C.R.I.M.E.S Against Nature

The new vice crusade is turning justice upside down.

By Rick Henderson

In 1987 Charles Donahoo's company, Charlie's Wrecking and Salvage Inc., demolished a plastics plant, releasing one pound of asbestos fibers from insulation into the atmosphere. In 1989 Donahoo made history. For not telling regulators about the pound of fibers, he became the first person convicted of a felony under the Comprehensive Environmental Response, Compensation, and Liability Act, better known as Superfund. He was sentenced to three years in prison for that crime, plus another year under the 1970 Clean Air Act.

But Donahoo was lucky. The judge reduced his prison term to six months with three years of probation and fined him only $75. Had he been convicted a few months later, such leniency would have been impossible. In 1989 the U.S. Supreme Court upheld the authority of the U.S. Sentencing Commission to impose mandatory prison terms for what judges once regarded as regulatory infractions. If the commission's guidelines on environmental crimes had been in place when Donahoo was convicted, he would still be in prison today.

Donahoo's story, though particularly egregious, is not an isolated case. While most of the country was focused on the war on drugs, the Bush administration was creating a more lasting legacy, a new category of vice crime: the environmental offense. Like laws against drug use or prostitution, environmental prosecutions are meant not to protect persons or property but to send a message about values. So environmental-law enforcers are subject to continuing pressure to up the ante, to send a stronger message through more arrests and prosecutions, stiffer penalties, and a wider range of crimes.

Traditional criminal laws can punish deliberate actions to harm persons or property, such as poisoning a water supply or dumping debris on someone else's land. Civil codes can require cleanups and monetary damages in accident cases. But neither category of traditional law pays homage to green values. As then-Attorney General Richard Thornburgh told the annual meeting of the National District Attorneys Association in 1989, "A polluter is a criminal who has violated the rights and the sanctity of a living thing—the largest living organism in the known universe—the earth's environment."

By defining all pollution as a crime, Thornburgh's speech marked a turning point. Environmental law was (and still is) a highly technical, jargon-filled field, more akin to tax or insurance law than homicide or robbery prosecution. The goal, until recently, was to deter polluters and clean up messes in the most efficient possible way.

Indeed, when University of California-Irvine law professor Joseph DiMento surveyed state and federal law enforcers for a 1986 book on environmental compliance, more than half "reported that when criminal sanctions are available [in environ-

mental cases] the enforcer does not pursue them." DiMento concluded, "Successful careers in the law will only rarely be made from pursuing pollution control criminals."

But today Thornburgh's attitude is widely shared by both politicians and the general public. "Judges [considering an environmental prosecution] once asked, 'Is this a criminal case?'" says Joseph G. (Jerry) Block, the head of the Justice Department's Environmental Crimes Section from 1988 to 1991. "That's different now. Their attitude is, 'Kill the bastards.'"

Although the Environmental Protection Agency hired its first criminal investigators in 1982, criminal prosecutions remained limited to unusual cases until the Bush administration. In fiscal 1983, 40 federal environmental criminal indictments were handed down. All led to plea bargains or convictions, with penalties totaling $341,000 and five years of prison time. By fiscal year 1992, however, the number of cases had increased five-fold—to 191 criminal indictments leading to 104 pleas or convictions, $163 million in criminal fines, and 34 years of prison time. Justice Department statistics show that 94 percent of all the fines and penalties ever imposed and 69 percent of the actual prison time that will be served for environmental crimes were handed down from fiscal 1989 through 1992.

Over the next few years, we can expect the number of criminal prosecutions in environmental cases to grow dramatically. In November 1990 Congress, with the blessing of the Bush administration, voted to increase the number of criminal investigators inside the EPA from 60 to 250 by 1995. Attorney Judson Starr, who became the first head of the Justice Department's Environmental Crimes Section in 1987, says the numbers game alone mandates that "Bush's ceiling [on criminal prosecutions] has become Clinton's floor."

Nor are federal prosecutors alone. State and local law enforcers are putting an increasing number of business operators, environmental compliance officers, and landowners behind bars when they violate environmental laws. At every level of government, individuals who previously would have faced fines or probation are going to prison—often for transgressing technical rules that, says one former federal prosecutor, "virtually anyone in the construction business will violate." When everyone is guilty, prosecution becomes arbitrary, giving the government nearly unlimited power. Consider these targets of the new vice squads:

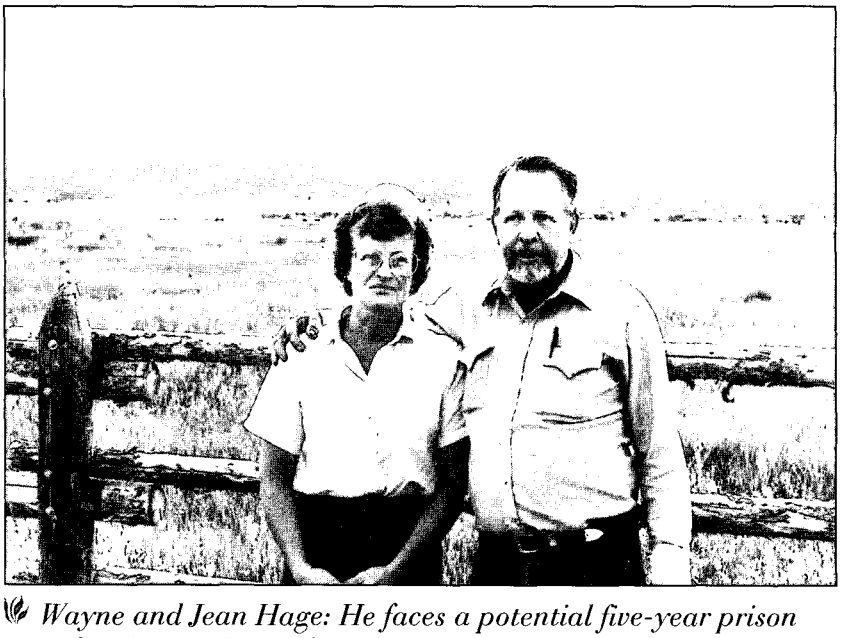
◆ Nevada rancher Wayne Hage faces a potential five-year sentence under the Clean Water Act for "redirecting streams" by hiring someone to clear scrub brush from irrigation ditches on his property. The ditches have been in use since the turn of the century.

◆ Todd Ross Shumway, an Arizona construction worker, received 18 months in state prison for dumping two loads of construction debris in the desert. A state environmental regulator said the debris wasn't hazardous waste but "a lot of sheet rock, some metal, wood boxes, and broken brick and tile."

◆ Rich Savwoir, owner of the US 1 Auto Parts Store in Bethpage, New Jersey, faces a one-year prison term and a $10,000 fine because he didn't post a sign stating that his store accepts waste motor oil for recycling. Savwoir says that on the day in question the sign was down because a window-washer was working on the store. The state Department of Environmental Conservation says Savwoir's arrest in April was the agency's first attempt to enforce the law, which took effect January 1, 1992.

◆ Harvey Van Fossan of Springfield, Illinois, was convicted in 1989 of violating the Migratory Bird Treaty Act, fined $450, and given three years of probation. Ordered by city officials to get rid of the pigeons that were creating a nuisance on a vacant lot near his home, Van Fossan had killed two common grackles and two mourning doves with strychnine-laced corn. A neighbor sent the dead birds to the Smithsonian Institution, and after an autopsy, local officials decided to prosecute. (Under the treaty, shooting birds is OK; poisoning them isn't.) The prosecutor declared this "one of the most important cases" in his office—even though there are more than 400 million such birds in North America. Like Donahoo, Van Fossan was convicted before the Sentencing Commission's guidelines took effect. As he upheld the conviction on appeal, Judge Frank Easterbrook of the Court of Appeals for the Seventh Circuit noted that, under the guidelines, Van Fossan could have been fined as much as $5,000 and sentenced to six months in jail. "Van Fossan should count himself lucky," wrote Easterbrook.

Unlike drug use or prostitution, environmental crimes can take place inadvertently, as a side effect of normal productive activities. Indeed, in a recent national sur-



JON CHRISTENSEN

Wayne and Jean Hage: He faces a potential five-year prison term for clearing brush from irrigation ditches on his ranch.

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vey of more than 200 corporate general counsels by *The National Law Journal* and Arthur Andersen Environmental Services, only 30 percent of the attorneys said they believed that full compliance with all state and federal environmental laws is even possible. Two-thirds said their companies had at some time in the past year violated some environmental regulation.

And no wonder. The 1990 Clean Air Act will eventually produce 60,000 to 80,000 pages of regulations, requiring even a single company to collect millions of pieces of data on air emissions. "Try arguing for 100 percent compliance with those kinds of numbers," Frank Friedman, a Los Angeles attorney and the author of a textbook on corporate environmental management, told *National Law Journal*. Not every regulatory infraction entails a crime, but the complexity of the regulations makes inadvertent criminal conduct more likely.

Under standards originally applied to misdemeanor health-and-safety regulations, prosecutors in environmental cases don't have to prove *mens rea*, or a "guilty mind," the intent traditionally required for criminal charges. In *U.S. v. Freed* (1971), the Supreme Court ruled that a defendant doesn't need to have a "guilty mind" to be convicted of violating a law in "the expanding regulatory areas involving activities affecting public health, safety, and welfare."

To send someone to prison under such "strict-liability" laws, a prosecutor does not have to prove that a person meant to harm others or even that the actions caused any actual harm. Proof of technical violations is all the government needs. In a 1975 case, *U.S. v. Park*, the Supreme Court affirmed that an "individual is or could be liable under [the Food and Drug Act], even if he did not consciously do wrong."

The majority in *Park* also stated that a supervisor can be held responsible for the actions of lower-level employees, even if the supervisor doesn't know what the employees are doing. (This is called the "responsible corporate officer" doctrine.) More recent decisions haven't clearly stated when an individual could *not* be liable.

Violations of the Food and Drug Act, however, carry only misdemeanor penalties. In his dissent in *Park*, Justice Potter Stewart wrote, "A standardless [misdemeanor] conviction approved today can serve in another case tomorrow to support a felony conviction and a substantial prison sentence." Stewart's warning has come to pass.

One oft-cited case involves environmental engineer Bill Ellen, who served a six-month prison sentence for moving dirt. In 1987, Chicago commodities trader Paul Tudor Jones II hired Ellen, who had once regulated wetlands for the Virginia Marine Resources Commission, to build duck ponds on Tudor Farms—a $7-million development on 3,200 acres Jones owns in Dorchester County on Maryland's Eastern Shore.

The development included fresh-water duck ponds (whose water tables would be controlled by hidden pumps) and enough crops and ground cover to attract migratory birds for hunters. It was a big, disruptive project—the kind environmentalists hate. But Ellen argued that he followed environmental regulations to the letter, obtaining 38 separate development permits and hiring two former Maryland regulators who, when they had worked for the state, had helped draw maps that separated wetlands from uplands.

As construction on Tudor Farms proceeded, the Bush administration altered not only wetlands protection but also how wetlands were defined, adding millions of acres of private property to the nation's wetlands inventory. The new, broader definition increased the amount of wetlands in Dorchester County from 84,000 acres to more than 259,000 acres—and now included, regulators argued, Tudor Farms.

Bill Ellen was caught in the bureaucratic shuffle. On March 5, 1989, a federal grand jury indicted Ellen. But the indictment also implicated Jones on the grounds that he was improperly supervising Ellen's work. A number of people familiar with the case believe the government's real target was multimillionaire Paul Tudor Jones, a flashy Gordon Gekko type. Indeed, Ellen said prosecutors offered to reduce the charges against him if he testified against Jones. Ellen refused, telling *Insight*, "I didn't think we had done anything wrong."

In May 1990, Jones decided to cut a deal. He agreed to pay a $1-million fine and make a $1-million contribution to the National Fish and Wildlife Foundation; he also received 18 months of probation, during which he could not hunt birds. That same month, federal prosecutors charged Ellen with six counts of violating Section 404 of the Clean Water Act of 1972. Prosecutors claimed that Ellen had illegally altered a dozen acres of an 86-acre wetland; Ellen countered that he had obtained the permits to do that work, and had, in fact, created more than 50 acres of additional wetlands. So to convict Ellen, the government had to rely upon a technical violation: Ellen had defied a "cease and desist" order and let workers move two truckloads of dirt from one spot on the property to another. According to the federal wetlands manual, moving dirt can constitute illegally filling a wetland.

In January 1991, a Baltimore jury convicted Ellen on five of the six counts. Property-rights advocate Peggy Riegle, chairman of the Fairness to Land Owners Committee and a friend of Ellen's, says that because Paul Tudor Jones agreed to pay a fine the jury believed *somebody* had to have committed a crime.

At his sentencing hearing in April 1992, Ellen argued that he had created wetlands that improved the local environment. Prosecutors disagreed. An article written by Assistant U.S. Attorney Jane Barrett in the Fall 1992 journal *Environmental Law* argues that Ellen's actions "resulted in the illegal filling of many acres

of very valuable and rapidly disappearing wetlands on Maryland's Eastern Shore." Quite an accomplishment with only two truckloads of dirt.

Bill Ellen is one of several individuals targeted in high-profile prosecutions because they altered wetlands without obtaining the necessary permits. Government officials have interpreted the Clean Water Act of 1972, which regulates "the navigable waters of the United States," to include control over "wetlands," which are not specifically mentioned in the act. (See "The Swamp Thing," April 1991.)

The Clean Water Act isn't the only environmental law that blurs traditional notions of criminal liability and intent. So does the Resource Conservation and Recovery Act, which regulates toxic wastes. The statute allows criminal penalties for any person who "knowingly transports...any hazardous waste identified or listed [under this law] to a facility which does not have a permit." (See "A Hazardous Waste," October 1989.)

A 1989 U.S. Circuit Court of Appeals decision says a defendant doesn't have to "know" he is transporting a listed hazardous waste to be criminally liable. He merely must be aware that the material is "not an innocuous substance such as water." In standard criminal cases, says former Justice Department prosecutor Starr, "your defense is [based on] the mental state of your client. Your only out in an environmental case is proving absolute ignorance of reality."

Consider Robert Wells, a vice president of North American Philips, who was indicted on criminal charges for illegally disposing of a RCRA hazardous waste. An employee of the Louisiana Department of Environmental Quality (LADEQ) saw 12 barrels by a roadside. The barrels contained two chemicals that are listed as hazardous wastes; since there were no labels that indicated who owned the barrels, the LADEQ employee tried to contact the five companies that manufactured those chemicals. Attorney Thomas C. Green, who represented Wells, says three of the companies were out of business and the person the LADEQ employee contacted at the fourth company told the regulator to get lost.

The regulator finally reached Wells, who was closing the books on Than, a former subsidiary of Philips that manufactured pesticides. The regulator called Wells at the Philips office in Kansas City, told him he had found 12 barrels of Than's "product," and asked Wells to take care of it. The LADEQ employee never told Wells what was in the barrels.

Green says Wells assumed the regulator was in fact describing materials that belonged to Than. Wells asked a Philips environmental consultant who worked in Pennsylvania to see if the barrels belonged to Than, and if so, to properly dispose of them. This consultant called ChemWaste, the company that normally handled waste disposal for Than, and told ChemWaste to pick up the barrels and dispose of whatever was in them. (It turns out that the barrels did not belong to Than.)

Without telling Wells what they were doing, two ChemWaste employees collected the drums, took them to a mini-warehouse they rented, left them there, and sent Wells a bill. The stuff inside the barrels eventually started to smell; the odor tipped off neighbors, who asked law-enforcement agents to investigate. Wells, the LADEQ regulator, and the ChemWaste employees were charged with unlawfully storing a RCRA hazardous waste. (The regulator and ChemWaste employees were also charged with disposing of and engaging in a conspiracy to dispose of the wastes.)

As a responsible corporate officer, Wells was charged with criminal liability for storing the wastes, even though he was never told what was in the barrels, he did not know what the ChemWaste employees did with the materials inside, and the responsible corporate officer doctrine does not apply in RCRA cases. Wells was acquitted (the other three defendants weren't), but Green says it was clear the government viewed a vice president of a huge multinational corporation as a juicy plum for environmental prosecutors to pick.

Even people who, like Wells, are found innocent have to pay for their alleged "crimes"—in time, reputation, anxiety, and cold, hard cash. Fighting such charges is both difficult and expensive. Oklahoma criminal-defense attorney Jerry McCombs estimates a competent environmental defense will cost between $250,000 and $500,000. The federal government will often spend that much or more to prosecute. In *U.S. v. Goodner*, a RCRA case involving the operator of an aircraft painting and repair shop, McCombs says Junior Goodner spent $300,000 to have his conviction overturned on appeal. The feds said they spent more than $468,000 on their prosecution.

Bill Ellen and his family: He spent six months in prison for moving two truckloads of dirt.

FAIRNESS TO LAND OWNERS COMMITTEE

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Despite the cost, some defendants can't afford *not* to fight. Consider the case of James A. and Mary Ann Moseley, Missouri farmers who were accused of violating the Clean Water Act. They had built a levee to prevent their farm from flooding. Two weeks before their trial started in 1991, the Moseleys were prepared to settle with the government. But prosecutors sought a criminal fine of $25,000 for each day the levee was in place; by then, the fines totaled more than $14 million. So the Moseleys hired John Arens, a Fayetteville, Arkansas, attorney who often represents farmers in wetlands cases.

During the Moseleys' trial, Arens asked a wetlands expert what might happen if the Moseleys decided to have a picnic near the levee and play some softball. Imagine the judge steps up to bat, Arens said, and knocks some dirt from his shoes back onto the field. Would this technically violate the Clean Water Act? The expert said yes.

As the jury deliberated, members asked the judge for copies of the "wetlands law." When all he could come up with were regulatory interpretations and a copy of the Clean Water Act, the jury voted to acquit.

Arens says "dirt-on-dirt" wetlands prosecutions such as the Moseley case are easy to beat, in part because they hinge solely on regulatory interpretations. A bigger challenge is keeping clients who indeed have violated environmental statutes out of prison. "The biggest epidemic [in prosecutions] now is settlement," he says. Prosecutors "will scare [defendants] to death—$25,000 a day fine and five years in prison—and you did [violate] the law. Sure [you'll] make a deal. That's what's wrong with the system."

Still, the Justice Department finds it harder to put people away for environmental offenses than for more traditional crimes. An internal DOJ memo shows that, from fiscal year 1983 (when the Environmental Crimes Unit began) through fiscal year 1991, the federal government had either negotiated guilty pleas or had won convictions at trial in 78 percent of its environmental cases. This ranks considerably lower than the 90-percent success rate the department considers "acceptable" for its criminal prosecutions. The conviction numbers suggest that prosecutors are bringing environmental charges even when the evidence is somewhat slim.

But some liberals in Congress argue that the federal government has severely *underprosecuted* environmental crimes. Early last year, a House oversight committee chaired by Rep. John Dingell (D-Mich.) launched an investigation of the Justice Department's environmental prosecution record. And at the behest of Rep. Charles Schumer (D-N.Y.), chairman of the House Subcommittee on Crime and Criminal Justice, George Washington University law professor Jonathan Turley issued a preliminary study on DOJ's environmental prosecutions last October.

This 160-page rhetorical letter bomb claimed to find, among other things, "a marked reluctance within the [Environmental Crimes Section at DOJ] to prosecute environmental crimes to the same degree as more conventional crimes"; "chronic shortages in funding and support of criminal environmental investigations and prosecutions"; and "possible political influence in both individual cases and general policies within the Environmental Crimes Section." While the number of environmental indictments jumped from 40 in 1983 to 125 in 1991, the report continues, "this remains a low number of prosecutions, given the 94 U.S. Attorneys offices capable of being environmental prosecutions [sic]."

The report is packed with innuendo, using unnamed sources to criticize individual prosecutors and treating persons with an ax to grind as disinterested observers. For instance, the report discusses six cases in which Justice refused to pursue criminal charges against defendants. In one pesticide case the report cites, Turley's principal sources are suing the manufacturer for wrongful death.

The study claims its "investigators" (who were Turley's law students) "were instructed to...interview every critical party in federal prosecutions." Except, apparently, officials at DOJ. Last December, DOJ spokeswoman Melissa Burns told me the department first learned of the study the day it was released.

In a December 1992 interview, Neil Cartusciello, who has run the Environmental Crimes Section since May 1991, was somewhat amused by the allegation that he's soft on crime. As an assistant U.S. attorney in New York, he prosecuted the Princeton/Newport securities fraud case. His aggressive use of pretrial asset forfeiture and racketeering charges drew the wrath of, among others, *The Wall Street Journal*'s editorial-page editors. "I believe the term they used to describe me was *overzealous*," he said.

Cartusciello is obviously miffed by the Turley report's charges. For instance, the report disapprovingly notes that the "number of indictments against corporate officers is clearly reduced by the enhanced use of plea agreements at the ECS." What's the problem with that? Cartusciello asks. There are plenty of times when a plea bargain is the best the government can do.

Someone accused of an environmental crime is supposed to receive the same constitutional protections as any other criminal suspect. The government "cannot bring a prosecution," says Cartusciello, "when there's not proof beyond a reasonable doubt that someone has committed a crime." Given the weaker burden of proof in civil suits, the government will often go that route. "Environmental laws have a full range of sanctions," including fines or other administrative penalties, he says. "If every case of pollution were [treated as] a criminal case there's hardly any need for these other remedies."

During last fall's presidential campaign, then-Sen. Al Gore said Turley's report proved that "George Bush and Dan Quayle are protecting their rich friends who own the smokestacks and pollute our environment." Bill Clinton and Al Gore may have won the election, but Schumer and Dingell still aren't satisfied.

In May, Attorney General Janet Reno announced an $11.1-million civil fine against Louisiana Pacific Co. The company had filed inaccurate emissions reports that violated the Clean Air Act. In addition to the fine, the company agreed to install $70 million in pollution equipment at plants in nine states.

Despite the enormous fine, environmental activists grumbled because none of Louisiana Pacific's corporate officers went to jail. In a *New York Times* interview, Turley said, "To allow Louisiana Pacific to simply internalize [the fine] and not face criminal liability sends a message to industry that environmental violations remain simply the cost of doing business."

Soon after the fine was announced, Dingell's subcommittee voted in secret to subpoena environmental prosecutors and compel testimony from them about any political pressures they may have received. And this spring, Congress authorized the use of subpoenas to compel the testimony of line prosecutors. Setting what many current and former prosecutors regard as a dangerous precedent, Reno will let Dingell's crew interview as many as 15 people in the Environmental Crimes Section on their handling of 20 different cases. This step opens the supposedly independent Department of Justice to political micromanagement and violates the separation of powers between Congress and the executive branch.

Speaking at the Heritage Foundation in August, Carter administration Attorney General Benjamin Civiletti roundly condemned the action. He cited a hypothetical case in which "an individual is targeted for investigation into alleged violations of federal criminal law." The potential defendant believes he is innocent and tries to persuade the prosecutor not to seek an indictment.

"Now imagine," Civiletti continued, "that our hapless individual, to be heard by the prosecutor, has to shout over the loud protestations of members of Congress urging indictment of this very individual; or that members of Congress are standing ready to chastise the prosecutor if no indictment is brought. To imagine such a scenario is to understand why congressional involvement in prosecutorial decisions can be perilous to civil liberty." But, as the escalation of the drug war has shown, civil liberties take a back seat to political symbolism once a new type of vice crime captures the public imagination.

Environmental lawyers have benefited personally from the rapid expansion of civil and criminal penalties—two-thirds of the companies surveyed by *National Law Journal* had hired law firms specifically to handle environmental issues in the last year. But many corporate lawyers are frustrated. Said one survey respondent: "Stop treating us all like thieves in the night. We are trying to do the right thing—it may take us longer than some would like, but we will get there. Self-appointed protectors of the public welfare have never tried to run a billion-dollar facility with hundreds of employees, to make a quality product at a decent profit while contending with environmental rules (and the thousands of other rules and regulations that OSHA or IRS or the state also think are important)."

Already, the prospect of a jail sentence may discourage companies from reporting accidents that could be cleaned up before they cause harm. Under civil law, when an environmental accident occurs, a corporation can reduce its liability by reporting the accident and fully disclosing what substances were released. Businesses train their environmental compliance officers and attorneys to cooperate with government officials.

But a cooperative officer may be cutting his own throat. Donald Hensel, head of environmental compliance at the American Newspaper Publishers Association, told attendees at ANPA's 1991 convention, "Government regulators may not be interested in working with the industry to achieve compliance. They may use a jail sentence as a mechanism to enforce compliance."

"The primary goal of any criminal enforcement is to identify, prosecute, convict, and, ultimately, send some responsible official to jail," reports a *Legal Times* environmental supplement. When criminal penalties are possible, it continues, "an unduly cooperative approach may sacrifice the legal rights of the company and its employees."

Many corporate environmental lawyers even caution that internal company audits to track environmental compliance can turn into smoking guns in court if they identify problem areas that managers need to correct. "Companies are in effect being asked to plead guilty before being charged," said one respondent to the *National Law Journal* survey. A third of the lawyers sur-

RANDOLPH CLERIHUE

In a Heritage Foundation speech, former Attorney General Benjamin Civiletti condemned congressional interference with environmental prosecutions.

veyed said they feared internal audits might be used in prosecuting their companies.

Although most corporate attorneys take environmental laws as given, the crusade against environmental vice has begun to produce a backlash. Within the legal profession, at least, many people have begun to question whether criminal sanctions are appropriate for most environmental offenses.

Free-market public-interest law firms, such as the Pacific Legal Foundation and Washington Legal Foundation, are pushing to return environmental offenses to the traditional realms of administrative, civil, and criminal law. They have also taken up the cause of individuals accused of violating wetlands laws by moving dirt on their own property.

But challenges aren't limited to free-market advocates. The Dingell inquiry, by infringing on the professional independence of federal prosecutors, has shocked even attorneys such as former Attorney General Civiletti who find nothing wrong, in theory, with wide-ranging environmental prosecutions.

The very mainstream *California Lawyer* magazine recently featured a special section on environmental law with lead articles titled "The Truth: 'There Are No Environmental Crimes'," "Enforcement Laws Tilt in Favor of Prosecutors," and "Faulty 'Priority' Prosecutions: Federal Statutes Treat Mere Negligence as Crime." Wrote David P. Bancroft, a partner with Sideman & Bancroft in San Francisco, "When the criminalization of negligence is coupled with the criminal law doctrines of vicarious liability [roping in "responsible corporate officers" who knew nothing about the alleged crime], the results can be truly draconian."

For the moment, however, the trend is toward an ever-escalating war on environmental vice. The number of environmental prosecutions in the Clinton administration is expected to soar—after all, the feds have to keep all those new investigators busy. "Name a law-enforcement agency that's ever put itself out of business," says former Environmental Crimes Section head Starr. Clinton may even decide that 250 criminal investigators at EPA are not enough.

And next year, the U.S. Sentencing Commission will hand down a new set of environmental guidelines. Among the commission's advisers: Jonathan Turley, who says the current corporate sentences for environmental crimes aren't tough enough. "Environmental criminal penalties punish individuals and corporations by correctly labeling them as criminals," Turley wrote recently in *The Wall Street Journal*. "Nothing serves to concentrate the business mind more than a potential prison stint, even a brief one."

Meanwhile, Rep. Schumer plans to reintroduce his own environmental crimes bill during this session of Congress. It would increase the penalties for violating five environmental statutes to fines as high as $1 million and prison terms as long as 15 years. Schumer's bill would also permit the feds to award bounties of as much as $10,000 to citizens who turn in violators. And it would prohibit federal agencies from contracting with convicted companies. So, for example, a pharmaceutical company could lose the right to sell medicine at government hospitals.

The bill would also require courts to appoint independent "experts" to audit convicted companies. These experts, who could not be company employees or have any connection with the firm, would file reports with the courts listing what the company did wrong and recommend specific changes in manufacturing or disposal processes to fix the problem. The company couldn't challenge the audit or its recommendations, even if the expert knew nothing about what the company did or how it makes its products.

Crusaders such as Turley, Schumer, and Dingell wrap themselves in the mantle of "law and order." They say they are simply seeking to prosecute criminals, to put bad guys behind bars. Countering this claim, challenging this latest vice sweep, therefore requires more than a piecemeal, case-by-case defense of particular individuals and companies. It requires a public reexamination of the purposes of both environmental statutes and criminal law—and a willingness to make distinctions environmentalists want to blur. It requires questioning the notion that matters of taste should be turned into felonies.

"The purpose of criminal sanctions is to protect persons and their property," says Roger Marzulla, who oversaw environmental prosecutions as an assistant attorney general in the Reagan administration. "With the environment, we're protecting neither." Instead, "anything that is an affront to trees, rocks, and mountains can be considered a crime."

Traditional criminal and civil codes can deal with environmental threats to persons and property, such as toxic spills. That's just what the law did before the recent spate of environmental prosecutions. Nor does traditional law require us to ignore unrealized threats. Legal scholar Peter Huber of the Manhattan Institute notes that a person who intentionally poisons a water supply but is captured by law-enforcement officials before he kills anyone can still be arrested for attempted murder. The entire body of law dealing with "inchoate" (incomplete) offenses has provisions to cover attempted murder, conspiracy, and other crimes that are planned but not consummated.

The traditional criminal code treats actions that cause different amounts of harm in different ways. That's why the prison sentence for simple assault is lower than that for murder. Applying the same approach to environmental crimes means basing penalties on measurable damage, not on arbitrary dangers concocted by publicity-hungry prosecutors, legislators, and green activists. As Huber says, "There's a difference between dumping a barrel of PCBs in the river and stuffing a kid in a barrel of PCBs."

Unless you "anchor the law to real events" and genuine risks, he argues, there's a real danger of setting completely arbitrary penalties. Predicting future dangers, such as the latent effects of exposure to microscopic levels of chemicals, he says, is often "worse than guesswork. It's more like witch hunting." And—as Charles Donahoo, Wayne Hage, Todd Ross Shumway, Rich Savwoir, Harvey Van Fossan, Bill Ellen, Robert Wells, Junior Goodner, and James A. and Mary Ann Moseley, among many others, can testify—witch hunts have a way of finding witches, regardless of guilt. ■

Rick Henderson is Washington editor of REASON.

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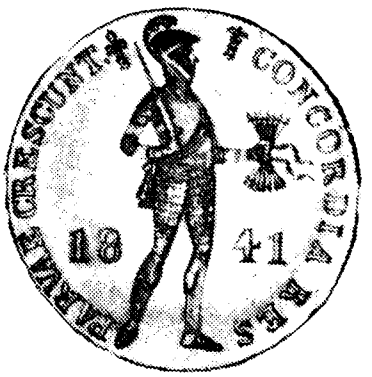

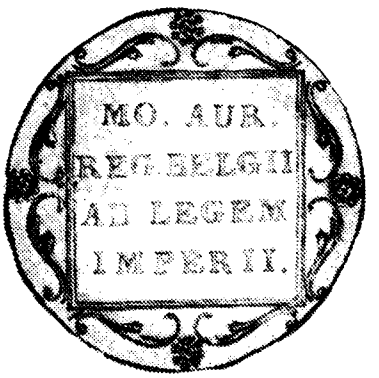

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Beginning in 1814 and for more than a century, the Utrecht Mint issued gold adhering to the ancient Ducat standard, containing 3.5 grams of .986 fine gold. To inspire confidence in the coinage, the Mint chose an ancient design as well — a design first used before 1600 by various independent cities in the Netherlands.

The obverse features the erect figure of a Knight in full armor holding his sword aloft in his right hand and a bundle of arrows in his left hand. The Utrecht mint is indicated by its mintmark, a tiny torch. (The photo above is enlarged to show detail; actual diameter is 2.3 mm, a little smaller than a nickel.)

The reverse features a tablet with the Latin inscription, "MO. AUR. REG. BELGII Ad LEGEM IMMPERII," which means "gold money of the kingdom of the Belgians and all its realm."

The coins circulated widely, both as a medium of exchange among banks and as circulating coins in the Netherlands East Indies. Because of their wide popularity and acceptance, the ancient design was left unchanged into the 20th century.

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We recently acquired several original uncirculated rolls of one Ducat gold coins of the Netherlands. Each original roll contains 100 Mint State coins, dated 1927 or 1928, and every coin is in gleaming Mint State, and we are able to offer Mint State specimens at a very special price:

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