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## An Eye For a Wetland? Exploring Retribution As a Theory of Environmental Sentencing

Paul A. Gillan Jr.

Of late, the great hue and cry among legislators and politicians is for greater penalties to be imposed upon environmental criminals. Criminal penalties for acts such as polluting the waters of the United States have existed for well over one hundred years,<sup>1</sup> yet it is only the last decade that has seen significant development in the enforcement of environmental statutes through criminal penalties. Indeed, the case considered to be the first "environmental crime" case, *United States v. Frezzo Brothers*,<sup>2</sup> was decided only fifteen years ago.<sup>3</sup> Relative to other crimes, environmental crimes are comparatively young.

Despite its youth, the area of environmental crimes has developed into an established part of the criminal justice system. The Federal Sentencing Guidelines Manual, for example, devotes an entire section to the sentencing of environmental crimes.<sup>4</sup> Currently, the environmental section covers only the sentencing of individual crimes. The Sentencing Commission's first attempt at developing a parallel section for corporate offenders met with such opposition that the proposed section was immediately withdrawn.<sup>5</sup>

Incidents such as the failure of the corporate guidelines proposal illustrate the heightened tension associated with the sentencing of environmental crimes. The public demands that environmental criminals be punished with a heavy hand.<sup>6</sup> Conversely, businesses complain of intrusion into day-to-day management, the hindrance of compliance, and the increasing willingness of courts to pierce the corporate veil, exposing directors and officers to personal liability.

The debate over the harshness of environmental criminal penalties centers around the deterrence factor of criminal sanctions. In fact, deterrence has been cited almost exclusively as the dominant theory behind envi-

ronmental sentencing.<sup>7</sup> Other theories of sentencing such as rehabilitation, isolation, and retribution have not been addressed.

The purpose of this article is to explore retribution as a viable theory in the sentencing of environmental crimes. Part I provides a brief overview of current methods of imposing environmental sanctions. Part II discusses deterrence as the main theory behind environmental sentencing and explains why the exclusive use of deterrence leaves theoretical gaps in sentence justification. Part III explores retribution as a theory of sentencing, and Part IV briefly discusses one possible counter-argument to the theory in section three. The article concludes by recognizing a societal obligation to explore retribution as a justification for environmental sentencing.

### I. Current Environmental Sentencing Procedures: The Statutes and the Guidelines

Most of the major environmental statutes<sup>8</sup> have provisions for the imposition of criminal sanctions.<sup>9</sup> The complexity of the criminal violation section varies from statute to statute. The content of each section correlates both with the nature of the statute (advisory v. regulatory), and with the nature of the substance or acts governed.

On the least complex end of the continuum is the Toxic Substances Control Act (TSCA) provision. The statute simply provides that anyone who "knowingly or willfully" violates the provisions of TSCA shall be subject to a fine of up to \$25,000 for each day of violation and imprisonment of not more than one year.<sup>10</sup>

On a more complex level is the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The FIFRA provisions describe various levels of fines depending on

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the person or business that is regulated. Producers<sup>11</sup> who violate FIFRA face fines of up to \$50,000 and one year in prison.<sup>12</sup> Commercial applicators<sup>13</sup> may be assessed up to \$25,000 in criminal fines and one year in prison.<sup>14</sup> Private applicators<sup>15</sup> are least threatened, with potential penalties ranging from fines of \$1,000 to up to thirty days in prison.<sup>16</sup>

The Clean Water Act (CWA) is an example of the most comprehensive and complex environmental criminal penalty statutes. Criminal activity under the CWA is divided into three groups: negligent violations, knowing violations, and knowing endangerment.

For negligent violations, a first-time offender faces a maximum penalty of fines ranging from \$2,500 to \$25,000 for each day of the offense or imprisonment for up to one year.<sup>17</sup> For a subsequent conviction under this section, an individual faces a fine of up to \$50,000 or imprisonment for up to two years.<sup>18</sup>

For knowing violations, the amount of the penalty is substantially higher. First-time offenders may be assessed fines ranging from \$5,000 to \$50,000 per day of violation and up to three years in prison.<sup>19</sup> Repeat offenders risk fines of up to \$100,000 and six years in prison.<sup>20</sup>

Knowing endangerment involves, through a violation of the regulatory provisions of the CWA, placing another individual "in imminent danger of death or serious bodily injury."<sup>21</sup> A person convicted under this section may be fined up to \$250,000 and faces imprisonment for as long as fifteen years. A business convicted under this section may be fined up to \$1,000,000. For repeat offenders, the penalties are doubled both as to fines and as to jail time.<sup>22</sup>

Like the CWA, the Resource Conservation and Recovery Act (RCRA) has a knowing endangerment provision. Both statutes provide limitations as to what is considered "knowing," and detail the affirmative defense that the endangerment was a "reasonably foreseeable hazard[] of an occupation, a business, or a profession; or medical treatment or medical or scientific experimentation."<sup>23</sup>

All of the statutes mentioned above are federal statutes. Accordingly, violations are prosecuted in federal courts, and are subject to the Federal Sentencing Guidelines.

The Guidelines were created to ensure honesty, uniformity, and proportionality in sentencing<sup>24</sup> and operate on a numerically-oriented basis. Offenses are

assigned a certain number, the "base level offense" value, which undergoes a series of calculations to arrive at a final number. That number is then plugged into a chart to determine the possible sentence range. The higher the number, the greater the minimum and maximum allowable sentence.

The sentencing procedure is best illustrated by example. Assume a manufacturer is convicted under RCRA<sup>25</sup> of one count of habitually dumping a mercuric compound wash on his own property. The manufacturer accomplished this "disposal" by ordering his night maintenance employee to carry the compound out in a bucket and spread it around in some tall grass near a fence. This process continued for about eleven or twelve years.

The RCRA violation would be sentenced under section 2Q1.2 of the Guidelines, which applies to mishandling of hazardous substances. Section 2Q1.2 includes "specific offense characteristics," and under section 2Q1.2(b)(1)(A), the court may increase the sentencing level number "[i]f the offense resulted in an ongoing, continuous, or repetitive discharge, release or emission."<sup>26</sup>

The court would then consider any "adjustments" under chapter three of the Guidelines. Section 3B1.1(c) provides for an increase in the sentencing level number if the defendant was an "organizer, leader, manager, or supervisor" in the criminal activity. Here, because the defendant exercised "decision-making authority," the offense level would be increased by two.<sup>27</sup>

Finally, because the defendant had been dumping the hazardous substance for a considerable length of time, the court may consider making a "guided departure" of up to two additional levels.<sup>28</sup> Factors that may influence the court to make a guided departure include the harm resulting from the activity, the quantity and nature of the substance involved, the duration of the offense, and the risk associated with the violation.

The final number is plugged into a chart to determine the sentencing range. In the hypothetical posed, even if the defendant fell into the lowest category, that is, the category with the least amount of past criminal conduct, the court would be obligated to impose a jail term of between twenty-seven and thirty months in length.<sup>29</sup> Although the judge may or may not impose criminal fines, the imposition of the jail term is mandatory.

Two decades ago such a stiff sentence would have

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been unheard of. Yet as the importance of preventing environmental violations continues to increase, both the sentences imposed and the potential sentences continue to increase as well. As section two more thoroughly illustrates, this step in the evolution of the environmental sentence has been attributed largely to the deterrent effect of increased penalties.

## II. Deterrence and the Need to Sentence Environmental Criminals

The premise that one convicted of a crime should be “punished” is often taken for granted. The thought of finding guilt is so closely associated with the imposition of sanctions that we scarcely consider the underlying rationale. Why do we punish? The question often goes unconsidered.

Centuries of thought and several gifted thinkers have provided four answers. Generally, the four objectives of criminal penalties are 1) deterrence, preventing both the sentenced individual and other individuals with the same propensities from committing a crime; 2) isolation, separating the individual from society either to protect society or to force the defendant into reflective meditation; 3) rehabilitation, an institutional counteracting of the social or psychological forces that caused the original crime; and 4) retribution, pure punishment, an “eye for an eye.”<sup>30</sup>

Over time, emphasis has shifted among these four theories in accordance with contemporary social thought. The earliest theory of sentencing was probably retribution.<sup>31</sup> Later thought, led principally by Plato, put off the “unreasonable fury” inherent in retributive action and opted for the more rational justification of deterrence. “[H]e who desires to inflict rational punishment . . . is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again.”<sup>32</sup>

This statement illustrates the two main subsets of deterrent theory: specific deterrence and general deterrence. Specific deterrence embodies the idea that “the man who is punished” will not repeat his crime for fear of being punished again. General deterrence operates

on the principle that “he who sees [the first man] punished” will be deterred from committing a crime for fear of meeting the same fate.<sup>33</sup> The thrust behind both subsets is that a wrong once “done” cannot be “undone”; under a deterrent theory of sentencing, the principle to which we should most aspire is the prevention of future like crimes.

The newest theory of sentencing, rehabilitation, arose in the early twentieth century. Under this doctrine, the purpose of punishment is primarily to reform the criminal, or to “do something to, for or with the defendant so that when the person’s sentence is completed . . . the defendant . . . will thereafter obey, not disobey, the law.”<sup>34</sup> The goal of rehabilitation is, arguably, preventing recurrence of the crime. The distinction, however, is that rehabilitation focuses on the individual and not merely the crime.

Unlike a sentence based on rehabilitation, a sentence based on pure deterrence is imposed so that the specific crime committed not recur, either by the sentenced defendant or by those who observe the execution of his punishment.<sup>35</sup> The

sentencing judge chooses a punishment with the goal of preventing recurrence of the crime. The rehabilitative sentence focuses specifically on the defendant, and asks by what means the forces which caused this particular defendant to commit a crime can be met and eradicated.

The chief means of implementing this philosophy of rehabilitation was the “indeterminate sentence.” A defendant convicted of a serious crime could face anywhere from one year to life in a correctional facility. Once committed, the prisoner works his way toward release by earning credits for good behavior.<sup>36</sup> Bad behavior earns demerits.<sup>37</sup> Upon the accumulation of a certain number of credits, the prisoner is considered “rehabilitated” and released; the key to the prison door, so to speak, is left in the prisoner’s hands. Indeterminate sentencing schemes, however, and rehabilitation with them, fell into judicial disfavor.<sup>38</sup> Since the decline of rehabilitation as a primary goal, deterrence has once again assumed a position at the forefront of criminal sentencing theory.

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With respect to white-collar crimes, deterrence has found particular favor among sentencing theorists. Although the trend appears to be changing,<sup>39</sup> white-collar criminals have traditionally received light sentences.<sup>40</sup> So great was the historical pattern of leniency that a white-collar defendant in 1975 challenged his twenty-five year prison sentence on the basis of cruel and unusual punishment.<sup>41</sup> There, the judge observed that:

[a] minority of the prison population are rightfully locked up because they are too dangerous to release.<sup>42</sup> If we are to justify imprisonment for the rest, it must be on the grounds of *punishment* or *deterrence*. And if this is our premise, the white collar criminal must come to expect equal or greater treatment than the common, non-violent thief.<sup>43</sup>

In sentencing the white-collar criminal, the judge found a firm footing in the theory of deterrence.

The court underscored this theory when it stated, "I doubt that deterrence will be very effective until the 'executive' becomes convinced that if he embarks on a criminal adventure, he will be severely - though proportionately - punished. Certainty is the key."<sup>44</sup> The court upheld the twenty-five year prison term, indicating its desire to provide some "certainty" to the arena of white-collar sentencing.<sup>45</sup>

With respect to sentencing of environmental crimes, deterrence has been the dominant underlying theory by far. Those involved in the investigation and subsequent prosecution of environmental crimes note the peculiar stigma attached to a criminal charge.<sup>46</sup> The deterrent effect of criminal prosecution is evidenced by such statements as "I would starve before I would do it again."<sup>47</sup>

Deterrence as a theory of sentencing is emphasized not only by those who are prosecuted under environmental laws, but also by those who prosecute.<sup>48</sup> Academics as well have centered their attention on the deterrent effect of environmental prosecutions.<sup>49</sup> Although acknowledging the existence of other sentencing theories, "the greatest emphasis in the environmental realm is placed on the deterrence effect a jail sentence has upon future potential violators."<sup>50</sup>

Unfortunately, failure to acknowledge the retributive aspect of environmental prosecution results in a kind of schizophrenia. On one hand, the government is

charging, prosecuting, and jailing environmental criminals in the same way that it is prosecuting and jailing murderers, thieves, and rapists. At the same time, there is no concomitant acknowledgment that the act committed is truly a "crime" that would invoke the principles of retribution. In other words, if deterrence is the only theory upon which environmental sentencing is based, the seriousness of environmental crime is reduced from the level of a "crime" to what may more aptly be termed a violation.

### III. Retribution

Of the four theories of criminal sentencing, only retribution operates retroactively. Each of the others operates proactively, in that the effect is felt or aimed to be felt either at the moment of sentencing or at some point thereafter.

Deterrence, for example, has as its specifically stated purpose the prevention of (1) recidivism on the part of the criminal (specific deterrence) and (2) the commission of like offenses by other criminals in the future. Rehabilitation, though theoretically and practically distinguishable from pure deterrence, nonetheless works towards the prevention of recidivism by removing the sociological and psychological influences that drove the individual's initial acts. Isolation protects society by incarcerating the criminal, thereby removing, at least for a period of time, the possibility that the same criminal will commit further crimes.

None of these theories addresses the criminal act itself. They focus solely on the prevention of further acts. Retribution, however, has as its sole focus punishment of the criminal for the crime committed, *regardless* of the criminal's potential to recidivate. The principle is that of *jus talionis*, an eye for an eye, retaliation.<sup>51</sup>

Understanding the difference between sentencing for deterrence and sentencing for retribution involves a hair-splitting distinction between what is considered "wrong" and what is considered "punishable."<sup>52</sup> For purposes of this argument, wrong and punishable may be placed at opposite ends of a continuum of acts for which any judgment may be imposed.

Wrong, on one end, covers purely administrative or statutory violations, characteristically punishable by fines, and construed to require a minimal amount of due process prior to imposition. A parking violation, for example, is nearly a pure wrong. The commission of a

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parking violation does little harm to society; thus, the sole reason for imposing a parking fine is to deter parking violators from recidivating and to deter others from violating parking laws.<sup>53</sup>

At the opposite end of the continuum are crimes that are purely punishable. These crimes are rare, because in a majority of cases, crimes that are punishable under a retribution theory are punishable under a deterrent theory as well. A sentence for murder, for example, demands not only that the crime be paid for, but also that a sentence be imposed that will deter others from committing the same crime.<sup>54</sup>

Consider, however, the following scenario: B murders A, who is the only other human being in existence. B cannot recidivate, nor are there any others who can possibly commit the same crime. B cannot, therefore, be sentenced under a deterrent theory, for there are none to deter. Neither can B be sentenced under an isolation theory, because there are none to protect from the possibility of B repeating his act. Finally, there is no sense in rehabilitating B, for there is no longer a "society" in which B must live and function normally.

Yet it would seem fitting to us, as nonexistent observers of this scenario, if B were to do some type of penance -- inflict some type of punishment upon himself to "pay" for the crime that he committed. Failing that, we would desire that B be struck by lightning, or fall and break a limb, or in some other way be made to suffer. This is because we identify the act of murder as wrong, and, more importantly, as *punishable* under a purely retributionist theory. Were we to fail to acknowledge retribution as a possible justification for sentencing B, there would be no sentence imposed whatsoever.

In *Jones v. United States*,<sup>55</sup> the United States Supreme Court discussed the possible justifications for sentences and noted, "[a] particular sentence of incarceration is chosen to reflect society's view of the proper response to commission of a particular criminal offense, based on a variety of considerations such as retribution, deterrence, and rehabilitation."<sup>56</sup> The Court further stated that "[t]he State may punish a person convicted

of a crime *even if satisfied that he is unlikely to commit further crimes*."<sup>57</sup> Implicit in *Jones* is the idea that retribution alone may serve as the justification for a particular sentence.

Perhaps a better explanation of retribution is found in *Gregg v. Georgia*.<sup>58</sup> In *Gregg*, the Supreme Court quoted *Williams v. New York*<sup>59</sup> for the proposition that "[r]etribution is no longer the dominant objective of the criminal law."<sup>60</sup> However, the Court later stated, "but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men."<sup>61</sup> The Court recognized that the appropriateness of a sentence may be determined by the community's belief as to what the sentence should be. Quoting Lord Justice Denning, the Court set forth the following passage in a footnote:

Punishment is the way in which society expresses its denunciation of wrongdoing: and, in order to maintain respect for law, it is essential that the punishment

inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else . . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of

*A crime is an act against the community as well as against the victim. Thus the community, through the legislature, may dictate what it considers the appropriate punishment for the crime.*

whether it is a deterrent or not.<sup>62</sup>

This passage provides insight into the rationale behind retribution as a theory of sentencing. A crime is an act against the community as well as against the victim. Thus the community, through the legislature, may dictate what it considers the appropriate punishment for the crime.

Retribution has been acknowledged by Congress as a legitimate sentencing consideration. In determining the sentence to be imposed, the sentencing judge must consider the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."<sup>63</sup> The environmental sentencing statutes are part of the

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very legislation that is based, in structure, on a retributionist sentencing theory.

Therein lies the fundamental flaw in relying exclusively upon deterrence to justify the harshness of environmental criminal sanctions. To ignore the retributive aspect of environmental sentencing is to ignore "the seriousness of the offense." It is a failure "to promote respect" for environmental law, and a failure to "provide just punishment for the offense" of environmental crime. To ignore the demands of retributionist theory is to ignore "the product of thousands of years of history, culture, tradition, religion, and other societal forces" embodied in retributionist theory.<sup>64</sup>

The result, as previously noted, is a schizophrenic embrace of environmental sentencing statutes. We impose criminal sanctions<sup>65</sup> on individuals whom we do not recognize as having committed "crimes" because their acts do not invoke (or we have not yet recognized them as invoking) the principles of retribution -- pure punishment for the crime committed.

In *United States v. Ellen*,<sup>66</sup> the United States Court of Appeals for the Fourth Circuit reviewed a six-month sentence imposed upon Ellen for violations of the Clean Water Act.<sup>67</sup> Ellen argued that his sentence could not stand unless his crime, destroying some eighty-six acres of federally protected wetlands, could be considered a "serious offense" under 28 U.S.C. § 994(j).<sup>68</sup> Upholding the sentence, the court noted that "[t]hrough the Clean Water Act and other environmental laws, Congress has determined that harm to the environment - even absent imminent threats to public health, welfare, or safety - is a public policy concern of the greatest magnitude."<sup>69</sup>

The court observed that in the Clean Water Act, "Congress determined that 'the restoration of the natural chemical, physical, and biological integrity of the Nation's waters is *essential*.'"<sup>70</sup> Ignoring retribution as a theory of environmental sentencing detracts from that statement, because it fails to recognize the seriousness that society, through the legislature, has assigned to environmental crimes. It fails to recognize the inherent wrong in abusing natural resources.

Ellen challenged his sentence, arguing that the destruction of wetlands, a critical natural resource, was not "an otherwise serious offense."<sup>71</sup> As the court aptly noted, "[t]hat Ellen believes that an offense of this magnitude is trivial or unimportant ironically exemplifies the need not to foreclose punishment by imprison-

ment in enforcing laws aimed at environmental protection."<sup>72</sup> In this statement, the court implicitly recognized the need to convey to defendants the seriousness of the offense, thereby affirming to society the integrity of its laws.

#### IV. Recognizing Debate

One possible counter-argument to the above theory is that if retribution has not been acknowledged as a justification for environmental sentencing, it is because society does not recognize environmental violations as crimes that would invoke retributive principles. The question then becomes whether a governing entity may impose criminal penalties for violations that the general population does not feel are "crimes." Though debatable, the answer must be resoundingly affirmative. If the answer were always in the negative, the use of the court system as an engine for effecting changes in societal behavioral patterns would be impossible.

Apart from this theoretical response, however, there is evidence to refute the counter-argument on a factual basis as well. As early as 1970, polls indicated that "most Americans consider pollution to be the most serious problem facing their communities."<sup>73</sup> In 1984, Americans ranked environmental crimes seventh on a list of serious crimes, ahead of heroin smuggling and skyjacking.<sup>74</sup> A Denver Post survey in 1989 concluded that "environmental concerns would be one of the very highest priorities for the 1990s."<sup>75</sup> One commentator had this to say on whether environmental crimes deserve the strict penalty of prison terms:

A strong argument can be made that crimes against the environment are more reprehensible than most "traditional" crimes. The damage wrought by pollution is devastating, widespread, and will be present for generations. Countless individuals have suffered ill-health and many have died as a result of pollution. These crimes are coolly carried out in a premeditated and methodical manner, motivated by the desire to make a profit.<sup>76</sup>

It is this revulsion, felt by so many at the thought of natural resources abuse, that demands retribution for environmental crimes. It is this revulsion that the courts must consider when imposing sentences in determining the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to

provide just punishment for the offense." It is this revulsion that demands a harsh sentence for environmental crimes even when the deterrent factor is nonexistent.<sup>77</sup>

## V. Conclusion

The investigation and prosecution of environmental crimes has become an established part of our criminal justice system. Within its scope fall hundreds of thousands of individuals, many college-educated, family-type people wholly devoid of what is normally considered "the criminal element."

There can be few things in this world more devastating than subjection to criminal process. And in these days where the world is ever-shrinking, an individual to whom the stigma of prosecution has attached is ever more likely to have his trial revisited, well after the penalty has been paid and the wrong absolved.

For these precise reasons, it is incumbent upon society, the legislature, and the judiciary to explore retribution as a theory of sentencing in environmental crimes. For if there is truly no urge for retribution, no revulsion at the abuse of natural resources, no need to inflict punishment upon an environmental criminal for the pure sake of punishing, then our reliance on criminal sanctions to ensure environmental compliance is altogether misplaced.

## ENDNOTES

<sup>1</sup> The Rivers and Harbors Act of 1899 (RHA) provided that "it shall not be lawful to throw, discharge, or deposit any refuse matter of any kind or description whatever" into navigable waters of the United States. RHA ch. 425 § 13, 30 Stat. 1121, 1152. A violation of that provision, if not under the enumerated exceptions, subjected an individual to a \$500-2,500 fine, or a prison term from thirty days to one year, or both. RHA ch. 425 § 16, 30 Stat. 1153. Moreover, the Act provided for a bounty payment - half the imposed fine - to be paid to the person giving information leading to conviction. *Id.*

<sup>2</sup> 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

<sup>3</sup> *Frezza Bros.* is often pointed to as the "first modern environmental criminal case." See, e.g., Michael J. Norton, *Federal Environmental Criminal Law Enforcement in the 1990s*, ALI-ABA, Oct. 7, 1993,

available in WESTLAW, C868 ALI-ABA 1, at \*6.

<sup>4</sup> United States Sentencing Commission, *Guidelines Manual*, Section 2Q (1993) (hereinafter *Guidelines*).

<sup>5</sup> The Sentencing Commission has since released a new set of proposed corporate guidelines. For their text, see Draft Corporate Sentencing Guidelines for Environmental Violations, 24 [Current Developments] *Env't Rep.* (BNA) at 1378 (Nov. 16, 1993).

<sup>6</sup> Norton, *supra* note 3, at \*3-4.

<sup>7</sup> The research for this paper, while not exhaustive, yielded no discussions of the retributive aspect of environmental sentencing.

<sup>8</sup> Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1988); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 (1988); Endangered Species Act (ESA), 16 U.S.C. § 1531 (1988); Clean Water Act (CWA) (formerly Federal Water Pollution Control Act), 33 U.S.C. § 1251 (1988); Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. § 1401 (1988); and Resource Conservation and Recovery Act (RCRA) (formerly Solid Waste Disposal Act), 42 U.S.C. § 6901 (1988).

<sup>9</sup> FIFRA § 14, 7 U.S.C. § 136l(b); TSCA § 16, 15 U.S.C. § 2615(b); ESA § 11, 16 U.S.C. § 1540(b); CWA § 309, 33 U.S.C. § 1319(c); MPRSA § 105, 33 U.S.C. § 1415(b); RCRA § 3008, 42 U.S.C. § 6928(d); and OSHA, 29 U.S.C. § 666(e)-(g).

<sup>10</sup> 15 U.S.C. § 2615(b).

<sup>11</sup> A producer under FIFRA is one who "manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide." 7 U.S.C. § 136(w).

<sup>12</sup> 7 U.S.C. § 136l(b)(1)(A).

<sup>13</sup> A commercial applicator is "an applicator . . . who uses or supervises the use of any pesticide which is classified for restricted use for any purpose or on any property." 7 U.S.C. § 136(e)(3).

<sup>14</sup> 7 U.S.C. § 136l(b)(B).

<sup>15</sup> A private applicator is "a certified applicator who uses or supervises the use of any pesticide . . . on property owned or rented by him or his employer." 7 U.S.C. § 136(e)(2).

<sup>16</sup> 7 U.S.C. § 136l(b)(2). A close look at FIFRA illustrates an interesting point. FIFRA requires the registration (and therefore, disclosure to the registering agency) of the complete formula of the subject pesticide. 7 U.S.C. § 136l(c)(1)(D). The FIFRA criminal violation statute allows the imposition of a three year prison term



on individuals who use or reveal, with the intent to defraud, any information relevant to the formulas. 7 U.S.C. § 1361 (b)(3). The maximum potential jail sentence, then, is three times as high for trade secret violations as for knowing mishandling of a pesticide.

<sup>17</sup> 33 U.S.C. § 1319(c)(1).

<sup>18</sup> 33 U.S.C. § 1319(c)(1).

<sup>19</sup> 33 U.S.C. § 1319(c)(2).

<sup>20</sup> 33 U.S.C. § 1319(c)(2).

<sup>21</sup> 33 U.S.C. § 1319(c)(3)(A).

<sup>22</sup> 33 U.S.C. § 1319(c)(3)(A).

<sup>23</sup> 42 U.S.C. § 6928(f)(3).

<sup>24</sup> Jane Barrett, *Sentencing Environmental Crimes Under the United States Sentencing Guidelines: A Sentencing Lottery*, 22 *Env'tl. L.* 1421, 1423-24 (1992) (citing U.S. Sentencing Commission, *Sentencing Guidelines and Policy Statements* § 1.2 (1987)). Whether those objectives have been met is the subject of an entirely different debate.

<sup>25</sup> Section 3008 of RCRA prohibits the knowing treatment, storage, or disposal of a hazardous waste without a permit, or in violation of an existing permit. 42 U.S.C. § 6928(d)(2).

<sup>26</sup> For an example where the court increased the sentencing level under this section, see *United States v. St. Angelo*, No. 92-5430, 1993 WL 142064 (4th Cir. May 5, 1993).

<sup>27</sup> See, e.g., *United States v. Irby*, No. 90-5113, 1991 WL 179110 (4th Cir. Sept. 13, 1991). The district court in *Irby* noted that the Defendant exercised "decision-making authority and authority to direct other employees in the plant," justifying an increase of two levels. *Id.* at \*1. The manager can suffer the consequences of the increase even if the employee who performed the actual dumping is not prosecuted. *Id.*

<sup>28</sup> See Guidelines, *supra* note 4, § 2Q1.2 n.5. It should also be noted that the "guided departures" under this comment could be downward as well. The court, at this stage, is essentially permitted a four-level range in which to place the sentence.

<sup>29</sup> This is an admittedly brief condensation of the steps involved in the sentencing of environmental crimes. For a more thorough explanation, see Gary S. Licenberg, *Sentencing Environmental Crimes*, 29 *Am. Crim. L. Rev.* 1235 (1992). See also Jane Barrett, *Sentencing Environmental Crimes Under the United States Sentencing Guidelines: A Sentencing Lottery*, 22 *Env'tl. L.* 1421 (1992).

<sup>30</sup> See generally, Nicholas N. Kittrie & Elyce H. Zenoff, *Sanctions, Sentencing, And Corrections* (1981).

<sup>31</sup> See *id.* at 3 for a presentation of the pre-Biblical Hammurabi Code. A few examples of the Code are illustrative:

1. If a man has laid a curse upon another man, and it is not justified, the layer of the curse shall be slain.

3. If in a lawsuit a man gives damnatory evidence, and his word that he has spoken is not justified; then, if the suit be a capital one, that man shall be slain.

193. If a son has struck his father, his hands shall be cut off.

194. If a man has destroyed the eye of a free man, his own eye shall be destroyed.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> The theory of general deterrence has met with considerable opposition. Whether an individual should be sentenced heavily to prevent others from committing the same crime is an issue that raises deep moral questions. Indeed, the fairness of such a theory has been challenged, although unsuccessfully, on Eighth Amendment grounds. See *United States v. Bergman*, 416 F. Supp. 496 (S.D.N.Y. 1976). The crux of the argument is that a defendant sentenced as an example to others is paying a penalty for crimes that others have not yet committed.

<sup>34</sup> Kittrie & Zenoff, *supra* note 30, at 14 (citations omitted).

<sup>35</sup> See *id.* at 12. As the authors note, "[a] judge who is called upon to sentence a burglar should ordinarily be considering the deterrent effect of the sentence of those who are likely to become burglars." *Id.* at 12-13. The focus of the sentence, at least for general deterrence, necessarily includes persons other than the defendant.

<sup>36</sup> The rehabilitative correctional curriculum includes psychotherapy and ongoing professional mental evaluations.

<sup>37</sup> One relevant issue not discussed here focuses on the determination of "good" and "bad" behavior as it relates to the prisoner's rehabilitation. For example, giving demerits for failure to make one's bed necessarily implies that making one's bed is characteristic of a conforming social character. In essence, it implies that good citizens make their beds (and obey laws) and bad citizens do not make their beds (and break laws). The logic of this argument is flawed, inasmuch as the

making of one's bed has no rational bearing on one's ability to obey society's criminal laws.

<sup>38</sup> See, e.g., *In re Rodriguez*, 537 P.2d 384 (Cal. 1975). The Supreme Court of California rested its decision not on the facial invalidity of the State's indeterminate sentencing statute, but on its operation. Because a person convicted of a low-level felony could potentially spend their entire life in prison, the California statute violated both the Eighth Amendment and Article I, Section 17 of the Constitution which require "that the punishment be proportionate to the offense." *Id.* at 392. Cf. *Browder v. United States*, 398 F. Supp. 1042, 1046 (D. Or. 1975), *aff'd* 544 F.2d 525 (9th Cir. 1976) ("Penology's recent enchantment with rehabilitation as a wholesale justification for imprisonment has dissolved in the face of numerous studies proving that rehabilitation rarely occurs.").

<sup>39</sup> See, e.g., Martin J. Littlefield, *Environmental Enforcement and the Criminal Justice System*, ALI-ABA, April 11, 1991, available in WESTLAW, C617 ALI-ABA 25. Littlefield notes a "dramatic increase in [environmental] criminal prosecutions since 1985," from forty in that year to 130 in fiscal year 1990. *Id.* at \*30. The increase in prosecutions has been accompanied by an increase in the length of jail terms. While the number of prosecutions tripled from 1985 to 1990, the number of years sentenced increased nine-fold, from 5 years and 5 months in 1985 to 45 years and nine months in 1990. *Id.*

<sup>40</sup> See *Browder*, 398 F. Supp. at 1046. Appealing a harsh sentence for interstate fraud, *Browder* conducted a study of 100 cases involving similar "white-collar" crimes. Twenty percent of the defendants in *Browder's* study received fines, the remainder received light sentences. *Browder* summed up his study by stating, "wherein the greater the offense against capital, the lesser the punishment." The reviewing court, however, was unpersuaded by the argument, and upheld the 25 year sentence.

<sup>41</sup> *Id.*

<sup>42</sup> This is the fourth theory of sentencing, isolation, which is not addressed directly in this paper. Discussion was omitted because isolation, historically, was never engaged by judges as a primary theory of sentencing. Nonetheless, it warrants note that isolation plays a significant role in many sentences, particularly where the crime is a violent one.

<sup>43</sup> *Browder*, 398 F. Supp. at 1046 (emphasis added).

The converse of this argument is that a well-educated defendant, most often surrounded by loving family and a caring community, is essentially released into good hands if given a light sentence. A defendant returned to a good family instead of the department of corrections, so the idea goes, will have more hands around him to keep him straight if, or when, his intentions once again run afoul of the law.

<sup>44</sup> *Id.* at 1047.

<sup>45</sup> The opinion in *Browder*, authored by Judge Skopil of the United States District Court for the District of Oregon, comes down rather harshly on white collar criminals:

The consequences of a white collar property crime tend to reach a higher magnitude in direct proportion to the level of status and power held by the criminal involved . . . Edward *Browder* was convicted of pledging over \$500,000 worth of stolen securities. He concedes his guilt for those crimes. The fact that they were accomplished by means of wit and charm rather than a burglar's tool does not minimize the damage done to the public.

*Id.* at 1046-47.

<sup>46</sup> *Criminal Enforcement of Environmental Law Seeks Deterrence Amid Need for Increased Coordination Training, Public Awareness*, 17 [Current Developments] Env't Rep. (BNA) 800, 802 (Sept. 26, 1986) (hereinafter *Enforcement of Environmental Law*).

<sup>47</sup> Norton, *supra* note 3, at \*5. The statement apparently came from a General Electric official jailed for price-fixing. *Id.*

<sup>48</sup> See *Enforcement of Environmental Law*, *supra* note 46, at 802. E. Dennis Muchnicki, an Ohio environmental crime prosecutor, states, "We have had people in corporations charged with an environmental crime who say that they would pay almost any civil penalty if we dropped the case." *Id.*

<sup>49</sup> See, e.g., Susan A. Bernstein, *Environmental Criminal Law: The Use of Confinement for Criminal Violators of the Federal Clean Water Act*, 17 New Eng. J. on Crim. & Civ. Confinement 107, at sec. IV "The Impact of Confinement: Is it an Effective Deterrent?", 118-23 (1991).

<sup>50</sup> Littlefield, *supra* note 39, at \*33. See also Gregory A. Bibler, *Counseling the Client on Environmental Crimes*, Prac. Law., at 37, 40 July 1991, (citing an EPA memorandum for the prospect that deterrence is a "major value of criminal prosecution").

<sup>51</sup> Kittrie & Zenoff, *supra* note 30, at 40.

<sup>52</sup> *Id.* at 39. Kant, in his *Rechtslehre*, posits that “[one] must first be found guilty and *punishable* before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens.” *Id.*

<sup>53</sup> Even in this example there is a bit of “crime,” in that the commission of a violation involves disrespect for the law. While the initial fine is imposed for deterrent purposes alone, a history of ignoring parking tickets indicates a disrespect for law that warrants imposition of a criminal (retributive) penalty as well.

<sup>54</sup> There are also isolation theories here as well, *i.e.*, that society should be protected from a dangerous criminal.

<sup>55</sup> 463 U.S. 354 (1983).

<sup>56</sup> *Id.* at 368-69.

<sup>57</sup> *Id.* at 369 (emphasis added).

<sup>58</sup> 428 U.S. 153 (1976).

<sup>59</sup> 337 U.S. 241 (1949).

<sup>60</sup> *Gregg*, 428 U.S. at 183 (quoting *Williams*, 337 U.S. at 248).

<sup>61</sup> *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 394-95 (1972) (Burger, C.J., dissenting)).

<sup>62</sup> *Id.* at 184 n. 30 (quoting Royal Commission on Capital Punishment, Minutes of Evidence, Dec. 1, 1949, p.207 (1950)). Although only a footnote, this passage has received attention since it was written. See *Atiyeh v. Capps*, 449 U.S. 1312, 1314 (1981) (Rehnquist, J., as Circuit Justice) (nothing in the Constitution says “rehabilitation” is the sole permissible goal of incarceration, retribution is equally permissible).

<sup>63</sup> 18 U.S.C. § 3553(a)(2)(A) (1988).

<sup>64</sup> Kittrie & Zenoff, *supra* note 30, at 14.

<sup>65</sup> Some debate exists as to where the line between civil and criminal sanctions is most properly drawn. See, *e.g.*, Developments--Corporate Crime, 92 Harv. L. Rev. 1227, 1370-71 (1979) (basic aim of civil sanctions is deterrence; retribution is the province of criminal law). See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (focusing on whether a given sentence is primarily regulatory or punitive).

<sup>66</sup> 961 F.2d 462 (4th Cir.), *cert. denied*, 113 S. Ct. 217 (1992).

<sup>67</sup> Ellen was convicted under 33 U.S.C. § 1311(a),

which prohibits the discharge “of any pollutant by any person” except as the discharge is allowed by a secured permit, and § 1319(c)(2)(A), which subjects a person who knowingly violates § 1311 to a fine of between \$5,000 and \$50,000, a prison term of up to three years, or both.

<sup>68</sup> Ellen argued that the Guidelines section under which he was sentenced, § 2Q1.3, was inconsistent with the Guidelines’ enabling legislation, 28 U.S.C. § 994(j). The enabling statute directed the Sentencing Commission to ensure that the Guidelines reflected “the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence *or an otherwise serious offense*.” *Id.* at 467-68 (emphasis added). Since Ellen was a first offender, and his crime was not a “crime of violence,” his sentence would be consistent with § 994(j) only if filling wetlands was “an otherwise serious offense.” *Id.*

<sup>69</sup> *Id.* at 468.

<sup>70</sup> *Id.* (quoting S. Rep. No. 414, 92d Cong., 2d Sess. 7, reprinted in 1972 U.S.C.C.A.N. 3668, 3674) (emphasis added). This holding has recently been reiterated by the Fourth Circuit in *United States v. Strandquist*, 993 F.2d 395, 399 (4th Cir. 1993).

<sup>71</sup> *Ellen*, 961 F.2d at 468.

<sup>72</sup> *Id.*

<sup>73</sup> Norton, *supra* note 3, at \*3.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at \*4.

<sup>76</sup> Comment, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 Buff. L. Rev. 307, 319-20 (1988) (cited in Bernstein, *supra* note 49, at 120).

<sup>77</sup> The efficacy of criminal prosecution as a deterrent works against the imposition of stiff sentences for deterrent purposes alone. If the deterrent value is in the prosecution, and the stigma attached to withstanding criminal process, there is little need for a harsh sentence. More aptly put, if the bark is sufficient, why the need for bite? The answer must be to fulfill the societal need to see criminals punished for their crimes, irrespective of their potential to recidivate.