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THE EXISTING CONUNDRUM OF LIABILITY IN ENVIRONMENTAL DAMAGES

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Abstract

Environmental crimes, if not controlled can jeopardize the very existence of human species. The research on environmental crime emphasized the need for increased attention to international environmental crime, enhanced understanding of the contexts and meanings of environmental crime, comparative studies of regulatory control styles, and better statistical information. Increased concern about the environmental degradation in late 20th century paved the way for the development of concept of the environmental crime. It is more often akin to public health and safety law in its basic thrust. The common law remedies could effectively supplement the special procedures provided under the special laws relating to environment protection like the Water, Air and Environment Acts. The Law Commission of India had rightly noted that in the view of predominant purpose of environment protection, the common law remedies are not to be repealed but to be used in the emergency. The emergence of an international criminal law of the environment is dependent on the interweaving of three areas that are largely irreducible and whose assembling require great care: international law, the environment, and the criminal law. The executive and legislative branches have not been carefully considering the character of particular environmental regulations or the distinct values, purposes, and limitations of criminal law in defining environmental crimes. This paper is an attempt to highlight the need for effective penal policy or for that matter effective enforcement of penal policy if it exist to combat environmental degradation, since, the impact of environmental damage is far more serious than the traditional crimes.

Introduction

The concept of "environmental crimes" is newfangled in the legal landscape and is still evolving. Until recently, the enforcement of environmental protection laws were governed by civil laws. In fact it was the increased concern about the environmental degradation in late 20th century that

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paved the way for the development of concept of the “environmental crime”. Although, historically[1], there certainly have been instances of criminal prosecutions pertaining to environmental pollution[2]. But there was no systematic effort to utilize criminal sanctions as a basis of environmental protection goals. Due to that the environmental criminal enforcement program remained largely moribund prior to the mid-1980s[3].

To examine the concept of environmental crimes, it is important to understand the meaning of the term. To put it simply, "environmental crime" is applied to behaviors that contravene statutory provisions enacted to protect the ecological and physical environment[4]. It is broader trend toward using criminal sanctions to environmental violations that were previously legal. M. Clifford says that the current definitions of green crime or environmental crime range from criminal violations of environmental law, to any act that harms or disrupts ecosystems. Overall, environmental practices are described as criminal/harmful based on how scholars prioritize the values and interests of relevant stakeholders (e.g. publics, corporations, ‘nature’)[5].The environmental crimes, however can be broadly defined as; illegal acts which directly harm the environment. They include: illegal trade in wildlife; smuggling of ozone depleting substances (herein after referred as ODS); illicit trade in hazardous waste; illegal, unregulated, and unreported fishing; and illegal logging and the associated trade in stolen timber. Perceived as ‘victimless’ and low on the priority list, such crimes often fail to prompt the required response from governments and the enforcement community[6]. Each definition reflects a particular philosophical stance based on the appropriate relationship between human beings and nature (i.e. human-centered, nature-centered, and balanced), the causes of green crime and the appropriate intervention to address them[7]. These definitions maintain that consideration of these features is essential to understand the subtleties of criminal enforcement in the environmental context since they are core of any fair and sensible criminal enforcement policy. Regarding criminalization of environmental crimes, it may be perceived that society has yet to reach any consensus about the seriousness of environmental offenses. Scholars such as Bourton Atkins and Mark Pogrebin[8] feels that harms to the environment lack the moral weight of crimes committed against human beings, and should therefore be addressed only through regulatory sanctions like compliance orders, injunctions and money damages. At the other end of the spectrum is scholar like Jane Barrett[9] who judge the scale of environmental damage as immense and its consequences so grave that even accidental violations should merit prison time[10]. It can even be argued that undue reliance on criminal prohibitions undermines the legitimacy of the criminal sanction by reducing, if not eliminating, its moral underpinning and also that the criminal

law only should be invoked for morally reprehensible conduct[11]. While on other hand it can be countered that the criminal law provides techniques to achieve social ends, not necessarily dependent upon prevailing notions of morality. In addition, to the extent that moral considerations are relevant, they argued that moral culpability and blameworthiness evolve over time within communities. Duncan Brack and Hayman[12], has contended that the reason for lack of effective penal sanction in environmental law is the poor assimilation of environment law into criminal law. They further asserted that the environmental policy makers have failed and done a commensurately poor job in considering the distinct values, purposes, and limitations of criminal law, since, assimilation requires give and take, as the values, purposes, and a limitation of each legal context responds to the other. By contrast, criminal law has simply been seen as another way to achieve environmental policy objectives by maximizing the law's potential for deterrence.

This paper is an attempt to highlight the need for effective penal policy or for that matter effective enforcement of penal policy if it exist to combat environmental degradation, since, the impact of environmental damage is far more serious than the traditional crimes. It is no where contended in the article that civil liability is a failure to control environmental damages, but looking at the scenario of environmental damages caused by big corporate houses or multi-national company, mere imposition of pecuniary liability in forms of fines or penalty appears very minimal and to be a mockery of the legal system. Pecuniary damage no matter how big does not deter them to jeopardize the human life. We have in front of us the examples by way of Bhopal Gas Tragedy case, where tremendous loss to human life was caused. Also lack of effective mechanism to control environmental crimes has also boosted up the terrorism since illegal activities such as illegal trade in woods and wildlife has become a money generating industry to sponsor such terrorist activities[13]. Environmental crimes are so serious in nature that if not controlled can jeopardize the very existence of human species. And it can be done by attaching stringent criminal sanctions. The environmental standards are not set based on the existence of traditional notions of criminal culpability; they are instead set at far more precautionary, risk-averse levels of protection against risks to human health and environment. In reality, the impacts affect all of society. For example, illegal logging contributes to deforestation. It deprives forest communities of vital livelihoods, causes ecological problems like flooding, and is a major contributor to climate change – up to one-fifth of greenhouse gas emissions stem from deforestation. Illicit trade in Ozone Depleting Substances (herein after referred as ODS) like the refrigerant chemicals chlorofluorocarbons

(herein after referred as CFCs), contributes to a thinning ozone layer, which causes human health problems like cancer and cataracts[14]. Given that the land and the sea and the air spaces of planet earth are shared, and are not naturally distributed among the states of the world, and given that world transforming activities, especially economic activities, can have effects directly or cumulatively, on large parts of the world environment[15].It becomes all the more important to evolve an effective penal policy to circumvent such dangerous crimes. The general principles of International law and national law imposing liability on actors for their illegal acts, or for the adverse consequences of their lawful activities, are relatively well developed at a general level, and are now reflected in the articles on State responsibility adopted by the International Law Commission in 2001[16]. According to the Environmental Investigation Agency,[17]the principal motive for environmental crime is, with rare exception, financial gain and its characteristics are all too familiar: organized networks, porous borders, irregular migration, money laundering, corruption and the exploitation of disadvantaged communities. Wildlife felons are just as ruthless as any other, with intimidation, human rights abuses impunity, murder and violence the **tools** of their trade[18].

II Nature and Scope of Environment Crime

Environmental law is not simply another kind of economic regulation. It is more often akin to public health and safety law in its basic thrust. Neal Shover and Aaron S. Routhe[19]says that despite the widely dispersed relevant literatures and a paucity of official data, much has been learned about environmental crime and efforts to control it. First, there is no doubt that the financial and human costs of environmental crime are enormous, if indeterminable. Second, both cumulative rates of environmental crime and crime commission by individuals and organizations vary substantially. Theory and research, point to a number of factors that influence aggregate rates or the likelihood of environmental crime. These risk and protective factors include the state of the economy, the degree of competition in an industry, the prevalence of socially acceptable rhetorical explanations for noncompliance, and the style of oversight. Third, oversight of environmental practices varies internationally, but controls are more intense where well-organized and sustained political movements press for state action. Fourth, the first line of oversight for environmental practices is regulatory agencies; criminal prosecution is rare. Although there is some movement toward more severe sanctions against environmental criminals, as yet there is little evidence to suggest a significant change has occurred. Fifth, concern for the economic health of a locale, region, or industry is a major constraint on oversight by decision makers at all levels of the oversight process. Sixth,

despite what has been said about a limited movement toward heavier criminal sanctions for environmental crimes, it is clear that a significant shift in regulatory paradigms has occurred; deterrence-based approaches generally have given way to programs of responsive regulation that emphasize educative, flexible, and cooperative strategies. The efficacy of this approach remains unclear. Last, the record of research on environmental crime shows the need for increased attention to international environmental crime, enhanced understanding of the contexts and meanings of environmental crime, comparative studies of regulatory control styles, and better statistical information.[20]

III Liabilities in Environmental Law

In relation to Environmental damage, however the liability rules are still evolving and in need of further development. Liability rules at the domestic or international level serve a variety of purposes. They may form economic instrument which provides an incentive to encourage compliances with environmental obligations[21]. They may also be used to impose sanctions for wrongful conduct, or to require corrective measures to restore a given environmental asset to its pre-damage condition. Finally, they may provide a technique for internalizing environmental and other social costs into production processes and other activities in implementation of the polluter-pays principle[22].The question whether criminal enforcement was appropriate for violations of statutes and regulations that often are mind-numbingly complex[23].

At common law, conviction of a criminal offense required both a criminal act, or actus reus, and a criminal state of mind, or mens rea. Mens rea ("guilty mind") was the chief distinguishing characteristic of criminal law.[24]While tort law was intended to remedy merely undesirable acts and occurrences, criminal law sought to punish immoral behavior.[25] Generally, mens rea was thought to exist when the prosecutor could show that the accused had committed the crime in question with some degree of “vicious will.”[26]. In the 20th Century, the courts adopted strict liability for some crimes, particularly regulatory crimes, including at least some environmental crimes. Since the 1950s, the Supreme Court has searched for a jurisprudence of regulatory crime that is capable of addressing the full range of regulated conduct, while still respecting the moral agency of criminal defendants. They departed from the mens rea principle of common law under two new doctrines, the "public welfare" and "responsible corporate officer" doctrines.[27] In both of these doctrines, it is alleged, that it assign criminal liability without regard to knowledge or intent; the public welfare doctrine by imposing strict liability via the imposition of vicarious

liability.[28] Strict liability has been a feature of tort since the 19th Century. Vicarious liability may in fact have ancient origins, but in criminal law, however, both strict liability and vicarious liability are extremely controversial.[29]Vicarious liability is the imputation of liability from an agent to his supervisor. Both strict and vicarious liability evolved in tort law. A "true" strict liability offense would require no mental state for conviction and permit none as a defense. The rule of strict liability later paved the way for development of better regime for protecting the environment and is a remarkable achievement of judicial review in India. In MC Mehta v Union of India[30] the Supreme Court formulated the doctrine of absolute liability for harm caused by hazardous and inherently dangerous industries by interpreting the scope and power under article 32 to issue directions or orders, 'which ever may be appropriate' in 'appropriate proceedings.' the new remedy, based on the doctrine of absolute liability, was later on focused in the Sludge case.[31] Absolute liability of hazardous and inherently dangerous industry is the high water mark for the development of "polluter pays" principle. The quintessence of the "polluter pays" principle is that polluter is responsible for compensating and repairing the damage caused by his omission. The "precautionary principle" was also accepted as part of our legal system in the Sludge case[32]and the Vellore Citizens Forum Case[33] where the court directed assessment of the damage to the ecology and environment and imposed on polluter the responsibility of paying compensation. The precautionary principle came to be directly applied in MC Mehta v Union of India[34] for protecting the Taj Mahal from air pollution. In Andhra Pradesh Pollution Control Board v MV Nayudu,[35] the apex court said that principle involves anticipation of environmental harm and taking measures to avoid it or choose the least environmentally harmful activity. However wider dimension of this doctrine was reduced in Narmada Bachao Andolan v Union of India[36]where the court said that the extent of damage likely to be inflicted is not known the doctrine cannot be used. Other principles incorporated by judiciary while interpreting environmental issues are public trust doctrine and concept of sustainable development. In MC Mehta's case[37],the apex court held that like common law system our system includes the public trust doctrine as part of its jurisprudence. In Bombay Dyeing & Mfg Co Ltd case[38] the court laid stress on sustainable development to balance between environmental values and development needs. Although the common law tort action against the polluter is one of the major and among the oldest of the legal remedies to abate environmental pollution. Most pollution cases in tort law fall under the categories of nuisance, negligence and strict liability. The court has highlighted the need for protection of ecology and has issued directions to fill the gaps in existing law. This was done by apex court in Muncipal Council, Ratlam v Vardhichand[39] which looked environmental degradation

from the point of view of nuisance A Plaintiff in a tort action may sue for damages or an injunction or both. While damages are the pecuniary compensation payable for the commission of a tort, an injunction is a judicial remedy where a person who has infringed or is about to infringe the rights of another, is restrained from pursuing such acts. In cases of continuing cause of action, such as pollution of a stream by factory waste or smoke emissions from a chimney, proper course is to sue for an injunction. Compensation awarded is often very low; moreover adjudication of cases takes very long time. Damages may be either “substantial” or “exemplary”. Substantial damages correspond to a fair and reasonable compensation for the injury. In Shri Ram Gas Leak Case,[40] the court observed that in such cases, compensation must be correlated to the magnitude and capacity of enterprise because such compensation must have a deterrent effect though its constitutionality has been upheld, strict criminal liability has, according Professor Alan Michaels, been "bemoaned" by critics since its inception, enduring "decades of unremitting academic condemnation."[41] Legislatures have also passed laws criminalizing behavior which, while detrimental to public welfare, was not inherently evil. There are almost over 200 central and the state statutes in India that have some bearing on environmental protection,[42]in most cases the environmental concern is incidental to the law’s principal object.[43] There were scattered and piecemeal ‘environmental’ provisions until 1970’s. In that decade, the evolution of national environmental policies resulted in Parliament enacting comprehensive laws in the fields of wildlife protection and water pollution, there was a shift in the government’s attitude from ‘Environment versus Development’ to ‘Environment and Development’. In early 1980’s, nationwide forest conservation and air pollution laws were passed. The Bhopal Gas Tragedy in December, 1984 caused a surge in environmental legislation: An umbrella Environment (Protection) Act, (herein after referred as EPA) was passed in1986, followed by amendments tightening the laws relating to air and water pollution and to hazardous activities. The 1990’s witnessed fresh legislation dealing with insurance cover for hazardous industries, new laws setting up an environmental tribunal and appellate authority, amendments to the wildlife regime and a spate of central regulations under EPA. Though the criminal provisions vary from statute to statute, the basic elements of environmental criminal violations are (i) an act that substantively violates a statute and (ii) an intent to so violate the statute. Common acts that constitute substantive criminal violations include making false statements, failing to file required reports, failing to pay required fees, operating without a permit, and exceeding the limits or conditions of a permit. To be convicted of a violation, the environmental criminal provisions generally require a men’s rea of "knowing, though some

statutes do have provisions for negligent violations. The courts have interpreted "knowing" not to require knowledge that conduct is unlawful; instead, a defendant needs only to have knowledge of a discharge of a pollutant.

In most instances, the act requirement for a criminal prosecution under the environmental laws involves the same conduct that could give rise to civil or administrative enforcement. In terms of statutory elements, the only additional proof required in a criminal prosecution is that the defendant acted with the requisite mental state, which many critics argued was a minimal showing. In all other respects, the same conduct could give rise to criminal, civil, or administrative enforcement, all at the whim of the investigating agency or prosecuting office. In the last decade, the environmental crimes program has thrived. The number of environmental prosecutors grew, even as other environmental protection efforts faltered, and a consensus emerged that significant environmental violations may warrant criminal enforcement. The argument in favour of criminal sanctions in environmental protection laws is fairly straightforward and compelling - indeed deceptively so. First, the harms that environmental laws seek to prevent can be just as significant, and sometimes even more so, than those implicated by more traditional criminal acts. For instance, pollution of a public drinking water supply can imperil the health, even with fatal results, of an entire community. Just because the wrongdoer has done so by way of an environmental medium - such as air or water - does not make that conduct any less deserving of criminal sanction. Environmental law, therefore, is not simply another kind of economic regulation. It is more often akin to public health and safety law in its basic thrust. Second, the moral culpability of those who violate environmental laws can be as great as those who commit any of the more traditional common-law-based crimes, such as murder, robbery, or assault. Individuals who violate environmental laws may do so for reasons no more justifiable and no less reprehensible than those motivating the most venal of criminals. Certainly, the fact that many violators of environmental laws do so to maximize profits does not make their conduct less culpable, nor does it distinguish environmental crimes from many other crimes that have long been subject to harsh criminal sanctions.[44] There are off course the Penal Laws such as Indian Penal Code,1860(herein after referred as I.P.C) and Criminal Procedure Code,1973 (herein after referred as Cr.P.C.) had existed since long and had been used in controlling environmental violations because of the easy availability of the environment machinery (police, judiciary etc.) in every district of the country. In fact Cr.P.C. provides a much faster remedy against public nuisance than Air, Water and Environment Act which provide for cumbersome procedure for prosecution. Section 133 of Cr.P.C. can be

used in spite of Air and Water Act to remove public nuisance by discharge of effluents and air discharge in case of hardship to the general public. Traditionally, the interpretation of the I.P.C. has been viewed as a conservative attempt at enforcement. This is because punishment and fines have been characterized as meager. For instance, punishment prescribed for fouling water or public spring or reservoir is imprisonment for 3 months or a fine of Rs.500/- or both(sec.277). Similarly punishment prescribed for making atmosphere noxious to health is a fine of Rs.500/-(sec.278). In addition, fouling a 'public spring' does not by definition include river which is where most pollution occurs. Also I.P.C. places too much emphasis intention, which becomes quite difficult to prove in cases of offences committed by bodies. Also available is the procedure for removal of nuisance is laid down in sections 133 to 143 of the Code of Criminal Procedure, 1973 and in section 91 of Code of Civil Procedure, 1908. The common law remedies could effectively supplement the special procedures provided under the special laws relating to environment protection (like the Water, Air and Environment Acts). The Law Commission of India in its 37th report had rightly noted that in the view of predominant purpose of environment protection, the common law remedies are not to be repealed but to be used in the emergency.

IV Need for Criminalization of liability in Environmental Law

The role of criminal sanctions in enforcing environmental law and promoting deterrence can be well established on efficiency grounds. The extent or scope of criminal sanctions in optimal deterrence is much more controversial. The concern among some analysts is that environmental law may have become over-criminalized with high penalties leading to over-deterrence for activities that society does not wish to prohibit entirely. That is, a balance must be struck between reducing environmental harm on the one hand, and promoting socially beneficial activities on the other. If sanctions for violating environmental regulations are set too high, the regulated community will respond by adopting excessive levels of abatement, precaution, or care. As a result, over-deterrence becomes inevitable. Imposing criminal liability for incidents not intentional or not controllable by the liable party is a controversial proposition. Once held liable, the Sentencing Guidelines mandate serious punitive sanctions. If over-deterrence and over-criminalization result, then criminal law itself might become trivialized with the resulting lack of moral stigma. Additionally, over-investing limited enforcement resources in criminal proceedings prevents the pursuit of other productive avenues for reducing environmental harms. In India, the problem of the illegal trade in animal parts has become a thriving business, especially in north-eastern part.

According to the government of India there are no reports in the Ministry indicating that smuggling of wild animals and trafficking of their derivatives/parts is increasing in the country.[45] As per the findings of the recent All India tiger estimation in 2008 using the refine methodology, the total country-level population of tiger is 1411 (mid value); the lower and upper limits being 1165 and 1657 respectively. The said findings indicate a poor status of tiger population in areas outside tiger reserves and protected areas. The tiger population, by and large, in tiger reserves and protected areas are viable, while requiring ongoing conservation efforts. Instances of local extinction of tigers have come into light at Sariska and Panna Tiger Reserves, where initiatives have been taken to repopulate the area through tiger reintroduction. Though milestone initiatives are taken by government to protect wildlife[46]but it is still a major concern to environmentalist in India.

V International Perspective

Global environmental change is common concern of mankind and possesses inherent capability of transcending national boundaries (one country's degradation of the global commons degrades the global environment for all countries). Therefore, the international regulation and control of the phenomenon of global environmental change is legitimate (however, the principle instrument for preventing global pollution and degradation is domestic law and policy). The Noordwijik Declaration[47] proclaimed that climate change is a common concern of mankind. The United Nation member states were urged to "consider acknowledging the most serious forms of environmental crimes in Economic and Social Council (ECOSOC), an international convention dealing with the role of criminal law in protection of the environment, suggestion were made moreover to create general offence of environmental degradation, ecocide or genocide. Proposals were made in World Future Council, Crimes against Future Generations to criminalize harm done to future generations. There are a few notable international offences that seek to protect the environment from severe forms of degradation. For example, Protocol I to the Geneva Conventions includes a "prohibition of the use of methods of warfare which are intended or may be expected to cause (widespread, long-term, and severe) damage to the natural environment". In the contemporary circumstances of international humanitarian law, such a prohibition probably entails international criminal responsibility. More than international offences stricto sensu, there is a degree of international mandating of criminal sanctions for the violation of certain environmental norms ("indirect" criminal law). The International Convention for the Prevention of Pollution from Ships (Marpol treaty) and the Convention on the Prevention of Marine Pollution (and a range of regional treaties) deal

with ocean pollution. Convention on International Trade in Endangered Species of Flora and Fauna (CITES) has some criminal implementation provisions, as does the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The Council of Europe has adopted a convention on the protection of the environment through criminal law, and the Europe has also adopted a similarly worded directive, on the basis of substantial domestic convergence. Some animal protection and some ocean protection treaties include penal provisions. The United Nations also at one point devoted some attention to the role of criminal law in protecting the environment, mostly in the context of fighting organized crime. A recommendation was made that "National and supranational authorities should be provided with a wide array of measures, remedies and sanctions, within their constitutional and legal frameworks and consistent with the fundamental principles of criminal law, in order to ensure compliance with environmental protection laws." None of these initiatives, moreover, really attempt to deal with what are arguably the gravest threats, i.e.: global environmental threats. Perhaps the paucity of international criminal environmental legislation is a reflection of the relatively recent and secondary status of domestic environmental crimes. The Council of Europe goes as far as to underline the subsidiary character of criminal repression. This may change, as the gravity of certain attacks on the environment is reassessed, but there is no mistaking a certain lack of enthusiasm for environmental criminal developments. Given the strong arguments that, as we will see, nonetheless militate in favor of the creation of international environmental offences, perhaps the key question should be: why is there not (already) an international criminal law of the environment? The argument here is that the emergence of an international criminal law of the environment is dependent on the interweaving of three areas that are largely irreducible and whose assembling requires great care: international law (a regime emphasizing state sovereignty and equality), the environment (a global public good of uncertain contours and problematic protection), and the criminal law (a regime emphasizing the individual, guilt and punishments).[48]

VI Conclusion

Without question, environmental law is complex. Environmental law raises conceptual and practical challenges even for respected scholars and experienced practitioners. Much of environmental regulation involves sophisticated and technologically advanced industrial processes. As a result, at least from a theoretical perspective, environmental law and criminal law could be difficult to integrate effectively. The criminal law demands the violation of clear legal duties; environmental law offers dense

regulatory requirements. Over the last decade, significant work has emerged laying the theoretical bases for a criminology of environmental protection (or “green” or “conservation” criminology).[49] Domestically, it is generally understood that at a certain level civil and administrative remedies lack both the element of stigmatization and deterrence needed to deal with fundamentally transgressive behavior.[50] Although the notion has taken time to take hold in the environmental field because of its close association with administrative law, it is now quite widely recognized in many jurisdictions. The criminal law serves as an enforcer of certain norms that would otherwise not exert sufficient pull in terms of values or interest to constrain the actions of all actors. The record of criminal prosecutions for pollution has in fact been presented as good, having a “very substantial effect” in terms of deterrence, and reinforcing systemically other areas of compliance.[51] At a certain level, the argument for criminalization of violations of fundamental environmental rules is a variant of the general idea that some criminal element is required to make good on the promise of all significantly prohibitionist regimes. The problems that currently threaten to overwhelm environmental criminal enforcement programme is the governmental incompetence and malfeasance in the administration of environmental criminal enforcement program. Second, the causes of these problems, the sweeping way in which the crimes are defined in environmental protection laws. The executive and legislative branches have not been carefully considering the character of particular environmental regulations (for example, health and safety versus economic) or the distinct values, purposes, and limitations of criminal law in defining environmental crimes. Both branches need to revisit those issues now. Also pertinent to note here is that for several years after the implementation of the environmental guidelines, environmental criminals continued to receive rather light sentences of either straight probation or incarceration of less than one year. Jane Barrett blames this continued disparity on the application notes that accompany the environmental sentencing guidelines. Barrett argues that such departures may allow a judge to undercut the adjustments for aggravating factors required by the specific offense characteristics of the particular crime, resulting in lower sentences for those convicted of environmental crimes. Although these application notes may provide the mechanism for departures, the motivation for such departures may be the result of criticism that the current guidelines "over criminalize" environmental crimes. It is believed that environmental violations as a type of white-collar crime - are different than street crimes such as robbery and theft and, thus, polluters should receive either fines or probation rather than face prison time. Even if done for what appears to be an equitable reason, the trivialization of certain environmental crimes can be detrimental to the enforcement of environmental law. Our system for punishing criminal

environmental offenses is supposed to send a deterrent message. But this method of deterrence will only function if courts indicate their intent to impose punitive sanctions against all violators. Even the most law-abiding are likely to reduce their compliance efforts if they perceive the absence of enforcement against offenders. The use of criminal sanctions to enforce environmental laws can be justified on a variety of grounds including the pursuit of such goals as incapacitation, rehabilitation, and retribution. While these motivations may well play some part in the recent trend toward criminalizing egregious violations of environmental law, it is clear that the core rationale is one of deterrence. Acts by the regulated community that result in environmental harm, or increase the probability of environmental harm, will be more difficult to deter with monetary sanctions alone when benefits to the violator are high, harm is substantial, the probability of imposing sanctions is low, and/or the level of violator assets is modest compared to harm done. As a result, criminal sanctions are an integral part of a marginal deterrence approach to the enforcement of environmental law.

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