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Discretion and the Criminalization of Environmental Law

by

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Abstract

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

I. INTRODUCTION

Environmental crimes are relatively new to the American legal landscape and attitudes toward them are far from uniform. While many believe criminal law to be an uncommonly effective means of environmental regulation, society has yet to reach a consensus about the moral seriousness of environmental harm. Some believe that crimes against the environment lack the moral weight of crimes against persons, and that they should therefore be dealt with by compliance orders, injunctions, and fines. At the other end of the spectrum are those who find certain harms to the environment so serious that even accidental violations may merit prison time.

Given this wide range of views, the broad language of these statutes, and the short history of environmental criminal law, prosecutors and courts will inevitably differ in their approaches to the prosecution, conviction and sentencing of environmental crimes. However, commentators on both sides of this divide have warned that the law leaves a dangerously wide gap for variances in the charges (or plea bargains) sought by prosecutors. They warn that this gap allows two acts of identical environmental harm to be dealt with quite differently. When all is said and done, certain violators may receive jail time while others, who have committed substantially the same act, are consciously ignored.¹

Some argue, on behalf of criminal defendants, that this variability leaves little hope of anticipating punishment.² Worse still, sanctions may be so harsh and discretion so broad that

¹ See generally Jane Barrett, *Sentencing Environmental Crimes under the United States Sentencing Guidelines: A Sentencing Lottery*, 22 ENVTL. L. 1421 (1992).

² Keith Onsdorff, *The Double Standard of Prosecutorial Discretion in Environmental Cases: Why Adopting Objective Standards is Crucial to Affirming the Rule of Law*, 158 N.J. L.J. 255 (1999).

even innocent defendants are effectively forced to take a guilty plea *in terrorum*.³ Others argue that Federal agencies have been lax in their enforcement of Federal environmental crimes like water pollution,⁴ and that courts have not taken them seriously. This leads commentators on both sides of the environmental law debate to argue for statutory limits on the exercise of discretion by prosecutors, courts, or both in the environmental criminal justice system.

This paper uses the Clean Water Act as a test case to examine the role of discretion in the Federal environmental criminal statutes, through the dual prisms of economics and criminal justice. We ask, is discretion more broad in the environmental law than in other bodies of criminal law? If so, is there an economic justification for this? Where does discretion exist in environmental enforcement? What sort of discretionary regime would be the most efficient? Finally, would that system be just?

A. Prosecutorial Discretion

[T]here is a complete absence of a...societal agreement when it comes to environmental law violations. Indisputably, no consensus exists among regulators, enforcers, prosecutors or within the general public on how federal and state enforcement authorities should respond to environmental violations ...alleged infractions addressed by one agency with the proverbial "slap on the wrist"...will be handled by a different agency in another locale by seeking to prosecute the alleged violator under a felony criminal statute.

Keith A. Onsdorff⁵

³ See David A. Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1412 (2002):

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

⁴ U.S. PUBLIC INTEREST RESEARCH GROUP, PERMIT TO POLLUTE: HOW THE GOVERNMENT'S LAX ENFORCEMENT OF THE CLEAN WATER ACT IS POISONING OUR WATERS (2002).

⁵ Onsdorff, *supra* note 2.

In the United States, prosecutors enjoy nearly unfettered discretion in criminal prosecution.⁶ It is generally limited only by the Constitution and the ethics rules of prosecutors.⁷ Although prosecutorial discretion consists of many different judgments, it may be usefully divided into three parts: the discretion to charge (the “charging function”), the decision to seek particular charges (the “selection function”),⁸ and the decision to decline to prosecute.⁹

A criminal defendant may only challenge the decision to charge under the Constitution, on equal protection (in the case of “selective prosecution”) or due process grounds¹⁰ (“vindictive prosecution”). These challenges very rarely succeed. Moreover, prosecutors are immune from civil liability for the decision to charge.¹¹ Thus, if a challenge is successful, it results merely in the charges being dropped. Only if prosecution is “vexatious, frivolous, or in bad faith” will an acquitted defendant even be awarded attorney’s fees.¹²

If the decision is made to charge a violator, the type and severity of charges sought is also largely within an administrator's or prosecutor's discretion. While a prosecutor may only

⁶ In general, legislatures and courts rarely have taken steps to interfere with the prosecutorial exercise of discretion in the charging function; as a result, particularly in regard to review autonomy, prosecutors act with nearly unfettered independence. Many justifications have been articulated for this maximization of the prosecutor's decision-making. Those advanced or identified by courts, other public officials, and commentators can be grouped in four categories: constitutional separation of powers theories, grounded in the commonly-held view that the prosecutorial function lies in the executive branch of government; deference to prosecutorial expertise; administrative necessity; and individualized justice. According to the proponents of broad discretion, the positive public benefits derived from it dictate that the most appropriate mechanism for monitoring and curbing abuse of the charging function is the electoral process, not legal regulation.

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

⁷ For the ethical rules of federal prosecutors, see Citizens Protection Act of 1998, 28 U.S.C. § 530(B).

⁸ Krug, *supra* note 6, at 645.

⁹ Karen M. McGaffey et al., *Enforcement*, in THE CLEAN WATER ACT HANDBOOK 196 (Parthenia B. Evans ed., 1994).

¹⁰ Krug, *supra* note 6, at 645.

¹¹ *Imbler v. Pachtman*, 424 U.S. 409 (1976).

¹² 18 U.S.C § 3006(A), the “Hyde Amendment,” provides that: “[A] court, in any criminal case may award to a prevailing party a reasonable attorney’s fee and other litigation expenses, where the court finds that the [government’s] position . . . was vexatious, frivolous, or in bad faith, unless . . . [it] finds that special

proceed if there is “probable cause” to believe that the defendant committed the act in question, the choice between the maximum penalty for that act or a lesser included offense is within prosecutors’ discretion.¹³ This leaves prosecutors a great deal of leverage to negotiate plea bargains. Since plea bargains have traditionally accounted for ninety percent of all criminal convictions,¹⁴ prosecutors’ discretion to negotiate deals is hugely influential on criminal outcomes. Moreover, this influence appears to be increasing. There is evidence to suggest that fewer cases are going to trial today than ever before; only five percent of cases going to trial in 2002, down from fifteen percent in 1962.¹⁵

Discretion to decline to prosecute is also broad.¹⁶ For example, although the enforcement section of the Clean Water Act states that the Environmental Protection Agency “shall” take enforcement action when it discovers a violation, courts have generally upheld the Environmental Protection Agency’s discretion to decline to do so.¹⁷

The government’s discretion to prosecute environmental crimes is not explicitly wider

circumstances make such an award unjust. 18 U.S.C § 3006(A).

¹³ Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 713 (1998).

¹⁴ *Id.*

¹⁵ *Trials Seem a Vanishing Piece of the Legal Landscape*, ARIZ. DAILY STAR, Dec. 14, 2003, at A15.

¹⁶ This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion. See *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869). This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency’s construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

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

than its discretion to prosecute federal crimes generally. However, the contentious nature of the environmental criminal statutes leads some commentators to suggest that prosecutors in this area have too much power and too few constraints.¹⁸ It is alleged that vagueness in the statutes themselves,¹⁹ civil and criminal penalties which largely overlap, and lack of moral consensus or clear prosecutorial guidance with respect to these crimes forces prosecutors to impute their own values. As such, critics argue, environmental laws are particularly open to arbitrary, or even politicized, enforcement.

Other commentators hold that this picture is further aggravated by the removal of criminal intent from environmental crimes.²⁰ It is widely held that environmental crimes have become crimes of “strict liability.”²¹ Crimes of strict liability (which are rare) may be committed without intending to do so, as no showing of intentional wrongdoing is required to sustain their conviction. Critics find this erosion of intent in two judicial doctrines “the public welfare” doctrine and its corollary the “responsible corporate officer” doctrine. Abolishing intent, it is argued, erases the threshold between civil and criminal sanctions, and grants prosecutors a blank check to seek any sanctions they please.²²

In this uncertain environment, critics allege, the regulated community may not understand

¹⁷ McGaffey et al., *supra* note 9, at 196.

¹⁸ See Joshua D. Yount, *The Rule of Lenity and Environmental Crime*, 1997 U. CHI. LEGAL F. 607, 620 (advocating the application of the rule of lenity to soften the dangers of inconsistent enforcement: “[A]mbiguity permits selective and arbitrary enforcement. In the environmental realm, where enforcement is committed to agencies accustomed to administering civil provisions with nearly unfettered discretion, protection from overzealous, unpredictable, and politically motivated prosecutions is necessary.”).

¹⁹ See Barker, *supra* note 3, at 1412.

²⁰ See Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, 15 TEMP. ENVTL. L. & TECH. J. 161, 180 (1996).

²¹ See Kepten Carmichael, *Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint*, 72 IND. L.J. 729. (1996).

²² See Barker, *supra* note 3, at 1412.

when or how they have violated the law,²³ much less anticipate a potential sentence. Overbroad statutes, overlapping penalties, a lack of clear prosecutorial guidance, and lowered burdens of proof for criminal intent, together give prosecutors overwhelming leverage at the plea bargaining table.²⁴ The wide range of penalties available for any given offense (some quite harsh) and low burdens of proof “up the ante” substantially, and may induce even innocent defendants to settle rather than risk taking a case to trial. Finally, when the line is blurred between civil and criminal proceedings, critics argue that violators stand in danger of losing the procedural protections afforded to criminal defendants.²⁵ These critics call for limits on prosecutorial discretion to charge and a return to common law notions of criminal intent.²⁶

At the other end of spectrum, some analysts argue that the Federal agencies and prosecutors are lax in its enforcement of the environmental laws. The prosecutorial discretion to decline to prosecute is being abused, they argue, by prosecutors that refuse to take environmental crimes seriously. For example, a study released in 2002 by the United States Public Interest Research Group found that almost thirty percent of industrial permit holders were had committed serious violations of the CWA during the years 2000-2002.²⁷ Due to prosecutorial discretion and a lack of funding this behavior went unpunished.

²³ See Lynch, *supra* note 20, at 165. (“The explosion of vaguely written environmental rules has spawned a notorious civil liability minefield for the business community. The criminalization of violations of those regulations is making the terrain so treacherous that even lawyers are having difficulty remaining on the right side of the law.”).

²⁴ See Barker, *supra* note 3, at 1412.

²⁵ [The] pretextual crime problem is potentially applicable to environmental crimes. EPA inspectors regularly show up for inspections without a warrant and simply ask for consent to inspect the facilities since consensual searches do not require warrants. Once the inspector has shown his credentials and is lawfully admitted to the property, anything in “plain view” is admissible evidence, and could quickly turn a routine inspection into a preliminary tour for a full-blown criminal investigation.

Id. at 1419.

²⁶ See Yount, *supra* note 18, at 620.

²⁷ *Permit to Pollute: How Enforcement of the Clean Water Act is Poisoning Our Waters*, U.S. WATER NEWS,

Do environmental prosecutors have too much power? A look at the case law of the Clean Water Act suggests that the criticism may have some merit. One way of measuring prosecutorial power and whether the potential for abuse exists is to see if prosecutions have been uniform or arbitrary. Early studies of enforcement of the Clean Water Act suggested that it was being applied inconsistently as between jurisdictions and similarly situated offenders.²⁸

In *United States v. Wells Metal Finishing*,²⁹ prosecutors sought criminal charges. John Wells and his metal finishing company were convicted of knowingly discharging hazardous pollutants in violation of CWA provisions. The discharge contained levels of zinc and cyanide in excess of federal pretreatment limits that inhibited the sludge process of the treatment plant of the City of Lowell (Massachusetts) that flows into the Merrimack River, a drinking supply for numerous downstream communities. Wells was found guilty of systematically discharging wastewater into the municipal water system and was sentenced to fifteen months of imprisonment and one year of supervised release. No fine was imposed.³⁰

In contrast, in *United States v. Gienger Farms*,³¹ farm managers discharged approximately 1.3 million gallons of manure-laden wastewater into ditches draining into Tillamook Bay, in Oregon, without a permit. In addition to polluting the environment with abnormally high levels of nutrients like nitrate and phosphorus, animal waste may contain pathogens directly dangerous to humans, like *giardia* and *cryptosporidium*. In this case, however, the EPA chose to deal with the matter administratively and the farm was assessed a \$20,000 penalty.

Sept. 2002, at 9, <http://www.uspirg.org>.

²⁸ See, e.g., Barrett, *supra* note 1.

²⁹ 922 F.2d 54 (1st Cir. 1991).

³⁰ Dennis Cory & Anna Rita Germani, *Criminal Sanctions for Agricultural Violations of the Clean Water Act*, 4 WATER POL'Y 491 (2002).

An even more troubling scenario involves arbitrary enforcement combined with diminished criminal intent under the responsible corporate officer doctrine. In this scenario, liability for the act in question is not only bumped up from civil to criminal, but imputed to a corporate officer, with no actual knowledge of the conduct, merely on the basis of his or her position in the company. In criminal CWA cases, when harm has been inflicted by a corporation, prosecutors may choose, under the “responsible corporate officer doctrine,” to pursue criminal charges against the officers of the corporation.³² In the early years of the CWA, all of the criminal offenses for which operator liability was available were misdemeanors. In 1987, however, the CWA was amended to effectively allow felony convictions of responsible corporate officers.³³ The possibility now exists that the officers of an offending corporation could *serve time* in one jurisdiction for conduct which, in another jurisdiction, would have attracted only a fine to the corporation itself.

This also appears to have some support in the case law. In *United States v. Johnson*,³⁴ Johnson Properties failed to maintain its wastewater treatment plants. Failure to maintain such plants according to CWA requirements can lead to the release of harmful levels of *Escherichia coli* bacteria and other microscopic organisms which cause intestinal illness in humans and harm aquatic organisms and wildlife. Prosecutors sought criminal charges against Glenn Kelly Johnson, general manager and president of Johnson Properties. He was convicted of failing to maintain the plants and knowing discharge of pollutants. The court sentenced Johnson to thirty-six months in

³¹ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, FY 1996 END OF YEAR ENFORCEMENT & COMPLIANCE ASSURANCE REPORT (1997).

³² Rachel Glickman et al., *Environmental Crimes*, 40 AM. CRIM. L. REV. 413 (2003).

³³ For a more precise explanation of the nature of “felonies” under CWA, see SUSAN F. MANDIBERG & SUSAN L. SMITH, CRIMES AGAINST THE ENVIRONMENT 108 (1997).

³⁴ (E.D. La. June 21, 2000).

prison, three years of probation, and a \$500,000 fine.

Again, by way of contrast, in *United States v. Rockview Farms*,³⁵ a California corporation which owned and operated a dairy farm in Nevada illegally discharged 1.7 million gallons of dairy wastewater contaminated with urine and feces. As in *United States v. Johnson*, exposure to fecal coliform and other pathogens in animal wastes can cause intestinal and other infections in humans and can also be harmful to aquatic life. At sentence, Rockview Farms was fined \$250,000 and was ordered to upgrade the dairy to prevent future discharges; the manager was fined \$5000 and given only three years of probation.

B. Judicial Discretion

Prior to 1984, federal judges enjoyed wide discretion in sentencing decisions. Nevertheless, concerns over unconstrained judicial discretion and sentence disparities for similar crimes provided the impetus for the Sentencing Reform Act of 1984.³⁶ This Act established sentencing guidelines to limit the range of acceptable sentences federal judges could impose on convicted defendants.³⁷ Under the guidelines, a judge must apply the sentence corresponding to the particular criminal offense for which the defendant has been convicted; a judge's discretion to determine the length of a sentence is limited to the narrow range set out by these federal guidelines.³⁸

In April 2003, Congress sought to reduce federal judicial discretion in sentencing criminals

³⁵ No. CR: 98-5331 (E.D. Ca. April 26, 1999).

³⁶ Sentencing Reform Act of 1984, Pub. L. No. 980-473, 98 Stat. 1987, *codified as amended* at 18 U.S.C. §§ 2551-3742 and U.S.C. §§ 991-998.

³⁷ See U.S. Sentencing Guidelines § 2Q1.1-2Q2.1.

³⁸ These ranges are six months or 25% of the minimum, unless the minimum exceeds thirty years. 28 U.S.C. § 994(b)(2).

from this range though the passage of the PROTECT Act.³⁹ A section of this Act, termed the Feeney Amendment, limits the federal judiciary's power to depart downward and requires reports to Congress on any judge who departs from the sentencing guidelines.⁴⁰ In his annual year-end report on the federal judiciary, Chief Justice William Rehnquist lamented the judiciary loss of sentencing authority, and warned that cataloging sentencing data could be "an unwarranted and ill-considered effort to intimidate individual judges in the performance of their duties."⁴¹ Rehnquist further noted that Congress enacted these changes without any consideration of the views of the judiciary, resulting in a break down of "the traditional interchange between the Congress and the Judiciary."⁴² Similarly, in a speech to the American Bar Association last year, Justice Anthony Kennedy echoed these concerns, arguing that mandatory sentencing, a related constraint on judicial sentencing authority, results in unacceptably harsh punishments.⁴³

This political discourse is not limited to the traditional field of criminal law. Seven federal environmental statutes currently contain provisions for criminal penalties. Sentencing of these environmental crimes committed by individuals is governed by Chapter 2 part Q sentencing guidelines.⁴⁴ The recommended sentence reflects a grading system based primarily on the severity of harm caused by the violation and the mental state of the violator.⁴⁵ This scheme creates three categories of environmental offenses: knowing endangerment, knowing or willful

³⁹ Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21 § 401(g), 117 Stat. 650 (2003).

⁴⁰ See David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211, 230-34 (2004).

⁴¹ William H. Rehnquist, *2003 Year-end Report on the Federal Judiciary*, Jan. 1, 2004, <http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html>.

⁴² *Id.*

⁴³ Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting* (August 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

⁴⁴ MANDIBERG & SMITH, *supra* note 33, at 529.

⁴⁵ *Id.*

violations of regulatory requirements, and negligence.⁴⁶ The sentence, however, can be enhanced or reduced at the discretion of the court based on specific characteristics provided by the sentencing guidelines.⁴⁷

The limited judicial discretion provided by these guidelines may create inconsistent results for seemingly similar offenses. For example, Allen H. Frey discharged petroleum-based pollutants into the sewer system. These pollutants released fumes inside the local sewage treatment plant, causing employees to become ill with headaches and nausea. The plant then discharged to an unnamed tributary, however, it is unknown whether pollutants were released into the water system. Because of his action, Frey was charged with two counts of negligently violating the Clean Water Act; he pled guilty to both counts and the court sentenced him to a \$5000 federal fine.⁴⁸

Similarly, Harry E. Washut discharged sewage from a campground RV dump station into a tributary of the Buffalo Fork River, which flows through the Grand Teton National Park just a few miles from the campground. For this act, Washut was charged with two counts of negligently violating the Clean Water Act. He pled guilty to one of these counts and was sentenced to twelve months probation and a \$2,500 fine.⁴⁹

Finally, Leon Baker, a supervisor at a waste water treatment plant, allowed untreated wastes to be discharged directly to the Potomac River. Although Baker was not directly responsible for the discharge, he knew about the ongoing discharge and did not attempt to prevent it. For his part, Baker received six months of home incarceration, twenty-four months of

⁴⁶ *Id.* at 529-30.

⁴⁷ 33 U.S.C. § 1319(c)(1)-(3).

⁴⁸ *United States v Frey*, No. CR: 99-0497 (E.D. Pa. June 16, 1999).

probation, a fine of \$2000, and a \$25 special assessment fee.⁵⁰

In all three of these cases, the defendant was charged under 33 U.S.C § 1319(c)(1) with negligently introducing a pollutant into the sewer that the defendant should have known could cause personal injury or property damage. For this negligent violation, the Clean Water Act requires a minimum penalty of \$2500.⁵¹ And, because these violations constitute criminal acts, they are subject to the federal sentencing guidelines. Under the federal guidelines, the defendants' acts were given an offense level of three; this offense level accords the sentencing judge a range of zero to six months incarceration if the defendant does not have an extensive criminal history. Accordingly, the possible sentence in each of these cases ranges from a \$2500 fine to six months in prison.

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

C. Summing up

Early sentences for significant violations of the CWA varied dramatically, suggesting that

⁴⁹ United States v. Buffalo Valley Resort, Inc., No. CR: 98-01 (D. Wyo. Sept. 14, 1998).

⁵⁰ United States v. Baker, No. CR: 98-2007 (W.D. Ark. Mar. 12, 1998).

⁵¹ 33 U.S.C. § 1319(c)(1).

criminal outcomes under CWA were largely a function of discretion, particularly prosecutorial discretion. Variance in outcomes is of serious concern, particularly from the standpoint of the criminal defendant. A central tenet of our criminal law system is that similar offenses should be punished similarly in different times and at different places. Can we account for these discrepancies? Is discretion too broad, or is there good reason to preserve discretion for environmental statutes like the Clean Water Act? If so, what form should that discretion take?

II. ENFORCEMENT UNDER THE CLEAN WATER ACT

The Federal Water Pollution Control Act,⁵² commonly known as the Clean Water Act (CWA), was intended to restore and maintain the chemical, physical and biological integrity of the navigable waters of the United States.⁵³ The Act provided for two primary means to this goal: funding for water (especially municipal sewer) infrastructure improvement and pollution control.

The primary pollution control provisions seek to control 1) the dredging and filling of wetlands and 2) the discharge of water pollutants. The former are dealt with through the dredge and fill permit program of section 402 of CWA.⁵⁴ Discharge is managed by splitting its sources into two categories, “point” and “non-point,” and dealing with each separately.

Non-point source pollution comes from less definite sources like city streets or industrial parks, often in the form of diffuse runoff.⁵⁵ Under sections 208, 303, and 319, the CWA has attempted to deal with this sort of pollution by mandating the use of “best management

⁵² Federal Water Pollution Control Act, 33 U.S.C. § 1344.

⁵³ § 1251(a).

⁵⁴ McGaffey et al., *supra* note 9, at 136.

⁵⁵ THOMAS F.P. SULLIVAN, THE ENVIRONMENTAL LAW HANDBOOK 284 (16th ed. 2001).

practices” (BMPs) at potentially polluting facilities,⁵⁶ establishing of “total maximum daily loads” (TMDLs) of pollutants in given water bodies, and calling on states to adopt and implement water quality standards.⁵⁷ Due to the uncertainties inherent in non-point pollution, however, this effort has been largely unsuccessful.⁵⁸

Point source pollution comes from a discrete source like a pipe, ship, container or feedlot and is dealt with under Section 402 of the Act by the National Pollutant Discharge Elimination System (NPDES).⁵⁹ NPDES is a regulatory scheme under which permits to discharge pollutants are issued subject to compliance with effluent quality standards and conditioned on the implementation of pollution control technology. NPDES has been very effective at reducing the amount of point source water pollution.

A. The Enforcement Pyramid

Under section 309(c) of the Clean Water Act, criminal liability can arise from 1) any negligent or knowing violation of the Act, 2) knowing endangerment of another person while violating it, 3) false statements made in required reporting under it, and 4) tampering with monitoring equipment.⁶⁰ Felony convictions are at least nominally conditioned on the “knowing” violation of the Act,⁶¹ though, as we shall shortly discuss, this knowledge requirement is diminished in certain important ways.

However, criminal enforcement is but one aspect of the Clean Water Act. Enforcement of the Act may be pursued by a variety of different parties through an array of different vehicles,

⁵⁶ DAVID GETCHES, WATER LAW IN A NUTSHELL 383-85 (3d ed. 1997).

⁵⁷ SAX ET AL., THE LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 898 (3d ed. 2000).

⁵⁸ *Id.*

⁵⁹ GETCHES, *supra* note 56, at 381.

⁶⁰ McGaffey et al., *supra* note 9, at 207-08.

⁶¹ *See supra* note 33.

ranging from state-level administrative fines,⁶² to compliance orders,⁶³ to lawsuits by private parties.⁶⁴ The Environmental Protection Agency (EPA), Department of Justice (DOJ), or both acting together may choose to proceed with a combination of these actions, in what is known as a “parallel proceeding.”⁶⁵ Similarly, a civil action may be pursued by state and federal enforcement jointly.⁶⁶ Prosecution decisions at all levels will be influenced by negotiations with the violator and the government’s discretion to reduce penalties⁶⁷ or drop charges as part of a settlement or plea bargain.⁶⁸ Generally, the environmental legal system is characterized by its flexibility; however, the DOJ retains exclusive authority to prosecute federal environmental crimes.⁶⁹

The primary enforcement actions can be organized into a pyramid descending from criminal referrals (the most rare) to administrative penalties (the most common).⁷⁰ Most often, a CWA case is raised when the offense in question comes to the attention of a regulatory agency, either the EPA or a parallel state environmental agency. The agency has wide discretion in choosing how to enforce the law. Subject to loose administrative guidance, the EPA may choose which cases to decline to pursue, which to leave to state and local enforcement, which to deal with administratively, which to refer to the DOJ for civil action and which to refer for criminal

⁶² The Act provides that the federal government will defer to the state’s enforcement for 30 days. 33 U.S.C. § 1319(a)(1).

⁶³ See 33 U.S.C. 1319(a)(3)

⁶⁴ 33 U.S.C. § 1365.

⁶⁵ UNITED STATES DEPARTMENT OF JUSTICE, U.S. ATTORNEYS’ MANUAL tit. 5, § 11.112 (2003).

⁶⁶ See generally UNITED STATES DEPARTMENT OF JUSTICE IN COOPERATION WITH THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT LITIGATION (2003), http://www.naag.org/issues/pdf/env-joint_enf_guidelines-full.pdf.

⁶⁷ U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF COMPLIANCE AND ENFORCEMENT, CIVIL PENALTY POLICY FOR SECTION 311(B)(3) AND SECTION 311(J) OF THE CLEAN WATER ACT 3 (1998), <http://www.epa.gov/compliance/resources/policies/civil/cwa/311pen.pdf> [hereinafter CIVIL PENALTY POLICY].

⁶⁸ MANDIBERG & SMITH, *supra* note 33, at 506.

⁶⁹ *Id.* at 325.

⁷⁰ See generally Cory & Germani, *supra* note 30.

charges.⁷¹ Once a civil or criminal action has been referred, the DOJ has further discretion to decline to prosecute.⁷²

The table below indicates the maximum penalties which are available for a given violation. The actual assessment of administrative and/or civil penalties is discretionary, but that discretion is subject to administrative guidance. The assessment is made according to a specific list of factors, including the seriousness of the offense and the offender's culpability. These factors are determined for each case, then manipulated and adjusted according to a uniform administrative rubric, producing a bottom line penalty figure.⁷³ While the specific calculation and the bottom line figure in each case are kept confidential for settlement leverage, the procedure itself is public record and is published by the EPA.⁷⁴

The EPA may pursue any permit violation with an administrative order mandating compliance and/or assigning a penalty to the violation. EPA will usually pursue the least resource-consumptive route to enforcement of a given offense, and in most cases this is an administrative order.⁷⁵ An administrative compliance order (ACO) details the violation and commands the offender to return to compliance immediately. Administrative fines are tailored proportionally to the scale of the offense. They are calculated by the number of days the offender is out of compliance. Per day fines are aggregated, and may run up to \$125,000.⁷⁶ Typical offenses include industrial and agricultural toxic leaks and corruption of wetlands in construction projects. Typical cases involve sole proprietors; often municipal sewers,

⁷¹ MANDIBERG & SMITH, *supra* note 33, at 14.

⁷² MANDIBERG & SMITH, *supra* note 33, at 323.

⁷³ *See, e.g.*, CIVIL PENALTY POLICY, *supra* note 67.

⁷⁴ *Id.* at 5.

⁷⁵ SULLIVAN, *supra* note 55, at 304.

⁷⁶ Class I administrative penalties may run as high as \$25,000 in the aggregate. Class II penalties are capped at

construction contractors, and dry cleaners.

Table 1
Clean Water Act Criminal Provisions

Penalties	Fine (per day)	Imprisonment	Both
Any Permit Violation	up to \$25,000	Not available	No
Any Negligent Violation	\$2500-\$25,000	<1 year	Yes
Second Negligent Violation	up to \$50,000	<2 years	Yes
Any Knowing Violation	\$5000-\$50,000	<3 years	Yes
Knowing Endangerment by individuals	<\$250,000	<15 years	Yes
Second Knowing Endangerment	<\$500,000	<30 years	Yes
Knowing endangerment by organizations	<\$1,000,000	n/a	n/a
Knowing false statement	<\$10,000	<2 years	Yes

Source: Cory and Germani (2002)⁷⁷

Factors like substantial harm, a sophisticated offender, or a repeat offender, may magnify the penalty assessed beyond the scope of administrative penalties. If the penalty-assessment rubric produces a bottom-line figure which exceeds the amount available via administrative order, the EPA will refer the case to the DOJ for judicial enforcement.⁷⁸ Civil sanctions are intended to remedy the environmental harm with money damages and fund any clean-up efforts. As such, the Department strives to make them proportional to the harm caused. In civil cases the offender is typically an institution and the offense is often multifaceted. While a single leaky pipe might only merit an administrative sanction, an aging factory causing multiple harms might better warrant civil damages.

B. The Impact of Investigative and Prosecutorial Discretion on the Decision to Charge Criminally

Both administrative and civil penalties are available without any showing of negligence or

\$125,000. 33 U.S.C. 1319(g)

⁷⁷ See Cory & Germani, *supra* note 30.

⁷⁸ CIVIL PENALTY POLICY, *supra* note 67, at 4.

fault by the violator.⁷⁹ In rare cases, knowing or repeated negligent violations of the Act may call for criminal sanctions. Before an offender can be charged with a crime, discretion must be exercised at two levels. The EPA must first exercise its “investigative” discretion in the decision to refer, and the DOJ must then exercise its truly “prosecutorial” discretion in the decision to charge.⁸⁰ Both EPA and DOJ have adopted guidelines for administrators and prosecutors to ensure that enforcement is consistent and that it comports with the goals of the CWA. While these guidelines do constrain each bureaucracy internally, courts have generally held that administrative guidance is not legally enforceable.⁸¹ Discretion remains broad at both levels.

In 1994, EPA Director of the Office of Criminal Enforcement Earl Devaney issued a memorandum detailing criteria to be used in making the decision to seek criminal investigation.⁸² This so-called “Devaney memo” remains the EPA’s primary administrative directive in making the decision whether to deal with a case internally or to send it to the DOJ for criminal enforcement. The Devaney memo makes clear that the EPA’s discretion is not discretion to charge a defendant, but merely to initiate an investigation and perhaps refer the case to DOJ.⁸³ Further, the memo stresses that criminal investigations are to be initiated sparingly. Explicitly acknowledging a scarcity of enforcement resources, the memo calls on the Agency to “maximize its presence and impact through discerning case selection.”⁸⁴

⁷⁹ SULLIVAN, *supra* note 55, at 305.

⁸⁰ *Id.* at 72. Although the names are different, the choices made at each level are very similar. We will therefore consider them both under the umbrella of “prosecutorial discretion.”

⁸¹ Both DOJ and EPA guidelines are published with warnings that are for internal use only and do not have the force of law. Courts have consistently held that these guidelines are intended to convey no legal rights. *See United States v. Blackley*, 167 F.3d 543, 548-49 (D.C. Cir. 1999).

⁸² Memorandum from Director Earl E. Devaney, to all EPA employees working in or in support of the Criminal Enforcement Program (January 12, 1994), <http://www.epa.gov/Compliance/resources/policies/criminal/exercise.pdf>.

⁸³ *Id.* at 3.

⁸⁴ *Id.* at 3.

The Devaney memo sets forth two criteria for selecting cases for criminal investigation: significant harm and culpable conduct.⁸⁵ It breaks these criteria down into factors for consideration. Significant harm may be found if any of the following four factors are found: 1) actual harm, 2) the threat of harm, 3) failure to report an actual or threatened harm, and 4) illegal conduct which “represents a trend or common attitude within the regulated community whereby criminal prosecution may provide a significant deterrent incommensurate with its singular environmental impact.”⁸⁶ Culpable conduct, in turn, breaks down into the following five indicating factors: 1) repeat violations, 2) deliberate misconduct resulting in violation, 3) concealment of misconduct or falsification of records, and 4) business operation of pollution-related activities without a permit or license.⁸⁷

The memo leaves unclear which conditions are necessary and which are sufficient. These guidelines are probably too loose to be helpful to the potential criminal defendant who hopes to anticipate the EPA’s action. The guidelines do, however, establish boundaries for administrators and give structure to EPA decisions.

The truly “prosecutorial” discretion by the DOJ is also limited by administrative guidance. According to the *Principles of Federal Prosecution*,⁸⁸ criminal prosecutions are forbidden without probable cause to believe a federal crime has been committed.⁸⁹ Prosecution should proceed if only there is probable cause to believe such a crime has been committed and the

⁸⁵ *Id.*

⁸⁶ *Id.* at 4.

⁸⁷ *Id.* at 4-5.

⁸⁸ *Principles of Federal Prosecution*, in U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, § 9-27.000 (2d ed. 2000), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

⁸⁹ *Id.* § 9-27.200.

evidence is likely to sustain a conviction.⁹⁰ However, prosecutors are granted discretion to decline to prosecute if 1) no “substantial Federal interest” would be served, 2) the person is subject to effective prosecution in another jurisdiction, or 3) there exists adequate non-criminal alternatives to prosecution.⁹¹ For further guidance, the *Principles* authorize seven factors for consideration in this decision: 1) federal law enforcement priorities, 2) the nature and seriousness of the offense, 3) the deterrent effect of prosecution, 4) the offender’s culpability, 5) the offender’s criminal history, 6) the offender’s willingness to cooperate, and 7) the offender’s probable sentence or other consequences of conviction.⁹² Specifically with regard to the decision to prosecute environmental crimes, the DOJ will consider the following four factors: 1) whether the regulated entity voluntarily discloses its violation or cooperates with the authorities, 2) whether the entity has a pervasive level of noncompliance, 3) whether the entity establishes preventative measures and compliance programs, and 4) whether the entity promulgates its own internal disciplinary actions and produces subsequent compliance.⁹³

Again, prosecutorial discretion at the DOJ is broad and these guidelines offer little predictive power for the potential criminal defendant.⁹⁴ They are, however, illustrative of the goals of enforcement: to prosecute only the most egregious offenses and offenders, to deter the regulated community as a whole, and to foster an environment of cooperation and compliance.

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

⁹⁰ *Id.* § 9-27.220.

⁹¹ *Id.* § 9-27.220.

⁹² *Id.* § 9-27.230.

⁹³ SULLIVAN, *supra* note 55, at 73.

⁹⁴ It is entirely possible that additional guidance exists, but is not available to the public. In *Jordan v. United States Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978), the court held that for purposes of the Freedom of Information Act, 5 U.S.C. § 522 (1994), documents relating to the exercise of prosecutorial discretion by the United States Attorney are not “administrative staff manuals,” releasable to the public under 5 U.S.C. § 552(a)(2).

Once an offender has been convicted or has pled guilty before the court, the judge will sentence the offender to the appropriate sentence under the federal sentencing guidelines. The sentencing process under the federal guidelines is composed of three elements: 1) pre-sentencing investigation by the probation officer 2) pre-sentencing report created by the probation officer, and 3) the trial court sentences the offender at a sentencing hearing.⁹⁵

Federal probation officers are required to make a pre-sentence investigation of the defendant.⁹⁶ When conducting the pre-sentence investigation, the probation officer looks at the various factors that compose the federal sentencing guidelines. The officer considers the history and characteristics of the offender.⁹⁷ The officer also looks at the classification of the offense as well as the classification of the defendant under the sentencing guidelines.⁹⁸ Regarding environmental crimes, the officer will likely consider prior environmental compliance and any subsequent environmental performance.⁹⁹

After the probation officer completes her investigation, she will compile her research into a pre-sentence report. This report will provide the courts with the necessary information from which to sentence the offender under the federal sentencing guidelines.¹⁰⁰ Although the report may contain any information that may help the court in its decision, several elements must be included. These critical components include any conclusions regarding appropriate classification of the offense and defendant, the level of sentence of the offense under the guidelines and the range set, references to any commission policy statement, and an explanation to any factors that

⁹⁵ MANDIBERG & SMITH, *supra* note 33, at 585.

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

⁹⁷ FED. R. CRIM. P. 32(b)(4).

⁹⁸ FED. R. CRIM. P. 32(b)(4).

suggest a sentence outside of the general recommended the guidelines.¹⁰¹ The report may also contain the history and characteristics of the offender, including any prior criminal record, and the offender's financial condition.¹⁰² Nevertheless, the report may not contain any information that might result in harm to the defendant.¹⁰³

The pre-sentence report must be disclosed to both parties thirty-five days prior to the sentencing hearing.¹⁰⁴ The parties then have fourteen days to file objections to any material information included in the report, such as the classification of the offense or range of the sentence or the inclusion of information the party deems relevant.¹⁰⁵ Based on these objections, the probation officer may agree to meet with the party objecting and even conduct further research to correct any discrepancy if needed.¹⁰⁶ The final report must be submitted to the court and parties at least seven days before the sentencing hearing.¹⁰⁷

At the sentencing hearing, the court must allow the parties to comment on the probation officer's determinations on any other matters that pertain to an appropriate sentence.¹⁰⁸ The court, in its discretion, may receive testimony or documentary evidence on behalf of either the offender or the state.¹⁰⁹ After considering all submitted information, the court will sentence the offender according to the federal sentencing guidelines. If the court chooses to depart from the

⁹⁹ MANDIBERG & SMITH, *supra* note 33, at 585.

¹⁰⁰ *Id.* at 587.

¹⁰¹ FED. R. CRIM. P. 32(b)(4).

¹⁰² MANDIBERG & SMITH, *supra* note 33, at 587.

¹⁰³ FED. R. CRIM. P. 32(b)(5).

¹⁰⁴ FED. R. CRIM. P. 32(b)(6)(A).

¹⁰⁵ FED. R. CRIM. P. 32(b)(6)(B).

¹⁰⁶ MANDIBERG & SMITH, *supra* note 33, at 588.

¹⁰⁷ FED. R. CRIM. P. 32(b)(6)(C).

¹⁰⁸ MANDIBERG & SMITH, *supra* note 33, at 589.

¹⁰⁹ *Id.*

guidelines, it must state the specific reasons for the modified sentence.¹¹⁰ Both the offender and the government have a right to appeal the sentence to the next highest court, generally the federal circuit courts.¹¹¹

III. THE LEGAL AND POLICY DEBATES OVER DISCRETION

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

As we have discussed, environmental violators may be held strictly liable for administrative and civil violations. It is commonly argued that violators may also be held strictly liable for both misdemeanor and felony criminal violations; that environmental crimes are crimes of strict liability. If true, environmental crimes represent a deviation both from basic principles of fairness and the common law.¹¹² Intuitive fairness seems to tell us that criminal penalties entail moral punishment, and are not appropriate absent an immoral choice. Moreover, at common law, criminal penalties required a positive showing of fault. Procedurally, strict liability eliminates that showing, lowering the burden for prosecutors.¹¹³ By making convictions in this area much easier to obtain, it could be argued, Congress and the courts have unreasonably broadened both the prosecutor's power and possible range of outcomes available to a given offender.

¹¹⁰ 18 U.S.C. 3553(c).

¹¹¹ 18 U.S.C. 3742. Applications of the guidelines are reviewed *de novo* as to legal issues and on a clearly erroneous standard to factual issues. Mixed questions of law and fact are reviewed under the clearly erroneous standard. MANDIBERG & SMITH, *supra* note 33, at 591.

¹¹² "For several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more types of fault (intention, knowledge, recklessness, or—more rarely—negligence)." 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* 381 (2d ed. 2003).

¹¹³ Doubtless with many such crimes the legislature is aiming at bad people and expects that the prosecuting officials, in the exercise of their broad discretion to prosecute or not to prosecute, will use the statute only against those persons of bad reputation who probably actually did have the hard-to-prove bad mind, letting others go who, from their generally good reputation, probably had no such bad mental state.

Id. at 382.

1. Mens Rea and the Criminal Common Law

At common law, conviction of a criminal offense required both a criminal act, or *actus reus* and a criminal state of mind, or *mens rea*.¹¹⁴ *Mens rea* (“guilty mind”) was the chief distinguishing characteristic of criminal law. While tort law was intended to remedy undesirable acts and occurrences, criminal law sought to punish immoral behavior as such. Generally, *mens rea* was thought to exist when the prosecutor could show that the accused had committed the crime in question with some degree of “vicious will.”¹¹⁵

In this century, Congress and courts have adopted strict liability for some crimes,¹¹⁶ especially regulatory crimes, including at least some environmental crimes.¹¹⁷ They have departed from the *mens rea* principle of common law under two relatively new doctrines, the “public welfare” and “responsible corporate officer” doctrines. Both of these doctrines, it is alleged, assign criminal liability without regard to intent.

2. Regulatory Crimes and the Public Welfare Doctrine

It is argued that *mens rea* was not problematic at the common law because the sort of acts that constituted crimes (*e.g.* intentionally killing someone) would also have been considered

¹¹⁴ COLIN HOWARD, STRICT RESPONSIBILITY 3 (1963) (“It is true that in the early law there appears to have been an emphasis on the nature and degree of harm done rather than on the moral guilt of the defendant; but the consensus of learned opinion is that at no stage did the law dispense altogether with the *mens rea* concept.”)

¹¹⁵ Admittedly, the degree of “will” that a prosecutor needed to show in court varied. Some crimes were available on a mere showing of negligence. Negligence is arguably not “willful,” but it does require a positive showing in court. The prosecutor must be able to prove that the accused had a duty and that duty was breached. While crimes of negligence are in some ways similar to crimes of strict liability, these additional hurdles demand some proof of culpability.

¹¹⁶ Usually, but not always, the statutory crime-without-fault carries a relatively light penalty—generally of the misdemeanor variety. Often, this statutory crime has been created in order to help the prosecution cope with a situation wherein intention, knowledge, recklessness, or negligence is hard to prove, making convictions difficult to obtain unless the fault element is omitted.

¹ LAFAVE, *supra* note 112, at 381.

¹¹⁷ It is not clear that all of the environmental crimes are public welfare offenses. See Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1204 (1995).

morally wrong *a priori*. As such, anyone who intentionally committed an act that violated the common law would have been conscious of his or her wrongdoing, and would therefore have *mens rea*.

However, with the growth of the government's role as a regulator at the turn of the 20th Century, a new class of crimes focused on the protection of the public interest. It was argued that Legislatures and Congress passed laws criminalizing behavior which, although not evil in the traditional sense, was nevertheless detrimental to public welfare. As Susan Mandiberg noted:

These new "light police offenses" addressed behavior related to consumer protection, regulation of resources, business practices, and other similar problems. The basic activities covered by these statutes were socially desirable. True, people could conduct the activities in ways that might harm others (for example, selling spoiled milk could cause illness). However, people who chose to use questionable methods did not choose to do wrong in the traditional "sin-laden" sense of the word; some, no doubt some thought that they did not choose to do wrong in any sense at all. Awareness of engaging in the behavior was not necessarily awareness of any wrongdoing, and thus could not prove *mens rea*.¹¹⁸

Courts struggled with *mens rea* in this context. While a murderer doubtless knows that she has committed both a moral and legal transgression, the seller of spoiled milk could conceivably not know his behavior is illegal. That is, she might have *acted* intentionally, but without intending to break the law. Though the ancient maxim holds that "ignorance of the law is no excuse," regulatory crimes raised the possibility of a *bona fide* "mistake-of-law" defense.

Nevertheless, Congress had criminalized these acts, and courts sought ways to ways to make them comport with *mens rea*. Courts adhering to traditional notions of criminal law and aiming at moral punishment, found *mens rea* only on a showing that the defendant had knowingly evaded the law and thus committed a moral transgression. This, in effect, legitimized

the “mistake-of-law” defense. Courts of a more utilitarian mindset, aiming solely at deterrence, eliminated *mens rea* for these crimes entirely and imposed a strict criminal liability. These courts disallowed both the “mistake-of-law” defense and the “mistake-of-fact.”

While utilitarian and pragmatist theories of criminal justice held sway at the turn of the 20th Century, American courts have since largely moved back towards traditional retributive theories of punishment. Accordingly, the Supreme Court has attempted to move away from strict liability and has articulated a new jurisprudence for regulatory crimes. This jurisprudence attempts to address the enhanced range of criminalized conduct that exists under the regulatory state while still respecting the moral agency of criminal defendants.

Today, traditional concepts of *mens rea* apply to regulatory crimes generally. However, certain regulatory crimes qualify as “public welfare offenses” and are subject to the public welfare doctrine. Mandiberg argues that the public welfare doctrine reaches those defendants who are unaware that their behavior is immoral and illegal and who would therefore not have *mens rea* at common law. Splitting the difference between the traditionalist and utilitarian rules discussed above, the contemporary public welfare doctrine permits a “mistakes-of-law” defense, but effectively subjects that mistake to a reasonableness test.¹¹⁹

Distilling a line of cases that begins with *Morissette v. United States*,¹²⁰ Mandiberg argues the doctrine provides that, for public welfare offenses, an awareness of wrongdoing will be imputed when the defendant acted intentionally and “a reasonable person should know” that her behavior “is subject to stringent public regulation and may seriously threaten the community’s

¹¹⁸ *Id.*

¹¹⁹ *But see* Allen Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999) (rejecting the “mistake-of-fact/mistake-of-law” distinction, and arguing instead for an underlying principle of “constitutional innocence”)

health or safety.” To qualify as a public welfare offense, an activity must be both “dangerous” and “uncommon.” Examples of public welfare offenses include the possession of a hand grenade and the transportation of hazardous materials without the proper license.

Mandiberg argues that, while it is partially true that the public welfare doctrine has diminished common law *mens rea*, it does not impose true strict liability. Rather, it represents a move from a subjective standard of *mens rea* (did the offender actually know hand grenades are illegal) to an objective one (would a reasonable person have known hand grenades are illegal). In all cases, she argues, conviction requires the defendant’s awareness of the *action*, if not its immorality and illegality. The public welfare doctrine, therefore, in keeping with ancient maxim, merely denies ignorance of the law as an excuse.

3. Vicarious Liability and the Responsible Corporate Officer Doctrine

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

David C. Fortney¹²¹

The responsible corporate officer (RCO) or “responsible share” doctrine is closely connected to the public welfare doctrine and is applicable to public welfare offenses if the statute so authorizes.¹²² Under the responsible corporate officer doctrine, a corporate officer may be held criminally liable for actions committed by her subordinates without her knowledge. The

¹²⁰ *Morrisette v. United States*, 342 U.S. 246 (1953).

¹²¹ David C. Fortney, *Thinking Outside the Black Box: Tailored Enforcement in Environmental Criminal Law*, 81 TEX. L. REV. 1609 (2003).

¹²² See Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681, 706-07 (2003).

doctrine requires that prosecutors show that the officer held a position that conferred the authority to prevent or correct the violation. Officers who can prevent and control the violation are presumed to have knowledge of the law.

The RCO doctrine stems from the 1943 case of *United States v. Dotterweich*,¹²³ in which the Supreme Court affirmed the conviction of the president of a pharmaceutical company for his company's violation of the Federal Food, Drug, and Cosmetic Act (FDCA)¹²⁴ without any evidence that he participated in or was even aware of the violation. The Court reasoned that "the purposes of [the FDCA] touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection."¹²⁵ The court cited the public welfare cases as support for the notion that criminal law had now become a legitimate and necessary means of regulating industrial conduct and redistributing risks. This regulation was aimed at preventing certain outcomes (in this case "misbranding" of drugs), and so, as the Court stated, "it is clear that shipments like those now in issue are 'punished by the statute if the article is misbranded [or adulterated] and that the article may be misbranded [or adulterated] without any conscious fraud at all.'"¹²⁶ In other words, criminal liability is established by the simple fact that the statute was violated and that liability may be imputed to anyone the statute authorizes without regard to their own knowledge or that of their subordinates. The responsible corporate officer doctrine is thus a doctrine of both strict and vicarious liability.

Both strict and vicarious liability evolved in tort law. Strict liability, has been a feature of

¹²³ *United States v. Dotterweich*, 320 U.S. 277 (1943).

¹²⁴ 21 U.S.C. § 331.

¹²⁵ *Dotterweich*, 320 U.S. at 280.

¹²⁶ *Id.* at 281.

tort since the 19th Century.¹²⁷ Although vicarious liability seems in some ways a subset of strict liability, vicarious liability actually predates it. Vicarious liability may in fact have ancient origins,¹²⁸ but we know that it entered the English common law in the early 18th Century.¹²⁹

Today, under the doctrine of *respondeat superior*, employers are liable for the tortious conduct of their employees, if those employees were acting within the scope of their employment. Vicarious tort liability is relatively uncontroversial.¹³⁰ It likely reflects a utilitarian judicial decision to force business to bear the risks of its conduct by allocating liability to those in the best position to adopt and enforce safe practices.¹³¹ In criminal law, however, both strict and vicarious criminal liability are extremely controversial.¹³² Although its constitutionality has been upheld,¹³³ strict criminal liability has, according to Professor Alan Michaels, been “bemoaned”¹³⁴ by critics since its inception, enduring “decades of unremitting academic condemnation.”¹³⁵ The controversy exists even though the vast majority of strict liability crimes are misdemeanors.

¹²⁷ See Jed Handelsman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 YALE L.J. 333 (2000).

¹²⁸ W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 500 (5th ed. 1984) (“Not only the torts of servants and slaves, or even wives, but those of inanimate objects were charged against their owner.”).

¹²⁹ Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1746. (“[Vicarious liability] seems to have entered the common law of England only around 1700 through a series of opinions, most of them authored by Justice Holt.”).

¹³⁰ *Id.* at 1745. (stating that “[T]here is now a consensus among those Americans who think about tort law that vicarious liability is an essential element in the tort system. Any idea of repealing vicarious liability would seem to us preposterous, inconceivable,” but going on to argue that repeal is, in fact, conceivable).

¹³¹ Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1235 (1984) (“Empirically, principals are usually better risk bearers than their agents. Agents are often individuals of limited means who may be quite risk averse as to the prospect of even modest financial losses. Principals, by contrast, are often wealthier individuals, and intuition suggests that aversion to risk of a given magnitude often declines as wealth increases.”).

¹³² The consensus may be summarily stated: to punish conduct without reference to the actor’s state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventative or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of mens rea.

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

¹³³ 1 LAFAVE, *supra* note 112, at 388.

¹³⁴ See Michaels, *supra* note 119, at 844.

Today, even after *Dotterweich*, strict liability under the FDCA is available for misdemeanors only.¹³⁶

Nevertheless, the 1987 amendments to environmental laws, including the Clean Water Act, authorize *felony* criminal liability; the statute expressly authorizes liability for responsible corporate officers. “If the doctrine were strictly followed as the Supreme Court originally formulated,” states Dean Miller, “it would result in a form of strict criminal liability. A corporate official could be convicted of a felony based merely on the official’s position in the company.”¹³⁷ As this doctrine amplifies the already broad discretion wielded by prosecutors, sanctions begin to look frighteningly unpredictable.

B. The Policy Debate: Judicial Discretion and Sentencing Uniformity

In an effort to remedy the previously non-directed criminal sentencing process, Congress enacted the Comprehensive Crime Control Act of 1984.¹³⁸ This legislation empowered the United States Sentencing Commission to create the federal sentencing guidelines, which became effective November 1, 1987.¹³⁹ The guidelines, formulated for the express purpose of controlling judicial discretion, had three basic policy goals: honesty, uniformity, and proportionality.¹⁴⁰

Under the previous sentencing scheme, judges had discretion to impose any sentence from probation to the statutory maximum; they did not have to provide reasons for a particular

¹³⁵ *Id.* at 831.

¹³⁶ Office of Civil Litigation, United States Department of Justice, *The Federal Food, Drug, and Cosmetic Act (FDCA)*, at <http://www.usdoj.gov/civil/ocl/monograph/fdca.htm> (last visited May 1, 2004).

¹³⁷ Dean C. Miller, *Hazardous Acts: Awareness of Pitfalls is Essential for Corporate Officers to Avoid Jail Time*, COLO. J., November 15, 2000, <http://www.dgslaw.com/articles/111114.html>.

¹³⁸ Sentencing Reform Act of 1984, Pub. L. No. 980-473, 98 Stat. 1987, *codified as amended* at 18 U.S.C. §§ 2551-3742 and U.S.C. §§ 991-998

¹³⁹ See 18 U.S.C. § 3551 (1988); U.S. Sentencing Guidelines Manual (1988).

¹⁴⁰ U.S. Sentencing Guidelines Manual, ch1 pt. a intro to comment n3.

sentence nor was the given sentence subject to appellate review.¹⁴¹ Under the new system, a judge must impose a sentence within a narrow range of six months set by the guidelines.¹⁴² Although the judge may depart from this narrow range, any departure must be only under extraordinary circumstances, it must be justified in writing, and is subject to review and even reversal by an appellate court.¹⁴³

Since their inception fifteen years ago, the federal guidelines have been the center of a contemptuous debate regarding the role of judicial discretion in sentencing. Some argue that the guidelines have reduced the sentencing process to an impersonal and mechanistic function, while others praise the guidelines for limiting unwarranted disparity in the sentencing process. Although no one doubts that the federal sentencing guidelines have drastically altered the sentencing arena in criminal law, whether these changes have improved or impaired the sentencing process remains an area of contention.

A. Judicial Discretion Allows Individualized Sentences

Not surprisingly, those who had the most to lose under the new sentencing scheme became its harshest critics. Jose Cabranes, a U.S. district judge for the District of Connecticut, has been one of the most outspoken critics of the federal guidelines. Cabranes believes that the exercise of discretion by a federal judge at sentencing is not a major or reparable weakness, but instead one of its strengths.¹⁴⁴ He questions the effectiveness of the basic tenet of the guidelines: that the human element of the sentencing process should be replaced by the “clean, sharp edges

¹⁴¹ John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551, 553 (1993).

¹⁴² See *supra* note 38 and accompanying text.

¹⁴³ Walker, *supra* note 141, at 553.

¹⁴⁴ Jose A. Cabranes, *A Failed Utopian Experiment*, NAT'L L.J., July 27, 1992, at 17.

of a sentencing slide rule.”¹⁴⁵ Thus, in his oft cited address to Yale, he critically notes that “the sentencing guidelines are a failure—a dismal failure.”¹⁴⁶

Although not as scathing or openly critical, many other judges agree with Judge Cabranes’ assessment that the guidelines will not succeed without the human element. William Schwarzer, a U.S. district judge for the Northern District of California, observes that the sentencing guidelines have reduced the sentencing process to a mechanical formula in order to eliminating discretion from sentencing.¹⁴⁷ Although the goal was to produce consistency and predictability in the sentencing process, it did so by creating the expectation that a correct and just answer is provided by the guidelines.¹⁴⁸ The search for that answer proves illusory since the factors involved do not lend themselves to being reduced to a precise, objective formula.¹⁴⁹ Based on his experience, Judge Schwarzer concludes that by taking away judicial discretion, the guidelines open the door to arbitrary results and, thus, creates a justice system that cannot be depended on to produce results that are fair and reasonable.¹⁵⁰

Outspoken condemnation by the judiciary was not the only professional response to the guidelines.¹⁵¹ Several academics argue that the commission’s limitation on judicial discretion has also had the unintended impact of creating disparity rather than limiting it. One of the guideline’s first critics, Charles Ogletree, argues that the guidelines are “flawed” because they failed to

¹⁴⁵ *Id.*

¹⁴⁶ Jose A. Cabranes, *Sentencing Guidelines, a Dismal Failure*, N.Y. L.J., Feb. 11, 1992, at 2.

¹⁴⁷ William W. Schwarzer, *Judicial Discretion in Sentencing*, 159 PLI/Crim 15, 20 (1991).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 28.

¹⁵¹ Over 200 district judges invalidated the guidelines and all or part of the Sentencing Reform Act before the Supreme Court upheld the constitutionality of the guidelines in *United States v. Mistretta*, 488 U.S. 361 (1989).

consider, among other things, the personal characteristics of the individual offender.¹⁵² Until such flaws are remedied, he argues that federal judiciary must continue to depart from the guidelines simply to ensure fairness and remedy the incidences of disparity created by the mechanical nature of the guidelines.¹⁵³ Ogletree concludes that “[t]he Sentencing Commission’s obsession with justice in the aggregate, with identical treatment regardless of individual differences, will eviscerate our more refined notions of individual justice.”¹⁵⁴

Similarly, David Freed argues that the guidelines have placed federal judges in the quandary of choosing between injustice and an infidelity to the guidelines.¹⁵⁵ Freed notes that a sense of justice is essential to one’s participation in a system for allocating criminal penalties and that when the penalty structure offends those charged with the administration of justice, tension arises between the judge’s beliefs and the law.¹⁵⁶ This choice has created hidden disparity-where judges may be avoiding the rigors of the guideline system and the perceived injustice resulting from them through informal non-compliance.¹⁵⁷ Freed argues that instead of increasing the sentencing visibility and reducing unwarranted disparity, the judicial response has tended to reduce the visibility and produce intentional disparity.¹⁵⁸

Finally, Steve Koh notes that, despite the mechanistic nature of the guidelines, judges still maintain their own philosophies regarding sentencing.¹⁵⁹ Those judges who prefer leniency will look for opportunities to depart while those disposed to rigidity defer to the established

¹⁵² Charles J. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1953 (1988).

¹⁵³ *Id.* at 1959.

¹⁵⁴ *Id.* at 1960.

¹⁵⁵ Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 YALE L.J. 1681, 1725-1727 (1992).

¹⁵⁶ *Id.* at 1687.

¹⁵⁷ *Id.* at 1726.

sentencing range.¹⁶⁰ As a result, the sentence a defendant receives can still depend largely upon which judge presides at sentencing, which is the precise situation the guidelines were designed to eliminate.¹⁶¹ Thus, Koh argues that not only did the sentencing process lose the potential benefit of discretion, but the process became “skewed in a way that promoted new, arguably more troubling, forms of disparity.”¹⁶²

In sum, these judges and academics each recognize that each sentencing hearing involves unique offenders and circumstances that need to be assessed by experienced professionals exercising human judgment.¹⁶³ The guidelines take an impersonal mathematical approach to what many consider one of the most significant jobs in the justice system.¹⁶⁴ Not only do the guidelines ignore the experience and instinct of the trial judge, but this limitation actually creates sentencing disparity when judges utilize their little remaining discretion to ameliorate the mandated sentence. Thus, according to its critics, the guidelines have failed in their prescribed goals: to provide sentences that are honest, uniform, and proportional.

B. Reducing Judicial Discretion Promotes Sentencing Uniformity

Despite the criticisms that the sentencing guidelines have received from the judiciary, some judges approve of the guidelines and limitation on judicial discretion. Stewart Dalzell, a judge for the Eastern District of Pennsylvania, readily admits to being in the minority of his

¹⁵⁸ *Id.* at 1718.

¹⁵⁹ Steve Y. Koh, Note, *Reestablishing the Federal Judge’s Role in Sentencing*, 101 YALE L.J. 1109, 1124 (1992).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Freed, *supra* note 155, at 1705.

¹⁶⁴ See, e.g., Shari L. Kaufman, *The Federal Sentencing Guidelines: A Formulaic and Impersonal Approach to Dispensing Justice*, Nev. Law., Sept. 1999, at 18, 20.

judicial colleagues in preferring the current sentencing regime to the one it replaced.¹⁶⁵ Although he acknowledges that this acceptance may be because he never knew the pre-guideline era,¹⁶⁶ he firmly states that he cannot support the old regime that gave lawless power to judges with no recourse except the parole board.¹⁶⁷ Instead, Judge Dalzell finds comfort in applying “readily ascertainable law” of the guidelines, and notes that over one-half of the sentences he has imposed were not constrained by the grid.¹⁶⁸ He also applauds the SRA provision allowing for appellate review of the previous system. As a result, Dalzell believes that the sentencing guidelines are “measures to improve rationality and consistency in the way discretion is used and to ensure adequate redress when it goes astray.”¹⁶⁹

Other members of the judiciary disagree with its critics because they do not believe that the guidelines have completely removed their discretion. For example, John Walker, a U.S. Circuit Judge for the Second Circuit, believes the criticism that the guidelines virtually abolish consideration of the defendant’s character has become a self-fulfilling prophecy.¹⁷⁰ Walker notes that when the commission created the guidelines, it was aware that a single set of guidelines could not accommodate the panoply of imaginable human conduct.¹⁷¹ As a result, the guidelines empower a judge to consider a defendant’s characteristics and depart from the guidelines if case is not “a normal one.”¹⁷² Similarly, Patti Saris, a judge for the district court of Massachusetts, argues that appellate and district judges have failed to recognize that not all seemingly similar

¹⁶⁵ Stewart Dalzell, *One Cheer for the Guidelines*, 40 VILL. L. REV. 317, 317 (1995).

¹⁶⁶ *Id.* at 323.

¹⁶⁷ *Id.* at 322-33, quoting Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2044 (1992).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 325, quoting SIR LEON RADZINOWICZ & JOAN KING, *THE GROWTH OF CRIME: THE INTERNATIONAL EXPERIENCE* 327-28 (1977).

¹⁷⁰ Walker, *supra* note 141, at 558.

offenders are in fact similar, and there are atypical situations when justice is best served by different sentences for different people.¹⁷³ Thus, Saris agrees that judges should be more vigilant to exercise their existing discretion by departing from the guidelines based on permitted factors.¹⁷⁴

Paul Robinson supports the notion that the guidelines allow for departures if the judges feel that the case falls outside the paradigm predicted by the Commission.¹⁷⁵ Robinson, who acted as counsel to the U.S. Senate Subcommittee on Criminal Law and Procedures during the drafting of the SRA, notes that judicial constraint detailed by the guidelines reflects a mechanism for the balance of power between judges and the Commission.¹⁷⁶ Each of the more than one thousand federal judges in our federal courts has the same guidelines from which to work.¹⁷⁷ Yet each of these judges maintains the authority to depart from these guidelines if she believes a particular case is outside the circumstances envisioned by the Commission.¹⁷⁸ And the threat of judicial review provides the incentive for a judge to depart only when she deems necessary and not solely on a whim.¹⁷⁹ Based on his experience, Robinson believes that this balance of power is what Congress envisioned when it drafted the SRA.¹⁸⁰

Whiteside is another academic who defends the guidelines, arguing that the guidelines have

¹⁷¹ *Id.*

¹⁷² *Id.*; see also *Koon v. United States*, 518 U.S. 81, 92 (1996).

¹⁷³ Honorable Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective* 30 SUFFOLK U. L. REV. 1927, 1029 (1997).

¹⁷⁴ *Id.* at 1062; see also Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 449 (1999) (noting that judges use their limited discretion to individualize in only approximately 10% of the cases, while 70% are sentenced within their sentencing range).

¹⁷⁵ Paul H. Robinson, *The Federal Sentencing Guidelines: Ten Years Later*, 91 NW. U. L. REV. 1231, 1235 (1997)

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

maintained significant judicial discretion over sentences while eliminating the judge's unbridled sentencing discretion.¹⁸¹ Whiteside notes that as the offense's severity rises, the judge's authority to impose probation is limited; but at low offense levels, a judge has more discretion to only impose probation or a mix of probation with prison time.¹⁸² And the court's discretion was furthered enhanced by the 1994 policy amendments that allow departure in some extraordinary circumstances.¹⁸³ As a result, Whiteside concludes that a court's sentencing discretion has not been eliminated by the guidelines, but that discretion must now be exercised with "due diligence."¹⁸⁴

Frank Bowman further notes that federal judges are not barred from setting criminal sentences based on the individual characteristics of defendants; they may consider all the factors which were appropriate before the advent of the guidelines.¹⁸⁵ Nevertheless, unlike the previous sentencing scheme, judges cannot sentence "based on factors as whimsical as dress or hairstyle or a 'gut feeling' that this defendant was good or bad."¹⁸⁶ Under the new regime, judges may now indulge their own "idiosyncratic theories of penology" only within the narrowly circumscribed limits of the applicable range.¹⁸⁷ Because the guidelines have greatly reduced unwarranted discretion, Bowman concluded that "Cabranes is wrong, absolutely wrong in declaring the guidelines a failure."¹⁸⁸

¹⁸⁰ *Id.*

¹⁸¹ Thomas N. Whiteside, *The Realty of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574, 1591 (1997).

¹⁸² *Id.* at 1593.

¹⁸³ *Id.* at 1596.

¹⁸⁴ *Id.* at 1593.

¹⁸⁵ Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 713-14.

¹⁸⁶ *Id.* at 686.

¹⁸⁷ *Id.* at 702.

¹⁸⁸ *Id.* at 680.

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

C. Discretionary Guidelines as an Alternative

As shown from the above analysis, judges and academics continue to debate the role of judicial discretion in criminal sentencing. Nevertheless, even the critics of the guidelines system support some theoretical structure to constrain discretion,¹⁸⁹ and some have even suggested the need for discretionary guidelines. For example, although Judge Schwarzer argues that the current sentencing guidelines have reduced the sentencing process to a mechanistic formula, he recognizes that discretionary guidelines would be useful in “giving judges a yardstick against which to measure the exercise of their discretion.”¹⁹⁰ In addition, Shari Kaufman observes that, as a mandated set of rules, the guidelines have created a plethora of litigation and have fallen short of the goal of uniformity in sentencing they were designed to achieve; but if the guidelines were truly guidelines rather than a simple mathematical calculation, they would be useful tools for all of those involved in the federal criminal justice system.¹⁹¹ Accordingly, even the critics of the federal sentencing guidelines acknowledge that, in and of themselves, the guidelines are beneficial

¹⁸⁹ Roy K. Little, *Proportionality as an Ethical Precept for Prosecutors in their Investigative Role*, 68 *FORDHAM L. REV.* 723, 770 n.139 (1999).

¹⁹⁰ Schwarzer, *supra* note 147, at 27-28.

because they provide a national standard on which judges can rely when sentencing a defendant.

In support of a more discretionary model, Lisa Rebello notes that Congress did not intend the guidelines to completely eliminate judicial discretion or that judges apply the guidelines mechanically.¹⁹² Although Congress did have the authority to establish mandatory sentences for all criminal statutes, it instead chose to retain an element of judicial discretion in sentencing, thus recognizing the importance of the judge's role in the sentencing process; in fact, the "[p]reservation of discretion is consistent with the primary goal of the [Sentencing Reform] Act—to allow sentencing judges to address the needs of individual offenders."¹⁹³ Accordingly, Congress intended that a judge's discretion in imposing a sentence should be guided but not eliminated.

These sentiments regarding the positive nature of discretionary guidelines were echoed in a survey of federal judiciary officials. Nine years after the guidelines went into effect, the Federal Judicial Center conducted a survey on the attitudes of the results of the guidelines.¹⁹⁴ Approximately seventy percent of district or circuit judges believed that mandatory guidelines were not necessary to direct the sentencing process.¹⁹⁵ Although the majority of these judges were willing to work within a guidelines system, they would prefer a system where judges are accorded more discretion.¹⁹⁶ Furthermore, most respondents indicated that would prefer

¹⁹¹ Kaufman, *supra* note 164, at 20.

¹⁹² Lisa Rebello, Note, *Sentencing Under the Federal Sentencing Guidelines: Five Years of "Guided Discretion"*, 26 SUFFOLK U. L. REV. 1031, 1037 (1992).

¹⁹³ Ryan M. Zenga, Note, *Retroactive Law or Punishment for a New Offense?—The Ex Post Facto Implications of Amending the Statutory Provision Governing Violations of Supervised Release*, 19 W. NEW ENG. L. REV. 499, 505 (1997).

¹⁹⁴ MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY (1997), [http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/\\$File/gssurvey.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$File/gssurvey.pdf).

¹⁹⁵ *Id.* at 3.

¹⁹⁶ *Id.*

advisory guidelines over both mandatory and decision-based sentencing.¹⁹⁷ As noted by one of the survey participants: “It is the mandatory nature [of the guidelines] which create the unfairness.”¹⁹⁸

D. The Environmental Debate¹⁹⁹

As noted above, some critics have denounced the federal sentencing guidelines for preventing judges from imposing individualized sentences.²⁰⁰ In contrast, others have praised the guidelines for bringing uniformity and consistency to criminal law.²⁰¹ Although much of this debate focuses on the sentencing of traditional criminal acts, several authors have extended the guidelines dispute to the field of environmental law.

Prior to the advent of the sentencing guidelines, those convicted of environmental crimes rarely, if ever, served significant prison terms for their crimes. According to Judson Starr and Thomas Kelly, Jr., practitioners of environmental law, the sentencing guidelines now require judges to view environmental crimes far more seriously than they have in the past.²⁰² Starr and Kelly note that, in what used to be a highly subjective process, the guidelines have removed nearly all judicial discretion in the sentencing stage. Therefore, if a defendant pleads guilty or is convicted of certain environmental crimes, he or she is not subjected to the “jurisdictional

¹⁹⁷ *Id.* at 3, 4.

¹⁹⁸ *Id.* at 4.

¹⁹⁹ The current federal sentencing guidelines only apply to individual offenders and not to corporations or professional organizations. Although organizational guidelines have been proposed, *see generally* Robert L. Kracht, *A Critical Analysis of the Proposed Sentencing Guidelines for Organization Convicted of Environmental Crimes*, 40 VILL. L. REV. 513 (1995), we limit our discussion in this paper only to those guidelines that have the force of law.

²⁰⁰ *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21 (2000); Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC’Y REV. 733 (2001).

²⁰¹ *See* Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1078 (1992).

lottery” that was common under the previous process.²⁰³ And because the guidelines require judges to follow strict measures under the sentencing process, Starr and Kelly contend that those who violate environmental regulations may now face significant prison sentences.²⁰⁴

Nevertheless, assistant U.S. attorney Helen Brunner contends that, despite the significant changes in the creation of the guidelines, not much has changed in regards to the severity of the punishment. She notes that the vast majority of environmental offenders receive only minimum jail time or probation.²⁰⁵ Assistant U.S. attorney Jane Barrett places the blame for the lenient sentencing of environmental crimes on the discretion and flexibility afforded to the sentencing court.²⁰⁶ Barrett contends that the sentencing guidelines for environmental crimes are often accompanied by application notes that suggest circumstances that may warrant a departure, and that these application notes “act as a broad invitation for sentencing courts to depart from the prescribed offense level.”²⁰⁷ She concludes that the judicial discretion in environmental guidelines should be reevaluated with the goal of balancing the need for flexibility in with the need to eliminate the variance in sentencing ranges that has allowed defendants convicted of similar crimes to receive disparate treatment.²⁰⁸

E. Summing Up

Since their inception in 1987, the federal sentencing guidelines have been the center of a policy debate between judicial independence and sentencing uniformity. Many judges find the

²⁰² Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and it is Hard time*, 20 ENVTL. L. REP. 10096 (1990)

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Helen J. Brunner, *Environmental Criminal Enforcement: A Retrospective View*, 22 ENVTL. L. 1315 (1992).

²⁰⁶ Barrett, *supra* note 1, at 1428-29.

²⁰⁷ *Id.* at 1429.

²⁰⁸ *Id.* at 1448.

system demoralizing and demeaning; although judges may not approach sentencing with identical philosophies and value system, they all approach it with very serious responsibility. In contrast, advocates of the federal guidelines believe that the guidelines are a great improvement over the previous system because the guidelines have reduced the unwarranted disparity and resulted in sentences that are uniform for similarly situated defendants. Accordingly, the need to achieve a balance between the equality and reliance in sentencing with the need for fairness to the individual remains a challenge.

IV. ENFORCMENT AND THE EFFICIENT EXERCISE OF DISCRETION: ECONOMIC CONSIDERATIONS

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

A. Marginal Deterrence

In the economic approach to law enforcement, the level of deterrence for a specific act is assumed to depend, *ceteris paribus*, on the expected sanction faced by persons considering the

act. The expected sanction, in turn, is simply the product of 1) a monetary or imprisonment sanction and 2) the probability of detecting, convicting, and actually punishing offenders. In this framework, deterrence can be increased by either increasing the sanctions, increasing the probability of sanctioning, or both. In general, cost-effective production of additional deterrence will require an optimal combination of the two.

In a seminal article by Gary Becker in 1968,²⁰⁹ the following conundrum was posed: if law enforcement is costly but crimes are socially undesirable and potentially deterrable, then efficiency requires that for all crimes the probability of apprehension be set arbitrarily low and the sanction arbitrarily high. This solution imposes no costs on society as long as the expected sanction is high enough to deter all crime.²¹⁰

This benchmark Becker prescription is clearly inapplicable when individual wealth is constrained relative to harm done. More importantly, a low-probability, maximal-fine system of sanctioning only applies when individuals are considering whether to commit a single harmful act. In the more general setting, where several harmful acts are being considered, undeterred individuals will have no reason to commit less rather than more harmful acts unless expected sanctions rise with harm.²¹¹

The idea of marginal deterrence, a term generally credited to George Stigler,²¹² refers to the tendency of an individual to be deterred from committing a more harmful act owing to the

²⁰⁹ Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

²¹⁰ Louis L. Wilde, *Criminal Choice, Non-monetary Sanctions, and Marginal Deterrence: Normative Analysis*, 12 INT'L REV. L. & ECON. 333 (1992).

²¹¹ Steven Shavell, *A Note on Marginal Deterrence*, 12 INT'L REV. L. & ECON. 345 (1992). The classic situation is described in an old English proverb, of unknown origin, first recorded in JOHN RAY, A COLLECTION OF ENGLISH PROVERBS (1678): "As good be hanged for a sheep as a lamb." Imagine a thief has an opportunity to carry off one animal from a flock. If the penalty is the same for whichever animal he chooses, he might as well take the most valuable. See David Friedman & William Sjostrom, *Hanged for a Sheep—The Economics of Marginal*

difference, or margin, between the expected sanction for it and for a less harmful act.²¹³ In the context of enforcing environmental law, the regulated community can commit several different sorts of violations and choose among them in part on the basis of the expected cost of being caught and punished. The central question, then, is how optimal punishment varies with the damage done.

David Friedman and William Sjostrom²¹⁴ have evaluated this sanctioning challenge in a context that seems particularly relevant to the enforcement of federal environmental law generally and to the CWA specifically. The authors demonstrate that sanctions should rise with the harm done by various violations if the following conditions hold: 1) the benefits to the violator vary directly with the harm done, and 2) enforcement effort is of a general nature, affecting in the same way the probability of apprehension for committing different harmful acts.²¹⁵ Under these circumstances the punishment should fit the crime.²¹⁶

Under the CWA, point sources of pollution are subject to NPDES permit regulations. Regardless of the size of a permitted facility, violation of effluent discharge limits, or other

Deterrence, 22 J. LEGAL STUD. 345 (1993).

²¹² George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

²¹³ Early writers have discussed the notion as well. In 1770, Cesare Beccaria argued that “the severity of punishment itself emboldens men to commit the very wrongs it is supposed to prevent; they are driven to commit additional crimes to avoid the punishment for single one.” CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS*, (Henry Paolucci trans., 1st ed. 1963). Similarly, in 1789, Jeremy Bentham stated that an object of punishment is “to induce a man to choose always the least mischievous of two offenses; therefore where two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less.” Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in *THE UTILITARIANS* (1973).

²¹⁴ Friedman & Sjostrom, *supra* note 211.

²¹⁵ Mookherjee and Ping derive similar results showing that when the level of an activity is a continuous variable and individuals derive heterogeneous benefits then marginal expected penalties should be everywhere less than marginal harm, and that there should be no enforcement at all against acts below a certain threshold. See Dilip Mookherjee & I.P.L. Ping, *Marginal Deterrence in Enforcement of Law*, 102 J. POL. ECON. 1039 (1994)

²¹⁶ A potentially important caveat for this result has been demonstrated in John Henderson & John P. Palmer, *Does More Deterrence Require More Punishment? [Or Should the Punishment Fit the Crime?]*, 13 EUR. J. L. & ECON., 1439 (2002). When the regulated community has heterogeneous tastes and preferences across violators, aggregation can lead to a backward-bending expansion path in the production of deterrence. Under these conditions, it may not be optimal for the punishment to fit the crime. The authors cite the example of the crime of

NPDFS requirements can trigger a variety of enforcement actions and related sanctions.²¹⁷ CWA violations can range from routine record keeping irregularities to tampering with monitoring equipment to negligent disposal of hazardous materials with the associated economic benefit rising accordingly. On the enforcement side, any number of violations can be discovered as part of a comprehensive system of CWA monitoring, reporting, and testing protocols. In practice, a large number of relatively minor violations are handed through administrative actions, followed by a smaller number of more serious violations handled through civil actions, and finally an ever smaller number of very serious violations handled through criminal prosecutions.²¹⁸

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

B. Criminal Sanctions

Society designates certain harmful acts as criminal and provides harsher sanctions when they occur.²¹⁹ One major category of acts that are treated as criminal include acts that are intended to do substantial harm. In the context of the CWA, a straightforward example would be the intentional dumping of hazardous waste into a body of water. In this case, the violator intends for harm to occur, although in general, the act will be treated as criminal even if harm does

assassinating a political leader. While this result is clearly of theoretical interest, such an outcome seems unlikely in the context of enforcing federal environmental law.

²¹⁷ McGaffey et al., *supra* note 9.

²¹⁸ MANDIBERG & SMITH, *supra* note 33, at 13.

²¹⁹ For a comprehensive discussion of the law and economics of criminal sanctions, *see* STEVE SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, chs. 20-24 (2003).

not actually occur but intent was present. On the other hand, if harm is intended but small in magnitude, then the act will not usually be considered criminal.

A second category of acts that is often considered criminal involves acts that are concealed, even if substantial harm was not intended. The key characteristic in this category of criminal acts is the offender attempting to conceal or evade his responsibility such as a firm covering up the violation of a safety regulation. An example in the CWA is the provision of criminal sanctions for knowingly submitting a false statement in any application, record, or report.

A variety of sanctions are available for punishing criminal acts. For purposes of enforcing federal environmental law, a combination of criminal fines and imprisonment terms is typical.²²⁰ Imprisonment, of course, is a sanction that is unique to criminal law. In contrast, fines can be imposed for either civil or criminal violations of environment law but criminal fines are typically larger, uninsurable, and not deductible for tax purposes. In the context of the CWA, criminal sanctions can be imposed when NPDES regulated activities are negligently operated. As shown in Table 1, sanctions can be severe, ranging up to two million dollars and thirty years of imprisonment.²²¹

The core justification for the application of criminal sanctions for particular violations of environmental law is the need for cost-effective, additional deterrence.²²² Clearly non-monetary

²²⁰ Imposition of criminal sanctions is not merely a hypothetical possibility. Between 1983 and 1995, more than 800 individuals and 350 companies have been convicted, and a total of 350 years of actual jail time has been served. See Memorandum from P. Hutchins, to Department of Justice, Environmental Crimes Sections (December 13, 1995). The general trend of increasing aggregate fines and imprisonment times for criminal violations of environmental regulations has continued to date.

²²¹ See *supra* note 77 and accompanying figure.

²²² Three other justifications have traditionally been given for imposing criminal sanctions on acts with the potential to due significant harm: 1) incapacitation, preventing individuals from engaging in undesirable acts by removing

sanctions are costly to impose. As a result, strict liability is generally a disadvantageous form of criminal liability compared to fault-based liability since fault-based liability reduces socially costly punishment.²²³ More generally, non-monetary sanctions should not be used unless monetary sanctions alone cannot adequately deter. A harmful act will be more difficult to deter with monetary sanctions alone when benefits to the violator are high, harm is substantial, the probability of imposing sanctions is low, and/or the level of violator assets is modest compared to harm done. Under these circumstances, criminal sanctions may be necessary to provide adequate deterrence.

One implication from an efficiency evaluation of criminal sanctions is that non-monetary sanctions should not be employed unless monetary sanctions have been imposed to the greatest extent possible. That is, non-monetary sanctions should only be used as a supplement to maximal monetary sanctions.²²⁴ Another related implication is that sanctions should be zero, or minimal, for violations with small harm. In the CWA case, an example would be issuing a notice of violation for trivial violations of reporting protocols.

The role of criminal sanctions in enforcing federal environmental law and promoting deterrence can be well established on efficiency grounds. The extent or scope of criminal sanctions in optimal deterrence is much more controversial. The concern among some analysts is

them from society, 2) rehabilitation, attempting to induce a reduction in a person's propensity to commit undesirable acts; and 3) retribution, the desire of individuals to see wrong doers punished. *See generally* WILLIAM SPELMAN, CRIMINAL INCAPACITATION (1994) (discussing incapacitation); RICHARD A. WRIGHT, IN DEFENSE OF PRISONS (1994) (discussing rehabilitation); Jack Hirshleifer, *Natural Economy Versus Political Economy*, 1 J. SOC. & BIOLOGICAL STRUCTURES 319 (1978) (discussing retribution).

²²³ Louis Kaplan, *A Note on the Optimal Use of Nonmonetary Sanctions*, 42 J. PUB. ECON. 245 (1990).

²²⁴ An interesting, and perhaps troubling, sociological implication of cost-effective deterrence involves the relationship between a person's wealth and sanctions. If an individual's wealth is above the threshold at which deterrence with monetary sanctions will be adequate, the sanction should be entirely monetary. Given the threshold level, as wealth decreases, the need for and magnitude of non-monetary sanctions increases. *See* Steven Shavell, *Criminal Law and the Optimal Use of Non-monetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236-

that environmental law may have become over-criminalized with high penalties leading to over deterrence for activities that society does not wish to prohibit entirely.²²⁵ That is, a balance must be struck between reducing environmental harm on the one hand, and promoting socially beneficial activities on the other. If sanctions for violating environmental regulations are set too high, the regulated community will respond by adopting excessive levels of abatement, precaution, or care. As a result, over-deterrence becomes inevitable.

There is general agreement that holding violators responsible for reasonable cleanup costs and third-party damages is sound enforcement policy. However, imposing criminal liability for incidents not intentional or not controllable by the liable party is controversial. Once held liable, the federal sentencing guidelines mandate serious punitive sanctions. If overdeterrence and overcriminalization result, then criminal law itself might become trivialized with the resulting lack of moral stigma. Additionally, by overinvesting limited enforcement resources in criminal proceedings, other productive avenues for reducing environmental harms cannot be pursued.²²⁶

C. Prosecutorial Discretion and Selective Enforcement

In the context of the enforcement of Federal environmental laws, prosecutorial discretion appears to be exercised in ways that vary dramatically from conventional prescriptions of economic deterrence theory. First, when the EPA observes violations, it often chooses not to pursue the violator. Second, the expected penalty faced by a violator who is pursued is small compared to the cost of compliance. Paradoxically, in spite of these prosecutorial policies, firms

37 (1985).

²²⁵ Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. CRIM. L. & CRIMINOLOGY 1054 (1992).

²²⁶ Mark A. Cohen, *Theories of Punishment and Empirical Trends in Corporate Criminal Sanctions*, 17 MANAGERIAL & DECISION ECON. 399 (1996).

are compliant a significant proportion of the time.²²⁷ That is, compliance rates seem to be higher than would be justified by the expected penalties for noncompliance.

Winston Harrington has provided one efficiency justification for selective enforcement based on the idea of creating “penalty leverage” by encouraging the regulated community to comply with environmental requirements.²²⁸ The rationale is based on a dynamic game-theoretic model of enforcement and compliance when penalties are restricted.²²⁹ The strategy is to divide the regulated community into two groups: a group that was in compliance with the last inspection and a second group that was not. This state-dependent enforcement regime then creates additional compliance leverage. Agents in the noncompliant group now have two incentives to come into compliance: 1) avoid maximal sanctions imposed on repeat offenders, and 2) possible reinstatement into group 1. In essence, prosecutors use a “carrot-and-stick” approach to enforcement, the threat of harsh sanctions coupled with the bribe of reinstatement.

More recently, an efficiency justification for selective enforcement has been proposed by Anthony Heyes and Neil Rickman.²³⁰ Leveraging penalties has the impact of increasing

²²⁷ When a violation is discovered, by far the most common response is for the agency to send a notice of violation (NOV) and then take no further action. *See generally* U.S. ENVIRONMENTAL PROTECTION AGENCY, PROFILE OF NINE STATE AND LOCAL AIR POLLUTION AGENCIES (1998). Moreover, when penalties are imposed, the average size of the penalty is much smaller than compliance costs. The magnitude of this discrepancy is illustrated in a survey of state enforcement activity over the decade from 1973 to 1983 conducted by Winston Harrington. Winston Harrington, *Enforcement Leverage when Penalties Are Restricted*, 37 J. PUB. ECON. 29, 30 (1988). Finally, other EPA studies have estimated that regulated sources were in violation of standards only about 9 percent of the time. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, CHARACTERIZATION OF AIR POLLUTION CONTROL EQUIPMENT OPERATION AND MAINTENANCE PROBLEMS (1981).

²²⁸ Harrington, *supra* note 227.

²²⁹ Restricted penalties often characterize environmental enforcement. For example, under the CWA, limits are placed on fines (see Table 1) and the Federal Sentencing Guidelines impose constraints on criminal sanctions. In theory, however, the EPA probably does possess sufficient power to force compliance with regulations. An example of a draconian measure might be seeking an injunction to shutdown a non-compliant plant completely. In practice, there is considerable reluctance to pursue extreme sanctions because it is costly and the outcome is uncertain. *See generally* SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1982).

²³⁰ Anthony Heyes & Neil Rickman, *Regulatory Dealing—Revisiting the Harrington Paradox*, 72 J. PUB. ECON. 361 (1999).

compliance over time when sanctions are restricted. Prosecutors must also be concerned with the spatial dimensions of enforcement. Frequently the EPA interacts with regulated agents in more than one enforcement context. Examples would include multi-plant firms, firms with branches in several geographical regions, or firms that are subject to multiple regulatory regimes such as air, water, and noise requirements enforced simultaneously. Given restricted penalties and limited enforcement resources, maximal enforcement will not necessarily result in maximal compliance. That is, strategic tolerance of noncompliance in selected areas may improve aggregate performance. Such an approach to prosecution is known as “regulatory dealing”, the policy of tolerating noncompliance in some contexts to induce increased compliance in others. As a result, the infrequent imposition of significant sanctions is not necessarily a sign of lax enforcement.²³¹ Bargaining between regulatory officers and polluters is a necessary component of efficient enforcement when both enforcement penalties and resources are constrained. In fact, having the discretion to not maximally sanction a violation becomes a prosecutor’s major bargaining resource.

Dynamic enforcement considerations and penalty leveraging, as well as spatial enforcement considerations and regulatory dealing, provide an efficiency basis for allowing EPA prosecutors wide latitude in sanctioning violations of environmental law.²³² Much more contentious, however, is the process of defining non-compliance in the first place. As Mark Cohen points out, expanding the grounds of liability, particularly criminal liability, runs the dual

²³¹ Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 14 BUFF. L. REV. 833 (1985).

²³² Naturally, there are other explanations of compliance without penalties. Informal sanctions such as facing bad publicity, being forced to attend time-consuming meetings, or conducting additional maintenance operations may also play an important role. See generally PAUL DOWNING, ENVIRONMENTAL ECONOMICS AND POLICY (1984).

risks of creating incentives for over-deterrence with the resulting misallocation of compliance resources, as well as the possibility of trivializing regulatory law itself.²³³

D. Judicial Discretion and the Federal Sentencing Guidelines

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

The use of a predetermined fixed schedule for sanctioning guidelines can be justified in a variety of ways.²³⁴ First, current methods of estimating monetary values are limited and there is little widespread agreement that they provide dependable and consistent valuations,²³⁵ particularly in the case of environmental losses, or reductions in losses, for which the compensation measure of value rather than the willingness to pay measure is appropriate.²³⁶

Second, and perhaps more importantly, the use of damage schedules can be more universally and

²³³ See Cohen, *supra* note 226.

²³⁴ Ratana Chuenpagdee et al., *Environmental Damage Schedules: Community Judgments of Importance and Assessment of Losses*, 77 LAND ECON. 1 (2001).

²³⁵ Brian R. Binger et al., *Contingent Valuation Methodology in the Natural Resource Damage Regulation Process: Choice Theory and the Embedding Phenomenon*, 35 NAT. RESOURCES J. 443 (1995); Daniel Kahneman et al., *Economic Preferences or Attitude Expression? An Analysis of Dollar Responses to Public Issues*, 19 J. RISK & UNCERTAINTY 220 (1999).

²³⁶ Jack L. Knetsch et al., *Reference States, Fairness, and Choice of Measure to Value Environmental Changes*, in ENVIRONMENT, ETHICS AND BEHAVIOR: THE PSYCHOLOGY OF ENVIRONMENTAL VALUATION AND DEGRADATION (Max H. Bazerman et al. eds., 1997); Jack L. Knetsch, *Environmental Policy Implications of Disparities Between Willingness to Pay and Compensation Demanded Measures of Value*, 18 J. ENVTL. ECON. & MGMT. 227 (1990). In an effort to appraise the validity of contingent valuation (CV) measures of economic value, a distinguished panel of social scientists, chaired by two Nobel Laureates, was established by the National Oceanic and Atmospheric Association (NOAA) to critically evaluate the validity of CV measures of nonuse value. See Report of the NOAA Panel on Contingent Valuation, 58 Fed. Reg. 4602-4614 (January 15, 1993). The report was highly critical; for a rebuttal see Discussion Paper 96-20 published by Resources for the Future: RICHARD T. CARSON ET AL., WAS THE NOAA PANEL CORRECT ABOUT CONTINGENT VALUATION? (1996).

less expensively employed than case-by-case monetized estimates of harm, while providing more consistent deterrence incentives, restitution for harms, resource allocation guidance, and greater fairness of similar treatment of similar losses.²³⁷

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

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

²³⁷ Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49 (1998); Murray B. Rutherford et al., *Assessing Environmental Losses: Judgments of Importance and Damage Schedules*, 22 HARV. ENVTL. L. REV. 51 (1998).

enforcement is well positioned to pursue deterrence objectives efficiently.²³⁸

E. Summing Up

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

- 1 Fines should be employed to the maximum extent feasible before resort is made to imprisonment. Fines are socially costless to impose, whereas imprisonment is socially costly, so deterrence should be achieved through the cheaper form of sanction first.
- 2 Sanctions can be imposed either on the basis of the commission of a dangerous act that increases the chance of harm or on the basis of the actual occurrence of harm. In principle, either approach can achieve optimal deterrence.
- 3 Enforcement is said to be general when several different types of violations may be detected by an enforcement agent's activity. When enforcement is general, the optimal sanction rises with the severity of the harm and is maximal only for relatively high harms.
- 4 In many circumstances, an individual may consider which of several harmful acts to commit, for example, whether to release only a small amount of a pollutant into a river or a large amount. Such individuals will have a reason to commit less harmful rather than more harmful acts if expected sanctions rise with harm. Deterrence of a more harmful act because its expected sanction exceeds that for a less harmful act is referred to as marginal deterrence.
- 5 Imprisonment sanctions usually will be required to maintain a tolerable level of deterrence of acts classified as criminal.
- 6 The standard of liability when imprisonment sanctions are imposed is

²³⁸ A recent study confirms the general, recent legal trend of the continuous increase in criminal penalties; that is, the trend toward fines and total penalties for corporations or organizations, convicted of federal crimes, being higher under the sentencing guidelines than they were previously well documented. See Cindy Alexander et al., *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J. L. & ECON. 393 (1999).

typically fault-based. This is socially desirable because fault-based liability reduces the use of socially costly sanctions.

- 7 The use of selective enforcement in prosecution of regulatory violations can increase compliance over time by creating penalty leveraging when penalties and enforcement resources are constrained.
- 8 The use of selective enforcement in prosecution of regulatory violations can increase compliance across the regulated community by using regulatory dealing when penalties and enforcement resources are constrained.
- 9 The federal sentencing guidelines can be viewed as a valid second-best approach to criminal sanctioning when monetary estimates of harm are suspect and expensive, and consistent and predictable deterrence incentives are required for efficacious enforcement.

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

At the heart of debates over the exercise of prosecutorial and judicial discretion in the enforcement of federal environmental law is a concern about criminal justice. Critics are concerned about the fairness of imprisoning violators who lacked intent or were unable to exercise control over the regulatory outcome. On the judicial side, critics worry that punishing environmental violators on par with serious crimes against persons and property is overreaching. Thus, in addition to the deterrence implications of the use of discretion, complex issues of

treating individual violators justly must be addressed.

V. IMPLICATIONS FOR CRIMINAL JUSTICE

From society's perspective, the efficient model of discretion in environmental criminal law is clear. Before adopting this regime, however, we must recognize the fundamental tension that exists between the efficiency of the legal regime and what has been called distributive justice. These two poles may be thought of, respectively, as society's interest in regulation and individual's interest in fair treatment.

A. Utilitarianism and Economics: Serving the Interests of the Group

Economics is an excellent tool for choosing which policies best serve the interests of the group or society as a unit. Classical economics is generally considered as a subset of the philosophy of utilitarianism. Pure utilitarianism rests on the principle that there is no intrinsic good²³⁹ other than happiness²⁴⁰ and that the aggregate happiness²⁴¹ of the group is the only standard of value. In keeping with the maxim "the ends justify the means," utilitarianism's goal is a state of affairs in which the "greatest good for the greatest number" is satisfied. On the classic formulation,²⁴² utilitarianism judges only the amount of happiness in the relevant group and is unconcerned with the fairness of the procedures that produce happiness or its distribution

²³⁹ Or, at least, that no such good can be known.

²⁴⁰ In this context, happiness is specifically understood as the satisfaction of preferences.

²⁴¹ Exactly *whose* aggregate happiness is not always clear. The boundaries of the relevant community are not a matter of consensus. According to some utilitarians, for example, the happiness of animals is also to be considered in calculating the aggregate happiness.

²⁴² Today, scholars commonly distinguish between two forms of utilitarianism: act-utilitarianism and rule-utilitarianism. According to act-utilitarianism, an act is just "if and only if, it would produce the best consequences among all the acts the agent can perform." According to rule-utilitarianism, acts are right "if, and only if, they are prescribed by rules which are in turn justified by the consequences of their being adopted or conformed to." Rule utilitarianism attempts to account for the seeming impossibility of building general moral principles like honesty and procedural fairness from instantaneous cost-benefit judgments. FRED R. BERGER, *HAPPINESS, JUSTICE, AND FREEDOM* 64 (1984).

within the group.²⁴³

Economics is subject to similar limits. While economics prescribes *efficient* means to the group's ends, it not address procedural or distributive fairness. For example, criminal procedure safeguards have no obvious economic benefit.²⁴⁴ Every conviction thrown out due to an illegal search represents costs to the group in the form of law enforcement resources. Yet cost savings are not sufficient grounds to repeal the Fourth Amendment. Regardless of their utility, such safeguards are integral to our concept and system of criminal justice.

B. Criminal Justice and Fairness to the Individual

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

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

Looking back, we recall that the efficiency model calls for wide prosecutorial discretion. Strict liability will result in efficiency gains and will therefore be an appropriate component of

²⁴³ A classic illustrative example suggests that the murder of one person, if committed in order to harvest his organs and redistribute them to ten sick and dying people, is justified by utilitarianism. Pure utilitarianism suffers from one clear deficiency: since happiness is subjective, purely utilitarian judgments are not subject to quantitative analysis. As such, most utilitarian arguments ultimately boil down to economic calculations, substituting wealth for happiness. To the extent that wealth and happiness are fungible, economics is utilitarian. However, utilitarians may be concerned with the distribution of *wealth* to the extent that wealth and happiness are not fungible. This is expressed by the principle of diminishing marginal utility, the idea that each additional unit of currency acquired produces less utility than the last or, in other words, that a dollar's worth is greater to a pauper than to a millionaire.

²⁴⁴ While one can imagine economic arguments accounting for rules prohibiting certain means *ex post facto* (for instance, that fear of arbitrary law enforcement chills the market), economics is unconcerned with justice *per se*.

that discretion if and only if the regulated entity is in a position to control and prevent violations. The responsible corporate officer tracks this model exactly, as it requires that prosecutors demonstrate the authority to prevent or correct the violation. The RCO therefore meets the efficiency standard and goes no further.

In effect, the RCO places a duty on corporate officers a) to be aware of the law that regulates their industry and b) to control the actions of their subordinates, exactly to the extent that they have the power to do so. If officers violate these duties, it is reasonable to assume that they choose to do so, and therefore are culpable. In the event that the officer truly could not have prevented the violation, the prosecutor will be unable to make his showing or, at least, lack of control will be available as a defense. Moreover, in at least one Circuit, proof of the officer's position in the company, while sufficient to infer knowledge of the law, is "not an adequate substitute for direct or circumstantial proof of knowledge [of the violation]."²⁴⁵

2. The Public Welfare Doctrine: Reasonable Knowledge of the Law

The picture is basically the same under the public welfare doctrine. As we discussed above, the public welfare doctrine denies ignorance of the law as a defense in those cases in which the reasonable person would have known their activity was probably regulated. Economics seems to approve of this objective (or "reasonable person" standard), since the reasonable person is one we hope will be deterred by the environmental laws.

But is the public welfare doctrine procedurally fair? The real issue here is not whether "strict liability" is fair in this context, but whether the application of an objective standard to knowledge of the law is truly "strict liability." Blacks Law Dictionary defines strict liability as "liability

that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe.”²⁴⁶ In other words, under strict liability, there is no excuse. Here, that is simply not the case; defendants may be saved by their ignorance of facts.

Moreover, we must remember that, at common law, a mistake of law was not a defense, whether the mistake was reasonable or not. In this sense, it could be said regulatory crimes generally have a heightened, not a diminished, standard of criminal intent. The public welfare crimes offer less protection to the defendant than is available under the other regulatory crimes, but still more than at common law.

Truly, the individual who is unreasonably ignorant of the law will be punished for his or her mistake. However, people are punished in other areas of the criminal law for their unreasonable mistakes. When a mistake of fact is asserted as a defense, that mistake must also be reasonable in order to excuse the defendant.²⁴⁷ If the person who bases his or her defense on an unreasonable mistake of fact will not be acquitted, is there any reason why the rule should be different for mistakes of law?

3. Safeguards for the Defendant at Risk

Finally, we must recall that, when judgments are made under both of these doctrines, procedural safeguards exist in the form of prosecutorial directives,²⁴⁸ constraining the overzealous or rogue prosecutor. These directive documents make clear, and prosecutors confirm, that prosecutions may only proceed if there is reason to believe the violator is culpable.²⁴⁹ So long as

²⁴⁵ *United States v. MacDonald & Watson Watse Oil Co.*, 933 F.3d 35 (1st Cir. 1991).

²⁴⁶ BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

²⁴⁷ Arnold H. Loewy, CRIMINAL LAW IN A NUTSHELL 136 (2000).

²⁴⁸ These safeguards are equally applicable to the RCO.

²⁴⁹ However, the question must be posed: if such evidence exists in every case, why not give prosecutors the burden of demonstrating it at trial? This would silence the critics once and for all.

this remains the case, the practical enforcement of the law will continue to track our intuitions of criminal justice.

Taken as a whole, this regime suggests that the danger of felony criminal conviction for morally blameless conduct is minimal. While criminal conviction for an unreasonable mistake is remains a possibility, this possibility is not unique to the environmental or regulatory law and we see no reason to take this danger more seriously in this context.

4. Prosecutorial Leverage and the Right to Trial

Broadening prosecutorial discretion itself may of concern from a fairness standpoint. Arguably, the broadening of prosecutorial discretion under certain statutes fundamentally alters the balance and separation of powers in our criminal justice system, redistributing power from courts (and the law itself) to prosecutors. As power shifts to prosecutors, law enforcement is increasingly achieved by threat, and not by trial. Overwhelming risk of jail time could effectively deny environmental defendants their day in court. This is perhaps the strongest criticism of prosecutorial discretion under the environmental laws.

B. Judicial Discretion

Effective criminal justice requires a balance between prosecutorial discretion and judicial discretion. As noted above, prosecutorial discretion focuses on fairness to the individual and seeks to ensure that each offender receives just treatment within the judicial system. In contrast, judicial discretion focuses on the effect an offender's sentence has on society. Although a guilty individual may be treated fairly in the events prior to sentencing, a judge may choose to impose a sentence other than what is prescribed by the sentence guidelines. Such a sentence is inherently unfair to society because it either creates a financial burden from the increased incarceration or

creates a sense of injustice if the offender receives a lesser punishment than what society believes is deserved. Accordingly, to be economically efficient, criminal justice requires equitable sanctioning to the individual and society.

The prosecution and sentencing of a criminal defendant is a multi-dimensional process. Prior to the indictment, a prosecutor has discretion to decide whether to charge the individual, and if so, what charges to pursue.²⁵⁰ Once the offender has been convicted or has pled guilty, a probation officer will compile a pre-sentence report detailing the criminal history and characteristics of the offender as well as the classification of the offense.²⁵¹ After considering all this information, including any testimony the court may allow, the trial judge will then sentence the offender based on the federal sentencing guidelines.²⁵²

Although some critics argue that the guidelines have reduced the sentencing process to “a stringent mathematical formula,”²⁵³ the above discussion supports the notion that the sentencing process remains the thoughtful, comprehensive procedure that existed before the enactment of the guidelines. However, as with the pre-guidelines era, the final sentence is determined by individualistic judges, each with their own belief as to what constitutes a just sentence.²⁵⁴ Accordingly, disparate sentencing of environmental crimes may continue to exist

1. Judicial Discretion and the Trivialization of Environmental Crimes

When Congress empowered the sentencing commission to implement the sentencing guidelines, one of its goals was to reduce the disparity in sentences between those convicted of

²⁵⁰ See *infra* Part II.B.

²⁵¹ See *infra* Part II.C.

²⁵² See *infra* Part II.C.

²⁵³ Kaufman, *supra* note 164, at 18.

²⁵⁴ See *supra* note 143 and accompanying text.

white-collar crimes and those convicted of conventional street crimes.²⁵⁵ Environmental crimes, considered a subset of white-collar crime, were targeted with this goal by the enactment of section Q designed to regulate the sentencing of environmental crimes.

Nevertheless, for several years after the implementation of the environmental guidelines, environmental criminals continued to receive rather light sentences of either straight probation or incarceration of less than one year.²⁵⁶ Jane Barrett blames this continued disparity on the application notes that accompany the environmental sentencing guidelines.²⁵⁷ These application notes, frequently included in the commentary accompanying the guidelines, often suggest circumstances that may warrant a departure from the proscribed sentence.²⁵⁸ Barrett argues that such departures may allow a judge to undercut the adjustments for aggravating factors required by the specific offense characteristics of the particular crime, resulting in lower sentences for those convicted of environmental crimes.²⁵⁹

Although these application notes may provide the mechanism for departures, the motivation for such departures may be the result of the criticism that the current guidelines “overcriminalize” environmental crimes. These critics believe that environmental violations—as a type of white-collar crime—are different than street crimes such as robbery and theft and, thus, polluters should receive either fines or probation rather than face prison time.²⁶⁰ Some critics also lament that Congress has amended the law to allow offenders with reduced moral culpability

²⁵⁵ Barrett, *supra* note 1, at 1423. A white-collar crime is a nonviolent crime, usually involving cheating and dishonesty in commercial matters. BLACK’S LAW DICTIONARY 1590 (7th ed. 1999).

²⁵⁶ Barrett, *supra* note 1, at 1427-29; *see also Panel I: Environmental Ethics*, 21 *ECOLOGY L.Q.* 417, 424-25 (1994) (“It is rare for an environmental criminal to serve any time for an environmental crime.”) [hereinafter *Panel*].

²⁵⁷ Barrett, *supra* note 1, 1427.

²⁵⁸ *Id.* at 1428.

²⁵⁹ *Id.* at 1429.

to be sentenced for longer periods of imprisonment with greater monetary penalties.²⁶¹ As a result, some critics believe that “some infractions of environmental regulations are treated as criminal behavior when they should not be, and many criminal infractions are punished too severely relative to other federal offenses or the harm to society.”²⁶² As a consequence, judges may use their authority to depart from the proscribed sentence as an attempt to remedy these perceived inequities.

One such remedy to the perceived overcriminalization of environmental crime is for a judge to permit a lower sentence for what they might consider a “trivial” offense.²⁶³ Under the current guidelines, a violation that results in a substantial likelihood of death or bodily injury will almost always be punished by imprisonment.²⁶⁴ But the guidelines may also call for imprisonment of negligent or misdemeanor violations that do not create a threat to public health or safety.²⁶⁵ In addition, the guidelines make no provision for alternatives to incarceration for these misdemeanor offenses.²⁶⁶ Because a downward departure may be the only means of reaching a seemingly just punishment, a judge may depart from the sentence proscribed by the federal guidelines if she believes that the crime is insignificant and the harm to the environment is negligible.²⁶⁷

²⁶⁰ See Cindy Johnson, Note, *For Better or Worse: Alternatives to Jail Time for Environmental Crimes*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265, 297 (2000).

²⁶¹ See *id.* at 277-78; see also *Panel*, *supra* note 256, at 421.

²⁶² See Benjamin S. Sharp, *Environmental Enforcement Excess: Overcriminalization and Too Severe Punishment*, C617 ALI-ABA 179, 181 (1991).

²⁶³ See Paula de Prez, *Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions*, 12 J. ENVTL. L. 65, 75 (2000).

²⁶⁴ Sharp, *supra* note 262, at 185.

²⁶⁵ See *id.*

²⁶⁶ *Id.* at 186.

²⁶⁷ de Prez, *supra* note 263, at 72-75.

For example, in *United States v. Ellen*,²⁶⁸ a jury convicted the defendant on five felony counts of illegally filling wetlands. The court arrived at an adjusted offense level of twelve, but, using its authority to depart, made a 2-level downward departure because the fill was not hazardous nor was there any specific damage to human or animal health. The court also applied the specific offense characteristic relating to discharge without a permit, but again made a 2-level downward departure for essentially the same reasons. Similarly, in *United States v. Osborne*,²⁶⁹ the defendant pled guilty to one count of knowingly permitting a discharge of sewage pollutants into a natural creek. After finding that the violation did not cause significant harm, the court departed from the guidelines. In each of these cases, the defendant either pled or was found guilty of intentionally violating the Clean Water Act. Despite the defendant's obvious guilt, the court reduced the defendant's sentence because the crimes did not create a threat to public health or safety. In essence, the court trivialized the defendants' crimes against the environment.

Even if done for what appears to be an equitable reason, the trivialization of certain environmental crimes can be detrimental to the enforcement of environmental law. Our system for punishing criminal environmental offenses is designed to send a deterrent message.²⁷⁰ But this method of deterrence will only function if courts indicate their intent to impose punitive sanctions against all violators; even the most law-abiding are likely to reduce their compliance efforts if they perceive the absence of enforcement against offenders.²⁷¹ Furthermore, consistently low penalties by judges are likely to perpetuate the idea that such crimes are trivial

²⁶⁸ 961 F.2d 462 (4th Cir. 1992).

²⁶⁹ No. 90-38-S (E.D. Ky. Jan. 7, 1991).

²⁷⁰ David B. Spence, *Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21st Century*, COLUM. J. ENVTL. L. 145, 173 (1995)

²⁷¹ Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2452 (1995).

and, inappropriately, not jailable offenses.²⁷² The trivialization of environmental offenses can only serve as an impediment to enforcement as a whole because, if the implications of criminal liability are neutralized, so is the threat of prosecution.²⁷³ By trivializing environmental crimes, the legal system has breached its obligation to society by sentencing offenders for less than the law requires.

2. Recent Trends in the Sentencing of Environmental Crimes

With the recent corporate fraud scandals such as ImClone, Enron, and Halliburton, public outcry has motivated lawmakers to enact tougher standards that require the incarceration of white-collar criminals. Environmental crime has followed this trend of increased penalties and for more and longer prison sentences for those convicted.²⁷⁴ This trend appears to result from congressional acts passed in the mid-1990's, which expanded the definition of criminal environmental behavior as well as harsher sanctions set out by the sentencing guidelines.²⁷⁵ Under this expanded definition, a criminal offender may include first-time violators as well as purely regulatory offenders.²⁷⁶ A criminal offender may also include offenders who acts may be contrary to the law, but whose actions have not actually harmed the environment.²⁷⁷ Furthermore, the sentencing guidelines significantly increased the penalties for those convicted of environmental offenses.²⁷⁸

In the years following the enactment of the sentencing guidelines, the criminal penalties

²⁷² de Prez, *supra* note 263, at 65.

²⁷³ *Id.* at 76.

²⁷⁴ See generally Alexander et al., *supra* note 238.

²⁷⁵ Lauren A. Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 FORDHAM ENVTL. L.J. 42, 48-51 (1993).

²⁷⁶ *Id.* at 50-51.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 48-51.

imposed totaled less than twenty million per year.²⁷⁹ But because of the congressional acts, this number increased in the mid-1990s, averaging close to sixty million, with 1997 and 2000 exceeding 100 million dollar collection in criminal penalties.²⁸⁰ The years of incarceration of criminal offenders have also increased. In 1999, the EPA announced that a record 208 years of jail time was imposed on criminal defendants;²⁸¹ this record was quickly surpassed in both 2001 and 2002.²⁸² Although recent reports indicate a decline in criminal penalties and jail time imposed, some attribute this trend to the recent shift of U.S. governmental manpower from environmental enforcement to issues of homeland security.²⁸³ Therefore, this decline may likely have resulted from the decrease of personnel for enforcement purposes and not necessarily from a decreased interest in prosecuting offenders.²⁸⁴ Accordingly, despite this recent decline, the overall trend indicates an increase in criminal enforcement, fines and incarceration of environmental offender, reflecting the government's increasing interest in criminal prosecution of environmental offenders. Thus, once an environmental offender is convicted, it has become increasingly likely that he will receive a term of imprisonment.²⁸⁵

These higher trends suggest that judges are less likely to trivialize environmental crimes. As the criminal penalties for environmental crimes continue to increase, the stigma of being

²⁷⁹ OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. 300-R-00-005, ANNUAL REPORT ON ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS IN 1999 6 (2000) [hereinafter 1999 COMPLIANCE ASSURANCE].

²⁸⁰ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, FY 2003 END OF YEAR ENFORCEMENT & COMPLIANCE ASSURANCE RESULTS, 12 (2003), http://www.epa.gov/compliance/resources/reports/endofyear/eoy2003/fy2003enforcementandcomplianceendofyear_charts.pdf [hereinafter 2003 COMPLIANCE ASSURANCE].

²⁸¹ 1999 COMPLIANCE ASSURANCE, *supra* note 279, at 5.

²⁸² 2003 COMPLIANCE ASSURANCE, *supra* note 280, at 12.

²⁸³ The amount of criminal fines collected in 2002 by the EPA declined approximately 34% or almost eight million dollars from the previous year. Kenneth Reich & Seth Handy, *Environmental Crimes: Penalties Are Down but the Beat Goes On*, 34 A.B.A. SEC. ENV'T, ENERGY, & RESOURCES NEWSL. 10, 10-11 (2003).

²⁸⁴ See 2003 COMPLIANCE ASSURANCE, *supra* note 280, at 12 (showing similar a decrease in the number of defendants charged in 2002 and 2003).

²⁸⁵ Sharp, *supra* note 262, at 185.

sentenced for this type of white collar crime will diminish. Thus, any moral need for a judge to depart from the guidelines to remedy the overcriminalization of such crimes will also diminish. As a result, sentencing disparity resulting from judicial discretion will decrease as judges impose sentences within the prescribed range of the sentencing guidelines.

In summary, the federal sentencing guidelines protect society's interests by imposing similarly situated penalties to similarly situated offenders and providing a consistent and predictable deterrence incentive to environmental crimes. But economic theory dictates that these benefits will only be realized when the sentence is anticipated and predictable and not solely the discretion of the sentencing judge; thus, efficiency arguments do not support the critics of the guidelines who believe that the abolition of these guidelines would promote more just sentences. In contrast, economics provides strong support for those legal practitioners and academics who support the guidelines in either their mandatory or discretionary form. Accordingly, despite their numerous criticisms, the federal sentencing guidelines provide the most efficient approach to balancing criminal justice issues in the sentencing of environmental offenders.

VI. CONCLUSIONS

The use of criminal sanctions to enforce environmental law can be justified on a variety of grounds including the pursuit of such goals as incapacitation, rehabilitation, and retribution. While these motivations may well play some part in the recent trend toward criminalizing egregious violations of federal environmental law, it is clear that the core rationale is one of deterrence. EPA prosecutors and investigators have attempted to create a compliance framework wherein the regulated community has clear incentives to adopt all cost-justified precautions so

that expected environmental harms can be efficiently abated. Acts by the regulated community that result in environmental harm, or increase the probability of environmental harm, will be more difficult to deter with monetary sanctions alone when benefits to the violator are high, harm is substantial, the probability of imposing sanctions is low, and/or the level of violator assets is modest compared to harm done. As a result, criminal sanctions are an integral part of a marginal deterrence approach to the enforcement of environmental law. Violations that create “significant environmental harm” are the particular focus of the EPA’s Criminal Investigation Division (CID).²⁸⁶

A. Prosecutorial Discretion and the Overcriminalization of Environmental Law

In practice, a given environmental violation can result in a variety of sanctions, ranging from a simple notice of violation, to a substantial civil penalty, or even to criminal sanctions depending on the response of government prosecutors. The choice between administrative, civil, or criminal proceedings rests with career prosecutors and their exercise of prosecutorial discretion. As a matter of public policy, dynamic enforcement considerations and penalty leveraging, as well as spatial enforcement considerations and regulatory dealing, provide an efficiency basis for allowing EPA prosecutors wide latitude in sanctioning violations of environmental law. On the other hand, while society has an important interest in reducing pollution and deterring illegal environmental activities, society also has an interest in ensuring that the requirements for complying and the penalties for not complying are not so severe that firms

²⁸⁶ The 1994 EPA guidance directs agents to focus on violators causing “significant environmental harm” which is defined by four factors: 1) actual harm that has an identifiable and significant harmful impact on human health or the environment; 2) the threat of significant harm by an actual or threatened discharge, release or emission; 3) the failure to report an actual discharge, release, or emission, coupled with actual or threatened environmental harm; and 4) a single violation that represents a “trend or common attitude within the regulated community.” See Steven P.

are inhibited from engaging in socially beneficial activities.

In the case of businesses subject to environmental regulations, prosecutorial discretion can be influenced negatively by a variety of factors including the way in which a company responds to an investigation, fails to prepare effectively for inspections, complies with search warrants, or develops a pattern of poor records management. Similarly, the Federal Sentencing Guidelines themselves suggest ways to favorably influence prosecutorial discretion and subsequent sanctioning. Under the existing Guidelines, a culpable organization with an effective program to prevent and deter violations of law can earn a three-point credit to mitigate the penalties it would otherwise receive. Organizational compliance programs have developed in direct response to this incentive. More generally, penalty policies allow for consideration of cooperation, mitigating factors, response, prevention of recurrence, and employee training when considering ultimate sanctions. Careful, considered response by the regulated community to a criminal investigation can have a major impact on the ultimate sanctioning outcome.²⁸⁷

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

Solow, *Preventing an Environmental Violation from Becoming a Criminal Case*, 18 NAT. RESOURCES & ENV'T 19 (2004).

of environment law is necessary if prosecutors are to achieve an acceptable level of deterrence in a cost-effective manner. Second, clear signals need to be sent to the regulated community concerning discretionary criteria so that potential violators can organize their precaution activities effectively. Third, factors and procedures that can affect prosecutorial discretion must be selected judiciously so that the response of the regulated community is to channel resources into activities that effectively reduce expected environmental harm, enforcement costs, or both. The alternative is to overcriminalize environmental law by encouraging sanctioning-minimizing activity that is divorced from the adoption of cost-justified precautions.

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

Critics are correct to point out that the requisite criminal intent in this area has been modified, and to some extent diminished, as compared with common law crimes. However, the critics’ fear of strict liability is unfounded. Substantial defenses and procedural safeguards exist. The danger of wrongful conviction is no greater in this area than in many other areas of criminal

²⁸⁷ See Joseph W. Martini & Karen Mignone, *Minimizing Client Exposure to Criminal Enforcement for*

law. An unresolved and perhaps a more serious question is whether increased prosecutorial leverage conferred by overlapping felony penalties alters the administrative or civil defendant's plea bargaining calculus so much as to effectively deprive him of his defenses in court.

B. Judicial Discretion and the Trivialization of Environmental Law

New sentencing guidelines for criminal sanctions were established in 1987 with the passage of the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984. Under this legislation, courts were required to impose sentences which reflect the seriousness of the offense, provide just punishment for the offense, and afford adequate deterrence to criminal conduct. The federal sentencing guidelines went into effect November, 1987 and apply to all federal crimes committed on or after that date. Sanctions under the guidelines are based on an evaluation of the gravity of the criminal offense and the defendant's criminal history.

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

Environmental Violations, 18 NAT. RESOURCES & ENV'T, 27 (2004).

guidelines in sanctioning violations of environmental law, important problems of implementation and criminal justice remain.

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

From a public policy perspective, however, the enforcement/deterrence implications of sanctioning outcomes under the federal sentencing guidelines are much more contentious. In the early 1990s, reviews of the application of the guidelines to environmental crimes concluded that the sentences imposed in the majority of cases reflected the reluctance of judges to impose significant incarceration for violations of environmental laws.²⁸⁸ The practice of lenient sentencing of environmental criminals was well documented in selected districts. As a result, implementation of the guidelines had not entirely eliminated lack of proportionality in sentencing with criminal violators continuing to receive sentences of straight probation and/or incarceration of less than one year, even for the commission of substantive environmental crimes.

The judicial motivation for departures that resulted in lenient sentencing may well have

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

A recent statistical study of the federal sentencing guidelines has documented that sentencing disparity has been reduced for defendants found guilty of similar criminal conduct.²⁸⁹ That is, implementation of the guidelines has been successful in reducing interjudge nominal sentencing disparity. Disparity reduction reinforces the expressive function of sentencing by documenting that sanctions are not simply the personal judgment of the sentencing judge, but more of a direct measure of the offense to the community. Additionally, recent trends in the sentencing of environmental crimes per se suggest that judges and prosecutors are less and less likely to trivialize environmental crimes. From the inception of the federal sentencing guidelines, criminal sanctions in terms of both monetary penalties and months of incarceration have risen dramatically, averaging well over \$100 million dollars and 200 years of jail time in recent years.²⁹⁰ To the extent that recent trends in the reduction of sentencing disparity and the imposition of significant criminal sanctions when appropriate are representative of current environmental

²⁸⁸ See generally Barrett, *supra* note 1.

²⁸⁹ See generally Alexander et al., *supra* note 238.

²⁹⁰ See *supra* notes 279 and 280 and accompanying text.

enforcement policy, society's interests in providing consistent, predictable, and proportionate deterrence are promoted.

C. Implications for Future Research

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