THE NEW "CRIMINAL" CLASSES: Legal Sanctions and Business Managers

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Distrust all in whom the impulse to punish is powerful.

Friedrich Nietzsche[1]

I. INTRODUCTION: THE IMPULSE TO PUNISH

Concern with crime, and faith in punishment are usually associated with political conservatives, who are likely to advocate longer sentences, oppose restrictions on the use of evidence, favor limits on habeas corpus, and complain about soft judges. In contrast, self-classified liberals are typically skeptical about punitive measures and talk of root causes and the need for social justice.

Half of this stereotype is growing obsolete. The political Left may retain its doubts about punishment in the context of street crimes, but in other areas it is spearheading a spectacular expansion in the scope and intensity of the nation's apparatus for punishment. Multiple provisions for penalties are routine parts of every new regulatory proposal. The new regime arising from this impulse to punish, which has given birth to environmental protection, financial practices, government contracting, employment relations, civil rights, medical practice—indeed every area of government interaction with society and the economy is what I call the "New Criminalization." A decade ago, an estimated 300,000 federal regulations could be enforced through criminal penalties.[2] Who knows what the number is now.

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[1] THUS SPAKE ZARATHUSTRA pt. II, ch. 29, *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 552 (16th ed. 1992).

[2] Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2441-42 (1995).

In the environmental area alone, no federal statute called for felony sanctions until the 1980s. All statutes passed since contain serious criminal penalties, and by early 1995 the Department of Justice had indicted 443 corporations and 1068 individuals, convicted 334 organizations and 740 individuals, recovered $297 million in criminal penalties, and obtained sentences of imprisonment totalling 561 years.[3] States do even more. The great bulk of environmental enforcement is at the state level, and, according to one analysis, "state environmental criminal prosecutions are several orders of magnitude more numerous than their federal counterparts."[4]

Appreciating the true strength of this movement requires attention to more than the expansion in criminal laws and sanctions, however. Punitive "civil" enforcement provisions, such as forfeiture of property, monetary penalties, treble damages, punitive damages, debarment from doing business with the government, and exaggerated estimates of compensatory damages have grown apace. In the environmental area alone, EPA has collected over $3 billion in such fines.[5] Over one hundred different forfeiture-of-property provisions are in effect. The promotion of private actions through bounties is also a new and expanding frontier. The False Claims Act, originally passed during the Civil War, gives whistleblowers a share of any money recovered from a government contractor, and the law was expanded in 1986 to make recoveries easier. Its application also extends far beyond the defense contracting business into health care and even environmental law. If these specific regulatory regimes are not enough, lawyers keep pushing to expand the federal Racketeer Influenced and Corrupt Organizations Statute (RICO), with its treble damages and forfeiture provisions, into new crannies of activity.

Yet another way in which the system has become more punitive is through the increased legal costs of defending an action. Most of

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[3] John F. Cooney et al., *Criminal Enforcement of Environmental Laws*, *in* ENVIRONMENTAL LAW INSTITUTE, ENVIRONMENTAL CRIMES DESKBOOK 5, 8 (1996) [hereinafter *Criminal Enforcement*].

[4] Lazarus, *supra* note 2, at 2408 n.4.

[5] TIMOTHY LYNCH, POLLUTING OUR PRINCIPLES: ENVIRONMENTAL PROSECUTIONS AND THE BILL OF RIGHTS (Cato Policy Analysis No. 223) (Apr. 20, 1995), <http://www.cato.org>.

the regulatory structures are incredibly complex, which makes legal defense extraordinarily expensive. A minimum of $100,000 is necessary to mount any kind of case, and the costs escalate from there.[6] The assets of any normal family are quickly exhausted. Most people find financial ruin more painful than a few weeks of community service or even jail, and a rational defendant often will choose to plead guilty rather than defend and go bankrupt.

From a common sense point of view, all these not-quite-criminal sanctions are an integral part of the punitive system. They share the most basic characteristic of criminal sanctions: they are intended to cause pain, not simply to compensate for damage. A counterargument can be made that some systems of civil penalties, such as the one administered by the Environmental Protection Agency, are designed only to remove the profit from an environmental violation. However, few practitioners believe this. The deck is stacked to make the price high, and the basic goal is really deterrence.[7]

The only serious opposition to this trend, indeed, almost the only notice of it outside a few references in law reviews, comes from a coalition of political libertarians and civil liberties advocates. The business classes, normally regarded as conservative, demonstrate a quiescence that is remarkable considering their role as the primary targets of this movement. It seems as if the Left and the Right have entered into an agreement whereby each side gets to criminalize conduct it abhors so long as it lets the other do the same. Restrictions on parole for muggers are balanced by jail sentences for violators of obscure regulations on wetlands or endangered species. Increases in the number of federal offenses subject to capital punishment are matched by forfeiture of the assets of individuals accused of soliciting sex or of doctors who misread complicated health care rules. More money for prison construction is approved on condition that a number of the cells be reserved for the newly criminalized managerial and professional and entrepreneurial classes.

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[6] Rick Henderson, *Crimes Against Nature*, REASON, Dec. 1993, at 18, 21.

[7] Robert H. Fuhrman, *Improving EPA's Civil Penalty Policies—And Its Not-So-Gentle BEN Model*, Environment Rep. (BNA) 874 (Sept. 9, 1994).

The breadth and intensity of this wholesale adoption of punitive measures are impressive. Reading the daily newspaper has become like subscribing to a service called the Professional, Managerial, and Entrepreneurial Classes Crime Report. When one probes beneath the surface of these examples, disturbing trends appear. It is always possible to find examples of genuinely reprehensible conduct, of course. The growth in the size and complexity of our society provides many new opportunities for chicanery, and human ingenuity is rising to the challenge. But we have gone far beyond punishing instances of one person harming another physically or taking unfair advantage of others through trickery or fraud. We have reached the point where government regulators punish matters that are, at root, contract disputes, or uncertainties over legal or moral requirements, or confusion over trade-offs among competing values (such as land preservation versus new homes), or simply the normal ruck of error inherent in human affairs. Darker forces are also at work, as special interests no longer limit themselves to raiding the treasury for subsidies or special treatment in the tax code; they capture regulatory agencies and processes, and use the punitive enforcement powers of the government as the mechanism to transfer benefits to themselves or to enforce pet ideas of virtue.

Here are some gleanings of recent clippings, plucked out of a staggering list of possibilities:

- In FY95 EPA made 256 criminal referrals and 214 civil referrals to the Department of Justice and imposed 1105 administrative penalty orders. It collected $94 million in fines and penalties, and imposed injunctive relief and other environmental requirements worth $1.1 billion. In FY96, it made 262 criminal referrals, collected $173 million in fines and penalties, and persuaded polluters to spend $1.49 billion to correct violations and prevent future problems.[8]

[8] FY95: EPA, FY 1995 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 3-4 (July 1996); FY96: *EPA Set Record in '96 of 262 Criminal Cases on Pollution Charges*, WALL ST. J., Feb. 26, 1997, at B5.

• Environmental enforcement is not directed solely at large corporations and their officers. Individuals are targeted in their roles as landowners, waste generators, or small business owners or operators. The definition of a wetland is so expansive that people have been convicted of "filling in wetlands" for putting clean dirt on dry land.[9] A developer in Charles County, Maryland continued a development that has been under construction since 1968, with the full approval of all state and local authorities. The development is on the highest elevation in the county, in the middle of an urban area, and the Army Corps of Engineers approved it in 1976. None of this mattered, and the developer is headed for twenty-one months in jail for "filling in a wetland."[10] Another current *cause célèbre* is the Duell case in New York, where a husband and wife each have been sentenced to six months in jail and a joint fine of $340,000, for a leaky septic tank that may not have actually polluted any waters. They also lost their property under the financial pressure.[11]

• Not content with the level of current penalties for environmental offenses, the administration is sponsoring H.R. 227, the Environmental Crimes and Enforcement Bill. It would add sentences and fines for "attempted" violations equal to the penalties for actual violations, provide for impoundment of corporate assets during the pendency of criminal proceedings, and impose twenty-year prison terms and $2 million fines for any environmental violations that result in specific injuries.

• The health care company SmithKline Beecham paid $325 million to settle allegations that it had cheated the government

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[9] United States v. Mills, 817 F. Supp. 1546 (N.D. Fla. 1992).

[10] This story has been widely recounted recently. *See, e.g.*, Max Boot, *The Wetlands Gestapo*, WALL ST. J., Mar. 3, 1997, at A18.

[11] *See, e.g.*, Dale French, *Adirondack Couple Faces 50 Years in Prison for Leaky Septic System*, LAND RIGHTS LETTER at 1 (Dec. 1996); John Fulton Lewis, *"Duell" Objectives: Criminalizing Civil Law & "Gutting" the Opposition* (Part 1), LAND RIGHTS LETTER at 1 (Jan./Feb. 1997). I have called the New York State Department of Environmental Conservation three times about this case. Each time, I have left a message saying that these facts are being reported by property rights advocacy groups and that I would like to hear the state's side of the matter. I have yet to receive a return telephone call.

on Medicare charges. The government is still debating whether to bring criminal charges. The company says that the matter stems from ambiguities in the language of regulations and guidelines, and that any errors were inadvertent. However, it adds, the costs and risks of fighting it out were too great, and prudence dictated a settlement.[12]

- A dealer in fossils bought and removed a tyrannosaurus skeleton from an Indian reservation. The government claimed it came from federal land, raided his laboratory, seized the skeleton and his business records, and prosecuted him. The government lost the main case; the judge ruled the fossil had indeed been on Indian, not government, land. Nonetheless, the fossil dealer was convicted of failing to report $30,000 in travelers checks he brought into the country, and of removing a fossil worth less than $100 from government land. He received two years in jail.[13]
- Medicare pays for hospice care only for patients with less than six months to live. The government is distressed because patients in some hospices are living longer than this. While at least ninety percent die within six months, a few last longer. The government's position is that this must be fraud—and the government is out to get money back from these cheating institutions that keep their patients alive too long.[14]
- The Savings & Loan crisis has died down, but it produced a steady stream of criminal actions. At the end of 1995, the Department of Justice announced that it had charged 6405 people with bank-related crimes, sent 3700 executives and owners to jail, levied $45 million in fines, and ordered $2.9 billion in restitution. Non-government observers were less jubilant. Bert Ely, an expert on financial issues, estimated that only about three percent of the $150 billion in losses can be blamed on criminal activity. He and

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[12] Elyse Tanouye, *SmithKline to Pay $325 Million to Settle Federal Claims of Lab-Billing Fraud*, WALL ST. J., Feb. 25, 1997, at B6; SmithKline Beecham, *SmithKline Beecham Settles Medicare Dispute for $325 Million*, Feb. 24, 1997 (Press Release).

[13] Malcolm W. Browne, *Fossil Dealer, Target of Federal Prosecutors, Begins Jail Term*, N.Y. TIMES, Feb. 22, 1996, at A17.

[14] Robert A. Rosenblatt, *Government Auditors Question Medicare for Long-Term Hospice Care*, WASH. POST, Mar. 16, 1997, at A17.

other experts have noted that the S&L disaster was caused by official policies of the U.S. government and many state governments, not by thievery.[15] In the 1980s, official policy encouraged the S&Ls to lift themselves out of the financial crisis caused by the rise in interest rates in the 1970s by speculating and making risky investments. Any corporate officer who did not try this was probably derelict in his duty to his shareholders.

- Judge Ralph Winter of the Second Circuit notes that corporate officers are now subject to criminal penalties for failing to give a sufficiently accurate account to the company of their activities. But there are no established standards. The crime is simply invented by the particular jury. It is not a defense that the officer intended no wrong, or that the company suffered no loss, or that nobody relied on the failure to disclose, or that the non-disclosure involved only trivia.[16]

- A former university president was a director of an S&L. In 1992, he became a defendant in a $32 million suit. The law firm prosecuting the case for the government sent him a letter noting that if he wanted to settle, "the RTC is likely to approve a settlement significantly less than the collective cost of hiring counsel to present a defense on your behalf. . . . All in all, it is a very complex and highly stressful process." He fought for four years, then settled for $20,000.[17] One former S&L director or officer not in jail and not paying anything is Henry Hyde, Chairman of the Committee on the

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[15] Michelle Singletary, *Justice Dept. Hails Prosecutions at Banks, S&Ls; Report Says 3,700 Senior Executives, Owners of Failed Thrifts Have Been Sent to Prison*, WASH. POST, Nov. 14, 1995, at A10; Gary Hector, *S&L's: Where Did All Those Billions Go?*, FORTUNE, Sept. 10, 1990, at 84; Paulette Thomas, *Fraud Was Only a Small Factor in S&L Losses, Consultant Asserts*, WALL ST. J., July 20, 1990, at A2. For detailed calculations, see Bert Ely, *FSLIC's Losses—When and How They Accumulated*, (Sept. 1990) (unpublished paper available from Ely & Company, Alexandria, Virginia); BERT ELY & VICKI VANDERHOFF, LESSONS LEARNED FROM THE S&L DEBACLE: THE PRICE OF FAILED PUBLIC POLICY; Rep. No. 108 (The Institute for Policy Innovation, Lewisville, Texas) (Feb. 1991).

[16] Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 955 (1993).

[17] Holman W. Jenkins, Jr., *Will the Real S&L "Crooks" Please Stand Up?*, WALL ST. J., Oct. 1, 1996, at A23.

Judiciary of the U.S. House of Representatives. He refused to contribute to a settlement on the grounds that he did nothing wrong.[18] He is believable because, aside from his personal credibility, it is safe to assume the prosecutors left no stone unturned in looking for sin. But how many of the other 6405 defendants could have made a similar claim but lacked either the resources to mount a defense or the power and visibility to ensure that any case against them would receive close scrutiny?

- A recent news story noted a trend to jail and fine employers in response to workplace accidents.[19] The Vice President has announced the administration's intent to issue rules using contract debarment as a sanction for federal contractors who are found to have violated laws on occupational safety, overtime, and union organizing.[20]
- The Philadelphia-based law firm Morgan, Lewis & Bockius has been sued for $100 million by the State of Pennsylvania for "civil racketeering" under RICO. The firm has plenty of company. As of 1992, 2,000 civil RICO suits were pending against lawyers and accountants alone, and "ordinary commercial disputes pled as RICO claims are now commonplace."[21]
- The Bureau of Justice Assistance in the Department of Justice recently published a new bulletin in its "Asset Forfeiture Series." It noted that when funds "not necessarily derived from an illegal source can be traced to an account into which both legal and illegal source funds have been deposited, courts have upheld forfeiture of all the money in the account because the 'clean' money facilitated the

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[18] John E. Yang, *Hyde's Denial Led to Separate S&L Settlement; Lawmaker Won't Pay in $850,000 Deal*, WASH. POST, Feb. 24, 1997, at A4.

[19] Ann Davis, *Treating On-the-Job Injuries as True Crimes*, WALL ST. J., Feb. 26, 1997, at B1.

[20] Steven Greenhouse, *Gore Informs Labor of New Restrictions on U.S. Contractors*, N.Y. TIMES, Feb. 19, 1997, at A1.

[21] *Pennsylvania Agency Sues Morgan, Lewis over Failed Insurers*, WALL ST. J., Feb. 28, 1997, at B3; Winter, *supra* note 15, at 961. *See also* THE RICO RACKET (Gary McDowell ed., 1989) (published by the National Legal Center for the Public Interest).

laundering offense."[22] In a time when automobile agencies can be convicted for selling to customers who turn out to be drug dealers, this is a formidable penalty.

- Private sector members are not the only ones at risk, because becoming a government employee is growing perilous. The ill-defined and suspiciously makeweight crimes of lying to Congress or to a federal investigator have become familiar. Federal officials are subject to penalties for violation of many ethical rules, including failure to disclose minutiae of personal financial affairs. In the past several months, Vice President Gore has owned up to making fundraising calls from federal property, an action which most experts on campaign finance law regard as a felony.

II. ANALYZING THE TREND

The application of punitive sanctions to a large-scale industrial society and welfare state in which the government intrudes into every nook and cranny is creating serious problems. These can be grouped into four major categories, which will be summarized, then taken up in more detail.

- *Increased Complexity.* Regulatory systems have become incredibly complex, to the point where no one understands them, including their enforcers. Furthermore, a good moral sense is no guide; many of the requirements are malum prohibitum (wrong because it is prohibited), not malum in se (wrong in and of itself), to invoke a very old, but very wise, doctrine from our legal heritage.
- *Diminished Role of Intent.* The government has persuaded the courts to dilute the great bulwark of mens rea, or evil intent, as an element of criminal offenses, and to ignore it completely for "civil" penalties, even those that have a fiercely punitive impact. People are now absolutely liable for complex and often incomprehensible requirements.

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[22] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, MONEY LAUNDERING FORFEITURES—LANDMARK STRUCTURING CASE PROVIDES GUIDANCE (June 1995), <http://www.ncjrs.org/txtfiles/assetfor.txt>.

- *Greater Intrusiveness.* Few members of the professional, managerial, or entrepreneurial classes can avoid the requirements of the new regulatory regime. The new criminalization permeates every area of the economy and society. The one group not much impacted so far is journalists, which may explain why the phenomenon has received so little attention.
- *Diminished Constitutional Protections.* Unlike a standard criminal, such as a murderer or robber, someone involved in one of the new-style offenses often cannot decline to incriminate himself, has serious difficulty protecting against arbitrary searches and seizures, and can make only limited use of the attorney-client privilege. Standards for what constitutes credible evidence also are being lowered.

Increased Complexity

Again, this section draws primarily on environmental law for its examples. However, there is no reason to think that the trends working in the environmental area differ from those in other fields, and occasional examples are invoked as a reminder of this fact.

There are at least twenty-five major environmental statutes in effect. All provide for criminal penalties (jail and fines) as well as for civil monetary penalties. Some penalty sections are keyed to specific statutory duties, but for the most part they are general catchall provisions that apply to any violation of the law or its implementing regulations. Extra penalties apply to particularly egregious offenses.

This scattergun approach subjects even venial sins to criminal sanctions. Under the Clean Air Act, any violation of any regulation issued by a state or the federal government is a crime. Recordkeeping is governed by regulations, so filling out a form incorrectly is an offense, as is any other failure. This may seem like a minor point; surely the government would not act unjustly. But the government does pursue technical violations, especially if it is convinced the target is guilty of more serious wrongs but lacks the evidence to prove the graver offense. Additionally, bureaucracies are always under pressure to justify their budgets by producing numbers demonstrating accomplishment. Anyone who thinks bureaucrats do

not succumb to the temptation to pick up easy numbers by prosecuting or charging trivial but easily provable offenses is guilty of excessive naivete.

Nor are prosecutors totally free agents on these matters. Professor Richard Lazarus—no foe of strong environmental enforcement—has written in detail about the government decision not to prosecute in connection with pollution at the weapons factory at Rocky Flats in Colorado.[23] The reward for prosecutors who acted with a sophisticated regard for the complexities and moral nuances of the situation, in accord with what one would think are highly desirable standards of ethical behavior, was excoriation by Congress and the press. The lesson will not be lost. It is inevitable that open-ended prosecutorial discretion will eventually become a shuttlecock of sound-bite politics.

The structure of the environmental protection statutes multiplies the problems caused by the off-hand breadth of the penalty sections. The laws are an amalgam of congressional micromanagement specifying minute detail on some topics combined with limitless delegation to EPA on others. They apply across the board to a multitude of industries and organizations, and the requirements usually mesh poorly with the operational needs of any particular industry. Every term and concept is subject to endless debate and interpretation.

A good example is the Resource Conservation and Recovery Act (RCRA), which governs hazardous waste. The statute is detailed, complex, and obscure. It applies to hundreds of thousands of wildly different business entities, and delegates great power to EPA. The law's basic definitions of hazardous waste are confusing and the implementing regulations are circular gibberish. Other regulations are almost as opaque. An important EPA purpose under RCRA is actually to decrease industrial efficiency. EPA wants to raise the costs of generating hazardous waste, thus discouraging activities involving such waste, regardless of any risks presented to humans or the environment. This Luddite philosophy makes the agency's reasoning particularly convoluted and difficult to follow.

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[23] Lazarus, *supra* note 2, at 2409-10, 2500-09.

An illustration of RCRA-think, by no means an unusual one, is a document that has become famous as "the solvent letter."[24] Spent solvent is one category of hazardous waste. If you clean a piece of machinery by putting solvent on the machine, wiping it down with a rag, and then tossing the rag in the trash, you are committing a number of criminal offenses. The solvent becomes "spent" when it eats the grease, so wiping it up with the rag transfers this hazardous waste to the rag. By tossing it out you dispose of hazardous waste without a permit. If, however, you pour the solvent on the rag first and then wipe the machine, you might still be a citizen in good standing. The solvent is not spent when it is poured on the rag, so wiping the machine with the rag does not entail transferring hazardous waste to the rag. If you then toss the rag in the trash, you are disposing of hazardous waste only if the discarded material would flunk specific EPA tests for "the characteristic of toxicity." Whether the test should be applied only to the solvent contained in the rag or to the combination of grease, rag, and solvent is a weighty and unsettled point. It has remained unsettled for over twenty years.

The solvent letter is an informal memorandum, not a rule or even a guidance document. In RCRA and in every other area, EPA and the states work through a mish-mash of policy pronouncements embodied in the fine-print of *Federal Register* notices, guidance documents, judicial opinions and their exegeses, thousands of letters of agency interpretations, verbal advice given over the "hot line" by employees of EPA contractors, and positions taken in civil and criminal enforcement actions. Arguably, all these constitute interpretations of the statute and its regulations, so one risks hefty penalties and jail if one violates any of them, no matter how casually created or contradictory of other interpretations.

EPA also routinely uses the complexity and ambiguity of the statutory language to expand its authority as far as possible. RCRA is an example of this phenomenon, as EPA uses a law directed at disposal of hazardous waste as a mandate to extend its authority deep

[24] Letter from Jacqueline W. Sales, Chief Regulatory Development Section, (EPA), to Frank Czigler, Environmental Department (S&W Waste Inc. in N.J.) (May 20, 1987) (on file with author).

into the workings of industrial processes. Consider, too, the Clean Water Act (CWA), a textbook case of the possibilities open to creative interpreters of legal language. The statute is directed at controlling the "discharge of pollutants into the navigable waters [of the United States]." You may think you know what this means—"do not dump your industrial waste into the nearest river." However, it has gone way beyond that. In the government's view, "navigable waters" include any waters that connect to navigable waters, a proposition upheld by the Supreme Court. "Waters of the United States" also include waters that *do not* connect with navigable waters. For a time, even EPA hesitated at asserting this, but in 1985 General Counsel Frank Blake hit on the answer. He signed an opinion that the CWA covered isolated waters that could be used by migrating birds or endangered species.[25] The validity of using peripatetic birds as a fount of agency power in a statute based on navigable waters has been a subject of solemn judicial consideration ever since, and remains unresolved.

The jurisdiction of the CWA can be stretched still further. Groundwater connects with surface water, though it may take a few thousand years, so a discharge that affects groundwater also might be within the ambit of the Clean Water Act. If you stand on your patio and pour the dregs of your drink on the ground, you have, in the view of the U.S. government, committed a criminal act.

So far, the government is not busting patio parties. But it has used these authorities aggressively to convert the Clean Water Act into a nationwide program of wetlands protection, and it does indeed prosecute. As Roger Marzulla, a leading expert on property rights, has noted, "For years now, the Corps of Engineers and the EPA have operated the wetlands program as though a statute existed which makes it a felony to disturb wetlands. Congress may well believe that such a program should exist; if so, it must pass that statute in accordance with Constitutional procedures. . . . Unelected bureaucracies . . . cannot be allowed to make up the rules as they go along." Nonetheless, between January 1990 and May 1992 alone, the

[25] Margaret N. Strand, *Federal Wetlands Law*, *in* ENVIRONMENTAL LAW INSTITUTE, WETLANDS DESK BOOK 3, 17 (1993).

Justice Department prosecuted 47 corporations and individuals for criminal wetlands violations.[26] The tempo has not eased since.

Because of the expansive scope given the Clean Water Act, the term "wetlands" has expanded to include property that no one in his right mind would regard as included. Even with the best will in the world, no one can tell what is within the definition. As I wrote recently:

> [D]efining a legally controlled wetland is a judgment call. In the words of an [Army Corps of Engineers] official, "for regulatory purposes, a wetland is whatever we decide it is." It is also a moving target. Between 1986 and 1994 the basic definition of wetlands used by the government changed at least six times. To really explore this question would require an explanation of the Corps of Engineers Manual of 1987, the 1989 revision, the 1991 compromise, the Congressional action blocking the use of the 1989 revision and mandating a return to the 1987 version, the National Research Council Report of 1995, and several Memoranda of Agreement between the Corps and EPA. You might even want to start with the Swamp Act of 1850 and work your way forward through the 1956 Fish and Wildlife Service definition, the 1979 Cowardin Report, and other primary sources. For a short cut, call the Environmental Law Institute (ELI) in Washington, D.C., and buy its *Wetlands Deskbook*, published in 1993. This lays out the field, 661 pages of fine print of explanation, analysis, statutes, regulations, guidance letters, interagency agreements, and other documents. Then get ELI's 1996 articles updating the explanations in the 1993 work. (Things change fast.) Add a few *Federal Register* notices published in the last three years, the 1995 National

[26] Roger Marzulla, *Presumed Guilty: Wetlands Criminal Prosecutions*, *in* FARMERS, RANCHERS AND ENVIRONMENTAL LAW 39, 41, 72 (Roger Clegg ed., 1995) (published by the National Legal Center for the Public Interest).

> Research Council report on wetlands, some Congressional hearings, and you will be ready to go.[27]

Wherever one turns in environmental law, one finds comparable complexity, technicality, indeterminacy, obscurity, and intragovernmental fragmentation and conflict.[28]

Diminished Role of Intent

Historically, intent has been a crucial part of the criminal law. Punishment is warranted only if the defendant knew the nature of his action and meant to perform it. Questions of proof sometimes have been difficult, and sometimes the necessary intent must be presumed from the nature of the act. For example, it is difficult to defend on the grounds that you did not know that bullets shot from a gun are deadly. On the other hand, if a defendant were an aboriginal who had no idea what a gun was, then pointing it at someone and pulling the trigger would not demonstrate any intent to harm.

Before the current boom in criminalization, some acts were made criminal on a strict liability basis; intent was not an element of the offense. For the most part, however, the number of such offenses was limited, applying only to minor offenses bearing light penalties. These can be readily explained as cases in which avoiding an occasional minor injustice was not worth the transaction costs of requiring proof of intent. Since neither serious moral condemnation nor significant financial costs were involved, the trade-off was viewed as acceptable.

The criminal environmental statutes almost all require that the offense be "knowing," but the meaning of that term is diluted. In *United States v. International Minerals & Chemical Co.*,[29] in 1971, the Supreme Court held that environmental crimes are "public welfare" offenses. This means that a defendant's knowledge that he

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[27] JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT—AND WHY YOU SHOULD CARE 134 (1997).

[28] Lazarus, *supra* note 2, at 2428-41.

[29] 438 U.S. 422 (1971).

is dealing with a substance known to be dangerous and thus likely to be regulated is sufficient to support a conviction even if he is unaware that he is violating the law. This formulation has caused immense problems, because the government has tried to push the "you should have known it was regulated" to the utmost limits of its logic. In the modern world, everything is regulated, which would remove the intent requirement from the law entirely.

In some contexts, the Court has resisted this effort to dilute the mens rea requirement, holding that an activity that can be undertaken for innocent reasons cannot be criminalized without a showing of specific intent to violate the law. In *Staples*, a 1994 firearms case, Justice Ginsberg posed the dilemma in the following terms:

> The question before us is not *whether* knowledge of possession is required, but what level of knowledge suffices: (1) knowledge simply of possession of the object; (2) knowledge, in addition, that the object is a dangerous weapon; (3) knowledge, beyond dangerousness, of the characteristics that render the object subject to regulation, for example, awareness that the weapon is a machine gun.[30]

In *Staples*, the Court held that the defendant was culpable only if he knew that the firearm was a machine gun.[31] Three other 1994 Supreme Court cases addressed the issue in other contexts, with roughly similar results.[32]

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[30] United States v. Staples, 114 S. Ct. 1793 (1994) (footnotes omitted).

[31] *Id.* at 1805:

> Some Courts of Appeals have adopted a variant of the third reading, holding that the Government must show that the defendant knew the gun was a machine gun, but allowing inference of the requisite knowledge where a visual inspection of the gun would reveal that it has been converted into an automatic weapon. See United States v. O'Mara, 963 F.2d 1288, 1291 (CA9 1992); United States v. Anderson, 885 F.2d 1248, 1251 (CA5 1989) (en banc).

[32] The others were Ratzlaf v. United States, 114 S. Ct. 655 (1994) (government must show that defendant knew that structuring cash withdrawals so as to avoid a bank's reporting requirements was illegal); Posters 'N' Things Ltd. v. United States,

The Supreme Court has not taken up the issue of intent in the context of an environmental law since *International Minerals*. Thus the basic public welfare rationale still holds, and the issue of intent raises four intertwined sets of issues:

(1) *Mistake of fact*: What if the defendant thinks he knows what he is discharging, and thinks it is water?

(2) *Mistake of law*: What if the defendant knows he is discharging a pollutant, but thinks the discharge is legal?

(3) *Recklessness*: What if the defendant neither knows nor cares what he is discharging?

(4) *Fair notice*: What if the defendant tried to do the right thing, inquired into the law and/or the facts, and was misled? What if he was misled by bad advice from regulatory authorities or by ambiguities in the regulations? Is there a requirement of "fair notice," possibly even a constitutional requirement?

The position of the U.S. government is that all of these things should be regarded as irrelevant. In *International Minerals*, the Court indicated that a defendant's genuine belief that he was discharging water might be a defense. Nonetheless, in *United States v. Ahmad*,[33] the government took the position that Ahmad could not defend on the grounds that he thought he was discharging water. In *United States v. Weitzenhoff*,[34] the government argued that the defendants should not be excused even if they honestly thought their discharges were allowed by the permit. In a Texas case, a company complied with a state interpretation issued in 1984. In 1994, EPA said it disagreed

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114 S. Ct. 1793 (1994) (government must show that defendant knew that items sold were likely to be used with illegal drugs and that it knowingly made use of an interstate conveyance); United States v. X-Citement Video, 115 S. Ct. 464 (1994) (government must show that defendant knew that the performer in a sexually explicit videotape was a minor).

[33] 101 F.3d 386 (5th Cir. 1996).

[34] 1 F.3d 1523, *amended on denial of rehearing and rehearing en banc*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995).

with the state and wanted penalties of up to $25,000 per day, going back ten years.[35]

The courts are in disarray over these challenges. In *Ahmad*, the Fifth Circuit allowed the mistake-of-fact defense. In *Weitzenhoff*, the Ninth Circuit upheld the government. Some defendants have argued for a formal "right to fair notice" doctrine, which would say, more or less, that ignorance of the law is indeed an excuse if a reasonable person cannot figure out the rules after making reasonable efforts. Due process is usually invoked to support the "fair notice" concept. A few successes are recorded, but on the whole this line of argument has not been successful. The courts keep *saying* that a defendant is entitled to reasonable notice, but in practice people are presumed to understand masses of incredibly confused rules. In at least one case, the defendant's confusion was treated as a reason to impose the penalty rather than mitigate it. The court feared that defendants would "game" the system by not applying for permits just because they could not tell whether they were supposed to do so.[36]

One court sympathetic to the fair notice argument is the D.C. Circuit. In *Rollins Environmental Services v. EPA*,[37] it held that civil penalties should not be imposed under conditions of regulatory confusion. In *General Electric v. EPA*,[38] the point was reiterated. The opinion upheld EPA's interpretation of a murky rule, but reversed EPA's attempt to impose a civil penalty on the grounds that fair notice was lacking.[39] However, the D.C. Circuit seems unique. Most courts actually over-read the Supreme Court's opinion in *International Minerals*, and assume that the case foreclosed

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[35] ALEXANDER VOLOKH & ROGER MARZULLA, ENVIRONMENTAL ENFORCEMENT: IN SEARCH OF BOTH EFFECTIVENESS AND FAIRNESS 6 (Reason Foundation, Policy Study No. 210) (Aug. 1996).

[36] For a discussion of this line of cases, see Margaret N. Strand, *The "Regulatory Confusion" Defense to Environmental Penalties: Can You Beat the Rap?*, 22 ENVTL. L. REP. (ENVTL. L. INST.) 10330 (1992).

[37] 937 F.2d 649 (D. C. Cir. 1991).

[38] 53 F.3d 1324 (D.C. Cir. 1995).

[39] 53 F.3d 1324 (D.C. Cir. 1995).

arguments for limiting the public welfare doctrine that were, in fact, left open.[40]

Nor have courts integrated into environmental enforcement the "innocent activity" problem recognized in *Staples*. Building a house on land that appears bone dry to the naked eye can be an intentional, and criminal, filling-in of wetland, despite the fact that building homes seems like an innocent activity. As a dissenting judge in *Weitzenhoff* said:

> Hot water, rock, and sand are classified as "pollutants" by the Clean Water Act. . . . Discharging silt from a stream back into the same stream may amount to discharge of a pollutant. For that matter, so may skipping a stone into a lake. So may a cafeteria worker's pouring hot, stale coffee down the drain. Making these acts a misdemeanor is one thing, but a felony is quite another . . . .[41]

The dilution of the intent requirement, combined with the uncertainty of the regulatory confusion defense, greatly enhances the government's punitive power. Environmental law has six levels of punishment: two levels of administrative penalties; judicially imposed civil penalties; misdemeanor offenses; felony indictments; and aggravated felony charges for "knowing endangerment." If intent is immaterial to the definition of the offense, then the government's burden of proof is basically the same for each of the first five levels. Deciding which of these levels to invoke is up to the prosecutor, who can choose whether a given action should result in a felony indictment or in a modest penalty assessment. The government's burden is probably higher for an offense of "knowing endangerment," but even this is not absolutely certain.[42]

Internal EPA guidelines list the factors relevant to a decision about what level of prosecution to invoke. These guidelines list the considerations one would expect to find: degree of knowledge, extent

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[40] *See* Lazarus, *supra* note 2, at 2476-84.

[41] 35 F.3d at 1298.

[42] *Criminal Enforcement*, *supra* note 3, at 12-19.

of the contamination or the seriousness of any hazard, compliance history, and the need to abate ongoing pollution.[43] However, such standards remain vague, and the most accurate assessment may have been provided by an anonymous state prosecutor when he said, "When the little hairs on the back of your neck stand up, its a felony. When it just makes you tingle, it's a misdemeanor. If it does nothing to you at all, its a civil problem."[44]

Moreover, the listed standards do not include several factors that experienced defense lawyers regard as relevant in the hardball world of criminal law. One factor not listed in the guidance documents is that an environmental violator who questions the agency's good faith, competence, or basic authority is much more likely to be indicted. For example, Ocie Mills in Florida was jailed for insolence. He bought his lot from a relative, who had been told by the federal Army Corps of Engineers that it was a wetland. It did not look like a wetland to Mills, so he had Florida's Department of Environmental Services (DES) do a wetlands survey. The state team erected flags dividing upland from wetland and Mills began putting sand on the upland side. The Corps sent him a letter telling him to stop. The letter included the phone number of the Florida DES to call with any questions. Mills called the DES, which said there was no problem. Mills wrote the Corps about the DES response, waited a year and heard nothing, assumed the problem resolved, and began putting more sand on the upland side of the flags. The Corps again told him to stop and again told him to call the Florida DES with any questions. Mills wrote to the Corps again, and, in the words of his lawyer, he "suggested . . . that it get its act together and get a more competent authority such as a court to straighten the matter out." He waited six months, heard nothing, put more sand on his lot, and was prosecuted and sent to jail for 21 months.[45]

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[43] *Id.* at 13 (citing EPA memoranda).

[44] Leslie Spencer, *Designated Inmates*, FORBES, Oct. 26, 1992, at 100 (quoted in LYNCH, *supra* note 5, at 10).

[45] *Hearings on S. 851, The Wetlands Regulatory Reform Act of 1995 Before the Senate Comm. on Public Works*, 104th Cong., 1st Sess. 9-11 (Nov. 1, 1995) (statement of James S. Burling).

Joseph Wilson, the Maryland developer recently sentenced to twenty-one months in prison, appears to be in the same category. He began his development in the 1970s. His plans were reviewed without objection by four federal agencies, including the U.S. Army Corps of Engineers. In 1990, the Corps informed Wilson that he had violated the Clean Water Act by adding fill dirt to a five-acre site that lies in the middle of a local business district, surrounded by highways and railroad tracks. Wilson removed the dirt, then sued the government claiming that his property had effectively been taken. Only then did the government start a criminal investigation, and in 1995 it indicted Wilson for actions between 1988 to 1993 in filling in the parcel that was the subject of the original dispute and three others. All four pieces of land are urban, lie at the highest point in the county, and are more than six miles from the Potomac River and ten miles from the Chesapeake Bay.[46]

If internal guidelines neglect to specify "insufficient servility" as a factor for prosecutors to consider, neither do they include "willingness to pay ransom." However, the government is reaping lots of money for something called Supplemental Environmental Projects (SEPs). SEPs are projects to improve the environment, ranging from reductions in the release of pollutants to the provision of environmental amenities. As EPA's Enforcement Report puts it,

> EPA uses SEPs to gain significant environmental benefits in conjunction with the settlement of enforcement cases. Nominally, SEPs are projects voluntarily undertaken by members of the regulated community in conjunction with case settlements . . . . In exchange . . . the facility is granted penalty relief . . . . Historically applied predominantly in reporting violation cases, SEPs are maturing into a more versatile tool . . . .[47]

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[46] Brief for the Appellant, United States v. Wilson, No. 96-4498(L) (4th Cir. 1996).

[47] EPA, FY 1995 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 3-13 (July 1996).

The completeness of the prosecutorial discretion that results from the dilution of intent, combined with the complexity of the offenses, the vagueness of the stated guidelines, and the influence of important unstated factors, gives enforcement an eerie uncertainty. Legal seminars are given by current government enforcers teamed with lawyers and consultants in private practice, most of whom were enforcers until they left the government a year or so ago. These experts describe the vast powers of the agency and explain that the laws are so extensive and complicated that no business can be in compliance all the time. It is literally impossible. Corporate lawyers agree. In a recent survey, over two-thirds of corporate attorneys conceded that their companies had violated some environmental statute during the preceding year, due largely to uncertainty and complexity.[48]

The impossibility of total compliance is not a serious problem, the seminar speakers add, because the government is reasonable and would never act unjustly, but one really does need a savvy guide through the maze. They are right about the need for a savvy guide, but corporate managers and individual entrepreneurs get unhappy when the government says, in effect: "We have created a system too complicated to understand and impossible to comply with, and all aspects of its administration—including whether to put you in jail—are totally at the discretion of the government, but do not worry because we are reasonable." Thomas Adams, a former enforcement chief at EPA and currently one of the leaders of a coalition addressing the issue of over-criminalization, says: "Increasingly, it is clear that the government is *not* always reasonable. The system really has gone amok, and matters that used to be treated as civil, and that should be dealt with as disagreements or misunderstandings, are now crimes."[49]

Concern over this formless, standardless, and perplexing structure is deepened by additional factors. Corporations can be found guilty of criminal activities even when the acts performed were explicitly against company policy. The penalties also apply to individuals, not

[48] LYNCH, *supra* note 5, at 8.

[49] Telephone interview with Thomas Adams (Feb. 1, 1997).

just organizations. EPA emphasizes individual liability because organizations cannot go to jail and may treat monetary payments as a cost of doing business; individuals are more sensitive.

EPA is also a strong supporter of vicarious liability, which means that it tries to penalize hierarchical superiors regardless of their knowledge or participation in any violation. Its goal is to avert management by wink or by deliberate ignorance, and to ensure that superiors conscious of their own jeopardy spare no expense complying with the regulatory requirements. Most cases against corporate officers rest on the theory that the person directed the violation, knew of it and did nothing, or remained deliberately ignorant. The government has tried to push its theories still further and to hold any "responsible corporate officer" criminally responsible. So far, the courts have resisted the effort to make individual corporate officials absolutely criminally liable on a basis of respondeat superior. However, courts have allowed liability to be imposed based on very little actual knowledge. For example, a corporate treasurer's opposition to a budget request for funds to remedy an alleged environmental violation may be enough to impose criminal responsibility upon her.[50]

This enforcement philosophy makes individual employees frequent targets. From the individual's point of view, given the hundreds of thousands of dollars required to defend a case of any complexity, the initial targeting by government regulators is as catastrophic as the final outcome. The necessary resources are well beyond the means of most individuals. These financial problems are exacerbated for ordinary people by an explicit government policy that treats companies that support and aid accused employees more harshly.[51]

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[50] *Criminal Enforcement*, *supra* note 3, at 33.

[51] *See, e.g.*, Jonathan M. Moses, *U.S. Presses Firms to Stop Supporting Accused Aides*, WALL ST. J., Nov. 4, 1993, at B1.

Greater Intrusiveness

Most people, faced with a punitive structure that is complex, unpredictable, and arbitrary, react rationally by avoiding involvement. For conventional crimes, this works. Most people do not come close to murder, robbery, arson, or similar wrongs in their daily lives. There are always grey areas where the legal and illegal merge, and tricky distinctions are occasionally necessary, but for the most part, avoiding these offenses is not something to which respectable people must devote great thought.

With regulatory crimes, this strategy no longer works. The new burdens are omnipresent, pushing so deeply into the daily life of the managerial, professional, and entrepreneurial classes that it has become impossible to avoid skirting, and almost certainly falling over, the edge of criminality. The new structure of criminal sanctions controls in detail activities that people must and are entitled to engage in, such as earning a living.

Again, the pervasive nature of the environmental laws is a good illustration. Every manager or entrepreneur in any industrial, agricultural, or extractive industry is at risk. Every home builder is in jeopardy from the wetlands and endangered species laws, and nothing in the objective situation will automatically alert him to the degree of danger. If there is no definitive way to tell whether your property is a wetland, and knowledge and intent are irrelevant, then even the act of building or buying a home becomes perilous. Virtually everyone is at risk of prosecution. Few managers at any level are free of an ominous sense of being subject to risks that they cannot assess or prevent.

Again, the environmental area is not unique. Any participant in the health care or defense industries is vulnerable to misreading a contract and having the dispute turn into a criminal investigation. The Vice President's recent speech to unions could bode the day when a disagreement over the scope of the Family and Medical Leave Act gets a company debarred from federal contracts. The securities industries and financial regulation are on a similar path. The head of the federal Office of Thrift Supervision noted that, as a result of all the prosecutions of S&L directors, financial institutions were having

trouble attracting qualified directors. He also noted that the fear of personal liability was causing bankers to turn down credit-worthy loans to credit-worthy borrowers.[52] Such efforts to hide will be in vain. Because the criminal law and related sanctions are intruding everywhere, no one can adopt a philosophy of minding his own business and thereby avoid legal risk.

Combining this intrusiveness with the complexity and uncertainty of the legal requirements, and with the lack of any necessary relationship between criminal conviction and moral turpitude, people who get caught up by the legal system are angry, not repentant.

There is grim humor in a paper prepared by a criminologist for a legal education seminar.[53] The author notes the difficulties of working with white collar criminals: "Most of these clients have been upstanding citizens, have been involved in charities and community causes, and generally will have tremendous difficulty identifying with the reality of being charged with a criminal offense. The client may be indignant, even outraged, that he is being investigated, and he will often want to make this known." The lawyer's goal must be to keep the client from "transmitting a negative initial impression to the court." The article moves on to advice on dealing with the probation officer, who has the power to make or break the client. "The client must take responsibility for his actions. He must also provide a sense of how he feels about the offense, e.g., remorse for transgressions, concern for victims if applicable. There should not be any excuses made. All too often, the defendant wants to explain how he is not really guilty, but had no choice except to take the deal offered by the government." Such remarks increase the likelihood of a stiff penalty or sentence.

This is solid advice. Quite a few defendants in wetlands cases would agree that protesting one's innocence or the unfairness of the system only makes matters worse. One of the defendants in *Weitzenhoff* also would agree. He denied his guilt on the witness

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[52] Timothy Ryan, *Banking's New Risk—Litigation*, WALL ST. J., Nov. 13, 1992, at A14.

[53] SHEILA BALKAN, PREPARING THE BUSINESS CLIENT FOR CRIMINAL PROCEEDINGS (ABA Section of Litigation, Paper No. 531-0023/5H) (Nov. 1993).

stand, and his sentence was adjusted upward. Those convicted of a crime when they honestly tried to comply with law or when they did not know that such a law existed find it difficult to grovel. One is left wondering how many of the 3700 S&L executives in jail were sent there because they refused to admit wrongdoing?

Diminished Constitutional Protections

The continuing expansion in the ambit of the punitive system is accompanied by a continuing decline in the scope of constitutional protections. As Timothy Lynch of the Cato Institute has analyzed in *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, protections against warrantless searches, self-incrimination, right to counsel, and double jeopardy all have been seriously diluted.[54] An additional factor not covered by Lynch is that the standards of what information rises to the level of legal "evidence" are also being weakened.

Search and Seizure

The Fourth Amendment says: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." It adds that searches must be by warrant, must be supported by probable cause, and must describe with particularity the premises to be searched.

In the new regulatory scheme, these protections are reduced. A series of court cases allows greater latitude for warrantless searches of commercial property than for residential. The elastic "closely regulated industry" argument that dilutes the requirement of intent is also used to reduce protections from unreasonable searches and seizure. As a result, those engaged in a "closely regulated industry" are subject to search without notice or warrant. Under RCRA,

[54] Cato Policy Analysis No. 223 (Apr. 20, 1995); *see also*, Timothy Lynch, Dereliction of Duty: THE CONSTITUTIONAL RECORD OF PRESIDENT CLINTON (Cato Policy Analysis No. 271) (March 31, 1997), <http://www.cato.org>.

inspectors can enter any place where hazardous wastes are generated, a classification that includes virtually every type of business establishment. Resistance to the warrantless search is itself a crime. On a practical level, no business is protected by the Fourth Amendment if the government chooses to treat it as "closely regulated."

Fourth Amendment protections are undermined in other ways as well. Some of these are particularly important to environmental offenses. For example, an "open field" exception allows agents to enter private fields. This removes any protection from fishing expeditions by agents seeking wetlands or Endangered Species Act violators. Some landowners are reacting with trespass prosecutions under state law. Trash is also fair game for searches. In New York, recycling police rummage through the garbage and issue citations for noncompliance with regulations requiring recycling.

Double Jeopardy

The Fifth Amendment says: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Early on, an issue arose as to how the Fifth Amendment affected prosecution by a state after a federal trial, and vice versa. The Supreme Court adopted the "dual sovereignty doctrine," which says that the Fifth Amendment does not bar successive prosecutions by state and federal governments. In areas in which state and federal programs overlap, which includes most regulatory areas, the possibility for dual prosecutions is omnipresent.

Nor does the prohibition on double jeopardy prevent successive criminal and civil prosecutions by the same sovereign. The government can indict criminally, then sue civilly for damages or property forfeiture. This has led to an arcane body of law on when civil penalties or damages or forfeitures are really "punishments," and thus within the protection of the double jeopardy clause.

The result of these doctrines is to encourage defendants to bargain for the best plea they can, and to concentrate all further discretion with prosecutors, not courts. As Lynch says, a CEO of a mid-size company should never contest a charge if it can cut a

reasonable deal. "Even if a jury acquits the company in federal court, another prosecution may be initiated in state court. And even if a second jury acquits, prosecutors can pursue stiff civil fines in both state *and* federal court." No matter how certain of innocence the CEO may be, realism about the costs and risks of litigation dictate that he fold. Even winning in court is risky because it is likely to annoy the agency, and ensure a second trial or heavy "civil" penalties.

Self-Incrimination

The Fifth Amendment also provides that no person can be compelled to be a witness against himself in a criminal case. This protection, like others, has been diluted in the regulatory context. For practical purposes, a business enterprise does not enjoy the protection against self-incrimination.

The lack of this basic protection has become the focus of a long and bitter dispute over internal audits of environmental compliance. EPA insists that any analyses must be available to the agency, which can then use them as the basis for criminal or civil charges. Private businesses are fighting hard for an audit privilege. Their argument is that companies are more likely to find and fix problems if they can do so without exposing themselves to uncertain and unlimited criminal and civil liability.

The paradigm case involved Coors Brewing Company, which conducted an expensive independent analysis to determine if fumes from evaporating beer were more potent than currently believed. The study showed that they were. To be a good citizen, Coors turned the analysis over to the state to show that the air pollution agency's measurement methods needed upgrading. The state agency then fined Coors over $1 million.[55] Twenty states have passed audit privilege laws and another ten are thinking about them. EPA is resisting vehemently, a stance that convinces many observers that the agency is more interested in its power than in the environment.

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[55] Valerie Richardson, *EPA at Odds with States over Voluntary Cleanup Privileges*, WASH. TIMES, Mar. 18, 1997, at A9.

Evidentiary Standards

The rules of evidence are primarily statutory or common law. Nonetheless, constitutional rights are involved, such as the rights to public trial, to know the evidence against you, and to confront your accusers. There is also a right, which probably rises to constitutional stature, to be convicted only on the basis of competent evidence. For example, if a state decided to start sending people to jail on the basis of testimony from the psychic friends network, one would hope such efforts would fail on constitutional grounds.

This right to be convicted only on the basis of competent evidence is also under attack. Much of the material on which regulations are based is junk science. But once in place, these rules have the same force as those based on the most well-established scientific truth. The rules governing wetlands and habitat protection for endangered species are particular examples, but there are many more.[56]

The decline in standards of evidence also leads directly to financial ruin. Refuting a junk science case is extraordinarily expensive. One must hire all kinds of experts and, in essence, reinvent the 1000-year development of the scientific method in simple terms that a nontechnical jury can understand. This is very expensive.

EPA is taking the dilution of evidentiary standards even further. It recently issued a rule saying that under the Clean Air Act emitters can be convicted not only if the formal reference tests show that emissions exceeded the limits, but also on the basis of "engineering calculations, indirect estimates of emissions, and direct measurement of emissions by a variety of means."[57] The exact meaning and import are not clear, but the ability to use "indirect estimates" as reliable evidence upon which to convict is ominous.

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[56] MICHAEL H. LEVIN, EPA'S INDEFENSIBLE 'CREDIBLE EVIDENCE' RULE: A CRITICAL ANALYSIS (Washington Legal Foundation Working Paper No. 76, 1997); *Junk Science Home Page* <http://www.junkscience.com>.

[57] EPA, Final Rule: Credible Evidence Revisions, 62 Fed. Reg. 8313 (Feb. 24, 1997).

III. CONSEQUENCES OF THE TREND

The point of this monograph is not to argue that all regulations or sanctions are mistaken. There is much bad behavior in the world, and society must combat it. There is also a general consensus on the need to protect the environment, and an increasing tendency to judge harshly those who pollute the national commons of the air, land, and water.

Even accepting all this, the rush to punishment is imposing tremendous costs. The sheer number of sanctions, their shotgun character, their breadth and vagueness, the irrelevance of intent, the use of punishment as a first resort rather than a last resort, the failure to examine the moral nature of the conduct that is criminalized, and the strong overlay of zealotry are creating serious problems. Among these are economic damage, pervasive injustice, decline in respect for the law, and a sapping of the moral legitimacy of the government. These consequences are serious, and supporters of punitive measures should harken to more advice from Friedrich Nietzsche: "Whoever fights monsters should see to it that in the process he does not become a monster."[58]

Economic Effects

Concern about the economic impact of the current regulatory system does not require automatic opposition to anything that raises business costs. No one wants the U.S. to look like Eastern Europe, and in a world with an expanding population, the costs of protecting the environment must increase. But society must be concerned with obtaining as much value as possible for the costs incurred. Excessive reliance on punitive measures thwarts this objective, and damages other important economic goals and interests.

The starting point for understanding the economics of the trend toward criminalization is to revisit the moral basis of classic criminal law. As long as the requirements of the criminal code are roughly

[58] THUS SPAKE ZARATHUSTRA, pt. IV, ch. 139, *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 552 (16th ed. 1992).

congruent with the basic morality of society, people have the information they need to conform to it. They may not know the difference between first and second degree murder or the fine distinctions among forms of larceny, but they know that if they kill, steal, set fire to things, or do any of the other acts that their parents told them were wrong, they are likely to get in trouble. From an economic point of view, they have most of the information they need to obey the law, simply as a result of living in a society. This lowers the information costs of obedience.

People do not have the information they need to conform to the current regulatory scheme with its technical complexity, ambiguity, and, often, politically-determined provisions. Furthermore, given the irrelevance of intent, lack of information does not shield one from prosecution. This raises the costs of obedience extraordinarily. If even a finely tuned sense of right and wrong is an inadequate guide, then everyone must devote time and effort to ascertaining the law, and the regulations, and the cases, and the interpretative letters, and the agency's internal guidance. The high information costs burden even large firms, and can be prohibitive for small firms and individuals. Determining the requirements usually takes expensive analysis, and many issues are so complicated as to be indeterminable. Legal errors are common, and the enforcers might regard following erroneous advice not as an indication of good faith but rather as an attempt to fool the government. Errors of understanding also may lead a firm to spend large sums to prevent action that is, in fact, legal.

Unless a settled answer is readily available from an agency hotline, seeking clarification from the government is often futile and almost always slow. Solving a new problem requires a policy decision, and this is low on the agency priority list. After all, in the government's view, the supplicant has an easy out—assume that whatever it wants to do is illegal and refrain from doing it. That this option might be expensive, inconvenient, or impossible matters little. Systems for coordinating the mass of regulatory information are primitive, and only recently have many of the interpretative documents even become publicly accessible. Turnover of agency staff is constant, at a high price to institutional memory and continuity. Any lawyer who has worked on a problem for a client over time will

testify that each visit to the agency probably will involve a new cast of characters. Each time the new group is unfamiliar with the problem, having never seen the papers submitted to the last group. These papers must all be updated and resubmitted, and, with luck, one substantive discussion will be had before the cast changes again.

Knowledge costs are only one hurdle. If permits are needed, and they can number in the dozens, obtaining them is a serious expense and cause of delay. Proceeding without the permits is, of course, a serious offense, even if all actions taken are reasonable.

Resource requirements are also formidable. That pollution reduction takes money is not in itself a problem. The national consensus is that using the environment as a sewer is no longer acceptable. On the other hand, compelling compliance by a system of punitive sanctions creates enormous inefficiencies. To call something criminal, or even to respond to it with inordinate civil penalties, means that it is to be avoided, no matter what the cost. It is axiomatic that chasing zero risk in the face of diminishing marginal returns is enormously expensive. Furthermore, it can make the resources required theoretically infinite because even if emissions are reduced to zero there is always a chance of error or breakdown, and avoiding this chance justifies commitment of yet more resources.

Emissions result from industrial processes that are subject to variation and upset. EPA sometimes takes this variability into account in setting standards; for example, standards for treating hazardous waste are set at a level that can be met by a designated technology ninety-five percent of the time, meaning that facilities will fail to meet the standard five percent of the time. However, if the standard is enforced with criminal sanctions, then in practice the treatment must ensure that *no* exceedences occur. A standard reasonable at a ninety-five percent level of achievement can be impossible or exorbitantly expensive if it requires one hundred percent certainty.

Any system that requires zero risk will become a voracious consumer of resources. Environmental protection must compete with other valued goals or objectives, such as health care, employment, or general economic well-being. Resources are finite, and decisions about appropriate trade-offs among their uses should involve comparisons at the margin. We must make a determination of how

much incremental environmental protection is worth versus how much loss of other values is appropriate. The use of punitive sanctions prevents desirable trade-offs. It decrees that any amount of environmental protection, no matter how small, is worth any amount of the sacrificed value, no matter how large. If numerous other areas of national policy are asserting the same absolute priority at the same time, through use of punitive sanctions of their own, the whole system becomes a creaking structure of conflicting absolutist requirements.

In many cases, the increment of environmental protection that is to be purchased without regard for costs is small indeed. In *General Electric v. EPA*, the agency fined the company for a practice that saved money and reduced pollution. In *Weitzenhoff*, the defendants were trying to keep the sanitation system of the city of Honolulu functioning and in the process they discharged 436,000 pounds of sewage over a period of fourteen months when their permit allowed them to discharge only 409,000 pounds—a difference of roughly six percent. They went to jail. John Pozgai went to jail for placing fill on a "wetland"—actually a water-logged vacant lot—that he himself had cleared of old tires, rusty metal, and other debris. One is hard-pressed to find any environmental benefit from these cases; indeed, the reverse is true. Yet their effect will be to compel heavy spending by other entities on similarly pointless or destructive acts in tens of thousands of similar situations. Superfund is compelling the expenditure of billions of dollars for cleaning up hazardous waste at sites that no one intends to use. The program adds limited or negative economic value to the nation, but it is enforced with all the power of our punitive apparatus.[59]

To some degree, agencies try to deal with these problems through enforcement policy. They assert that as long as people are acting reasonably, they are in no real jeopardy. Experience does not bear this out, since many who thought they were acting totally reasonably have been hit with stiff fines and sentences. Reasonableness is in the

[59] For an extensive analysis, see JAMES V. DELONG, PRIVATIZING SUPERFUND: HOW TO CLEAN UP HAZARDOUS WASTE (Cato Institute, Policy Analysis No. 247) (Dec. 18, 1995), <http://www.cato.org>.

eye of the beholder. Some regulators and members of the environmental movement regard virtually any productive use of land as harmful and evil. If this view is the standard by which reasonableness is measured, it is difficult for someone who does not share this mind set to act "reasonably."

Even if enforcement policy fulfilled an ideal of complete fairness, the problems facing any organization would not dissolve. Any corporate executive needs to know that his organization is in compliance, not that it is out of compliance but that the agency will probably not treat the matter seriously. Agency emphasis on vicarious liability multiplies the importance of this certainty, precisely as the government intends. Even if management were willing to live with ambiguity, uncertainty creates impossible problems of internal administrative control. A large organization cannot develop guidelines about which rules will be enforced and which winked at; it must comply with them all.

As an economic system, punitive sanctions represent the ultimate in command-and-control, and, as the Soviet experience should have taught us, omnipresent command-and-control is a poor way to run a country. Society wants its economic actors to proceed with intelligent discretion, balancing costs and benefits. Criminalization destroys this balance by declaring that all mistakes are intolerable, and removing all discretion to act reasonably under unforeseen circumstances. It also subjects all economic activity to the control of a regulatory *nomenklatura* that is every bit as unqualified to manage industrial and business activities as was its Soviet namesake.

The effect will be to undermine the dynamism and efficiency of all industries touched by the system. One of the great strengths of the U.S. economy has always been the freedom to act fostered by the common law system. Under this regime, people go through life trying to act reasonably, ethically, and with reasonable care. If someone fails on any of these counts, and someone else is damaged as a result, the actor pays for the actual damage, but no more. There is no financial bonanza for the injured party or the government. Ultimate decisions are in the hands of independent judges, who have no vested interest in a particular program. This approach has served us well. It

has encouraged entrepreneurial activism and responsibility. It is, in the current jargon, empowering.

The new emphasis on criminalization is the opposite. It dictates passivity, as clarification of the rules must be sought and prior approval secured. The consequences of an error bear no relation to the harm caused, or even to a determination that harm actually occurred. The approach is disempowering, as it forces private actors to play, "Mother, May I?" with the government over each minute aspect of their businesses.

It has been suggested that the criminalization of government contract law is a formidable barrier to conversion of the defense industry to civilian projects because it "breeds a severe aversion to taking risks of the kind required for industrial leadership elsewhere in the economy."[60] The increasing number of whistleblower suits is making this situation even worse. In *Butler v. Hughes Helicopters*, the plaintiff is arguing that he should be able to sue even though: (1) government representatives participated fully in the development of the product and were aware of all the changes in the specifications and tests; (2) the government refused to participate in the suit; (3) the government saved money rather than losing it.[61]

As the recent news accounts on SmithKline and hospices show, the health care industry is heading down the same dangerous track. Capital markets are also in danger.[62]

The system of punitive enforcement badly serves the nation's goal of improving our international competitiveness. Environmentalists fear that other nations will obtain competitive advantage by means of a willingness to degrade their environment. This may be cause for concern, but another fear is far more immediate. Nations can compete by developing more efficient

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[60] Les Daly, *But Can They Make Cars?*, N.Y. TIMES MAG., Jan. 30, 1994, at 26, 27.

[61] 71 F.3d 321 (9th Cir. 1995). Linda Greenhouse, *High Court Hears Arguments on Whistleblower Lawsuits*, N.Y. TIMES, Feb. 26, 1997, at A21. For additional critiques of the federal whistleblower statutes, see CITIZEN SUITS AND QUI TAM ACTIONS (Roger Clegg ed., 1996) (published by the National Legal Center for the Public Interest).

[62] *See*, Winter, *supra* note 15.

systems for promoting their social and environmental goals. The U.S. system uses multiple governments and agencies to enforce uncertain and sometimes inconsistent punitive standards, with no tolerance of error, and with each program asserting an absolute priority over all others. Any problems are to be solved by uncoordinated exercises of discretion by prosecutors.

To appreciate the full impact of the system we are creating, imagine it transferred to the area of automobile accidents. Everyone would agree that accidents are a bad thing. They cause personal injury and property damage, and they produce no economic benefit. If we apply the philosophy we are adopting in other areas, the answer is simple. We will outlaw accidents. From now on, it is a criminal offence to be involved in an auto accident. If some fuss-budget protests that people do not intend to have accidents, the answer is that they intend to drive cars, and that they know that cars are sometimes in accidents. Therefore, they have all the intent that is necessary. They drive knowing that accidents are possible, just as industrial companies know that pollution is possible. Of course, since prosecutors may not want to take charge of all cases, we will also set up an accident agency and give it power to levy civil penalties and other sanctions on people who are involved in accidents. Furthermore, all penalties will apply to all accidents, from the most minor fender bender to a multi-fatality interstate pile-up. If you only bend a fender, but the prosecutor thinks you are a bad guy, you can go to jail. (Unless, of course, you want to make a large contribution to a new program of Special Highway Projects, which pays for extra guardrails, driver training, and so on.)

This system would reduce accidents. People facing stiff sentences regardless of fault or harm would modify their behavior. They would drive only when absolutely necessary, go twenty-five miles an hour on interstate highways, stop even at green lights, and so on. So why don't we do this? Because we do not want to devote all of our energies and all of our resources to the single goal of avoiding all auto accidents. Yet, in other areas, this is precisely the standard we are adopting—that some single-minded goal must be pursued regardless of any countervailing factors, goals, or costs.

Moral Impacts

The argument against excessive use of punitive measures is not solely an economic one. The same factors that make a punitive regime economically inefficient render it ethically deficient.

First, excessive reliance on punishment can increase harm. Because the regulated community must put its resources into averting any possible risk of violation, any area not covered by a rule is ignored. Resources go to reducing already trivial risks while more severe problems go unattended. A joint study of a refinery performed by a large oil company and EPA found that the company could reduce overall risks substantially by de-emphasizing some risks now subject to regulation and diverting the saved resources to risks that are now uncontrolled.[63] The study has resulted in many speeches, but minimal action.

Another ethical problem is that a willingness to skate close to the line becomes a competitive advantage. This can result in a Gresham's Law effect whereby the marginal operators drive out the honest ones. Agency officials are well aware of this potential, and try to tailor penalty policies to offset it, but this game can be won only when standards are clear and attainable. When the sheer number and complexity of laws and regulations reach the point that full compliance is impossible, enforcement becomes increasingly random. Moreover, the conclusion that compliance is a tactical rather than a moral issue becomes irresistible. Over time, a willingness to skate close to the line of illegality or to develop an organization that specializes in systematic violations of the law will become a major source of competitive advantage. The more an area of economic activity becomes subject to criminal law, the more that area will be taken over by criminal organizations.

Unfairness to individuals is also growing and festering. Uncertainty in the law puts people "at risk" when engaging in normal, but important economic activities. There is tremendous potential for results that offend the sense of justice. For example, should owners

[63] Bill Mintz, *Yorktown: A Revolution in Regulation?*, HOUSTON CHRON., Mar. 13, 1994, at F1.

of businesses or corporate employees be jailed or fined because they did not simply go out of business rather than run the slightest risk of violating an ambiguous regulation? Regulations not tailored to a specific situation also create questions of fairness.

Ethical concerns are heightened by the reality that even an acute sense of morality is a poor guide to the new criminalization. No one would defend the morality of most conduct that historically has been criminalized, or worry much about people who try to cut it close to the line. But for much of the new criminalization, moral consensus exists only at a high level of generality. Our contemporary sensibilities do indeed condemn those who use the environment as a sewer for hazardous materials, discriminate on the grounds of race, gender, or physical characteristics, or cheat shareholders. But moral consensus at this level of generality is far more easily attained than consensus at a finer level of detail. The immorality of dumping chemicals indiscriminately does not tell one that dirt contaminated with pesticide is hazardous waste if the pesticide was spilled, but not if it was applied deliberately. The need to avoid polluting the air does not tell one to use a sulfur scrubber even when burning non-sulfur coal. Ethical opposition to "discrimination" moves onto treacherous moral terrain when "nondiscrimination" comes to be defined as imposing affirmative action quotas, or reconstructing a small business to provide better access, or forbidding insurance premiums based on actual risk factors. A recent book on the explosion in employment litigation describes in detail how a system of legal controls can, using the sanctions of extraordinary damages, become unhinged from normal standards of behavior, economic efficiency, morality, and common sense.[64]

The capture of vast parts of the regulatory process by special interests adds a new dimension to these ethical issues. Take just one example, out of thousands. It is a criminal act, a felony, to install a toilet that uses 3.5 gallons of water per flush. One must install a new, 1.6 gallon model, a requirement foisted on America by an alliance of environmentalists and plumbing appliance manufacturers. Many

[64] WALTER K. OLSEN, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE (1997).

people have aesthetic objections to the new models. Furthermore, the value of the new model is small. In Washington, D.C., water costs $0.00383 per gallon. It would take 137 flushes to save a single dollar's worth of water. Heaven knows how long it would takes to save enough on water bills to offset the cost of the newly mandated toilets. Financially beleaguered New York City spent $270 million paying property owners $240 each to tear out and replace old toilets. Unfortunately, some of the new models are inferior. They back up and become clogged more easily and must be flushed multiple times, so they use more water rather than less. Several lawsuits also have been filed, charging that some new-model toilets have exploded and cut people with shards of porcelain.[65]

What moral right does the government have to declare people criminals because they choose to spend a little more on water, or because they have an aversion to clogged or exploding toilets? If water is scarce, then raise the price, and let people make their own decisions based on the new information. In fact, the more one delves into the facts, the worse the government's moral position becomes. In the arid West, some farmers pay $7 per acre-foot for water. This could mean that water is not scarce. It could also mean that these farmers get water so inexpensively because they have political clout. So the government is making you a criminal if you fail to save tiny amounts of water which will then be given away to the politically powerful. A final irony is that these same farmers must also buy new-model toilets. Since one acre-foot of water equals 326,000 gallons, it takes them 171,579 flushes to save seven dollar's worth of water.

The toilet example strikes everyone as humorous, especially headline writers, who produced such tags as "A Whole New Bowl Game; Saying No to 'Low-Flow,' Buyers Flush Out Old Toilets."[66]

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[65] Clifford J. Levy, *Report Says Toilet Program Wasted Water and Money*, N.Y. TIMES, July 31, 1996, at B3; George James, *Lawsuit Filed for 2 Injuries from Toilets*, N.Y. TIMES, Dec. 29, 1995, at B6.

[66] Tamara Jones, WASH. POST, May 28, 1996, at A1. The jump-page headline was, "As Rules Take Effect, a Run on 3.5 Gallon Toilets." *See also* Cindy Skrzycki, *Going Against the Flow: One Legislator Isn't Bowled over by a Conservation Rule*, WASH. POST, Mar. 21, 1997, at G3.

However, the principle involved is not at all funny. Nor is the effect on the nation when the example is multiplied by the several hundred thousand regulations in effect. With every flush of a new-model toilet, some of the moral legitimacy and credibility of the legal system and the government goes down the drain. If the criminal law is so absurdly applied to new toilets, why should anyone believe the government when warned that freon must be outlawed for the sake of the ozone layer, or energy use must be curtailed to prevent global warming, or development of property must be stopped for the sake of endangered species? Simply put, when government criminalizes almost everything, it also trivializes the very concept of criminality.

The capture of chunks of the regulatory system by various special interests leads to a loss of moral legitimacy for another reason. It causes particular activities to be criminalized precisely *because* of the lack of community moral consensus. The heavy hand of government regulation is used to compensate for the lack of pressure from society or internal conscience. This technique has its uses; it can sway people who are on the fence. But the fact that something is a good idea in one context does not make it good in every situation, and the technique first wears out, then backfires, when overused.

Many landowners are morally outraged by the draconian application of wetlands regulation, which has turned into a large-scale program of property appropriation. They also know that the program was never explicitly passed by Congress. It was created by regulators, who were pushed by activist judges and crafty drafters of legislative history. Hence, its moral legitimacy is thin. Violators are criminalized precisely for the *in terrorem* effect because the law does not correspond with people's sense of moral right. It is somewhat similar to an occupying army shooting a hostage occasionally to instill fearful obedience from the populace.

The federal budget crunch is making this problem worse. As Congress loses the financial freedom to give money to favored constituencies, it passes laws forcing private actors to transfer wealth to them. Since these laws are perceived as lacking moral legitimacy, they require constant escalation of the effort to enforce them. Also, if money for enforcement is limited, agencies have strong incentives

to impose disproportionate costs on the private sector to relieve the pressure on their own budgets. For example, EPA may require expensive air monitoring technology to save itself trivial expenditures on inspection. Agencies may also become more punitive. If few violators can be prosecuted, the temptation to make horrible examples of those few is overwhelming.

Overuse of punitive sanctions damages the moral fabric of the culture. By lumping trivial with serious transgressions, it undermines people's sense of moral priorities. Additionally, when people who regard themselves as responsible moral actors learn that they have committed criminal offenses that they have never even heard of, their first reaction is disbelief. Their second is contempt for the law. The developing perception is that one cannot possibly keep up with all the rules and cannot afford to try. The rational person must shrug and accept the possibility of criminal conviction as one of the risks of life, like automobile accidents or rare diseases—doing what is reasonable to avoid troubles, but recognizing that no one is immune to chance.

The moral fabric of the culture will be undermined in another way—corruption. The lack of clarity in the laws and the immense bureaucratic discretion to define standards create serious risks of corruption even if the stakes were purely economic. The addition of punitive sanctions raises the stakes, and over time levels of bribery and extortion will rise. This will provide new business opportunities for those particularly skilled in these arts.

Even without corruption, many of the new sanctions lend themselves to unfortunate enforcement tactics. Allegations that forfeitures of property are the snake pit of law enforcement are becoming louder. Some local officials have effectively made such laws vehicles for theft of other people's property.[67]

The power of prosecutors is also exploding. Even when law enforcement is at its best, prosecution must be selective; not enough resources exist to pursue everyone. So how are the sacrifices chosen? Some of it is chance, such as public notice. Some targets are chosen for tactical reasons, to impress other potential targets. Some targeting

[67] *See* DELONG, *supra* note 26, at 275-77.

is big game hunting and political ambition. And is there any real doubt that some large political contributors are buying insulation from enforcement excess?

Another good way to become a target is to look as if you can turn in someone more interesting. If you can, you get a deal; if you cannot, that is your misfortune. When every minor violation is criminal, such as an error in filling out a form, prosecutors find this technique easy to use. The pressures for perjury are obvious.

Public awareness of these issues creates an impression that enforcement is increasingly political and tendentious. True or not, the perception is damaging public respect for the legal and law enforcement systems, which is already low. Indisputably, the increase in criminalization has turned tremendous power over to the discretion of enforcers, a development deeply alien to traditional, and well-founded, American skepticism of untrammeled authority. This shift is accentuated by new sentencing guidelines that restrict a judge's freedom to reduce a sentence in the light of special circumstances. Combine this limit on judicial mercy with a regulatory system so extensive and complex as to make anyone chargeable, and government by prosecutorial discretion is complete.

IV. CONCLUSIONS

The often quoted (and always taken out of context) cure comes to mind: "[F]irst ... let's kill all the lawyers." The legal profession is, indeed, a primary villain. Its "there oughta be a law" mind set has encouraged government to react to every perceived problem with a new penalty, and to respond to each failure of this approach by making the penalty more severe and redoubling enforcement efforts. This is a destructive cycle.

The late Paul Bator, a thoughtful scholar of the legal system, criticized both the courts and the nation's legal elites for failing "in their essential professional tasks of stabilizing, clarifying, and improving the national law, so as to make it useful for its 'consumers'," and for their lack of "a sense of decent obligation to

[those who must use, obey, and apply the law]."[68] The criticism is well-deserved.

A succession of congressmen, presidents, state legislators, and governors also deserves censure. During the past 25 years, the habit of loading criminal provisions and other sanctions into every law has become a thoughtless reflex. No consideration is given to the problems discussed here. And at the federal level, neither legislators nor presidents have made any serious effort to rein in regulators who use vague statutes backed up by hair-raising penalties to stretch their authority to the utmost. The congressional charade of railing against "out-of-control bureaucrats" one day and giving them more money and power the next has become a tiresome act.

The process also feeds on itself. Laws based on raw political power or campaign contributions rather than on a shared sense of morality lack legitimacy. Such commandments are likely to be violated whenever people think they can get away with it. This does indeed increase the level of "criminality" in society, and creates a need for more enforcement and harsher penalties.

The courts also deserve censure. With a few notable exceptions judges have spent the past twenty years not noticing the erosion of many constitutional and common law protections. Basic doctrines of administrative law, including presumptions of agency competence and good faith, were formulated in the very different environment of the 1930s. Every other intellectual discipline that studies government has gone through a revolution since then—not the law. Its assumptions are those of the Progressive Era of 1900 to 1920, the New Deal of the 1930s, and the Great Society of the 1960s. In this view, Congress, or state legislatures, enact vague laws to promote the public interest. They then delegate implementation of these laws to administrative agencies and hope that they act as wise guardians and disinterested experts bringing to bear the best in technical knowledge to achieve some social optimum. Courts have been heavy on presumptions of regularity and constitutionality, on deference to agency expertise, and on the gospel that all government officials

[68] Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 674, 691 (1990).

operate in disinterested good faith. It is a smiley-face view of things, and it bears little resemblance to the harder, messier world of contemporary legal and political analysis.

The first step toward reform is educational and political. Since virtually everyone is affected by these issues, virtually everyone needs to become informed and motivated to act. Members of all three branches of government need to be pounded with the message that the present trend is wrong, that it is harming society, and that it is eroding trust in, and respect for, government and law. Business organizations need to devote particular effort to this. They are on the sharp edge, but seem paralyzed by the public relations problems that might be created by any action that could be interpreted as trying to defend "criminal" conduct.

Political conservatives bear a particular burden. They need to reenergize their fight to convince people that the role of government must shrink because government intervention in any area will almost certainly lead not just to economic inefficiency, but to an expansion of the criminal code and a delegitimizing of law, all of which damages society.

For example, an examination of something that seems on the surface as innocuous as the administration's initiative to give schools free access to the Internet is instructive. The program must be fleshed out with rules: What is a school? How much access? Who can access through the school—teacher, substitute teacher, part-time student, parent? Can a student resell services? The complications will keep multiplying, and so will the rules. And every rule will be enforced by sanctions. It will become criminal for a teacher or a student to use a school Internet connection for noneducational purposes. Then how will this be enforced? Will the government impose requirements that all school Internet users maintain logs of all Internet use to prove compliance? Will failure to keep the log current become, itself, a criminal offense, even if all use is actually educational? (Those who think this scenario is silly have not practiced environmental law.) Do we really want a world in which a school boy who logs onto the Playboy web site through a school computer becomes a federal offender whose fate is in the hands of the U.S. Attorney?

Leaving aside fights over the basic role of government, there is a second line of defense. Where the government must act, serious attention needs to be devoted to developing alternatives to command-and-control regulation, such as the development of markets. Punitive sanctions are the inevitable tool of any system of command-and-control. Therefore, the fight for alternative approaches is a high-stakes game.

Those who favor a more limited role for government also must pay attention to the problems of the civil justice system. Many businesses complain about the heavy random risks the system now imposes on them. At least part of this trend is due to the difficulty of getting rapid, efficient, and fair resolution of disputes. If civil justice were swifter, more consistent, and better, there would be less pressure to convert commercial disputes into RICO violations, or to pile up punitive damage provisions, or to substitute environmental regulations for private nuisance actions. Reforming civil justice would create possibilities for limiting the New Criminalization in favor of a system designed around the common law virtues.

At a more specific level, a number of reforms are needed:

- An obvious measure is for Congress to review the penalty policies in every program and provide clear guidelines and limitations, or require the administering agency to do it with active congressional oversight.
- Another step is to reinstate intent as an important element of an offense, possibly by resurrecting the old concepts of malum in se, mens rea, and malum prohibitum. Ignorance of the law should often be an excuse, and concepts of fair notice should be expanded to meet the realities of the modern world. Rules that are not ascertainable after reasonable effort should be enforced only by a cease-and-desist order, not by civil or criminal penalties. Even beyond this, there should be an explicit defense of acting reasonably under the circumstances, regardless of whether formal commands were violated, and this should be adjudged by some authority other than the implementing agency.
- Courts should be more protective of common law rights and constitutional principles. Old concepts of vagueness and undue

delegation, now in desuetude, should be revived. An overly activist judiciary is rightly to be feared, but the opposite sin of paralysis is equally grievous. Substituting judicial whim for the judgment of the political organs is a bad thing, but this can be distinguished from insisting that those organs meet reasonable standards of clarity and competence. The courts need to develop a jurisprudence suited to the regulatory state as it has developed during the past half century, and to their own role as a backup quality controller if the other branches refuse to exercise the function over their own activities.[69] The D.C. Circuit's opinion in *General Electric v. EPA* is a ray of light in this respect, as is the Fifth Circuit's recognition of the mistake-of-fact defense in *Ahmad.*

The criminalization of highly complex and often conflicting regulations with virtually no requirement of intent leads to situations where even the well educated and well informed cannot be sure what the law is and what they must do to comply with it. If Congress will exercise the legislative authority and oversight responsibility granted it, and if courts will again require intent to be proven before allowing the imposition of criminal sanctions or quasi-criminal penalties and reinvigorate common law principles, we will experience a sea change. From a regulatory perspective, those things that society collectively agrees should be regulated will continue to be regulated with regulators focusing on the real harms to society. From an economic perspective, we will see greater efficiency with resources being devoted not only to a cleaner environment, but to other productive uses. From a moral perspective, law-abiding citizens will not live in fear of mistakenly violating an obscure regulation. From a constitutional perspective, those accused of regulatory crimes will enjoy the same safeguards as those accused of traditional crimes. And finally, from a political perspective, cynicism will recede, and the government's legitimacy in the eyes of the populace will increase substantially.

[69] *See*, James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L.REV. 399 (1986).