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Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants under Environmental Statutes

Michele Kuruc

COMMENT

Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes

The condition of America's natural environment had been largely ignored by the nation until recently.[1] In the seventeenth and eighteenth centuries, the colonists viewed the land and its resources as unlimited.[2] Nature's abundance misled early Americans into believing that careless use of the land or lumber was not detrimental. Even as the homesteaders and ranchers of the 1800's extended the frontier westward, conservation commanded little attention.[3] The early industrialists continued to exploit the land and often made their fortunes at the expense of the natural environment. Throughout this country's history, our citizens' concerns about preserving the environment for future generations were simply secondary to the needs of the moment. The environment provided a vast wealth of raw materials and resources for development, but at the same time, it became an all-purpose dumping ground for the waste generated by an ever-growing population.[4] The air, land, and water became society's junkyard.

Although today government stands as a watchful overseer, regulating everything from radiation[5] to herbicides,[6] it has not always been so.[7] Only in the past several decades have people begun to realize that pollution

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1. *But see* G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW, 129-31 (1981) (in the late 19th century, John Muir was one of the few individuals who devoted his life exclusively to preservation of the natural environment).

2. F. SKILLERN, ENVIRONMENTAL PROTECTION §§ 1.01-1.02 (1981).

3. *See supra* note 1.

4. But, of course, society's demands continue to increase for the products that are often responsible for pollution. For example, the demand for vinyl chloride rose astronomically over the last three decades. Vinyl chloride is a gas used in the production of plastics for industrial and consumer use. In 1950 approximately 112 million pounds of vinyl chloride were produced; by 1978 the level of production had risen to seven billion pounds. Vinyl chloride has been implicated in damage to the liver, circulatory system, and bones. It has also been held responsible for birth anomalies and cancers of the liver, brain, and respiratory and lymphatic systems.

The extractive industry, which produces the greatest amount of wastes, includes that which is taken from mines, forests, and croplands. About 2.5 billion tons of solid waste are generated each year in the form of mine tailings and spoils, forest residuals, and crop wastes. Manufacturing disposes of the second largest quantity of wastes. In 1977, manufacturers discarded an estimated 160 million tons of solid wastes such as sludges, slags, dust, paper materials, and other organic and inorganic materials. These figures do not reflect consumer wastes which accounted for an additional 150 million tons in 1978 (the equivalent of approximately 3.7 pounds per person per day). COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL TRENDS, 76-86, 90, 100 (1981).

5. 42 U.S.C. §§ 5801-5879 (1982).

6. 7 U.S.C. §§ 136a-136y (1982).

7. *But see* 33 U.S.C. § 407 (1982) (originally enacted as Rivers and Harbors Act of 1899, ch. 425, § 13, 30 stat. 1152). This Act was probably the most important of the early federal pollution control laws for the protection of navigable waters. It prohibited the discharge or deposit of any type or amount of refuse matter, except that which flowed from streets and sewers, into navigable waters of the United States. 3 CLARK, WATERS AND WATER RIGHTS § 244.1 (1967). The Rivers and Harbors Act of 1899 was described as a consolidation of prior acts which had listed specific pollutants, such as sawdust and cinders, and forbade their release into specific bodies of water, such as the New York Harbor. United States v. Standard Oil, 384 U.S. 224, 226-28 (1966). For the most part polluters have had little to fear until

must be stopped. This public awareness elevated environmentalism to the status of a cause célèbre during the 1960's and 1970's.[8] As with other movements, public activism stimulated Congress to establish the current pervasive system of government controls.

In attempting to punish those who jeopardize the public's health and well-being by polluting, Congress has seen fit to include criminal sanctions in several of today's environmental statutes.[9] These criminal sanctions which exist as an alternative to civil penalties, injunctions, or administrative remedies,[10] will be the focus of this comment. After exploring how criminal sanctions are actually employed by the courts against corporate defendants, I will argue that, as presently used, the sanctions are ineffective deterrents. Finally, I will evaluate special problems which exist for the prosecutor or judge who attempts to invoke criminal sanctions against a corporate defendant. Questions to be explored include the feasibility and propriety of punishing the corporate entity, and difficulties associated with proceeding against a corporate official or responsible individual within the corporate organization.

CRIMINAL SANCTIONS AGAINST CORPORATE POLLUTERS: THE PROBLEM

Only recently did Americans begin to consider pollution a crime.[11] Polluting fresh water, destroying arable lands, and injecting lethal toxins into the earth are now recognized as morally reprehensible acts. These acts involve more than just a failure to comply with an administrative regulation, and more than just an economic wrong. Environmental pollution threatens society's welfare as much as acts traditionally labelled as violent crimes.[12]

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recent years. The recent growth of federal regulatory agencies is apparent when one examines the Code of Federal Regulations. In 1949, the Code of Federal Regulations contained 22,055 pages but by 1980 it had grown to 102,195 pages. B. SCHWARTZ, ADMINISTRATIVE LAW, 267-68 (1982).

8. M. Ways, *The Environment, A National Mission for the Seventies*, in ENVIRONMENTAL PROTECTION 1 (L. Jaffe & L. Tribe, eds. 1971).

9. *See infra* text accompanying notes 50-61.

10. United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975). The court held that under the FWPCA an administrator was not forced to first bring about compliance with civil measures. A criminal action could be instituted from the outset.

11. The violent effects of industrial pollution were probably most graphically illustrated by the Love Canal disaster which received much public attention in the late 1970's. For many years Hooker Chemical buried thousands of drums containing industrial solvents under land surrounding its New York facility. Hooker later sold parcels of this land for residential development and also graciously conveyed another section to the Niagara Falls Board of Education for one dollar so a school could be erected. Reports of stillborn children, deafness, birth defects, retardations, skin lesions, dizziness, and deterioration of bone marrow filled the media as causal links between the chemicals and these physical ailments became apparent. The outraged citizens of Niagara Falls finally succeeded in having the State of New York purchase their contaminated homes. BROWN, LAYING WASTE 3-38 (1979).

12. R. Kramer, *Corporate Criminality* in CORPORATIONS AS CRIMINALS 20 (E. Hochstedler ed. 1984). Air pollution has been estimated to be responsible for 140,000 deaths annually. The toxic wastes found at Love Canal, New York, Times Beach, Missouri, and Toone, Tennessee, proved to be so life-threatening that residents were evacuated permanently from their contaminated homes. Clean-up workers could not risk even temporary exposure to the waste-ridden soil. They had to wear protective suits, covering them from head to toe, before they could handle these hazardous toxins. Deaths from chemical poisons, pose as great a danger to society as a gun-toting killer.

Although pollution comes from many sources, industry contributes the most pollutants to the environment.[13] Corporations that have been responsible for releasing toxic chemicals have proved to be difficult to regulate. This was often due to the existence of the corporate veil, which provided company officials with a shield from liability, although their actions and policies violated federal or state law. Thus, although the enactment of environmental legislation aimed at imposing criminal penalties on corporate entities and their officials might be seen as a solution to this problem, it has not proven to be so. The judiciary's reluctance to impose criminal penalties on corporations has rendered the sanctions of little value.[14]

The continued unwillingness on the part of courts to punish the corporation or the responsible corporate officials stems from early views on the subject. These current judicial attitudes can be explained by examining how reglatory violations were seen by the courts and the public throughout the nineteenth and twentieth centuries. First, these regulatory violations were viewed as economic crimes;[15] for instance, compliance with health and safety codes was viewed as merely a matter of economics.[16] Compliance was more costly than noncompliance, because corrective devices were expensive and fines were slight.[17] Therefore, it behooved the profit-seeking company to break the law. Viewed as economic crimes, with such an amorphous group as "the public" as its victim, judges often had difficulty looking at the crimes as deserving of criminal punishment.[18] "Criminal judges . . . who are used to following the traditional requirement of *mens rea*, often hesitate to inflict heavy criminal penalties upon one who may have unknowingly become a criminal."[19] Often the violations were not, and could not be, knowing or negligent, so imputing criminal intent to a violator was disfavored.[20]

The second view as to why courts are reluctant to punish corporations involved criminal intent but also concerned the public's perceptions of these prohibited acts. Originally, many regulatory crimes were crimes of strict liability:[21] if the act was done, liability was imposed regardless of intent.[22] Regulatory crimes were strict liability crimes because regulatory violations were not perceived as morally delinquent acts by the public. For instance, in the early part of this century, health and housing code violations were not viewed as morally reprehensible; people did not view a landlord's failure to repair a broken window as damaging to the welfare

13. *See supra* note 4.
14. *See infra* notes 71-79 and accompanying text.
15. F. GRAD, TREATISE ON ENVIRONMENTAL LAW 2-561 to 2-562 (1983).
16. *Id.*
17. *See infra* text accompanying notes 73-79.
18. Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALB. L.R. 61, 69 (1972).
19. *Id.*
20. F. GRAD, *supra* note 15, at 2-560.
21. *Id.*
22. *Id.* at 2-561.

of the society. Because the violations were not considered to be criminal acts they were not punished as criminal acts.[23]

Trying to explain the courts' "hands off" attitude toward punishing corporations can best be understood by examining the development of criminal penalties in analagous areas. Most environmental statutes are recent additions to federal, state, and local law. In the corresponding area of health and safety (which in the latter part of the nineteenth century and much of the twentieth century included the anti-pollution codes), sentences for business offenders were notoriously light.[24] Despite the availability of substantial fines, the average fine in New York City for a housing code violation was fifty cents.[25] Even as recently as 1970, penalties were slight. In *United States v. Park,*[26] the president of a large supermarket chain was found guilty under the federal Food, Drug, and Cosmetic Act[27] of exposing food to rodent contamination.[28] The president was fined only $250,[29] despite a guilty verdict on five separate counts. The $250 fine amounted to less than a "slap on the wrist" for his supermarket chain, Acme, which was comprised of 874 retail outlets and 36,000 employees.[30]

Another example of the traditional leniency to which corporate offenders have grown accustomed can be taken from the antitrust area. In a single electrical equipment price fixing case in 1960,[31] twenty-nine corporate defendants and forty-five individuals were prosecuted by the government. The General Electric Company (GE), the industry leader, was assessed the largest fine, $437,500.[32] The fine seems to be substantial until one realizes that not only was the penalty seen as surprisingly harsh,[33] but that GE had annual sales amounting to four billion dollars in 1957.[34] Thirty-one of the forty-five individual defendants drew jail sentences, but twenty-four of these sentences were suspended.[35] Of the seven defendants who actually served time in jail, thirty days was the maximum time served.[36]

With this background, it is not difficult to understand why environmental crimes, a new class of regulatory crimes, are often perceived

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23. *Id.* at 2-555, 2-564.
24. Comment, *supra* note 18, at 61-63 (1972).
25. *Id.*
26. 421 U.S. 658, 670 (1974).
27. 21 U.S.C. § 331(k) (1974).
28. The inspectors found extensive evidence of rat and mouse infestation. Rodent pellets were found along the walls of the warehouse and on the ledge in the hanging meat room. In addition, rats had chewed holes in bales of various food products. These conditions had been found to exist for an extended period of time. United States v. Park, 421 U.S. 658, 661-62 nn. 4-6.
29. *Id.* at 666.
30. *Id.* at 660.
31. United States v. Westinghouse Elec. Corp., 1960 Trade Cas. (CCH) 76753 (E.D. Pa. March 24, 1960).
32. Comment, *Is Corporate Criminal Liability Really Necessary?* 29 Sw. L.J. 908, 921-22 (1975).
33. Watkins, *Electrical Equipment Antitrust Cases,* 29 U. CHI. L. REV. 97, 100 n.7.
34. *Id.* at 101.
35. *Id.* at 100.
36. *Id.*

by the judiciary as inappropriate for criminal penalties.[37] The idea that environmental crimes should be punished by civil remedies is still prevalent.[38] Reliance on these explanations though, does not serve as adequate justification for the "foot-dragging" of today's judges.

Lack of criminal prosecution in the environmental area reflects a hesitancy on the part of the prosecutors to seek such convictions, and a reluctance on the part of the judiciary to impose such sanctions. This presents a vicious circle, for if judges will not impose the penalties in a meaningful way, then it is futile for prosecutors to seek such ineffective sanctions. Moreover, the less often criminal penalties are sought, the less chance judges have to impose them.

Even if one assumes a generous lag time after the enactment of the legislation with criminal sanctions, so enforcement mechanisms can be put in place,[39] the usage of criminal penalties by the courts has been slow. For instance, once the Environmental Protection Agency came into existence, teams of investigators devoted to enforcing environmental legislation were available to seek out and collect evidence on violations. But these field officers needed to be educated in proper criminal procedures if criminal penalties were to be sought. Training was needed so searches and seizures would not run afoul of the fourth amendment's exclusionary rule. Even after these enforcement mechanisms were established prosecutions were rare. Only a handful of cases exist in which criminal sanctions have actually been imposed. Thus, deterrence provided by the existence of such sanctions is, at present, minimal if not meaningless.

If federal and state governments are to deter environmental pollution, courts and prosecutors must not be afraid to impose criminal sanctions. Congress has provided for large fines[40] to aid in effective enforcement and deterrence.[41] Congress has also added language to statutes calling for the imposition of sanctions on "responsible corporate officials."[42] The congressional mandate is thus clear; Congress has intended for those who pollute, whether an individual or a corporation, to be punished by sanctions commensurate with the seriousness of the offense.

The social stigma which attaches to a criminal proceeding and to imprisonment will be an effective deterrent only if courts use criminal penalties.[43] Businessmen and corporations are clearly concerned with their reputations in the community.[44] Heavy fines, incarceration, and the subse-

37. Comment, *supra* note 18, at 67.

38. *See* United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1124 n.1 (3d Cir. 1979).

39. Conversations with Judd Starr, Attorney, Land and Natural Resources Div., U.S. Dep't. of Justice (August 1984).

40. *See supra* text accompanying notes 51-60.

41. *Frezzo Bros.*, 601 F.2d at 1127 n.5.

42. *See infra* note 61 and accompanying text. Even though the legislative history is unenlightening, the language on its face is clear. Congress did not intend for responsible individuals to be able to escape from liability by hiding behind a corporate shield.

43. Comment, *supra* note 18, at 63.

44. *Id.*

quent loss of reputation, encourage corporate obedience. These penalties carry no clout however, if they are not used as intended.

Fortunately, several factors have changed since the early days of regulatory crime. First, environmental crimes are no longer viewed as merely economic crimes. In 1970 a Harris poll indicated that most Americans considered pollution to be the most serious problem facing their communities.[45] Many forms of pollution cause serious health problems, sometimes death.[46]

Society's changed perceptions have resulted in new demands on the Congress for appropriate legislation. In response, lawmakers have produced environmental regulations which provide for punishments that have heretofore been reserved for those criminals whose acts were considered harmful and against society's collective mores. Now people have come to realize that polluting is more than mere negligence; it is a deliberate act with life-threatening consequences. The intent of the polluter is clearly present when a violation is committed.

The perception of polluting as a violent crime helps to blur, or perhaps eliminate, the *malum in see - malum prohibita* distinction.[47] *Malum in see* crimes indicate a deliberateness on the part of the actor. Corporate officials of today are well educated on the effects and dangers of their products. When corporate policies are made that allow violations to occur, it is not inadvertant. These decisions are informed and conscious. When responsible corporate officials pollute, it is intentional, and the harmful consequences are well documented. Violators know what will happen when they discharge prohibited substances, and they should be held accountable.

Second, under federal statutes criminal punishment is possible only after intent or knowledge has been shown.[48] When an employee commits a violation while acting under orders, principles of fairness should allow the court to impute the employee's knowledge to his manager, or to his corporation. Obviously, a plant manager knows, or should know, what occurs in the facility of which he is in charge.[49] In today's climate of extensive industrial regulation, it is naive to think that every corporate official is unaware that his plant is violating an emissions standard or is burying toxic waste in an improper storage or disposal facility. Managers are concerned with these matters, so if they violate the law the courts must be

45. Comment, *supra* note 18, at 68.

46. S. EPSTEIN, L. BROWN & C. POPE, HAZARDOUS WASTE IN AMERICA 36 (1982).

47. Comment, *supra* note 18, at 67. Generally, no criminal intent or *mens rea* is required for *malum prohibita* crimes and the mere accomplishment of the act or an omission is sufficient for criminal liability. BLACK'S LAW DICTIONARY 861, 862 (rev. 5th ed. 1979).

48. *See* F. GRAD, *supra* note 15, at 2-559 to 2-561 (suggesting that state and municipal laws that do not require the showing of intent or knowledge can never deal effectively with the environmental criminal).

49. In testimony before the Senate Subcommittee on Air and Water Pollution, one union official suggested that his company would turn back their furnaces when an air pollution inspection was upcoming. *Hearings before the Sub-Committee on Air and Water Pollution of the Senate Committee Public Works,* 91st Cong., 1st Sess. 161 (1969).

cognizant that these violators are knowing violators. Now that sanctions which are capable of deterring polluters have been placed in environmental statutes, the final hurdle which must be overcome is the reluctance of the judiciary to use these criminal penalties.

STATUTORY CRIMINAL SANCTIONS

Using a criminal penalty to enforce pollution regulations is neither a recent development, nor unique to American jurisprudence. In the fourteenth century, for example, an Englishman was executed for violating a Royal Proclamation on smoke abatement.[50] Today several environmental statutes, regulating various pollutants of land, air, and water contain criminal penalties. Although sanctions no longer provide for capital punishment, they do typically provide for the imposition of potentially large criminal fines[51] and/or imprisonment of up to one year for an initial conviction.

Under the Clean Air Act,[52] for example, noncompliance "[s]hall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both."[53] Both the Toxic Substances Control Act[54] and the Federal Water Pollution Control Act (FWPCA)[55] contain provisions identical to those found in the Clean Air Act. These criminal sanctions can be applied to various violations: violations of permit limitations or conditions under the FWPCA;[56] violations of emissions standards under the Clean Air Act;[57] and violations of the Toxic Substances Control Act. Under the Toxic Substances Control Act polluters can be subjected to sanctions for several reasons: for refusing to permit inspections, for refusing to establish, maintain, and permit access to records, and for using various prohibited chemicals.[58] The FWPCA and the Clean Air Act also provide criminal penalties for such actions as: making false statements in reports that are required to be filed, falsifying required documents, and tampering with monitoring devices or

50. Mix, *The Misdemeanor Approach to Pollution Control*, 10 ARIZ. L. REV. 90 (1968), *citing* Chass and Feldman, *Tears for John Doe*, 27 S. CAL. L. REV. 349-52 (1954).

51. W. LAFAVE & A. SCOTT, CRIMINAL LAW 38, n.39 (1972). The test for distinguishing between criminal fines and civil fines is not a clear one. For example, if recovery is by indictment or information, it is criminal; otherwise it is civil. If the government sues it is criminal; if a private person sues it is civil. If the fine is awarded to the government it is criminal, if to a private party it is civil.

52. 42 U.S.C. §§ 7401-7626 (1982).

53. 42 U.S.C. §§ 7413(c)(1) (1982). The Endangered Species Act also provides criminal penalties, but it is generally not used against corporate defendants. Therefore, it will not be discussed in this comment.

54. 15 U.S.C. §§ 2601-2629 (1982).

55. 33 U.S.C. §§ 1311-1328 (1982). The FWPCA has a unique feature in its scheme of criminal fines. In the statute, Congress has set a *minimum* monetary fine. Although the legislative history does not indicate why Congress chose to require a fine of at least $2,500 per day for violators, it seems Congress wanted to ensure that these fines served as punishment.

56. 33 U.S.C. § 1319(c)(1) (1982).

57. 42 U.S.C. § 7413(c)(1) (1982).

58. 15 U.S.C. § 2615 (1982).

methods.[59] Criminal fines under these provisions are set at a maximum of $10,000, with jail sentences not to exceed six months.[60]

The criminal sanctions in these statutes apply to "any person."[61] The definition of "person" encompasses many entities, including individuals and corporations. Beyond this, however, Congress enlarged the term "person" to include "any responsible corporate officer."[62] By broadening the class of potentially liable parties in this way, Congress demonstrated that it did not intend for individuals in a corporate enterprise to escape punishment by hiding behind the corporate veil. With the addition of a provision specifically directed at corporate officers, Congress anticipated the difficulties to be encountered when the government attempts to hold a corporation, or those connected to it, criminally responsible for its acts of pollution.

In addition, all of the statutes require that knowledge or willfulness be shown before a criminal sanction can be imposed on a violator.[63] In a corporate context, the knowledge or willfulness requirement presents difficulties. A corporation cannot act or think except through its agents; yet the corporation *itself* must be held to have knowledge before it can be punished. If the knowledge or willfulness of an individual actor could not be imputed to a corporation, companies would be able to assert lack of knowledge as a complete defense. To overcome this inequity, a legal fiction which imputes to a corporation knowledge of the acts of their agents has been employed by the courts.[64] This fiction has been used since the beginning of the twentieth century. In *United States v. MacAndrews & Forbes Co.*, the court characterized the refusal to impute knowledge to a corporation as "but a remnant of an always fanciful and soon to be abandoned fiction. It seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation."[65]

The Wyoming Environmental Quality Act,[66] (WEQA) follows the scheme of liability found in the federal statutes. A violation of the state act carries a penalty of no more than $25,000 per day, or no more than a year of imprisonment, or both. A $50,000 fine, or two years in jail, or both, can be imposed on a repeat offender. A person who tampers with monitoring devices or who falsifies records faces a $10,000 fine or a jail

59. *Compare* Federal Water Pollution Control Act, § 309, 33 U.S.C. § 1319(c)(1) (1982) *with* Clean Air Act, § 114(c)(2), 42 U.S.C. § 7413(c)(2) (1982).

60. *See, e.g.*, 33 U.S.C. § 1319(c)(1) (1982).

61. 33 U.S.C. § 1362(5) (1982) defines a person as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or an interstate body." Although the Toxic Substances Control Act applies to any person, the term "person" is not specifically defined.

62. *Compare* Federal Water Pollution Control Act, § 309, 33 U.S.C. § 1319(c)(3) (1982) *with* Clean Air Act, § 302(e), 42 U.S.C. § 7413(c)(3) (1982). Both statutes provide: "[f]or purposes of this subsection [referring to the subsection on criminal penalties], the term 'person' [means] . . . any responsible corporate officer."

63. 33 U.S.C. § 1319(c)(1) (1982); 42 U.S.C. § 7413(c)(1) (1982); 15 U.S.C. § 2615(b) (1982).

64. United States v. MacAndrews and Forbes Co., 149 F. 823 (S.D.N.Y. 1906).

65. 149 F. 823, 835-36 (S.D.N.Y. 1906).

66. WYO. STAT. § 35-11-901 (Supp. 1984).

sentence of one year.[67] The Wyoming legislature has added a further criminal sanction that is to be applied against those who resist or impede the enforcement activities of an agent regulating surface coal mining operators.[68] A maximum fine of $5,000 or one year in jail or both, can be imposed. As with the federal statutes, all of the sanctions provided by WEQA require a knowing or willful violation.[69]

APPLYING CRIMINAL SANCTIONS

The broad purpose of criminal penalties is now represented by a single theory, deterrence.[70] The protection of society by making people do what society regards as desirable, and by preventing them from doing what society considers undesirable, is the ultimate goal of deterrence.[71] Criminal penalties serve to control the behavior of the individual in several ways. First, they specifically deter repeat offenders. Second, they generally deter potential offenders who see others being punished. The social stigma associated with criminal sanctions is one aspect of punishment which can serve as both a specific and general deterrent. In cases involving well-off defendants, the threat of social stigma may be particularly effective.[72]

Criminal sanctions can only serve to deter individuals and corporations if they are actually *used* by the courts. Punishment will deter only those who expect its imposition. In order to gauge the effectiveness of criminal sanctions in controlling corporate conduct, one must examine how

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67. *Id.*

68. WYO. STAT. § 35-11-901(m) (Supp. 1984).

69. The criminal provisions of the WEQA have never been used in an environmental prosecution. Typically, the remedies sought by the state have been civil in nature. Fines, injunctions, and orders of abatement have been used to punish those who violate the Act. *See generally* Nickelson v. People, 607 P.2d 904 (Wyo. 1980). The state prosecuted Nickelson under WYO. STAT. 35-11-901(a) (1977), which provides for large monetary penalties but fails to indicate whether the fines are to be considered civil or criminal. When this question was before the court, it reasoned that the fines were civil because environmental regulations were outgrowths of property and nuisance law, areas traditionally involving civil remedies. After *Nickelson*, one wonders whether the Wyoming Supreme Court would be reluctant to enforce the criminal provisions of the WEQA.

70. UNIFORM LAW COMMISSIONERS, MODEL SENTENCING AND CORRECTIONS ACT § 2 (1979).

Historically, three theories have been advanced to support the imposition of criminal sanctions: retribution, rehabilitation, and deterrence. Retribution, vengeance, or the idea of an eye for an eye was at the core of the ancient system of criminal law. Revenge was carried out by a single individual or small group of individuals attempting to avenge an isolated wrong that had been done to them or to one of their group members. As rules and laws developed to keep order, revenge to achieve personal justice fell into disfavor. Individuals were expected to conduct themselves within the bounds of the law. The system, not the individual, began to prescribe punishment.

The second theory espoused to justify criminal penalties was rehabilitation. This theory emphasized a criminal's re-entry into society. To the extent that rehabilitation concentrates on the individual, his background, and his prospects for reform, it is more correctly related to sentencing and corrections. This theory attacks the problem after the fact, after crimes have occurred. It does not attempt to prevent crime from being committed, which is the overall purpose of criminal law. Therefore, the theory has been dismissed as a justification for criminal penalties by most commentators. Comment, *Toward A Rational Theory of Criminal Liability for the Corporate Executive*, 69 J. CRIM. L. & CRIMINOLOGY 75, 77 (1978).

71. W. LA FAVE & A. SCOTT, CRIMINAL LAW 21 (1979).

72. *See* Comment, *supra* note 32, at 919.

existing penalties are used by the courts. As mentioned earlier,[73] environmental statutes contain both civil sanctions as well as criminal penalties.[74] Which alternative to pursue is left to the discretion of the officer charged with enforcement.[75] Criminal sanctions, however, are used with alarming infrequency.[76] Michael K. Glenn, former Deputy Assistant Administrator for Federal Water Enforcement, pointed out that: "[D]uring the past twenty-five years the federal government has relied almost exclusively on negotiation, public pressure, and voluntary compliance by dischargers as the principal means of achieving compliance with federal water pollution control laws."[77]

Very few cases exist in which a court imposed the criminal sanction of either a fine or incarceration on a corporation or one of its agents for violating an environmental statute. Punishment of individuals involved in corporate crimes of any type has been extraordinarily uncommon in the United States.[78] For example, a recent study[79] pointed out just how unlikely it is for any corporate officer charged under any statute, environmental or otherwise, to be convicted, fined, or incarcerated. The study found that in 1975 and 1976, only 1.5 percent of all enforcement efforts produced a conviction of a corporate officer; and of these convictions, only twenty percent were of high level corporate officials.[80] Jail sentences, when imposed, rarely exceeded thirty days, and monetary fines were so low as to be inconsequential.[81] This "hands off" attitude extended into all areas where corporations were potential defendants. Corporations that violate environmental laws continue to enjoy leniency when they face sentencing because of this meekness on the part of the courts in dealing with corporate criminals.

PROSECUTING CORPORATE POLLUTERS: THE UNFORTUNATE REALITY

Criminal prosecutions are infrequent and sentences are light in the environmental area. For instance, in 1969, only four complaints out of 800, made under a Boston municipal air pollution law, resulted in prosecution, and only one resulted in conviction.[82] The situation in the federal courts

73. *See supra* notes 52-64.

74. Civil sanctions are used most frequently in environmental violations. *See supra* notes 24-36 and accompanying text.

75. *See, e.g.*, United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975). In examining the legislative history of section 309 of the FWPCA, the court determined that the Act provided alternative sources of enforcement action.

76. United States v. Frezzo Bros., Inc., 602 F.2d 1123 (3d Cir. 1979).

77. *Id.* at 1124 n.1. Glenn made his comment in 1973 after a comprehensive analysis of the use of criminal sanctions under the FWPCA.

78. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1982 526 (1983). For instance, in antitrust cases filed in the United States district courts between 1960 and 1981, the average number of criminal cases filed per year was 24, with 1970 having a low of 4 and 1981 having a high of 82.

79. M. CLINARD, ILLEGAL CORPORATE BEHAVIOR 206 (1979).

80. *Id.*

81. M. ERMANN & R. LUNDMAN, CORPORATE DEVIANCE 168 (1982).

82. Kovel, *A Case for Civil Penalties*, in Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALB. L. REV. 61, 66 (1972).

is just as bad. In *United States v. Little Rock Sewer Committee*,[83] even though the defendant was found to have knowingly made materially false statements in reports that were required on a regular basis, the sentence was suspended.[84] The court refused to impose a fine or other penalty so long as the defendant brought the sewer system up to statutory standards within a reasonable time.[85] In another case where probation substantially mitigated the effect of the punishment, an oil company was initially fined $20,000 and given three years probation,[86] for failing to report to the EPA that it had discharged an oil spill into navigable waters.[87] The fine was to be reduced to $5,000 if no further violations were committed within the probationary period.[88] In *United States v. Blue Lagoon Marina, Inc.*,[89] the corporation was acquitted while the individual defendant was given a fine of $2,500, the minimum allowed by the FWPCA.[90] The minimum fine was assessed even though the individual defendantl was found to have deliberately turned on a gasoline pump and discharged hundreds of gallons of gas onto the surface of a frozen lake.

In only one instance, in *United States v. Frezzo Brothers, Inc.*[91] was a maximum fine imposed on a corporation *and* on the two responsible corporate officials.[92] Although the individuals were given jail sentences, these sentences were mild.[93] The defendants[94] were engaged in a mushroom farming concern. A mixture of hay, water, and horse manure was used by the corporation as a growing medium for its mushrooms.[95] On four separate occasions the defendants were found to have willfully discharged manure into a nearby creek.[96] Composite analysis of the discharges confirmed that high concentrations of pollutants had been dumped into the waterway. The corporation was fined $50,000 and the individual defendants were fined $25,000 each.

It is curious to note, however, that a single large corporation has never endured a criminal prosecution under a federal environmental statute,

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83. 460 F. Supp. 6 (E.D. Ark. 1978).

84. *Id.* at 9.

85. The committee subsequently brought the sewer system up to the standards and after several conferences the court took the defendant off probation prior to the original expiration date. United States v. Little Rock Sewer Comm., No. LR-CR-77-138 (Oct. 31, 1979).

86. Apex Oil Co. v. United States, 530 F.2d 1291, 1292 (8th Cir. 1976).

87. *Id.* at 1292. If the defendant had reported the spill, then the information could not have been used against him because section 1321(b)(5) of the FWPCA provides in relevant part that "[n]otification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in criminal case, except a prosecution for perjury or for giving a false statement." 33 U.S.C. § 1321(b)(5) (1982).

88. *Apex Oil*, 530 F.2d at 1292.

89. No. 75-80824, (E.D. Mich. Dec. 12, 1975).

90. United States v. Hamel, 551 F.2d 107 (6th Cir. 1977).

91. 602 F.2d 1123 (3d Cir. 1979).

92. *Id.*

93. *Id.* at 1124.

94. The corporation, and the two individuals who served as principal corporate officers, were defendants. *Id.*

95. *Id.* at 1125.

96. *Id.*

although some cases have been settled.[97] Large companies are violating pollution codes but [98] they are not being forced to undergo criminal prosecutions. This is due to a hesitancy on the part of the prosecutors and the judiciary to use criminal sanctions.

PREPARING TO PROSECUTE THE CORPORATE POLLUTER

Before an environmental lawsuit is undertaken, a prosecutor should thoroughly consider the obstacles he will face. He must first determine who to name as a party; it might be appropriate to charge only the corporation, but perhaps an official should be indicted, or perhaps both should be named. As a key element of proof it must also be determined how knowledge of a violation will be shown. If an individual official is charged, the prosecutor needs to know the extent of the connection between the violation and that official. Finally, the prosecutor must decide what penalties he will request and for whom. The following sections will discuss these issues.

Indictment

Determining who should be indicted in corporate criminal cases is often difficult. If a corporate official has committed a prohibited act, or in other words, if he has been the actor himself, it is easy to charge him.[99] This situation is often encountered in small or closely held corporations,[100] where the decision-maker and employees are the same individuals. The problem arises when large corporations are involved. In large corporations, isolating who is "responsible" for a particular violation often involves unravelling multiple layers of management in corporate hierarchies where the roles of manager, supervisor, and decision-maker are often indistinguishable. In a large corporation, the person who actually commits a violation is technically guilty of violating the law but often the act is committed by a low level employee who is merely acting under orders from managers on a higher level. Those who make policy are more "responsible" than those who merely carry out orders. In large organizations, indicting a lower-echelon employee will do little more than provide a scapegoat for those who actually determine corporate policy.[101]

Indicting a corporate official based on his agency relationship to a corporation has been held to be a sufficient connection to confer liability upon the individual.[102] In *United States v. Park*,[103] the corporate president

97. Conversations with Judd Starr, Attorney, Land and Natural Resources Div., United States Department of Justice (August 1984).

98. *Id.*

99. Parisi, *Theories of Corporate Criminal Liability* in CORPORATIONS AS CRIMINALS 48 (E. Hochstedler ed. 1984). This is the theory known as "identification" in which liability is direct and not vicarious.

100. United States v. Frezzo Bros., Inc., 602 F.2d 1123 (3d Cir. 1979). The corporation was a family-run business where the individual defendants were the principal policy-makers and corporate officers.

101. *See* Comment, *supra* note 70.

102. United States v. Park, 421 U.S. 658 (1974).

103. *Id.*

was deemed to wield enough power over the corporation and its employees to be held liable, even though he personally did not commit the violation.[104] Park admitted that he had delegated the task of correcting the unsanitary conditions that had existed in his warehouses to middle management; Park admitted though that he ultimately had power over all operations, and was responsible for them.[105] Although he did not act, the United States Supreme Court reasoned it was within his power to see that the conditions were corrected. He did not exercise that power, however. The Court emphasized that Park was being held criminally liable because of his failure to act to ensure that the health violations were being corrected.[106] Park's ultimate liability was closely tied to his relationship to the company because this relationship provided him with the power to correct the infractions.[107] While a corporate official certainly cannot be expected to know the day-to-day conduct of every employee in his corporation, after *Park*, a corporate manager can be held responsible for violations of which he has, or should have, knowledge.[108]

In large organizations the *Park* case allows a corporate official in a supervisory position to be held responsible for the acts of those under him. This liability is not based on any act done by the official but assumes that the official could have prevented the violation because he had power to control lower level employees. The relationship of an official to the corporation confers the power to control. Therefore, liability can be conferred based on one's relationship to the company. This forces those who have the power to correct the abuses to accept responsibility for their inaction.

It must be emphasized that the basis of liability in *Park* was the principal's failure to act. This can be likened to nonfeasance; there was a duty to act to correct the violations, but the duty was ignored. The violative conduct of lower level management was not imputed to Park although he had knowledge of the violations. That knowledge could have served as a justification for imposing liabilty on Park but the Court did not discuss this even though it is a natural extension of its holding.

Knowledge

Imposing liability on a corporate defendant requires that knowledge of the offense be shown.[109] Imputing knowledge requires that the corporation, an artificial entity, have knowledge of the actor's violation.[110] The Supreme Court disposed of this problem in *United States v. A & P Trucking Co.*,[111] by declaring that "it is elementary that such impersonal entities [such as corporations and partnerships] can be guilty of 'knowing'

104. *Id.* at 663-65.
105. *Id.* at 664.
106. *Id.* at 673-74.
107. *Id.*
108. Comment, *supra* note 70, at 81-84.
109. *See supra* note 63.
110. *See, e.g.*, Ex parte Marley, 29 Cal. 2d 525, 527, 175 P.2d 832, 834 (1946).
111. 358 U.S. 121, 125 (1958).

or 'willful' violations of regulatory statutes through the doctrine of *respondeat superior.*"[112] After additional discussion, the Court went on to state:

> The business entity cannot be left free to break the law merely because its owners do not personally participate in the infraction. The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment. This pressure is brought on those who own the entity to see to it that their agents abide by the law.[113]

Therefore, if it is shown that an agent knowingly committed a violation, courts will impute that knowledge to the corporate principal.

Penalties

Corporate fines are, in effect, licenses to pollute because they are so light.[114] As one candid executive said, "It's cheaper to pay claims than it is to control flourides."[115] Devices needed to eliminate or reduce pollution are often extremely expensive. Until fines begin to be a true burden for a corporation, it will be less costly for a company to incur fines than to comply with the law.[116] If fines are nominal, they serve neither the purpose of punishing the corporation for its illegal action, nor of correcting the infraction for the protection of society.

Punishing a corporation actually punishes those people — shareholders and the public — with a very tenuous relationship to the act complained of.[117] Furthermore, if a fine is imposed it will be internalized as a cost of doing business; paying the fine through reduced dividends and increased prices further punishes shareholders and the public. Shareholders' only recourse would be to vote out the responsible officers through the board of directors.[118] The effectiveness of this solution is highly questionable.[119] The public, as consumer, must bear the company's punishment, too. The company, in order to dilute its liability, will distribute its costs and raise prices.[120] The public will tolerate the violative conduct of management only while prices remain in an acceptable range. Controlling a corporation's activities through the imposition of criminal fines will not, in and of itself, provide an ideal solution to the problem. Fines ought to be retained, for they are the only form of criminal punishment which can be imposed on a corporate entity.

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112. *Id.* at 125.
113. *Id.* at 126.
114. F. GRAD, *supra* note 15, at 2-555.
115. Reynolds Metals Co. v. Lampert, 324 F.2d 465, 466 (9th Cir. 1963).
116. Comment, *supra* note 70.
117. "By penalizing the corporation it is often the case that innocent investors are the real suffers, while the guilty parties are free to again violate the law...." Whiting, *Antitrust and the Corporate Executive,* 47 U. VA. L. REV. 929, 945 n.63 (1961).
118. *See* MODEL BUSINESS CORP. ACT § 51 (1974).
119. Eisenberg, *Legal Models of Management Structure in the Modern Corporation,* 63 CAL. L. REV. 375, 400-01 (1975).
120. *See* Comment, *supra* note 18, at 62.

Another problem with imposing a criminal fine on a corporate entity is that it allows those who are personally responsible for the violation to remain unscathed. Not only does indicting a corporation without naming responsible individuals as defendants allow them to go unpunished, it also highlights two additional difficulties. First, for many purposes corporations are treated as natural persons.[121] This legal fiction ignores the fact that corporations cannot act except through agents and various officials.[122] Often because of the depersonalized nature of a corporation, juries tend to separate the prohibited conduct from the individual actor.[123] Even though a certain individual must be responsible for a violation, juries typically allow the individual to go unpunished. In most instances, the actor is not acting for personal gain, but at the behest of the corporation.[124]

Punishing only a corporation as opposed to an individual is not always preferable because the true violator is not punished, and those bearing the brunt of the penalty are not the guilty parties. Punishing only responsible parties is also not a perfect solution because the corporation benefits from actions not paid for. The best course of action is to punish both, and to punish them effectively.

In addition to criminal fines the possibility of incarceration also exists. Although jailing a corporation, an artificial entity, is not possible, jailing those who make the violative policies accomplishes the objective of sanctioning the guilty party. A denial of liberty is an unpleasant prospect for the corporate executive and should be used without hesitation by the courts to encourage corporate officials to comply with the law.

CONCLUSION

Criminal sanctions are rarely used against corporations that pollute. The sanctions exist but they are simply not utilized. Congress included criminal provisions in environmental legislation to strengthen the government's enforcement capabilities, but the court system is frustrating this enforcement effort. Stiff monetary fines and incarceration exist to deter the polluter, but courts either refuse to impose these penalties, or they impose such diluted versions that the sanctions do not amount to punishment.

To rectify the ineffective sentencing that is now occurring, criminal sanctions should be imposed more stringently on both corporations and

121. *Id.*

122. *Id.* at 65.

123. *See* Comment, *supra* note 32, at 910.

124. United States v. Hamel, 551 F.2d 107 (6th Cir. 1977). In United States v. Hamel, however, the tendency to exonerate the individual was ignored. Both the corporation, Blue Lagoon Marina, Inc., and its yard foreman, Gilbert G. Hamel, were charged with violating the criminal portion of the FWPCA. The jury found Hamel guilty after hearing eyewitness testimony that he activated a pump that dispensed over 300 gallons of gasoline onto Michigan's Lake St. Clair. The judge acquitted the corporation. Perhaps the eyewitness testimony relieved the corporation of liability, although generally the knowledge of the corporation's employees is imputed to the corporation. Normally, the violation is clearly one which benefits the corporation. The *Hamel* case is rather atypical, for it is difficult to see how Hamel's actions benefitted himself or the corporation in anyway.

responsible individuals. When imposing criminal fines on corporate bodies, fines should be given in amounts which reflect their punitive character. Congress should adopt a scheme similar to the one found in the FWPCA, where a minimum fine is set. It does little good to impose a $500 fine on a company that earns several billion dollars a year. Issuing licenses to pollute are not the function of our courts. In all cases an effort should be made to identify responsible individuals within the organization. Sentencing violators to one year in jail will surely provide the impetus for corporate leaders to correct existing violations. The tactics suggested, although harsh, are the only effective ways that corporations can be prevented from disregarding the health of our environment.

MICHELE KURUC