interplay between environmental protection and the freedom of the seas.

When marine pollution first became a concern, it was addressed in international conventions. These developed complicated systems of enforcement that allowed undefined actions to be taken by states other than flag states under limited circumstances.[366] In general, though, these conventions deferred issues of jurisdiction to the developing law of the sea.[367] When read in tandem with the 1954 Convention on the Law of the Sea, MARPOL served merely to strengthen flag state control.[368] When the 1982 U.N. Convention was completed, it addressed pollution concerns in somewhat greater detail but retained a structure that defers to a vessel's flag state for compliance certification and enforcement actions.[369] This legal framework reinforces the "tragedy of the commons" situation, leading all actors to take whatever measures best serve their interests until, finally, the resource is exhausted.[370]

Under this legal regime, any flag state that enforces environmental standards strictly, in effect, would limit the portion of the commons its flag vessels could use. Doing so would force those vessels to "internalize their externalities."[371] If every nation took similar measures, there could be progress in controlling pollution. Unfortunately, this type of stringent enforcement measure also leads to a "prisoner's dilemma" in which other nations have the opportunity to realize a competitive advantage by enjoying the benefits of another country's environmental protection activities while taking limited action at home.[372]

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[361] *See supra* notes 132–36 and accompanying text.
[362] *See supra* notes 42–65, 161–165 and accompanying text.
[363] *See generally supra* III.A, B, and C.
[364] *See supra* III.B.
[365] *See supra* notes 245–50 and accompanying text.
[366] *See supra* note 109 and accompanying text.
[367] *Id.*
[368] *See supra* notes 94–95 and accompanying text.
[369] *See supra* notes 146–48 and accompanying text.
[370] *See supra* notes 76–77 and accompanying text.
[371] *See supra* note 81 and accompanying text.
[372] *See supra* note 86 and accompanying text.

This situation has led developing countries to offer "flags of convenience." Vessels under their control are generally subject to less stringent environmental regulation,[373] so there is a common shift in vessel registry from nations like the United States, with strict environmental regulations, to flag states of convenience.[374] Under the current legal regime, as vessels change their flag of registry from the United States to a flag state of convenience, the percentage of vessels subject to stringent environmental control obviously shrinks.[375]

The solution to the tragedy of the commons problem lies in some mandate from a superior authority or in an agreement among the parties, with sanctions to compel conformance.[376] Under international law, however, there are few mandates from superior authorities. Along with treaties of general principles, nations are governed by customary international law, which is created by consistent and uniform state practice and followed out of a sense of legal obligation.[377] While many provisions of the U.N. Convention on the Law of the Sea have been accepted as declarative of customary international law,[378] the Convention has not been signed by the United States.[379] Moreover, the concept of customary international law leaves some room for change or modification in response to changing circumstances.[380]

B. The Oil Pollution Act Takes a Bold Step Forward in Addressing Today's Marine Pollution Problems

The U.N. Convention on the Law of the Sea was negotiated during the mid 1970s and completed in 1982.[381] During those negotiations, environmental law in the United States was in a nascent stage.[382]

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[373] *See supra* note 112 and accompanying text. *See also* Wang, *supra* note 71, at 332 (indicating that vessels registered in flag of convenience states have the worst records of polluting the oceans).

[374] *See* Dzidzornu & Tsamenyi, *supra* note 73, at 277 n.28. Under the current legal regime, when a nation such as the United States, with strict environmental regulation loses vessels flying its flag, it loses the concomitant control over vessel source pollution and the world loses the environmental benefits of stringent control. *Id.*

[375] *Cf.* Gold, *supra* note 26, at 438 (indicating that one result of United States' adopting strict requirements in Oil Pollution Act is that "a number of responsible operators will continue to serve the U.S. market subject to available insurance coverage, and that importing oil companies will become more and more selective in their choice of carriers.")

[376] *See supra* note 77 and accompanying text.

[377] *See supra* notes 67–71 and accompanying text.

[378] *See supra* note 67 and accompanying text.

[379] *See supra* note 66 and accompanying text.

[380] *See supra* notes 68–72 and accompanying text.

[381] *See* Oxman, *supra* note 63, at 809.

[382] *See supra* notes 237–39 and accompanying text. *See also* Habicht, *supra* note 238, at 10478–79.

While the Convention recognizes a coastal state's ability to protect itself from marine pollution, it limits the state's ability to impose penalties on an offender. Only monetary penalties may be assessed for pollution in the territorial sea unless the pollution is proven to be the result of a willful and serious act.[383]

Since the Convention was negotiated, environmental law has matured. The costs pollution imposes on society have been widely recognized,[384] and Congress has passed a great deal of domestic legislation regarding pollution. As Congress has been asked to deal with progressively more difficult problems, it has turned increasingly to criminal enforcement methods.[385] In doing so, it has apparently recognized the need to shape the preferences of those who would choose to pollute even if doing so would expose them to liability for a monetary penalty.[386] Some have called this response to environmental challenges the New Environmental Paradigm.[387]

Since Congress passed the Oil Pollution Act of 1990, it has been a crime for any person to negligently[388] or knowingly[389] spill oil or hazardous materials[390] in the internal waters,[391] territorial sea,[392] contiguous zone,[393] or exclusive economic zone[394] of the United States. The law

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[383] *See supra* notes 161–62 and accompanying text.

[384] *See supra* notes 241–42 and accompanying text.

[385] *See supra* notes 242–44 and accompanying text.

[386] *See supra* note 268 and accompanying text.

[387] *See supra* notes 241–42 and accompanying text.

[388] *See supra* note 224 and accompanying text.

[389] *See supra* note 225 and accompanying text.

[390] *See supra* note 228 and accompanying text.

[391] *See supra* note 228 and accompanying text. *See also* 33 U.S.C. § 1362(7) (1988) (defining navigable waters to include the waters of the United States, including the territorial sea).

[392] *Id.*

[393] *See supra* note 228 and accompanying text.

[394] *Id. But see* 33 U.S.C. § 1321(b)(3) (1988) (excepting discharges as permitted by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships). MARPOL does not use permits as an enforcement tool so the meaning of what is permitted under the Act could be viewed as ambiguous. The only instance in which the use of this word could aid in the understanding of the statutory language is in the legislative history of the Act that added this language to 33 U.S.C. § 1321(b)(3) (1988). *See* the Act to Prevent Pollution from Ships, Pub. L. No. 96-478, 94 Stat. 427. The legislative history of that Act refers to the prior practice of oil tankers under existing law in these words: "[b]eyond 50 miles [from land] tanker operational discharges are *permitted* while proceeding enroute, if the instantaneous rate of discharge does not exceed 60 liters per mile and the total quantity of oil discharged on a ballast voyage does not exceed one part per 15,000 of the total cargo capacity." (emphasis added). H.R. No. 96–1224, 96th Cong., 2d. Sess. § 3 (1980). The House Report then continues with an explanation of tanker operations and ballasting, the inevitability of mixing oil with water, and how MARPOL tries to reduce concomitant discharges of oil. *Id.* at §§ 5–6. MARPOL, in fact, places stringent technical requirements on the operation of tankers. *See supra* note 103 and accompanying text. The only reading of § 1321(b)(3)(ii)(A) that executes the congressional policy that

provides for criminal fines[395] and lengthy prison terms.[396] This is a clear change from the domestic legal regime that prevailed in the *Exxon Valdez* prosecution.[397]

When it is enforced, the Oil Pollution Act will be used to exercise U.S. criminal jurisdiction beyond the geographical jurisdiction accorded to a coastal state under the U.N. Convention on the Law of the Sea.[398] It will also bring within U.S. criminal jurisdiction a class of persons who have until now been beyond the reach of that jurisdiction. The class of persons that will be subject to liability includes responsible corporate officers.[399] With this addition will come the Justice Department's effort to attribute criminal responsibility to the highest ranking responsible officer.[400]

Because the Oil Pollution Act's amendments incorporated the Clean Water Act's specific reference to responsible corporate officer liability,[401] a major hurdle toward establishing their liability has been removed; there will be no need to prove the Act is a public welfare statute.[402] Moreover, the real debate over the responsible corporate officer doctrine involves the question of whether it imposes criminal liability on corporate officers who lack the necessary *mens rea* when the underlying statute requires knowledge.[403] Under the Oil Pollution

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there should be "no discharge of oil . . . which may affect natural resources . . . of the United States," 33 U.S.C. § 1321(b)(1), is one that would read the statutory words to permit discharge in accordance with the technical requirements of the regulations implemented by MARPOL. There is also an exception to the general rules that makes them inapplicable if a discharge of oil or oily mixture results from damage to a ship or its equipment. *See supra* note 103, regulation 11(b). Here again, this passage must be read with caution. Arguably, all accidental oil spills are preceded by some damage to a ship. Thus, read the wrong way, this clause could conceivably eliminate all liability for any oil spill that occurs after an accident. That reading, though, would frustrate MARPOL's goal of minimizing accidental discharge of oil into the ocean. *See supra* note 102 and accompanying text. The only logical reading of this regulation is that it applies to vessels that spill oil during routine operations as a result of damage to their equipment. This reading is bolstered by two conditions on the applicability of the exception. First, the exception only applies if "all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimizing the damage" and as long as the owner or master has not acted "either with intent to cause damage, or recklessly with knowledge that damage would probably result." *Supra* note 103, regulation 11(b).

[395] *See supra* notes 224–26 and accompanying text.

[396] *Id.*

[397] *See supra* notes 163–204 and accompanying text.

[398] *See supra* notes 158–62 and accompanying text.

[399] *See supra* note 236 and accompanying text.

[400] *See supra* note 250 and accompanying text.

[401] *See* 33 U.S.C. § 1319(c)(6).

[402] *See supra* notes 304–05 and accompanying text; United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991).

[403] *See supra* notes 303–10 and accompanying text.

Act, there are serious penalties associated with negligent violations.[404] While courts have so far been unwilling to experiment with this doctrine, the Oil Pollution Act's negligence standard may provide fertile ground for expanding the *Dotterweich* and *Park* reasoning beyond the narrow framework of strict liability public welfare misdemeanors.[405]

C. United States Courts Should Enforce the Oil Pollution Act's Criminal Penalties Extraterritorially and Against Foreign Nationals

Just as important as the breadth and stringency of the Oil Pollution Act's liability provisions is the question of whether its criminal provisions may apply to foreign nationals beyond U.S. territory.[406] As the *Noriega* case illustrates[407] a trend appears to be developing that is lowering the barriers to prosecution of foreign nationals whose actions outside the United States have some arguable effect inside.

Just as in the *Noriega* court's interpretation of the RICO statutes and Travel Act,[408] the Oil Pollution Act's penalties apply to "any person who negligently . . . or knowingly violates . . . 1321(b)(3)."[409] While this choice of wording alone may not be enough to overcome any remaining presumption against extraterritorial application,[410] other factors argue in favor of such an application. First, the statute on its face applies beyond U.S. territory.[411] Second, its text is not limited to Americans, people on U.S. flag vessels, or people on vessels calling at U.S. ports.[412] Third, Congress clearly intended that the Oil Pollution Act push the progress of international law in the area of monetary compensation.[413] Fourth, there is no legislative history indicating the

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[404] *See supra* note 224 and accompanying text.

[405] *See supra* notes 307–12 and accompanying text; United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 54 (1st Cir. 1991) (refusing to extend the responsible corporate officer doctrine to a statute requiring knowledge but noting in dicta its potential for use in cases not involving a knowledge requirement) (citing United States v. Frezzo Bros. Inc., 602 F.2d 1123 (3d Cir. 1979) *cert. denied* 444 U.S. 1074 (1980)).

[406] Clearly, the Oil Pollution Act, like all laws, applies to U.S. citizens wherever they may be. *See, e.g.*, Noriega, 746 F. Supp. at 1512 n.4.

[407] Along with *Alvarez-Machain*, *Verdugo-Urquidez* and *Yunis*. *See supra* note 315 and accompanying text.

[408] *See supra* notes 342–52 and accompanying text.

[409] *See supra* notes 224–25 and accompanying text.

[410] *See supra* notes 89–90 and accompanying text.

[411] *See supra* note 228 and accompanying text.

[412] *Id.*

[413] Oil Pollution Act, Pub. L. No. 101-380, § 3001, 104 Stat. 507–08 (1990); H.R.CONF. REP. NO. 653, 101st Cong., 2d. Sess. 125–26, *reprinted in* 1990 U.S.C.C.A.N. 779, 803–04. *See also* George

adoption of a narrow interpretation of the Act's criminal provision.[414] Fifth, even if there were a contrary legislative intent, the Supreme Court's current standards for statutory interpretation would not allow a court to rely on that contrary history.[415] Sixth, and perhaps most significantly, the actions that could lead a foreign national to be indicted for violating the Oil Pollution Act's criminal standards would be actions that, when they occur beyond the territorial sea, must have an effect on the resources of the United States.[416]

When considered individually, no one of these factors may be conclusive. Considered together, the factors are at least as persuasive as the *Noriega* court's reasoning allowing the General's prosecution under RICO and the Travel Act.[417] If there is any remaining presumption against the extraterritorial application of U.S. criminal law after *Alvarez-Machain, Yunis,* and *Noriega,* these factors should be sufficient to rebut it.

Interpreting the Oil Pollution Act to apply extraterritorially would also expose corporate officers responsible for environmental affairs to criminal liability in the United States. This would be true regardless of whether the vessel for which the officer is responsible flies the United States flag or a flag of convenience, or whether the officer is physically located in the United States or overseas.

Recent trends and the historical analysis of the law of the sea provide a persuasive answer to the second question framed by the *Noriega* court—whether the United States may reach the conduct under traditional principles of international law. In this regard, the

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J. Mitchell, *Preservation of State and Federal Authority Under the Oil Pollution Act of 1990,* 21 ENVTL. L. 237 (1991).

[414] H.R. CONF. REP. NO. 653, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 779; S. REP. NO. 99, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 750, 770 (describing the purpose of the legislation and indicating that Congress intended to allow prosecutions under the *Hamel* and *Exxon* approach); S. REP. No. 94, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 723 (indicating that the bill tries to consolidate and enhance the oil spill liability and compensation provisions of at least five different statutes, each of which is viewed as different and inadequate); H.R. REP. NO. 200, 101st Cong., 1st Sess. (1989) (discussing increased and criminal penalties under other Acts, in particular, the Ports and Waterways Safety Act, the Intervention on the High Seas Act, the Deepwater Ports Act, and the Act to Prevent Pollution from Ships).

[415] *See* United States v. Ron Pair Enter. Inc., 489 U.S. 235, 241 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (failing to consult legislative history in spite of disputed statutory meaning); Public Citizens v. Dep't. of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) (challenging legislative materials as unauthoritative). *See also* George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History,* 1990 DUKE L.J. 39 (1990).

[416] *See supra* note 228 and accompanying text.

[417] *See supra* notes 342–52 and accompanying text.

Noriega court quoted Mr. Justice Holmes for the proposition that, "acts done outside a jurisdiction, but intended to produce or producing effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."[418] The court then observed that "[a nation's] power to secure itself from injury may certainly be exercised beyond the limits of its territory."[419]

Thus, in determining the reasonableness of exercising extraterritorial jurisdiction, the *Noriega* court relied on the nature of the conduct and the degree to which the desire to regulate is generally accepted. The court observed the United States' strong interest in controlling its drug epidemic, its participation in an international Convention, and the fact that Panama had not objected to U.S. regulation of drug trafficking.[420] In light of these strong interests, the court determined that international law did not preclude the General's prosecution.[421]

Under the Oil Pollution Act, there is a similarly strong interest in regulating against maritime oil spills.[422] Although there is an international Convention whose provisions would weigh against this jurisdiction,[423] it has never been ratified by the requisite number of states including the United States.[424] Furthermore, there remains the question of whether the convention reflects customary international law.[425] Indeed, there is persuasive evidence for the proposition that the Convention's limits on coastal state powers have not attained the status of customary international law.[426] Moreover, the Convention was developed before the nations of the world recognized the strong measures that must be taken to control environmental harm.[427] Instead, the Convention took its current form because the United States had a pressing interest in ensuring the free navigation of its warships when the Convention was being negotiated.[428]

Although the concepts generally thought to underlie the convention have been accepted for over 350 years, they were originally nothing more than an advocate's response to a world situation that was op-

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[418] *See* 746 F. Supp. at 1513.
[419] *Id.* (citing Church v. Hubbart, 6 U.S. (2 Cranch) at 234).
[420] *See supra* notes 328–33 and accompanying text.
[421] *Id.*
[422] *See supra* notes 206–09 and accompanying text.
[423] *See generally, supra* notes 121–62 and accompanying text.
[424] *See supra* note 126 and accompanying text.
[425] *See supra* notes 128–30 and accompanying text.
[426] *Id.*
[427] *See* Hahn & Richards, *supra* note 85; Hedman, *supra* note 241, and accompanying text.
[428] *See supra* notes 134–36 and accompanying text.

pressive to his client.[429] More importantly, while the Convention, MARPOL, and the commentators[430] all seem to have adopted the view that the seas must be governed by a seemingly absolute concept they call the "freedom of the seas,"[431] that absolutism is neither the end for which Grotius argued, nor is it supported by his reasoning.[432]

Any court asked to resolve this question should review the words of Grotius and let history confine the concept of the freedom of the seas.[433] Grotius recognized that a certain type of ownership is necessary for those things which, when used, become less fit for future use.[434] He specifically limited the category of property subject to common use to those things which can be used without loss to anyone else,[435] and he based his conclusion that the seas must be open to free navigation on his understanding that "navigation cannot harm anyone except the navigator himself."[436]

It is now clear that Grotius' belief that navigation does not harm anyone but the navigator does not apply to modern shipping methods.[437] Indeed, a recent study indicates that the risk of serious oil spills greatly exceeds the risk society accepts in other aspects of modern life.[438] The entire MARPOL Convention and the United States legislation that implements it are premised on the need to control and reduce pollution from routine operations of vessel traffic.[439] Moreover, scientists now have evidence that environmental systems do not deteriorate gradually but may maintain their basic integrity until the point of collapse,[440] ". . . at which point the process of decay could no longer be feasibly arrested."[441]

Put plainly and simply, pollution of the ocean from the routine operation of vessels has become "a liability to be borne by the international community as a whole."[442] Because "the ocean is the most

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[429] *See supra* note 45 and accompanying text.

[430] *See e.g., supra* note 73.

[431] *Id.*

[432] *See supra* notes 50–55 and accompanying text.

[433] *See* CARDOZO, *supra* note 10, at 51.

[434] *See supra* note 51 and accompanying text.

[435] *See supra* note 52 and accompanying text.

[436] *See supra* note 55 and accompanying text.

[437] *See supra* notes 28–31 and accompanying text.

[438] *See supra* note 27 and accompanying text.

[439] *See* H.R. REP. NO. 1224, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 4849. *See also* PEARSON, *supra* note 81, at 84–85 for a table indicating that routine tanker operations account for more than twenty-five percent of all oil pollution in the ocean.

[440] *See* KINDT, supra note 2, at 5 (citing Falk, *Toward a World Order Respectful of the Global Ecosystem,* 1 ENVTL. AFF. 251, 252 (1971)).

[441] *See supra* note 31 and accompanying text.

[442] Dzidzornu & Tsamenyi, *supra* note 73, and accompanying text.

sensitive and probably the most abused component" of the environment, continued pollution could lead to the collapse of the oceans' ecosystem sooner than we imagine.[443]

In summary, because of these fundamental changes in the incidents of navigation since Grotius wrote his argument in 1613; because of the emergence of a new environmental paradigm in our nation to which Congress has responded;[444] because Congress has expressed its impatience with the pace of developments in the area of international environmental law;[445] and because the law of the sea is one of the most dynamic and malleable areas of the law, both domestically and internationally,[446] a U.S. court should give precedence to the Oil Pollution Act over the U.N. Convention.[447]

D. *Failing to Apply the Oil Pollution Act Extraterritorially Would Frustrate the Will of Congress*

Failing to apply the Oil Pollution Act extraterritorially would frustrate the Act's purpose.[448] Congress has chosen to adopt a set of stringent criminal penalties that impose varying degrees of punish-

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[443] *See* KINDT, *supra* note 2, at 5.

[444] *See* Hedman, *supra* note 241, at 890–91.

[445] *See* H.R. CONF. REP. NO. 653, 101st Cong., 2d Sess. 126 (1990) *reprinted in* 1990 U.S.C.C.A.N. 779, 805 (indicating the sense of Congress regarding participation in an international regime at least as effective as domestic law).

[446] KINDT, *supra* note 2, at 3. Indeed, the world is already responding favorably to U.S. initiatives to make shipping safer. In March 1992, the International Maritime Organization adopted a resolution to amend Regulations 13F and 13G of the MARPOL Protocol requiring double hulls on tank vessels. *See* Resolution MEPC (32), Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, Mar. 1992, Annex I. (on file with author).

[447] *See* Turley, *supra* note 90, at 632 n.232 (citing case law in support of the proposition that laws passed by Congress have supremacy over international law).

[448] Congress clearly intended to protect U.S. resources by placing severe requirements on ships transitting U.S. waters. In the words of the Senate Committee on Environment and Public Works:

> Spills are still too much of an accepted cost of doing business for the oil shipping industry . . . [t]he costs of spilling and paying for its cleanup and damage is not high enough to encourage greater industry efforts to prevent spills and develop effective techniques to contain them. Sound public policy requires reversal of these relative costs. The Nation's continued heavy dependence on oil will result in increasing transport of oil in tankers through U.S. waters and greater offshore exploration and production in deeper waters and harsher environments. These conditions can only increase the potential for future catastrophic oil spills and the need to prevent such pollution and minimize its damage.

S. REP. NO. 94, 101st Cong., 2d Sess. 3 (1990), *reprinted in* 1990 U.S.C.C.A.N. 723, 724. *See also* Grumbles, *supra* note 3, at 165 (noting that the bill in support of which this report was written was the predecessor of the Oil Pollution Act of 1990); Randle, *supra* note 168, at 10120. Congress

ment based on the geographic location of the vessel spilling oil and the *mens rea* of the accused. Applying these provisions only to American flag vessels, which are subject to the acts of Congress wherever they may be, would permit a great percentage of the ships traversing United States waters to avoid liability altogether, regardless of their culpability.

Such an application of the law would expose Americans and American flag vessels to an extraordinary panoply of penalties to which no one else is exposed. This would, in turn, exacerbate the disparity in regulation between U.S. flag vessels and vessels registered in flag-of-convenience states.[449] The disincentives to register a vessel in the United States or even for a U.S. company to own a vessel and register it under a flag of convenience, would be enormous. Many might be forced to sell their vessels and rely solely on the vessels of other nations.

Aside from the adverse effect this would have on the maritime industry in the United States, it would exacerbate the prisoner's dilemma problem[450] in which underdeveloped flag-of-convenience nations are able to take advantage of the benefits that flow from U.S. environmental regulation by loosening their own. This, combined with the disincentive to register vessels in the United States, could have the net effect of exposing the coastal waters of the United States to potentially greater risk than they now bear. This is clearly not the result Congress intended in passing the Oil Pollution Act.

The Oil Pollution Act should instead be viewed as Congress' latest word in responding to the emerging environmental paradigm. Congress recognized the costs of oil spills and expressed its desire to minimize the damage society suffers from those spills.[451] In formulating its new policies, Congress observed that the shipping industry too readily accepts oil spills as a cost of doing business and expressed its intent to raise industry's costs to encourage it to prevent spills.[452] To

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chose to protect those resources with sweeping new language, an extensive scheme for imposing monetary liability, and criminal penalties. *See supra* notes 220–26 and accompanying text. Unfortunately, the legislative history on the criminal provisions is too sketchy to be useful in interpreting the statutory language. *See supra* note 220. Thus, as Justice Cardozo explained, "when [judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance." CARDOZO, *supra* note 10, at 67.

[449] *See supra* notes 373–75 and accompanying text.

[450] *See supra* note 86 and accompanying text.

[451] *See supra* note 448 and accompanying text.

[452] *See supra* note 448 and accompanying text. *See also* Mitchell, *supra* note 413 (expressing one senator's vehemence on this point); Boos, *supra* note 112 (analyzing the effect of the Act's substantive requirements on vessels registered in nations other than the United States).

do so, Congress imposed criminal penalties that provide for lengthy prison terms.[453]

By including lengthy prison terms, Congress apparently rejected the older view that criminal penalties involving incarceration are merely substitutes for monetary penalties.[454] It appears, instead, to have adopted Professor Dau-Schmidt's view that imposing incarceration is a more effective way to shape preferences than imposing financial penalties.[455]

The Act should be interpreted in a manner that recognizes the increasing attention Congress is paying to the environment[456] and the pervasive growth in the use of congressionally mandated criminal penalties[457] to shape the preferences of those who might choose to pollute despite the monetary penalties associated with doing so.[458] Indeed, such a broad interpretation of the Oil Pollution Act offers the only potential solution to the "tragedy of the commons" problem.[459]

In order to implement this broad interpretation of the Oil Pollution Act, the United States must be willing to assume a position of leadership in a new international regime. That regime would use tools such as the Oil Pollution Act's criminal penalties to reach a new balance between environmental concerns and the freedom of navigation. Achieving this new balance would require regime members to reject the prevailing view of the law of the sea, refusing to continue destroying the world's oceans while paying fealty to the words of a Convention that reflects neither the needs of today's world, nor the principles that were meant to shape it.

V. Conclusion

The Oil Pollution Act of 1990 has given the President power to express the country's moral outrage at those who carelessly pollute the marine environment. He may now choose to criminally prosecute those responsible for marine disasters. Doing so, however, would require him to adopt a new interpretation of the law of the sea. By

[453] *See supra* notes 222–26 and accompanying text.

[454] *See supra* notes 254–60 and accompanying text.

[455] *See supra* note 278 and accompanying text.

[456] *See supra* notes 241–42 and accompanying text.

[457] *See supra* notes 243–45 and accompanying text.

[458] *See supra* notes 267–68 and accompanying text. Congress clearly intended to raise the cost of spilling oil to a level high enough to change behavior in the shipping industry. *See also supra* note 448 and accompanying text.

[459] Stringent enforcement of the Oil Pollution Act and similar laws in other nations could serve as the mandate and sanctions needed to solve tragedy of the commons problems. *See supra* notes 76–86 and accompanying text.

enforcing the Oil Pollution Act's criminal provisions beyond its territorial sea or within the territorial sea for spills that do not rise to the level of willful and serious, the United States would be exercising greater power than that allotted to coastal states under the U.N. Convention on the Law of the Sea.[460]

The exercise of this jurisdiction is authorized by a strict interpretation of the Oil Pollution Act[461] and would carry out the intent of Congress.[462] No U.S. court should dismiss such a case because it sees a violation of international law.[463] Instead, a court should recognize the decision to prosecute as a political question and defer to the President's judgment.[464] The use of criminal sanctions to protect the marine environment recognizes the environmental paradigm that has emerged to govern our society since the 1982 U.N. Convention on the Law of the Sea was negotiated.[465] The use of these sanctions also recognizes that pollution of the oceans is an economic externality imposed on society by a relatively few actors.[466] The threat of criminal sanctions should help shape the preferences of those who would choose to cause such an externality,[467] and the application of those sanctions in a few highly visible cases should serve the Justice Department's goals of deterrence.[468]

Some may argue that exercising this power would show a lack of respect for international standards that amounts to lawlessness[469] or could lead to retaliation by other states.[470] Customary international law, however, is a malleable concept.[471] Its malleability has led the world to adopt an all powerful concept of freedom of navigation. Today's version of that concept has grown beyond that conceived by Hugo Grotius and is out of line with the needs of the modern world.[472]

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[460] *See supra* note 398 and accompanying text.

[461] *See supra* notes 411–12 and accompanying text.

[462] *See supra* notes 451–59 and accompanying text.

[463] *See supra* notes 444–47 and accompanying text.

[464] *See supra* note 357 and accompanying text.

[465] *See supra* notes 241–42 and accompanying text.

[466] *See supra* notes 78–82 and accompanying text.

[467] *See supra* notes 267–79, 448, 458 and accompanying text.

[468] *See supra* note 247 and accompanying text.

[469] *See* Noriega, 746 F. Supp. at 1537 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1978) (Brandeis, J., dissenting) ("If the government becomes a law breaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy . . . [and] would bring terrible retribution.").

[470] *Id.*

[471] *See supra* notes 68–69, 71–72 and accompanying text. *But see* Sohn, *supra* note 70, at 271 (giving the concept a greater degree of structure).

[472] *See supra* notes 428–37 and accompanying text.

Furthermore, enforcing the Oil Pollution Act against American vessels and not against others could lead American flag ships to seek flags of convenience in other nations.[473] If this happens, aggressive enforcement of the Oil Pollution Act would, ironically, expose U.S. waters to an even greater risk of pollution.[474]

To avoid this result, some will no doubt argue that the best solution is to amend the Oil Pollution Act to comport with a particular view of international law or to not enforce it at all.[475] These solutions are, of course, no answer. They are retrenchments. They would call on Congress to admit that it did not mean what it said. This argument would only be made by those with vested interests in polluting the environment, who are resisting the push to internalize the costs they impose on society, but whose attention has nonetheless been keenly focused by the risk of criminal penalties.[476]

With the emergence of the new environmental paradigm in the United States and with concern for the environment growing around the world,[477] perhaps the time has come to challenge the status quo. Perhaps the nations of the world should reread the words of Hugo Grotius to see just how badly the current law distorts his initial reasoning. Perhaps in doing so, the world will realize that the old UNCLOS rule is missing its aim and can no longer justify its existence.[478]

Grotius' ideas were indeed prescient in their day. His words better accommodate the exigencies of modern shipping than the rules developed just ten years ago, presumably following his lead. Perhaps the time has come for the United States to lead the way to a new understanding of Grotius' freedom of the seas. Perhaps the new rule will "let the welfare of society fix [its] path. . . ."[479] Perhaps the day is closer than we realize when we will no longer hear of oil tanker captains running twenty-five million gallons of oil onto the rocks, exposing us all to another marine disaster, only to hear, "Under international law, I don't think the Captain can be charged, but one must question the prudence of his seamanship."[480]

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[473] *See supra* notes 373–75, 449–50 and accompanying text.

[474] *See supra* notes 449–50 and accompanying text.

[475] *See, e.g.*, Gold, *supra* note 26, and accompanying text.

[476] *See supra* note 249 and accompanying text.

[477] *See* Richard J. Williamson, Jr., *Building the International Environmental Regime: A Status Report*, 21 U. MIAMI INTER-AM. L. REV. 679 (1990); *See also* HAFKAMP, *supra* note 83, at 17.

[478] CARDOZO, *supra* note 10, at 66.

[479] *Id.* at 67.

[480] *See* Wills, *supra* note 1, and accompanying text.