William & Mary Environmental Law and Policy Review

Volume 32 (2007-2008)
Issue 2

Article 6

February 2008

Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?

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EXPANDING THE ARSENAL FOR SENTENCING ENVIRONMENTAL CRIMES: WOULD THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE WORK?

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> *Whether occurring under the cover of darkness by a typical criminal, or behind the protective barrier of corporate structures by a business school graduate, [environmental crimes] are some of the most far-reaching, dangerous and complex crimes affecting society. They are crimes that may directly affect our health today or the health of untold generations to come.*[1]

INTRODUCTION

Both civil and administrative penalties serve appropriate and important roles in dealing with violations of environmental laws. However, the disaster at Love Canal in 1978[2] demonstrated that civil and administrative remedies were failing to deter environmental crime, and thus all three branches of the federal government, as well as state and local authorities, began to consider criminal liability as an important tool for dealing with environmental criminals.[3] Given that the "environmental crisis" can be said to "[cause] substantially more illness, injury, and

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* William and Mary School of Law, Class of 2008. Special thanks to my parents for their enduring support, to Professor Wayne Logan for helping me select this topic, and to the Editorial Board of the *William & Mary Environmental Law and Policy Review*.

[1] Judson W. Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379, 394 (1986).

[2] YINGYI SITU & DAVID EMMONS, ENVIRONMENTAL CRIME: THE CRIMINAL JUSTICE SYSTEM'S ROLE IN PROTECTING THE ENVIRONMENT 8 (2000); *see also* Eckardt C. Beck, *The Love Canal Tragedy*, EPA J., Jan. 1979, http://www.epa.gov/history/topics/lovecanal/01.htm (describing the history of the Love Canal project, its transition from a planned community to a toxic waste dump, and the human casualties resulting from the reckless toxic waste disposal at the site).

[3] SITU & EMMONS, *supra* note 2, at 11.

death than street crime,"[4] the introduction of criminal sanctions into the arsenal of possibilities for environmental crime sentencing makes sense.

Over the years, criminal liability has increased the deterrent and retributive effects of environmental crime sanctions.[5] However, prosecutions for environmental violations committed by both individuals and corporations continue. Perhaps, therefore, other alternatives besides civil, administrative and criminal penalties should be considered in dealing with these specialized types of crimes. As this Note will suggest, therapeutic jurisprudence—specifically, problem-solving courts—and restorative justice practices may offer unique and unconsidered strategies for sentencing environmental crimes.

Part I will consider the history of environmental crime in the United States and abroad, and the differences between the civil and criminal sanctions currently used to respond to environmental violations. Part II will explain the requirements and penalties within some important United States environmental statutes, and will outline the specifics of the United States Sentencing Guidelines for environmental statute violators, including corporations. Part III will highlight the distinctions between how courts respond to "environmental criminals" who may cause indiscriminate injuries and more "traditional criminals" whose crimes cause more easily identifiable injury. Part IV will address the problems of proof associated with identifying environmental crime victims and transition to Part V, which will introduce two additional sentencing approaches: the therapeutic problem solving court model that centers on rehabilitating the defendant and the restorative justice model that focuses on restoring the victim. Part V will advocate that using these two models, along with the more punitive approaches within the Federal Sentencing Guidelines and environmental statutes, can add to the sentencing possibilities for those who commit environmental violations. This discussion will include consideration of the possible weaknesses in this overall argument, addressing in particular the issue of double jeopardy raised within the Fifth Amendment of the United States Constitution.

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[4] *Id.* at 7.

[5] MARY CLIFFORD, ENVIRONMENTAL CRIME: ENFORCEMENT, POLICY, AND SOCIAL RESPONSIBILITY 5 (1998) (explaining that environmental crime "typically refers to crimes involving hazardous wastes, irresponsible corporate activities, water contamination, or other violations of environmental law").

I. ENVIRONMENTAL CRIME

A. *History: The Rise of Environmental Regulation*

1. In the United States

After the 1970s, the United States government began to take environmental protection more seriously in response to public sentiment and growing scientific evidence of the threats caused by pollution.[6] During this period, the Environmental Protection Agency ("EPA") was created[7] and Congress drafted environmental statutes such as the Clean Air Act Amendments[8] and the Clean Water Act.[9] These statutes, among others, "seek to establish a balance between industrialization and the equally important goal of protecting the public health and welfare while preserving natural resources."[10] In 1981, the EPA established an Office of Criminal Enforcement[11] which "enforces the criminal provisions of . . . [the] statutes in conjunction with the Department of Justice ("DOJ")."[12] In addition, the DOJ created an Environmental Enforcement Section within its Lands Division to provide litigation support to agencies and deter statute violations.[13] During the 1970s, the courts only prosecuted twenty-five environmental crimes.[14] By contrast, "[i]n fiscal year 2000, the EPA referred 236 criminal cases to DOJ, and the courts assessed $122 million in criminal penalties."[15] The increase over eighteen years can be attributed

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[6] *Id.* at 10.

[7] *Id.*

[8] Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7661 (2000)).

[9] Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1376 (2000)).

[10] Starr, *supra* note 1, at 379.

[11] Mark A. Cohen, *Environmental Crime and Punishment: Legal / Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. CRIM. L. & CRIMINOLOGY 1054, 1056 (1992).

[12] Elizabeth M. Jalley et al., *Environmental Crimes*, 39 AM. CRIM. L. REV. 403, 406 (2002).

[13] Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 904 (1991) ("The Environmental Enforcement Section was formed, primarily to enforce civil environmental law sanctions. One publicly stated goal of the reorganization was to enhance criminal prosecution . . . .").

[14] F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 Envtl. L. Rep. (Envtl. Law Inst.) 10,478, 10,479 (1987).

[15] Jalley et al., *supra* note 12, at 406.

in part to the EPA's hiring of criminal investigators "with the authority to carry firearms and execute search and arrest warrants."[16]

In 1992, the Federal Bureau of Investigation ("FBI") became involved in environmental enforcement through a memorandum of understanding with the EPA.[17] After that time, investigation of those who violated environmental laws took place in a similar manner to investigation of other criminals.[18] In addition to imposing monetary fines, courts also began sending environmental statute violators to prison.[19] In 1997, the courts ordered "195.9 years worth of jail time" to those found guilty of violating environmental laws.[20]

In each environmental statute, penalties not only target individual persons but corporations as well.[21] The statutes all include corporations in their definition of "persons"[22] and liability is based on the "imputation of agents' [or employees'] conduct to a corporation, usually through the application of the doctrine of respondeat superior."[23] Respondeat superior is a common law principle under which an employer can be held liable for tortious actions of his employees committed within the scope of their employment, even though the employer may not be personally at fault.[24]

When considering the sentence severity for corporate environmental violations, however, EPA and DOJ apply a flexible standard. Both

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[16] SITU & EMMONS, *supra* note 2, at 13 (stating that by 1995, at least two hundred investigators were employed by the EPA).

[17] *Id.*

[18] *See generally id.*

[19] *Id.* at 14.

[20] Nancy K. Kubasek et al., *The Role of Criminal Enforcement in Attaining Environmental Compliance in the United States and Abroad*, 7 U. BALT. J. ENVTL. L. 122, 123-24 (2000).

[21] *See, e.g.*, 42 U.S.C. § 6928(e) (2000) (implying that an organization can be a defendant under the Resource Conservation and Recovery Act ("RCRA")); *id.* § 6928(f)(5) (defining the term "organization" as "a legal entity, other than a government, established or organized for any purpose," which includes "a *corporation*, company, association, [or] firm") (emphasis added).

[22] *See id.* § 6903(15) (defining the term "person" within the RCRA statute to mean "an individual, trust, firm, joint stock company, *corporation* (including a government corporation), partnership, [or] association " (emphasis added)).

[23] V.S. Khanna, *Corporate Criminal Liability, What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1489 (1996).

[24] Carol M. Lynch, *Rule 10b-5—The Equivalent Scope of Liability Under Respondeat Superior and Section 20(a)—Imposing a Benefit Requirement on Apparent Authority*, 35 VAND. L. REV. 1383 (1982) (discussing the breadth of respondeat superior with the breadth of certain provisions of the Securities and Exchange Act of 1934).

agencies "look favorably upon . . . voluntary compliance efforts."[25] These include, for example, "voluntary disclosure," taking proactive "preventive measures," and "self-policing."[26] The EPA implemented a policy in 2000 that made penalty reductions contingent on self-auditing and included incentives for voluntary discovery and compliance.[27]

2. Around the World

Within the United States alone, tension between the health of the environment and economic and corporate development complicates environmental protection efforts and creates the necessity for numerous laws and sanctions promulgated by Congress, regulated by state and federal agencies, and enforced by the judiciary.

The complexity of the problems within the United States helps to explain the lack of success in dealing with environmental criminality on an international scale. One of the central issues that complicates the control of environmental misconduct worldwide is that the effects of environmental crimes are often indeterminate and therefore difficult to prove.[28] Furthermore, the "jurisdictional boundaries of most environmental laws . . . tend to turn on questions of degree that are, at best, gray at the border."[29]

After the 1970s, around the time the United States began paying more attention to environmental concerns, other nations also began to consider the threats to environmental quality.[30] At the United Nations' World Congress on the Human Environment, held in Stockholm in 1972, the countries in attendance acknowledged the importance of the environment to the protection of public health.[31] "The Stockholm Declaration

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[25] Jalley et al., *supra* note 12, at 418.

[26] *Id.* at 407.

[27] *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,619 (Apr. 11, 2000) (stating that "[t]o provide an incentive for entities to disclose and correct violations . . . the Policy reduces gravity-based penalties by 75% for violations that are voluntarily discovered and promptly disclosed and corrected").

[28] Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2421-22 (1995).

[29] *Id.* at 2431.

[30] Terry L. Anderson & J. Bishop Grewell, *It Isn't Easy Being Green: Environmental Policy Implications for Foreign Policy, International Law, and Sovereignty*, 2 CHI. J. INT'L L. 427, 427 (2001) ("Before 1970, only thirty-seven environmental treaties were in force. After 1970, an additional 104 were created.").

[31] *See* Gerhard O.W. Mueller, *An Essay on Environmental Criminality*, *in* ENVIRONMENTAL

states that '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.'"[32] Twenty years later, the Rio Declaration echoed the sentiment that man is "entitled to a healthy and productive life in harmony with nature," but also recognized the "inherent tension between the right to development and the right to a healthy environment."[33]

Despite the fact that multiple nations agreed with the message of these two declarations, and regardless of the common knowledge that man-made pollution does not simply stop at state or national borders, "few conventional laws and domestic laws criminalize international environmental misconduct effectively."[34] In fact, environmental criminal laws that are legally binding on all nations do not exist and there is no organization with the authority to create such legislation.[35]

B. Current Sanctions: Civil v. Criminal

Within the United States system, the purposes of criminal and civil law are different, so legislatures and courts use varying rules and paradigms to analyze their actions and decisions in regards to those differences.[36] The Constitution, statutory law, and the common law each distinguish between criminal sanctions, which emphasize guilt and innocence, and civil proceedings, which "emphasize the rights and responsibilities of private parties."[37] Criminal enforcement is best understood

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CRIME AND CRIMINALITY: THEORETICAL AND PRACTICAL ISSUES 4 (Sally M. Edwards et al. eds., 1996).

[32] Peter Sharp, *Prospects for Environmental Liability in the International Criminal Court*, 18 VA. ENVTL. L.J. 217, 229 (1999) (citing United Nations Conference on the Human Environment adopted by the United Nations Conference on the Human Environment in Stockholm, June 16, 1972); Conference on the Human Environment, June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, ¶ 2-3, U.N. Doc A/CONF.48/14/Rev.1 (June 16, 1972).

[33] Sharp, *supra* note 32, at 229 (citing Adoption of Agreement on Environment and Development: The Rio Declaration on Environment and Development, at 3, U.N. Doc. A/CONF.151/26/Rev.1 (1992), *reprinted in* 31 I.L.M. 876 (1992)).

[34] Byung-Sun Cho, *Emergence of an International Environmental Criminal Law?*, 19 UCLA J. ENVTL. L. & POL'Y 11, 11 (2000-2001).

[35] *Id.* at 37 (stating that "there is no international superlegislature to establish international environmental criminal laws and no effective international mechanism with enforcement authority").

[36] Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796-97(1992).

[37] Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law*

as "one tool in an enforcement toolbox that also includes various civil and administrative enforcement options."[38] The courts utilize different procedural and investigatory rules, standards and "burdens of proof, rules of discovery," and methods of punishment within criminal and civil proceedings.[39] In light of these alternatives to federal liability, the question can be raised why Congress found the addition of criminal sanctions for environmental crimes necessary.

One reason might be that criminal penalties lead not only to incapacitation, possessing a significant deterrent value, but they also possess a "unique ability to express moral condemnation."[40] Corporate officials in particular, and in some instances individuals, "belong to a social group that is exquisitely sensitive to status deprivation and censure" and will respond to the moral stigma that accompanies a criminal prosecution.[41] In contrast, simply using regulatory justice and focusing on a social harm needing a remedy sustains the idea that there is little wrong with specific individuals within a corporation, or members of the public, who may intentionally or negligently violate a law.[42]

1. Civil Sanctions

Civil law is defined as "a compensatory scheme, focusing on damage rather than on blameworthiness, and providing less severe sanctions and lower procedural safeguards than the criminal law."[43] In principal, the purpose of civil sanctions is to compensate for damages caused, while criminal sanctions are aimed at retribution and incapacitation.[44] "Absent adequate civil sanctions" for environmental criminals who cause injury to human and environmental health, "polluters have [little to] no incen-

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Objectives: Understanding and Transcending the Criminal-Civil Distinction, 42 HASTINGS L.J. 1325, 1325 (1991).

[38] Michael M. O'Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 144 (2004) [hereinafter O'Hear, *Sentencing the Green-Collar Offender*].

[39] Cheh, *supra* note 37, at 1325.

[40] Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1295 (2001).

[41] GILBERT GEIS, ON WHITE-COLLAR CRIME 53 (1982).

[42] Brown, *supra* note 40, at 1339.

[43] Mann, *supra* note 36, at 1799.

[44] *See generally* Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 767 (1943).

tive to modify their environmentally harmful conduct."[45] This illustrates a need for increased criminal enforcement to bolster the civil sanctions. Also, "lenient [civil] sanctions encourage [the] perception that environmental transgressions are not considered serious by either society or the criminal justice system."[46] Therefore, more severe penalties are necessary to prove to environmental criminals that their actions are not condoned by society.

2. Criminal Sanctions

Criminal enforcement of environmental crime increased throughout the 1980s. "In 1987 United States Attorney General Edwin Meese authorized a new Environmental Crimes Section within the . . . Department of Justice."[47] "Criminal law is [in general] distinguished by its punitive purposes, its high procedural barriers to conviction, its concern with the blameworthiness of the defendant, and its particularly harsh sanctions."[48] Others have proposed that, in reality, all that distinguishes a criminal from a civil sanction is the level of "community condemnation" that justifies the sanction.[49] In some situations, it has been argued that only imprisonment will allow the "full weight of the criminal law to be brought to bear on that conduct."[50] Regardless, without criminal sanctions, corporations in particular may view the penalties for environmental violations as a mere "cost of doing business" that they may ultimately pass on to their customers.[51]

All the environmental statutes that exist in the United States contain provisions, restrictions, and requirements that expose violators

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[45] Steven L. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311, 327 (1990).

[46] Kasturi Bagchi, *Application of the Rule of Lenity: The Specter of the Midnight Dumper Returns*, 8 TUL. ENVTL. L.J. 265, 266-67 (1994) (quoting Brian E. Concannon, Jr., Comment, *Criminal Sanctions for Environmental Crimes and the Knowledge Requirement*: United States v. Hayes International, 786 F.2d 1499 (11th Cir. 1986), 25 AM. CRIM. L. REV. 535, 538 (1988)).

[47] Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889, 894 (1991).

[48] Mann, *supra* note 36, at 1799.

[49] DAVID C. BRODY ET AL., CRIMINAL LAW 8 (2001).

[50] Edmund W. Kitch, *Economic Crime Theory*, 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 670-678 (1983), *reprinted in* CORPORATE AND WHITE COLLAR CRIME: AN ANTHOLOGY 18 (Leonard Orland ed., 1995).

[51] Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 880 (1994).

to criminal, civil, and administrative liability.[52] Civil judicial enforcement implies the possibility of significant monetary punishment that, for various environmental crimes, may reach "up to $25,000 per day."[53] Allowing for larger fines and more jail time, criminal enforcement can be "seen as a harsher substitute for civil enforcement."[54] As demonstrated below, the "civil, criminal and administrative penalt[ies]" in environmental statutes overlap and many of the same types of penalties appear within multiple statutes.[55]

II. THE ENVIRONMENTAL STATUTES AND THE SENTENCING GUIDELINES

A. *Overview of Major Environmental Statutes*

For a first example, the Resource Conservation and Recovery Act ("RCRA") is designed to control hazardous waste from "cradle-to-grave"[56] by regulating its generation, treatment, storage, transportation, and disposal.[57] According to the Act, solid waste is hazardous if it is ignitible, corrosive, reactive, or toxic.[58] Under section 6928 of the Act, seven specific criminal actions have been identified.[59] Six of these impose a penalty of up to $50,000 per day of violation and up to five years of imprisonment.[60]

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[52] *See generally* Charles J. Babbitt et al., *Discretion and the Criminalization of Environmental Crimes*, 15 DUKE ENVTL. L. & POL'Y F. 1 (2004) (arguing "that while broad prosecutorial discretion is justified on economic efficiency grounds, extending criminal sanctions to outcomes lacking violator intent or control is likely to result in the over-criminalization of environmental law").

[53] Jeremy Firestone, *Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice*, 27 HARV. ENVTL. L. REV. 105, 109 (2003). *See also* 42 U.S.C. § 7413(b) (2000).

[54] Michael Herz, *Structures of Environmental Criminal Enforcement*, 7 FORDHAM ENVTL. L. REV. 679, 680 (1996).

[55] Jeffry S. Wade, *Environmental Damages and Crimes*, 15 FLA. J. INT'L L. 39, 42 (2002).

[56] John C. Chambers & Mary S. McCullough, *From the Cradle to the Grave: An Historical Perspective of RCRA*, 10 NAT. RESOURCES & ENV'T. 21, 22 (1995) (stating that the "cradle-to-grave . . . regulatory program, commonly referred to as the RCRA Subtitle C program, is widely viewed as the most comprehensive regulatory program ever developed by EPA").

[57] 42 U.S.C.A. §§ 6901-6992 (West 2002 & West Supp. 2005).

[58] *See* 33 U.S.C. § 1319(c)(7) (2000) (incorporating the definitions of hazardous waste under various other environmental statutes).

[59] 42 U.S.C. § 6928(d) (2000).

[60] These six actions include: (1) transporting waste to a non-permitted facility; (2) treating, storing, or disposing of waste without a permit or in violation of a permit condition; (3) omitting a significant information form, or making a false statement; (4) failing to

If any action regarding hazardous waste places a person in imminent danger of death or serious bodily injury, an individual may be fined $250,000 and/or receive up to fifteen years imprisonment. If such a crime is committed by a corporation, that entity may be fined up to $1,000,000.[61] In addition, RCRA gives authority to the DOJ to file civil judicial actions in United States District Court against persons or companies who have not complied with the statutory requirements of RCRA.[62] The EPA can also issue administrative orders pursuant to sections 3008(a), 7003, 3013, and 9006 of the Act.[63]

As a second example, the 1990 Clean Air Act ("CAA") amendments allow the EPA Administrator to impose civil penalties of up to $25,000 per day for violation of any requirement, rule or order.[64] As with most environmental statutes, citizens can seek civil penalties through citizen suits.[65] In addition, after 1990, criminal fines of up to $250,000 and prison sentences up to five years can now be imposed on any person who knowingly or negligently releases any hazardous air pollutants listed on the Superfund list.[66] As is most often the case, those fines are higher for corporations.[67]

As aforementioned, most of the other environmental statutes contain the same or similar criminal, civil or administrative penalties as those in RCRA and the CAA. One such example is the Toxic Substances Control Act ("TSCA"), which aims to eliminate the "unreasonable risk of injury to health or the environment" from introducing toxic substances into the market.[68] Under TSCA, manufacturers must maintain records and submit reports on their chemical manufacturing, importing, and processing; they violate the law if they do not do so.[69] Specific enforcement such

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comply with RCRA's record keeping and reporting requirements; (5) transporting waste without a manifest (containing information about the generator of the waste, the recipient of the waste, and the quality and quantity of the waste), and; (6) exporting waste without consent of the receiving country. *Id.*

[61] *Id.*

[62] Environmental Protection Agency, RCRA Enforcement Process and Authorities, http://www.epa.gov/compliance/civil/rcra/rcraenfprocess.html; *see also* 42 U.S.C. § 6928(g) (2000) (outlining civil monetary penalties under RCRA).

[63] *Supra* note 62.

[64] 42 U.S.C. § 7413(d)(1) (2000).

[65] *See, e.g., id.* § 7604; 33 U.S.C. § 1365 (2000).

[66] U.S. Department of Energy, Clean Air Act, http://www.hss.energy.gov/nuclearsafety/nseaa/oepa/policy/caa (last visited Jan. 10, 2008).

[67] *Id.*

[68] Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601-2692 (2000 & Supp. IV 2004)).

[69] *Id.* § 2(b)(2), 90 Stat. at 2004.

as an injunction under TSCA section 17 or criminal sanctions under TSCA section 16 (requiring knowing or willful conduct) may be warranted.[70]

The Safe Drinking Water Act of 1974 ("SDWA") represented the first federal attempt to control harmful contaminants in public water and to regulate drinking water underground.[71] The Act requires tap water providers to meet national drinking water standards[72] and implements underground injection control programs to protect the quality of groundwater.[73] Under the Act, the states have the primary enforcement responsibilities for implementing the regulations and their programs must meet or exceed minimum federal requirements.[74] Enforcement of the SDWA includes civil fines of up to $25,000 per day of violation and criminal fines.[75]

In addition, violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") result in similar types of civil, administrative, and criminal penalties. FIFRA regulates pesticides that threaten the environment.[76] The Act requires distributors of pesticides to register with the government.[77] All new pesticides must be registered with the EPA, including the complete formula, a proposed label, and a description of the tests administered.[78] Those who fail to adhere to FIFRA's mandates are subject to civil penalties of up to $5,000 per offense, if they are an employee or professional, or $1,000 if they are an individual or private citizen.[79] Criminal sanctions can include up to $50,000 in fines and one year in prison for professionals on the job and up to $1,000 in fines and thirty days in jail for private citizens.[80]

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[70] Memorandum from Jesse Baskerville, Director, Toxics and Pesticides Enforcement Division, to Regional Division Directors for TSCA § 8, 12 & 13 and Regional Enforcement Directors for TSCA § 8, 12 & 13 (Mar. 13, 1999), *available at* http://www.epa.epa.gov/compliance/resources/policies/civil/tsca/erp8_12r.pdf.

[71] Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. §§ 300f-300j-26 (2000)).

[72] 42 U.S.C. §§ 300f-g (2000).

[73] *Id.* §300h(b).

[74] *Id.* § 300g-2.

[75] *Id.* § 300h-2(b).

[76] *See generally* 7 U.S.C.A §§ 136-136y (West, Westlaw through Pub. L. No. 110-180).

[77] 7 U.S.C. § 136a(a).

[78] 7 U.S.C.A § 136a(c) (West, Westlaw through Pub. L. No. 110-180); *see also* EPA Region 5 Information Sources, http://www.epa.gov/lawsregs/laws/fifra .html (last visited Jan. 10, 2008) (indicating that "[t]hrough later amendments to the law, users must also take exams for certification as applicators of pesticides").

[79] 7 U.S.C. § 136*l*(a) (2000).

[80] *Id.* § 136*l*(b).

Finally, there is the Clean Water Act ("CWA"), which seeks to eliminate discharges of pollutants into navigable waters, with an interim goal to achieve water that is both 'fishable' and 'swimmable.'[81] Before discharging pollutants, polluters must obtain a National Pollution Discharge Elimination System ("NPDES") permit that contains limits on how much of a pollutant can be discharged from identifiable point sources.[82] The permit holder must monitor and report his discharge and must use the "best available technology" (as determined by the EPA) to treat the pollution before releasing it.[83] Similar to the other statutes, civil and administrative penalties along with criminal fines and prison sentences accompany violations of the CWA.[84]

All of these statutes make clear that individuals and corporations are not wasting their time by considering compliance with environmental laws to be an important goal. Difficulties arise when those individuals and corporations do not have knowledge of the requirements, feel that ignoring the requirements would be easier or better for their business, or are unclear about the environmental impacts of their actions.

In 1984, through the Sentencing Reform Act, Congress directed the U.S. Sentencing Commission to "serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of . . . Federal sentencing practices."[85] The commission promulgated the Federal Sentencing Guidelines, which remain the most comprehensive sentencing system in existence.[86] These guidelines have proved helpful in clarifying some of the confusion inherent in the environmental statutes with which corporations and individuals must comply.

B. Federal Sentencing Guidelines and Environmental Crimes

The U.S. Sentencing Commission included in the Federal Guidelines specific provisions for environmental violations.[87] The guidelines require

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[81] 33 U.S.C. §§ 1251 (2000).

[82] *See id.* § 1342(A).

[83] *Id.* § 1317(a)(2) (stating that "[e]ach toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources").

[84] *See id.* 33 U.S.C. § 1319.

[85] 28 U.S.C. § 995(a)(12)(A) (2000). *See also* Charles Loeffler, *An Overview of the U.S. Sentencing Commission Data*, 16 FED. SENT'G REP. 14, 14 (2003).

[86] Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319 (2005).

[87] GREGOR I. MCGREGOR, ENVIRONMENTAL LAW AND ENFORCEMENT 124 (1994).

judges to impose specific sentences for various categories of environmental violations and assist in providing uniformity when sentencing the same crimes.[88] The sentencing subsections dedicated to environmental violations are not assigned to a specific statute, but instead overlap and appear in more than one Act, as discussed in the previous section.[89]

In 1991, the Sentencing Commission promulgated the Organizational Sentencing Guidelines.[90] Under these guidelines, organizations can be sanctioned with fines, community service, placing public notices or apologies in local newspapers, and probation terms.[91] The guidelines are designed to further just punishment and deterrence, two primary goals of sentencing.[92] The guidelines give organizations an incentive to implement effective compliance programs[93] and are marked by an "avowedly pragmatic 'carrot and stick' approach."[94] This creates an appropriate "mix of persuasion and punishment."[95]

In December 1993, an advisory group to the Sentencing Commission published proposed guidelines for corporations convicted of federal environmental crimes.[96] These guidelines focused on environmental compliance programs that reduced corporate exposure to criminal liability.[97] The

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[88] *See* 18 U.S.C. app. §§ 2Q1.1 to 2Q2.1 (2000).

[89] *See* Cindy Johnson, *For Better or Worse: Alternatives to Jail Time for Environmental Crimes*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265, 267 (2000) (outlining the six subcategories that cover numerous criminal environmental violations).

[90] PAULA DESIO, DEPUTY GEN. COUNSEL, U.S. SENTENCING COMM'N, AN OVERVIEW OF THE ORGANIZATIONAL GUIDELINES, http://www.ussc.gov/corp/ORGOVERVIEW.pdf (last visited Jan. 10, 2008).

[91] *Id.*; *see also Growing the Carrot: Encouraging Effective Corporate Compliance*, 109 HARV. L. REV. 1783, 1786 (1996) (stating that the guidelines require an organization of fifty or more employees be placed on probation until it implements an effective compliance program).

[92] Mark A. Cohen, *Environmental Sentencing Guidelines or Environmental Management Guidelines: You Can't Have Your Cake and Eat it Too!*, 8 FED. SENT'G REP. 225, 225 (1996) (stating that "Congress mandated that its guidelines consider the need for just punishment, specific and general deterrence "); *see also* 18 U.S.C. § 3553 (2000).

[93] *See* Win Swenson, *The Organization Guidelines' "Carrot and Stick" Philosophy, and Their Focus on "Effective Compliance", in* CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION 27, 34-35 (1995).

[94] Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 358 (2003).

[95] FIONA HAINES, CORPORATE REGULATION: BEYOND "PUNISH OR PERSUADE" 9 (1997).

[96] Sentencing Guidelines for United States Courts, 58 Fed. Reg. 65,764 (Dec. 16, 1993) (requesting public comment).

[97] *See generally* Jason M. Lemkin, *Deterring Environmental Crime Through Flexible Sentencing: A Proposal for the New Organizational Environmental Sentencing Guidelines*, 84 CAL. L. REV. 307 (1996) (arguing for "wider penalty ranges and . . . greater opportunity

landmark corporate compliance case, *In re Caremark International Inc.*, demonstrates that organizational guidelines generally provide "powerful incentives" for corporations to create "compliance programs to detect violations of law, promptly to report violations" to the proper authorities, and "to take prompt, voluntary remedial" measures.[98] In addition, "[t]he *Caremark* decision expanded potential liability for board members by holding that a corporate director has a good faith duty to see that adequate information and reporting systems are established within the organization."[99]

United States v. Mills was "[t]he first environmental case to successfully impose jail sentences and fines using the Sentencing Guidelines.[100] This case "involved six counts of knowingly dredging a canal and discharging fill into wetlands in violation of the Clean Water Act."[101] The defendants, two Florida landowners, were convicted on six counts and sentenced to twenty-one months in jail without the possibility of parole.[102] In addition, a supervised release required that they "comply with a site restoration plan prepared by the [Army] Corps [of Engineers]" and the EPA, and a fine of over $5,000.[103]

III. THE APPLICATION OF SANCTIONS: ENVIRONMENTAL CRIMINALS VS. TRADITIONAL CRIMINALS

Consideration of these specialized guidelines draws attention to a trend of discrepancy between how environmental defendants and other federal defendants, committing more general crimes, are sentenced.[104]

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for convicted organizations to mitigate their fines by maintaining strong compliance programs").

[98] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 969 (Del. Ch. 1996). Plaintiffs alleged in a derivative action that members of a corporate board abrogated their fiduciary duties of care to the corporation in connection with alleged violations of federal and state laws and regulations applicable to health care providers.

[99] Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 714 (2002).

[100] MCGREGOR, *supra* note 87, at 125.

[101] *Id.*

[102] *Id.*; United States v. Mills, 1989 U.S. Dist. LEXIS 18372 (N.D. Fla. 1989) (stating that "[i]ntent to discharge fill material on protected wetlands is sufficient to support conviction; it is unnecessary to show defendant knew a permit was essential to legally do so" (citing United States v. Bradshaw, 541 F. Supp. 880 (D. Md. 1981))).

[103] Mills v. United States, 36 F.3d 1052, 1054 (11th Cir. 1994) (indicating that the sentences were subsequently affirmed on direct appeal in an unpublished decision United States v. Mills, 904 F.2d 713 (11th Cir. 1990)).

[104] O'Hear, *Sentencing the Green-Collar Offender*, *supra* note 38, at 206 (pointing out that the discrepancy is highlighted by seven years of data).

An increasing disparity in the relative severity of punishments illuminates the differences.[105] "Mandatory minimum sentences, including harsh recidivist laws" for repeat offenders, are used as punishment for many traditional crimes unrelated to environmental violations.[106] Fewer environmental defendants are going to prison while the percentage of federal defendants guilty of other crimes who are sentenced to jail time continually increases.[107] "Sentencing Commission data make clear that prison is the exception, not the norm, for environmental defendants," especially those representing corporations.[108]

Environmental defendants, and most clearly corporations, appear to be treated with lenience in comparison to individual criminals prosecuted within the federal system.[109] This observed leniency can be attributed in part to the substantial assistance and mitigating circumstance departures that lessen environmental criminal sentences more often than other defendants who commit non-environmental crimes.[110] Congress determined that giving substantial assistance to the government, such as owning up to wrongdoing or cooperating with mandates, should be seriously considered when sentencing environmental crimes.[111] Substantial assistance is a "public policy decision [that] addresses the broader societal concern of giving incentives for cooperating with law enforcement authorities."[112] Mitigating circumstances are situations or facts that do not negate a defendant's guilt, but are considered by the court during the sentencing process, especially when considering a less severe sentence.[113]

Another distinction can be made between the Sentencing Guideline's treatment of corporations and its treatment of individuals. Corporations cannot be incarcerated in the same manner as an individual, since they have "no soul to be damned, and no body to be kicked."[114] However, the

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[105] *Id.*

[106] Brown, *supra* note 40, at 1314.

[107] O'Hear, *Sentencing the Green-Collar Offender*, *supra* note 38, at 206.

[108] *Id.* at 205.

[109] *Id.* at 207.

[110] *Id.* at 210.

[111] Habicht, *supra* note 14, at 10,482 (stating that "[e]ven if a criminal prosecution is unavoidable, substantial assistance rendered to the government may lead to immunity or a favorable plea bargain for cooperative defendants in appropriate cases").

[112] *Federal Court Practices: Sentence Reduction Based on Defendants' Substantial Assistance to the Government*, 11 FED. SENT'G REP. 18, 18 (1998).

[113] BLACK'S LAW DICTIONARY 260 (8th ed. 2004).

[114] John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) (quoting M. KING, PUBLIC POLICY AND THE CORPORATION 1 (1977)).

law has developed in a direction that allows the actions of individuals within a corporation, such as their executives or employees, to be convicted for criminal actions committed in the name of the corporation.[115]

A. *Sanctioning Corporate, White-Collar Criminals*

"Since the Supreme Court's decision in *New York Central & Hudson River Railroad Co. v. United States*,[116] organizations have been held vicariously liable for the federal criminal offenses of its employees . . . ."[117] In a later Supreme Court case, *United States v. Dotterweich*, the Court held the president of a pharmaceutical company liable for corporate violations of the Food, Drug, and Cosmetics Act based on the officer's level of responsibility in the corporation.[118] Liability was imputed to the corporation even though it did not derive any pecuniary benefit from the individual's acts.[119]

In 1940, Criminologist Edwin Sutherland coined the term "white-collar crime," defining it as a crime committed by an otherwise respectable person in the course of his or her business or occupation.[120] Economically successful businessmen of otherwise upright standing commit most white-collar offenses, including embezzlement, tax evasion, and violation of environmental statutes.[121] As already addressed, however, the use of criminal law is not the dominant approach to dealing with white-collar criminals, whereas it is the most common tool used to deal with individuals who commit crimes not within the scope of their employment.[122]

B. *Sanctioning Traditional (Non-Environmental) Criminals*

Generally, many more individuals than corporations are prosecuted for criminal offenses.[123] Within the years 1996-2000, the courts imposed 257,441 federal sentences on individuals while only imposing

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[115] RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).
[116] 212 U.S. 481 (1909) (finding that the traffic agent's use of his delegated authority to make transportation rates and to pay illegal rebates upon shipments should be imputed to the corporation for public policy reasons).
[117] Robert L. Kracht, Comment, *A Critical Analysis of the Proposed Sentencing Guidelines for Organizations Convicted of Environmental Crimes*, 40 VILL. L. REV. 513, 519 (1995).
[118] United States v. Dotterweich, 320 U.S. 277 (1943).
[119] *Id.*
[120] Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1, 1-4 (1940).
[121] *See* Kitch, *supra* note 50, at 14.
[122] Brown, *supra* note 40, at 1298.
[123] *See generally* Murphy, *supra* note 99.

1,149 on corporations.[124] This discrepancy may exist because corporate crimes are often viewed as "unintentional or technical in nature, thereby allowing white-collar offenders to be dealt with differently than street criminals."[125]

In the case of traditional individual crimes, the connection between the individual and their communities is downplayed in comparison to corporate agents and their firms.[126] Being part of a larger regulatory environment makes white-collar crime seem more a consequence of structural influence rather than of morally blameworthy or deficient individuals.[127] The differences most likely have to do with the wealth of corporations and their legal identity in contrast to the 'nonidentity' of individual offenders. Whatever the reason, "the assignment of culpability [to corporations] is muddied in a way that it is not in street crime."[128]

Just as corporations commit environmental infractions in order to save money and time, so do individuals. Individuals can also be found guilty of environmental statute violations. John Rapanos was liable for beginning construction of a subdivision over a wetland without seeking the proper permit as required by the Clean Water Act.[129] Many crimes committed by individuals unaffiliated with any organization or corporation are recreational or household crimes committed for convenience.[130] These include "dumping garbage and fuel from recreational boats; failing to pack refuse out of wilderness areas. . . hunting or fishing for endangered species out of season, or beyond legal limits; [and] ignoring fire bans."[131]

IV. ENVIRONMENTAL CRIME VICTIMS: PROBLEMS OF PROOF

The injuries caused by many environmental crimes may not be immediately obvious and the threat they pose may "be gradual and silent, going undetected for years."[132] The victims of most environmental crimes

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[124] *Id.* at 699.
[125] Brown, *supra* note 40, at 1315.
[126] *Id.* at 1332.
[127] *See generally* Franklin E. Zimring & Gordon Hawkins, *Crime, Justice, and the Savings and Loan Crisis, in* BEYOND THE LAW: CRIME IN COMPLEX ORGANIZATIONS 247 (Michael Tonry ed., 1993).
[128] Brown, *supra* note 40, at 1319.
[129] Rapanos v. United States, 126 S. Ct. 2208 (2006).
[130] SITU & EMMONS, *supra* note 2, at 114.
[131] *Id.* at 115.
[132] *Id.* at 4.

are not as easily identified as those in the Sixth Circuit case *United States v. Rutana*.[133] In that case, the defendant was convicted of illegally dumping highly acidic wastewater into a city sewer line. At the other end of the pipe, the contaminated water badly burned two employees of the sewage treatment plant.[134]

The indefinite predictions made by an expert in a case like *United States v. Thorn* are more common when it comes to identifying environmental threats or making criminal convictions. In the *Thorn* case, the owner of an asbestos abatement service was convicted under the Clean Air Act for violations of asbestos removal regulations.[135] At sentencing, a government expert testified that there was a "virtual certainty" that at least some of the defendant's seven hundred employees would eventually become ill even though asbestos-related diseases may not appear until twenty-five to thirty years after exposure.[136]

Dangerous environmental pollution, such as toxic substances released impermissibly, often do no immediate, discernable damage and may be absorbed into the tissues of the body, remaining there for years before the effect of their presence, normally in the form of disease, manifests itself.[137] The slow manifestation of environmentally-related injuries indicates how difficult it can be to identify the victims of environmental crimes. These crimes can often be too amorphous and difficult to evaluate[138] and therefore create a continuing challenge for the court system.

Prosecutors and investigators remain concerned "that fines and administrative penalties are insufficient to deter bad conduct," that is most often driven by greed.[139] Yet, incarceration may not be the answer either because prison terms that incapacitate and deter environmental criminals from recidivism levy a high price to society or do not adequately

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[133] United States v. Rutana, 18 F.3d 363 (6th Cir. 1994).
[134] *Id.* at 364.
[135] United States v. Thorn, 317 F.3d 107 (2d. Cir. 2003).
[136] *Id.* at 115-16.
[137] Tamsen Douglas Love, *Deterring Irresponsible Use and Disposal of Toxic Substances: The Case for Legislative Recognition of Increased Risk Causes of Action*, 49 VAND. L. REV. 789 (1996). "Although persons exposed to toxic substances may experience immediate physical symptoms, more often exposure increases one's risk of contracting a serious disease in the future. The disease may remain latent for many years after exposure." *Id.* at 795-96.
[138] Lucia Ann Silecchia & Michael J. Malinowski, *Square Pegs and Round Holes: Does the Sentencing of Corporate Citizens for Environmental Crimes Fit Within the Guidelines?*, 8 FED. SENT'G REP. 230, 231 (1996).
[139] J. Michael Bradford, *Environmental Crimes*, 45 S. TEX. L. REV. 5, 7 (2003).

seek to address the root causes of environmental law violations.[140] The inadequacy of current methods indicates the need for additional sentencing strategies that can be coupled with the civil, administrative, and criminal penalties already in existence.

Many reasons to favor alternative sentences for environmental crimes that do not include prison or fines exist. Some of these reasons include less expense to taxpayers, keeping the employee as a productive member of society and the workforce, and working toward education and deterrence goals.[141] The therapeutic jurisprudence and restorative justice models, if added into the arsenal of sentencing possibilities for environmental defendants, could permit swifter resolutions for smaller crimes, improve self-reporting and monitoring problems, and assure more positive outcomes by ensuring that offenders are held accountable and that the public can play a role that they are otherwise not afforded. The goals of both models include some of the same goals as criminal and civil approaches, including deterring offenders from future lawbreaking and supporting offender rehabilitation.[142]

V. EXPANDING THE SENTENCING ARSENAL

A. Therapeutic Jurisprudence and Problem-Solving Courts

1. History and Development (Defendant-Focused)

"Therapeutic jurisprudence began in the late 1980s as an interdisciplinary scholarly approach in the area of mental health law."[143] Since the 1990s, the use of therapeutic jurisprudence has also been applied to analyze issues in healthcare, disability law, and contract law, among others.[144] At its core, therapeutic jurisprudence is a broad and potentially all-encompassing concept that "examines whether the law and legal institutions have healing effects or detrimental effects"[145] and attempts to

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[140] *Id.*

[141] Johnson, *supra* note 89.

[142] David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 319 (2003).

[143] Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1062 (2003).

[144] DAVID B. WEXLER & BRUCE I. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvi (1996).

[145] Shirley S. Abrahamson, *The Appeal of Therapeutic Jurisprudence*, 24 SEATTLE U. L. REV. 223, 223 (2000).

ascertain whether the negative effects can be reduced "without subordinating due process and other justice values."[146]

Potentially, some scholars argue that "[a] spillover into criminal law and procedure" might be appropriate for therapeutic jurisprudence concepts.[147] Following that line of argument, this method could work in the context of environmental crime as "a tool for gaining a new and distinct perspective on questions regarding the law and its applications."[148] The problem-solving court model may be the most workable example of how therapeutic principles can help to combat environmental crime. This model is a sentencing possibility that could serve as a different way to focus on non-compliant corporations and individuals.

The first drug problem-solving court was established in 1989 followed by domestic violence courts in 1996 and mental health courts in 1997.[149] This recently developed court model takes a therapeutic approach to using the legal process and the role of the judge to rehabilitate offenders.[150] Supporters of problem-solving courts would agree with the proposition that while retributive policies might feel productive,[151] "they do not necessarily reduce crime" or reduce the harm felt by victims.[152] These newer courts attempt a "radical judicial reorientation"[153] and deal with problems such as drug abuse and domestic violence that continue to require "focused and sustained attention."[154] However, despite the

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[146] Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 157 (1998).

[147] David B. Wexler, *An Orientation to Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 259, 263 (1994) [hereinafter Wexler, *Orientation*].

[148] Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 445 (1999).

[149] James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1542-44 (2003).

[150] Winick, *supra* note 143, at 1066.

[151] Brian D. Skaret, *A Victim's Right to View: A Distortion of the Retributivist Theory of Punishment*, 28 J. LEGIS. 349, 352-53 (2002) ("When a member of the community acts in selfish disregard of the common good, retributive theory dictates that society must punish the offender.").

[152] Logan, *supra* note 94, at 383.

[153] Greg Berman, *Redefining Criminal Courts: Problem-Solving Courts and the Meaning of Justice*, 41 AM. CRIM. L. REV. 1313, 1313 (2004).

[154] Victor E. Flango, *DWI Courts: The Newest Problem-Solving Courts*, NAT'L CTR. FOR STATE COURTS, ¶ 1 (2004), *available at* http://www.yourhonor.com/dwi/dwicourts/NCSC Article.pdf.

changes, problem-solving courts remain connected to the traditional court system.[155]

In a problem-solving court, one judge may deal with all cases[156] and allows "the court process to actually become part of the [offender's] treatment."[157] The purposes of these courts include "(1) immediate intervention, (2) nonadversarial adjudication, [and] (3) hands-on judicial involvement."[158] The judges attempt to actively resolve the case before them and the problems that caused the parties to come to the courtroom. These judges receive specific training and play a part in helping to monitor and supervise the treatment processes of offenders.[159]

Within these specialized courts, "evolving standards, continuous monitoring and collaboration replace existing structures."[160] The model has been well received, and the use of the courts has expanded because they have allowed for "more effective case load management, reduced systemic costs . . ., and decreased rates of recidivism" within the specialized areas of law to which the model is applied.[161] Achieving those three goals would be significantly beneficial in the fight against environmental crime, another specialized area in the law.

2. Application to Environmental Crimes

Given that the problem-solving courts and the concept of therapeutic jurisprudence "represent a newly broadened conception of the role of the courts,"[162] it may be feasible to apply these approaches to the specific realm of environmental crime. Employing only one judge would greatly reduce the necessary resources to prosecute environmental crimes, especially if the judge traveled to partake in the traditional trials for environmental violations, such as those with identifiable local effects and those

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[155] Hora et al., *supra* note 148, at 471.
[156] *Id.*
[157] *Id.* at 472 (quoting JOHN S. GOLDKAMP, U.S. DEP'T OF JUSTICE, JUSTICE AND TREATMENT INNOVATIONS: THE DRUG COURT MOVEMENT - A WORKING PAPER OF THE NATIONAL DRUG COURT CONFERENCE, DECEMBER 1993, at 11 (1994)).
[158] Flango, *supra* note 154.
[159] Winick, *supra* note 143, at 1065.
[160] Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1459 (2004).
[161] Hora et al., *supra* note 148, at 456. *See also* Linda Drazga Maxfield, *Measuring Recidivism Under the Federal Sentencing Guidelines*, 17 FED. SENT'G. REP. 166, 166 (2004) (relating the rate of recidivism to the likelihood that an offender will re-offend).
[162] Winick, *supra* note 143, at 1090.

committed by individuals. This particular judge could have the responsibility of acquiring detailed expertise in the field of environmental law and with the parameters of environmental sentencing.[163] An environmental problem-solving court judge who has particularized knowledge concerning the lengthy environmental statutes and their penalties could create unique sentencing requirements for each individual defendant.

When considering a corporation rather than an individual, a judge could consider different options. Courts could compel a company to hire someone to come by periodically, potentially unannounced, to monitor or audit the companies' behavior.[164] Alternatively, they could insist that the violator of the law or the company's Board of Directors hold meetings to teach the corporation about what should be considered to comply with the laws, taking necessary steps to ensure compliance.[165] Indeed, an employee within a company would be more likely "to know where problems of illegality have occurred previously, and to be able to detect cover-ups" in a way that an external auditor might not.[166] In addition, a problem-solving judge could impose requirements that benefit the community by requiring a company that has committed an environmental offense to individually provide, or pay for an environmental specialist to provide, free seminars.[167]

3. Potential Problems with This Argument

The practical application of these strategies may be difficult and there are certain weaknesses that must be acknowledged and addressed. An initial argument might be that there are regulatory agencies already

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[163] David B. Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?*, 37 COURT REV. 22, 23 (2000) (stating that "[s]pecialized courts . . . are staffed by permanent judges who have substantive expertise in the area" (quoting ISAAC UNAH, THE COURTS OF INTERNATIONAL TRADE: JUDICIAL SPECIALIZATION, EXPERTISE, AND BUREAUCRATIC POLICY-MAKING 7 (1998))).

[164] Mia Anna Mazza, *The New Evidentiary Privilege for Environmental Audit Reports: Making the Worst of a Bad Situation,* 23 ECOLOGY L.Q. 79, 86 (1996).

[165] Johnson, *supra* note 89, at 281 (stating that violators of an environmental statute "can use their new knowledge to help teach others about their mistakes, and the regulated community can use this information to [sic] towards self-compliance").

[166] Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism, and Accountability*, 11 SYDNEY L. REV. 468, 496 (1988).

[167] Johnson, *supra* note 89, at 281-82 (advocating that free seminars or public speeches provide the opportunity for others to learn how to prevent violations of environmental statutes).

playing these roles for individuals and corporations. However, the counter-argument is that by the time the court steps in, regulation by that agency has failed to work. A second argument may concern the fact that environmental crime lacks the clear therapeutic potential that exists when dealing with mental health issues, drug abusers, or situations of domestic violence.[168] However, the purpose of using a therapeutic approach would simply be to apply the problem-solving model.[169] The usefulness of the problem-solving approach may extend beyond simply considering the therapeutic potential of those courts.

Another argument might be that decisions by corporate managers or individuals to accept jail time or fines rather than comply with statutory mandates may undermine how well the problem-solving model will work.[170] To address this possibility, there should be incentives during a trial to lessen jail time or monetary fines if a corporation or individual agrees to take part in the more therapeutic process. This could be deemed akin to giving substantial assistance to the government.[171]

A final argument against problem-solving courts is that such a therapeutic approach is not punitive in nature and therefore does not add enough to the traditional system to be worth the effort.[172] However, the proactive solutions discussed above regarding education and monitoring assistance for other companies are applied relatively easily and help prevent future violations, reducing the overall number of traditional trials. The problem-solving model makes executives 'useful' at their own expense instead of simply levying them a fine or mandating time in prison. Specialized environmental problem-solving courts may permit swifter resolutions for smaller crimes, reduce docket backlog, improve self-reporting and monitoring problems, and assure more positive outcomes by making offenders accountable and further protecting the public.[173] For these

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[168] *See generally* David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 220 (1995) [hereinafter Wexler, *Reflections*].

[169] Winick, *supra* note 143, at 1062 (stating that problem-solving courts are situated "within the scholarly and law reform approach known as therapeutic jurisprudence").

[170] Wexler, *Reflections*, *supra* note 168, at 220.

[171] *See* O'Hear, *Sentencing The Green-Collar Offender*, *supra* note 38, at 211 (noting that "substantial assistance" is one of the most frequent reasons for sentence departures in environmental cases).

[172] Nolan, *supra* note 149, at 1564 (identifying the difficulties of "objecting to therapeutically justified sanctions because they are classified as 'treatment,' not punishment").

[173] *See generally* Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955 (2003).

reasons, its use in the context of environmental crime may prove to be an effective means of enforcement.

B. Restorative Justice

1. History and Development (Victim-Focused)

In contrast to therapeutic problem-solving courts, restorative justice focuses on the victim, allowing them a more active role in sentencing. In the early 1970s, the Mennonite Central Committee workers established the first "victim-offender reconciliation program" that utilized the concept of restorative justice.[174] Since that time, much of the restorative justice literature focuses on relatively minor juvenile crime, but some proponents of the model believe it can apply to adult crime, civil disputes, and large-scale political conflicts as well.[175]

Advocates of restorative justice "view crime as more than simply lawbreaking, an offense against government authority; crime is understood also to cause multiple injuries to victims, the community, and even the offender."[176] The theory gives a community "a voice in the criminal process"[177] and calls for a restructuring of the criminal system.[178] Restorative justice can provide restitution to the victim, put "a human face on the offender," and give "the victim some appreciation of how the circumstances may have brought the offender to commit the offense."[179] Ideally, restorative

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[174] Lenna Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 265 (2000).

[175] Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303 (2003) (basing this contention on the opinion that restorative justice cannot eliminate punishment and that "restoration does require punishment"); *see also* JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 16 (2002).

[176] Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 259 (1993).

[177] Eric W. Nicastro, *Confronting the Neighbors: Community Impact Panels in the Realm of Restorative Justice and Punishment Theory*, 9 ROGER WILLIAMS U. L. REV. 261, 261 (2003). *See also* Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 UTAH L. REV. 343, 343 (2003) (stating that "[i]n the language of restorative justice, 'community' is the bedrock on which justice stands or the latent source of moral energy on which justice draws").

[178] Michael M. O'Hear, *Is Restorative Justice Compatible with Sentencing Uniformity?*, 89 MARQ. L. REV. 305, 306 (2005) [hereinafter O'Hear, *Restorative Justice*].

[179] Paul H. Robinson, *The Virtues of Restorative Processes, The Vices of "Restorative Justice"*, 2003 UTAH L. REV. 375, 376 (2003).

justice processes will be able "to change an offender's perspective . . . [and] make them fully appreciate the human side of the harm they have done."[180] The goal behind restorative justice is that the restorative process can change an offender's behavior if the opportunity to take criminal action arises in the future.

Sentencing circles are a specific application of the restorative justice model. In existence since 1991, sentencing circles are open to all members of a community who choose to participate in them.[181] The community determines a sentence that possibly includes jail time, though in practice most sentences are community based and include house arrest or community service.[182] In this way, sentencing circles focus on restoring and empowering the victim or victims.

Community impact panels are similar to sentencing circles. These panels promote the values of restorative justice by empowering a community to stand up against businesses and companies that may seem too large to confront.[183] A "panel consists of one or more offenders, community members, a trained facilitator [who gives a one-hour training and orientation to those who volunteer], and an out-of-uniform police officer."[184] Offenders must attend following "a judge's initial determination or a court approved plea-bargain."[185]

2. Application to Environmental Crime

Restorative justice creates a forum in which an "offender meets face-to-face" with representatives of a harmed community.[186] This face-to-face "meeting involves a facilitated dialogue in which all participants are given an opportunity to share their views."[187] In essence, this approach requires less "professional expertise in substantive law, procedure, or sanctioning."[188] Restorative justice seeks to simplify procedure and put

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[180] *Id.* at 375.
[181] Kurki, *supra* note 174, at 280-81.
[182] *Id.* at 282.
[183] Nicastro, *supra* note 177, at 265.
[184] *Id.* at 267.
[185] *Id.*
[186] O'Hear, *Restorative Justice*, *supra* note 178, at 307.
[187] *Id.*
[188] Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 63 (2003).

the offender and the affected party in direct control over the outcome.[189] The restorative process is a unique approach to justice that can be applied to unique crimes. Therefore, restorative justice principles can work well when handling specialized types of crime, including corporate and individual crimes affecting the environment.

Environmental crime, just like prostitution and vandalism, can cause the victimization of a community as a whole.[190] The restorative justice model envisions crime as "a violation of people and relationships" that "creates obligations to make things right."[191] Environmental violations threaten human and environmental health, and that threat can be considered a harm which restorative justice may ameliorate. Unfortunately, the effects of environmental crimes may not be purely local or readily recognizable. Therefore, the restorative justice paradigm will be most useful when applied to crimes that result in identifiable harms within a specific community or that are committed by a specific individual.

In such situations, when a corporate employee causes identifiable harm, the individual at fault, along with the corporate executives, should be present to explain the reason for their illegal conduct.[192] The members of the public who represent the community would then express the impact resulting from the corporation's actions or inactions. In addition to expressing these views, the participants will seek consensus as to restorative measures to minimize the harm.[193] The restorative justice dialogue occurs in place of judicial sentencing and if no agreement is reached or the offender chooses not to participate, sentencing will take place in the conventional manner.[194]

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[189] *Id.* (stating that "the outcome—and, to a lesser degree, the process—can be tailored to the individual circumstances rather than relying on standard procedure").

[190] Nicastro, *supra* note 177, at 261; *see also* Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration*, 2003 UTAH L. REV. 439, 461 n.117 (2003) (stating that "[r]estorative justice views a crime as having an immediate victim and secondary victims, such as the community").

[191] HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181 (1990).

[192] As of yet, restorative justice principles have not been applied to a corporation, but the idea is considered. *See* Peter Cleary Yeager, *Law Versus Justice: From Adversarialism to Communitarianism*, 29 LAW & SOC. INQUIRY 891, 899 (2004) (stating that "polic[ies] that appl[y] the principles of restorative justice to both street crime and business crime will . . . not only reduce offending but also increase justice").

[193] O'Hear, *Restorative Justice*, *supra* note 178, at 307.

[194] *Id.*

3. Possible Problems with This Argument

The sentencing circle and community impact strategies could work in the context of environmental crime. However, this type of privately-negotiated dispute resolution can be criticized as being fraught with bargaining inequality,[195] and in terms of sentencing corporations for environmental crime, that criticism does have some merit. Corporations are undeniably more powerful than community individuals simply because they can exert more leverage via political clout, monetary muscle, and sheer size.

Skeptics also worry that restorative justice does not promote uniformity in sentencing,[196] since different communities may see different punishments as appropriate for companies or individuals committing the same types of offenses,[197] such as illegal dumping or filling in wetlands without a permit. In contrast, formal sentencing guidelines within the traditional criminal justice system focus on sentencing uniformity, due process protection, and ensuring the existence of procedural safeguards.[198] Critics contend that these concerns are not fully addressed within the practice of restorative justice.[199]

In response, supporters of the restorative justice model ask whether due process is infringed upon any differently than it is in a plea bargain.[200] Plea bargaining circumvents "rigorous standards of due process and proof imposed during trials"[201] and occurs in eighty percent of felony prosecutions.[202] Given that a plea bargain involves the acceptability of a sentence to the defendant, the application of restorative justice sentencing could

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[195] *Id.* at 322.

[196] *See* Dolinko, *supra* note 142, at 331-34 (noting that restorative justice may give similar offenders disparate treatment).

[197] *See* O'Hear, *Restorative Justice*, *supra* note 178, at 306.

[198] Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1281 (1994).

[199] *See* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 104 (1999) ("[R]ights can be trampled because of the inferior articulation of procedural safeguards in restorative justice processes compared to [the] courts.").

[200] Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 684 (2005).

[201] Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 336 (1990).

[202] U.S. Department of Justice, Bureau of Justice Statistics, Criminal Case Processing Statistics, http://www.ojp.usdoj.gov/bjs/cases.htm (last visited Jan. 10, 2008) (noting that "ninety-five percent of convictions occurring within 1 year of arrest were obtained through a guilty plea").

require that, if desired, an individual could reject a sentence in favor of a traditional trial.[203]

Furthermore, it is arguable that in the context of environmental crime, talk is not enough; without some material burden, a corporation will be sent the wrong message. If the volunteer community members are sympathetic to the intentions of the corporation or the individual who has committed the environmental crime, this warning may be justified. For example, in the case of John Rapanos, volunteers may find a new apartment complex to be more useful than a wetland, offering a lenient punishment.[204] This could send a message of complicity which would not deter people like John Rapanos from circumventing environmental regulations in the future. Another instance in which this could happen is if a corporation negligently dumps their waste in violation of the Clean Water Act, while simultaneously providing services that the community appreciates. In this case, the community impact panel volunteers may overlook the damage to the waterways because they feel that it does not directly affect them.

"Restorative justice advocates dream of a day when justice is fully restorative, but whether this is realistic is debatable, at least in the immediate future."[205] Perhaps, approaching restorative justice as a complement to the criminal justice system rather than a replacement is the best starting point in adding to the arsenal of possible types of environmental crimes sentences.[206]

C. *The Question of Double Jeopardy*

If the restorative and therapeutic models are applied to environmental crimes, traditional criminal and civil sanctions are still required to deal with some cases and situations.[207] The argument that this imposes two types of punishment on corporate or individual offenders can be easily dismissed.

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[203] BLACK'S LAW DICTIONARY 1190 (8th ed. 2004) (defining plea bargain as "[a] negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu[ally] a more lenient sentence or a dismissal of the other charges").

[204] *See* Rapanos v. United States, 547 U.S. 715 (2006).

[205] HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 59 (GOOD BOOKS 2002).

[206] *See* Reimund, *supra* note 200, at 672 ("There are . . . numerous programs operating as complements to the criminal justice system.").

[207] ZEHR, *supra* note 205, at 60.

In *Hudson v. United States*, the Supreme Court ruled that the double jeopardy clause, outlined in the Fifth Amendment of the Constitution, only protects against multiple criminal punishments for the same offense.[208] The Court also held that an administrative proceeding is not a bar to later criminal prosecution since administrative proceedings are civil, not criminal.[209] Restorative justice and therapeutic jurisprudence approaches carried out through sentencing circles, community impact panels, or problem-solving courts are not criminal and work toward more remedial outcomes than criminal punishment.[210]

As proposed in the Appellee's Brief in *DirectTV, Inc. v. Treworgy*, as long as the goal of the sanction (a civil sanction in that particular case) is remedial, it does not matter if it has some punitive or deterrent effects.[211] Restorative justice and therapeutic jurisprudence can be considered as "other social policy options" and constitute "nonlegal crime prevention strategies."[212] Thus, even if an environmental offender were 'tried' through a restorative or therapeutic approach and later criminal prosecution was initiated, the double jeopardy clause would not bar the use of a criminal trial.[213]

CONCLUSION

Since the 1970s, the government and the public have paid increasing attention to the seriousness of environmental crime. The EPA, the DOJ and the United States Sentencing Commission have utilized

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[208] Hudson v. United States, 522 U.S. 93 (1997); *see also* U.S. CONST. amend. V (". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .").

[209] *Hudson*, 522 U.S. at 104.

[210] *See* Jason M. Day, *The Intertwining of Administrative Action and the Criminal Justice System*, 4 TEX. TECH. J. TEX. ADMIN. L. 99, 104 (2003) (explaining that if a sanction promotes a remedial purpose, as restorative justice and therapeutic approaches do, the double jeopardy clause will not be triggered).

[211] *See* Appellee's Brief at 6, DirectTV, Inc. v. Treworgy, 373 F.3d 1124 (11th Cir. 2004) (No. 03-15313-BB) (stating that "[t]he mere fact that civil derivative actions under the Electronic Communications Privacy Act of 1986 ("EPCA") provide a significant deterrent effect does not alter the fact that Congress' primary purpose for the provision was remedial and compensatory").

[212] Brown, *supra* note 40, at 1297.

[213] *Id.* at 1352 (stating that drug courts foster and rely "on trust, cooperation, and persuasion, but [are] backed up by monitoring and the threat of punitive sanctions, which are used only when less punitive options [therapeutic or restorative approaches, for example] have temporarily failed" (citation omitted)).

administrative, civil, and criminal sanctions to deal with these crimes committed within the scope of corporate duties and also by unaffiliated individuals. However, the number of environmental crime cases being heard by courts continues to increase.[214] This may be because monitoring has become stricter and more environmental crimes are being discovered, or because statutory sanctions are not properly handling the root causes of why corporations and individuals violate environmental laws.

If the latter is true, it may be that new approaches, such as the therapeutic jurisprudence and restorative justice theories, are worth a closer look. Both these models involve a different consideration of "traditional notions . . . [of] deterrence, rehabilitation, incapacitation, and crime prevention."[215] In fact, "[i]t is by no means clear that we can persuade the public to view conduct as wrongful by making it criminal[;]" therefore utilizing restorative and problem-solving approaches may be even more useful.[216] These models depend on more attention from specifically trained judges and increased input from the public. Both of these recently developed specialized approaches may be what is needed to bolster sentencing possibilities for specialized crimes such as those identified within the environmental statutes.

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[214] Olson & Dzur, *supra* note 188, at 58 ("[C]riticism that has contributed to restorative justice notes the failure of the conventional process to significantly reduce crime in general and recidivism in particular.").

[215] Braithwaite, *supra* note 199, at 2. *See also* Brown, *supra* note 40, at 1297 (acknowledging that "[c]riminal law's expressive and retributive functions sometimes conflict because punitive approaches alienate offenders, reduce cooperation toward compliance, and may damage the legitimacy of law that is important for deterrence" and that "retributivist sanctions can harm prevention efforts and reduce voluntary compliance," all of which are important for dealing with environmental crimes).

[216] Herbert L. Packer, *The Businessman as Criminal, The Limits of the Criminal Sanction*, *in* CORPORATE AND WHITE COLLAR CRIME: AN ANTHOLOGY 12 (Leonard Orland ed., 1995). Packer states that "there is very little evidence to suggest that the stigma of criminality means anything very substantial in the life of a corporation." *Id.* at 12.