Policy Analysis

Cato Institute Policy Analysis No. 223: Polluting Our Principles: Environmental Prosecutions and the Bill of Rights

April 20, 1995

Tim Lynch

Timothy Lynch is assistant director of the Cato Institute's Center for Constitutional Studies.

Executive Summary

In recent years environmental criminal prosecutions have become a major interest of federal prosecutors. Each year the Department of Justice announces "record levels" of fines imposed, persons indicted, and jail time served for infractions of environmental regulations. The ostensible purpose of the criminal program is to punish and deter polluters whose actions might endanger public health and the environment. However desirable those policy objectives may be, they should not obscure the means by which the government pursues its environmental mandate.

Many of our most basic constitutional principles are being compromised to facilitate environmental investigations and prosecutions. Federal lawmakers have authorized coercive "self-confession" programs and warrantless inspections of commercial premises. The law has stripped environmental criminal suspects of traditional legal defenses such as good faith, fair warning, and double jeopardy. Stringent regulations make it extremely difficult for legitimate businesses to operate within the law. Indeed, the web of regulations has grown so dense that many observers believe compliance with the law is unachievable. It is no overstatement to say that many American businesses are currently operating in what is essentially a regulatory police state.

A fundamental reexamination of the federal regulatory structure is in order. It is imperative that Congress reexamine the role of the federal government, as well as the role of criminal sanctions, in environmental law. Reform should begin with the immediate restoration of the legal rights and privileges that are enshrined in the Bill of Rights.

> The Constitution is the rock of our political salvation; it is the palladium of our rights; . . . [but] when the [government] pursues a favorite object with passionate enthusiasm, men are too apt, in their eager embrace of it, to overlook the means by which it is attained. These are the melancholy occasions when the barriers of the government are broken down and the boundaries of the Constitution defaced.
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> -- *Junius Americanus*

American lawmakers, spurred by their concern for the natural environment, have created a regulatory environment in which "the barriers of government are broken down and the boundaries of the Constitution defaced."[1] They seem to have lost sight of the importance of constitutional protections as they measure their accomplishments in terms of numbers of prosecutions and convictions and the dollar value of fines.[2]

All three branches of government at both the federal and state level have seriously eroded important protections, including the principle of "specificity" in penal statutes, the Fourth Amendment guarantee against unreasonable searches and seizures, the constitutional bar on double prosecutions, and the Fifth Amendment privilege against self-incrimination.

The Federalization and Criminalization of Environmental Law

The federal government did not enter the field of environmental law until 1890, largely because early Congresses and presidents harbored serious doubts as to whether the federal government had the constitutional authority to develop and regulate natural resources.[3] The scope of the first federal environmental statute, the Rivers and Harbors Act (1890), was so modest that the act passed without fanfare or controversy.[4] Indeed, the primary purpose of the statute had nothing to do with environmental protection. The act was meant to facilitate trade among the states by prohibiting commercial obstructions of navigable waterways. A tangential purpose of the statute was to prohibit pollution of navigable waters. The law was not controversial, since it merely supplemented the public nuisance laws of the states. Criminal prosecutions under the act were extremely rare. In fact, only 25 environmental crimes were prosecuted by the federal government before 1982.[5]

The federalization of environmental law began in earnest 25 years ago, on April 22, 1970, the first "Earth Day." A New York Times reporter compared it to Mother's Day because it was apparent that no one in public office could oppose it.[6] Gov. Nelson Rockefeller of New York made headlines by pedaling his "nonpolluting vehicle" (a bicycle) into Brooklyn's Prospect Park to announce his support for a bill on pollution abatement; Gov. Marvin Mandel of Maryland spent the day signing 21 bills and resolutions dealing with environmental controls; and state legislatures and city councils across the country passed dozens of resolutions expressing concern about the earth's environmental problems.

Earth Day also captured the imagination of federal lawmakers. Sen. Gaylord Nelson (D-Wis.) advocated a constitutional amendment that would empower the federal government to guarantee every American an "inalienable right to a decent environment," and former vice president Hubert H. Humphrey called on the United Nations to establish a global agency to "strengthen, enforce and monitor pollution abatement throughout the world."[7] Although decidedly less enthusiastic, Republican leaders also joined the movement for political action. Through a White House spokesperson, President Richard M. Nixon issued a statement saying that he hoped Earth Day would be the start of a continuing campaign against pollution. A few months later, in July 1970, President Nixon proposed the creation of a new federal regulatory body, the Environmental Protection Agency.

Since 1970 the federal government has dramatically expanded its regulatory and enforcement activity. Consider the rapid succession of events:

* In 1971 the EPA had about 7,000 employees and a budget of $700 million. Today the EPA has 17,600 employees and a budget of about $6 billion.[8]

* Many major environmental statutes were passed rapidly in the 1970s: Clean Air Act (1970); Ocean Dumping Act (1972); Clean Water Act (1972); Federal Insecticide, Fungicide, and Rodenticide Act (1972); Endangered Species Act (1973); Safe Drinking Water Act (1974); Resource Conservation and Recovery Act (1976); Comprehensive Environmental Response, Compensation and Liability Act (1980).

* During the 1980s Congress systematically elevated environmental criminal violations from misdemeanors to felonies.[9]

* In 1981 the EPA created the Office of Criminal Enforcement. Within months, the Department of Justice created its Environmental Crimes Unit in anticipation of case referrals from the EPA. Both units have grown steadily over the years. In 1982 the EPA had 21 criminal investigators. By 1992 the cadre had grown to 60-- and the Pollution Prosecution Act of 1990, which was signed by President George Bush, required the EPA to have at least 200 investigators by the end of 1995.[10]

* Enforcement figures have skyrocketed. Since 1982 the federal government has secured over 1,400 criminal indictments and over 1,000 convictions. Since 1974 the courts have assessed over $3 billion in civil and judicial penalties and over $290 million in criminal penalties.[11]

By 1990 a fully centralized command-and-control regulatory regime was firmly entrenched, and a frightening bureaucratic imperative has now taken over. Consider, for example, the following internal memorandum to regional division directors from the EPA's Office of Wastewater Enforcement and Compliance.

We have just reviewed the national enforcement measure results for the second quarter, and while some indicators are very good, we believe we can and should be taking more enforcement actions. At the annual meeting of the Enforcement Branch Chiefs in Denver, we received projected activity levels for EPA enforcement activity. . . . After reviewing these projections against mid-year performance, we are concerned that we will fall considerably short as we are well below 50% of these end-of-year projections and well below achievement levels attained at this time last year.[12]

Such predetermined "achievement levels" or enforcement quotas help to explain some of the EPA's enforcement actions in the field. In the summer of 1994, for example, independent oil producer John Herlihy spent $15,000 in a timely cleanup effort when a mechanical malfunction at one of his wells resulted in a spill of 10 barrels of oil.[13] Although state regulatory authorities found no wrongdoing, the EPA stepped in and imposed a $37,000 fine because it found the firm's contingency plans "inadequate." A flabbergasted Herlihy told newspaper reporters, "I feel like I ought to be held up as a model, not fined."[14] Although Herlihy's fine may seem unduly harsh to most Americans, it can make perfect sense from the point of view of a regional EPA division director. After all, "enforcement performance" might suffer if the agency had to consider the mitigating circumstances in each and every case.[15]

Many businesses are operating in what is essentially a regulatory police state. A recently published environmental law treatise acknowledges that "it is virtually impossible for a major company (or government facility) to be in complete compliance with all regulatory requirements. [And yet] virtually every instance of noncompliance can be readily translated into a [criminal] violation."[16] Environmental criminal prosecutions are increasingly the result of bad luck, not of blameworthy choice.

The most alarming aspect of environmental prosecutions is that businesspeople cannot avail themselves of many of the constitutional protections that are explicitly set forth in the Bill of Rights. Attorney Barry C. Groveman observes, "We are seeing a political climate of affirmative action on the environment in which a businessman does not have civil rights."[17] The lesson of history is that, in the long run, violations of civil liberties have no ideological pedigree. Thus, it is important that men and women of good will-- conservatives, liberals, and others--be alarmed by the legal trends we are seeing today and act to check unconstitutional encroachment wherever it occurs.[18]

Vague Statutes: A Guessing Game for Business

The Fifth and Fourteenth Amendments to the Constitution guarantee that no American citizen can be deprived of "life, liberty, or property, without due process of law." One due process limitation on lawmaking is the idea that penal statutes should be drafted in clear and simple terms so that individuals "can know in advance whether the conduct on which they are about to embark is criminal or not."[19] The Supreme Court has held that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[20] In recent years, however, the government has successfully limited the application of that principle in the context of "regulatory crimes." The explosion of vaguely written environmental rules has spawned a notorious civil liability minefield for business. The criminalization of violations of those regulations is making the terrain so treacherous that even lawyers are having difficulty remaining on the right side of the law.[21]

From Caligula to John Marshall

History is filled with examples of tyrannical governments that were able to persecute unpopular groups and innocent individuals by keeping the law's requirements from the people. The Roman emperor Caligula, for example, posted new laws high on the columns of buildings so that they could not be studied by ordinary citizens. Such abominable policies were discarded during the Enlightenment, and a new set of principles--known generally as the "rule of law"--took hold. Included among those principles are the requirements of legality and specificity.

"Legality" means a regularized process, ideally rooted in moral principle, by which crimes are designated and prosecuted by government. The Enlightenment philosophy was expressed by the maxim nullum crimen sine lege (there is no crime without a law). In other words, persons can be punished only for conduct previously prohibited by law. That principle is clearly enunciated in the ex post facto clause of the U.S. Constitution (article I, section 9). Note, however, that the purpose of the ex post facto clause can be subverted if the legislature can pass a criminal law that condemns conduct in general terms--such as "seditious and treasonous" behavior. Such a law would not give individuals fair warning of the conduct prohibited. Thus, "specificity" requires that all penal statutes be drafted with precision. The specificity principle guards against arbitrary enforcement and gives individuals the opportunity to adjust their behavior to conform to the law's requirements.[22]

Although the ex post facto and due process clauses were intended to guard against legislative and prosecutorial abuses, the American judiciary recognized that judges were also capable of violating the principles embedded in those clauses. An expansive or unusual interpretation of a criminal statute, for example, could surprise a citizen who honestly believed his conduct to be lawful. In 1820 Chief Justice John Marshall warned, "It would be dangerous, indeed, to carry the principle, that a case that is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."[23] To guard against the injustice of unfair surprise, the courts have followed the "rule of lenity," which holds that any ambiguity concerning the scope of criminal statutes is to be resolved in the defendant's favor.

The principle of specificity operates together with the rule of lenity to advance two important values implicit in the concept of due process of law. First, they give every individual fair warning about conduct that is prohibited. Second, they reduce the likelihood of arbitrary and discriminatory application of the law by keeping policy matters away from policemen, administrative bureaucrats, prosecutors, judges, and juries, who would have to resolve ambiguities on an ad hoc, subjective basis.

Prosecutors Secure a "Regulatory" Exception

Early American courts frequently relied on the specificity principle to reverse criminal convictions. In The Schooner Enterprise (1810), for example, a federal judge wrote, "It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning."[24] Applying the principle in Tozer v. United States (1892), Justice David Brewer stated, "The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."[25] Undaunted, legislators continued, however, to pass indefinite penal legislation, and government attorneys persistently argued that the specificity principle was too inflexible for the type of governing that was necessary in the modern age.

By 1913 it was clear that those arguments were being taken seriously by the Supreme Court. Justice Oliver Wendell Holmes, for example, questioned the correctness of Brewer's opinion in Tozer. According to Holmes, the law was

> full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here; he may incur the penalty of death.[26]

After Holmes's opinion was published, the law began to shift markedly as lower courts flirted with a more "flexible" degree of specificity. Within 30 years the Supreme Court sustained a conviction under the legal standard that had been held unconstitutional in Tozer. In United States v. Ragan (1942), the Court stated, "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."[27]

Although the specificity requirement remains a basic principle of criminal law, a "regulatory" exception has crept into modern jurisprudence. The Supreme Court allows "greater leeway" in regulatory matters because the practicalities of modern governance supposedly limit "the specificity with which legislators can spell out prohibitions."[28] Over the past 50 years fuzzy regulatory terms such as "unreasonable," "unusual," and "excessive" have withstood constitutional challenge.

The rule of lenity has not only been ignored in the context of regulatory offenses, it has been turned on its head. When an ordinary criminal statute is ambiguous, the courts give the benefit of the doubt to the accused, but when a regulatory provision is ambiguous, the benefit of the doubt is given to the prosecutor.[29]

Environmental Laws That Lawyers Cannot Decipher

The modern Supreme Court precedents have allowed lawmakers at the federal and state level to pass vague environmental legislation. In a recent survey by Arthur Andersen Environmental Services and the National Law Journal, 47 percent of 200 corporate attorneys interviewed said that the environmental duty that occupied most of their time and energy was trying to determine the seemingly basic question of whether or not their companies were complying with the law. The Journal reported, "Nearly 70 percent [of the attorneys surveyed] said they didn't believe total compliance with the law was achievable--due to the complexity of the law, the varying interpretations of regulators, the ever-present role of human error, and the cost."[30]

Owners and executives of small businesses are particularly vulnerable to prosecution when the law is unclear since they cannot afford full-time legal staffs to guide them through the regulatory jungle, whereas legal specialists warn large corporate clients about loopholes and inconsistencies that would probably go unnoticed by the novice. Attorney Judson Starr and two colleagues write,

Everyone has his or her own favorite RCRA [Resource Conservation and Recovery Act] inconsistency. Ours involves the solvent-laden rag used to clean machinery. If the solvent is poured first on the machinery and then wiped with a clean rag, the rag is a hazardous waste. However, if the solvent is poured first on the rag and then is used to wipe the machinery clean, the rag is not a hazardous waste. Go figure.[31]

Conscientious laypersons could try to interpret the regulations themselves, but such attempts are likely to lead to confusion and frustration. After all, if a federal judge found RCRA's provisions "mind-numbing," how can an ordinary businessperson possibly comprehend his legal rights and obligations?[32]

One explanation for the presence of so many vague rules in environmental law is the fact that the courts reward sloppy lawmaking by resolving ambiguities in the government's favor. As previously noted, the judiciary does not adhere to the rule of lenity in the regulatory context. When an ordinary criminal statute is unclear, the ambiguity is resolved in the defendant's favor, but in environmental prosecutions the government itself is the beneficiary of unclear provisions. In United States v. Standard Oil (1966), for example, the Supreme Court found the statutory term "refuse matter" to include commercially valuable gasoline.[33] That interpretation made it possible for the government to prosecute Standard Oil for an accidental oil spill under the Rivers and Harbors Act. Three justices dissented from that ruling because it ignored the "traditional canon that penal statute[s] . . . be narrowly construed."[34]

In United States v. Phelps Dodge Corporation (1975), a federal district court considered the scope of a provision of the Clean Water Act.[35] Phelps Dodge argued that the terms "navigable waters" and "waters of the United States" could not be fairly construed to encompass "normally dry arroyos through which water may flow."[36] Even though the court found the legal issue to be a "close" one, the prosecutor's expansive interpretation of the statute was upheld. The Standard Oil and Phelps Dodge precedents have encouraged environmental prosecutors to overreach with novel legal theories that would probably be considered an abuse of process in ordinary criminal proceedings.[37]

When the specificity principle and the rule of lenity are ignored, the dangers of arbitrary and discriminatory enforcement are heightened. Enforcement of environmental law is likely to be inconsistent and arbitrary because the prosecutor can pursue violations in one of three ways: (1) administratively, (2) civilly, or (3) criminally.[38]

Government officials assure the public that decisions to bring charges are made by disinterested attorneys who take all of the relevant information into account. Enforcement decisions are supposedly based on considered judgments of what will ultimately further the "public good." A critical examination of decisions to charge, however, would reveal that some prosecutors act in their own self-interest. It is no secret that many prosecutors harbor ambitions for higher office. Those individuals might allow factors such as public opinion and potential media coverage to affect their charging decisions. Although some offices follow strict guidelines that are based on objective criteria, other offices are guided by nothing more than the personal predilections of the attorney assigned to the case. A Los Angeles County prosecutor, for example, says the decision about whether to indict a company depends on how the violation affects his neck hairs. "When the little hairs on the back of your neck stand up, it's a felony. When it just makes you tingle, it's a misdemeanor. If it does nothing to you at all, it's a civil problem."[39] Those "criteria" are probably not representative of the ones used in the decisionmaking processes in government offices across the country, but they are a stark reminder of the abuse of power that is possible when the freedom and reputation of ordinary citizens rest on the "professional judgment" of a prosecutor.

The Framers of the Constitution understood that democracy alone was no guarantor of justice. As James Madison noted, "It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow."[40] Unfortunately, Madison's vision of unbridled lawmaking is an apt description of environmental policy in the 1990s. The EPA, for example, received so many queries about the meaning of RCRA that it set up a special hotline for RCRA questions. Note, however, that the "EPA itself does not guarantee that its answers are correct, and reliance on wrong information given over the RCRA hotline is no defense to an enforcement action."[41] The situation is so obviously rotten that many prosecutors are acknowledging that there is simply too much uncertainty in environmental law. Massachusetts attorney general Scott Harshbarger concedes, "One thing we haven't done well in government is make it very clear, with bright lines, what kinds of activity will subject you to . . . criminal or civil prosecution."[42]

The Supreme Court ought to revisit the precedents that created a regulatory exception to the requirement of specificity. Those precedents are making a mockery of the due process principles that have helped to secure procedural justice in ordinary criminal cases. The Court should also apply the rule of lenity to regulatory matters. Legal uncertainties ought to be resolved in favor of private individuals and organizations, not the state.

Warrantless and Unreasonable Searches

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." Over their 200-year history the safeguards of the Fourth Amendment have unfortunately been diluted "by a process of devitalizing interpretation."[43] Year after year government attorneys seek constitutional rulings that will facilitate investigations and prosecutions. All too often the courts reason that the Fourth Amendment rights of private individuals and organizations must yield to the needs of law enforcement.

Nowhere has that trend been more evident than in the context of commercial property. Law professor Steven Wax observes, "The needs of the people have been defined as consistent with the agendas of various administrative agencies, at the expense of the liberty interests of business- people, employees, and others subjected to the administrative agents' intrusions."[44] Federal environmental laws authorize the warrantless inspection of commercial facilities. The courts have also allowed officials of the EPA and the U.S. Fish and Wildlife Service to trespass upon noncommercial property without probable cause. One federal appellate court has held that regulatory inspections can take place for no other reason than that a particular agency wants "assurance" that the rules of the Federal Register are being complied with.[45] Justice Potter Stewart aptly described the "peculiar logic" of the Supreme Court's search and seizure jurisprudence in 1981: "[T]he scope of the Fourth Amendment diminishes as the power of governmental regulation increases."[46]

The Colonial Experience

The Fourth Amendment's safeguards evolved in response to the colonial experience with English writs of assistance. In the early 1700s the British government sought to prevent the colonies from doing business with non-English industries. To enforce the trading restrictions, customs officials were given general search warrants that were called writs of assistance. The writs invested individual officials with broad discretionary powers to enter homes and shops in search of contraband. The colonists fiercely resisted the restrictions on trade and the capricious customs officials who attempted to enforce the British policy.

In 1761 a group of Boston merchants retained attorney James Otis to challenge the legality of the writs. The case was closely watched, and Otis's eloquent speech became one of the most famous legal arguments in the annals of American law.

The writ prayed for in this petition is illegal. It is a power that places the liberty of every man in the hands of every petty officer. . . . A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Customhouse officers may enter our houses when they please; we are commanded to permit their entry. . . . Bare suspicion without oath is sufficient. . . . Every man prompted by revenge, ill humor, or wantonness to inspect the inside of his neighbor's house may get a writ of assistance.[47]

Although the court upheld the legality of the writs, John Adams later credited Otis's arguments with laying the foundation for the American Revolution. "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there, the child Independence was born."[48]

The Fourth Amendment became binding in 1791. Although most Americans think of the amendment in the context of criminal proceedings, its function is far broader. "It serves as one the fundamental brakes on governmental intrusion into our lives."[49] As Judge E. Barrett Prettyman observed in 1949, "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity. . . . To view the Amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon."[50]

A "Newfangled Warrant" for Commercial Property

Although the Supreme Court is often divided in Fourth Amendment cases, the governing principle of the vacillating precedents is that "a search of private property without consent is 'unreasonable' unless it has been authorized by a valid search warrant."[51] An important precedent was set, however, in Davis v. United States (1946).[52] In that case the Supreme Court upheld a governmental seizure of rationing coupons at a gasoline station. The decision was noteworthy because the majority opinion emphasized that the filling station was a place of business, not a private residence. The implication, of course, was that the holding might have been different if the seizure had taken place on noncommercial property.

After Davis, owners of commercial property began to receive less constitutional protection than owners of residential property. The legal trend was confirmed in Donovan v. Dewey (1981) in which the Supreme Court made explicit what had previously been only implied: Government has "greater latitude to conduct warrantless inspections of commercial property" than of residential property.[53] It was from that sort of reasoning that the "administrative search warrant" was born. According to a treatise on the Fourth Amendment, the probable cause standard for administrative searches "bears no resemblance to the usual requirements of probable cause in criminal procedure. Administrative search warrants may be issued solely on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to the particular place to be searched. There need be no probable cause that a violation has occurred or is occurring in a particular place."[54]

The Fourth Amendment guarantee was weakened again in the 1970s when the Supreme Court held that the business premises of certain "closely regulated" industries were exempt from the (already lax) rules concerning administrative searches. In United States v. Biswell (1972), the Court considered the constitutionality of a gun control law that authorized federal agents to inspect the premises of federally licensed gun dealers without an administrative warrant.[55] The Court upheld the law because the pervasive regulations governing firearms essentially put those engaged in the business on notice as to the government's powers. The majority opinion suggested that if the "threat to privacy" were to reach "impressive dimensions," the Court might be inclined to revisit the issue.

At first the doctrine of closely regulated industries was limited to businesses with a long history of pervasive regulation, such as liquor and firearms, but the list has expanded over the years as the Supreme Court has deferred to the legislature's judgment about what industries are, in fact, closely regulated. One court was so deferential that it found barbering to be a closely regulated industry! With such precedents on the books, Fourth Amendment scholar

John Wesley Hall Jr. warns, "the government can now impose the warrant exception on practically any industry which it could conceivably regulate."[56]

The EPA's License to Trespass

A number of federal environmental laws explicitly authorize warrantless inspections of commercial premises. Section 6927(a) of RCRA, for example, provides,

For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, such officers, employees or representatives are authorized--

(1) to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;

(2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.

RCRA makes it a crime for a company to refuse entry to EPA investigators.[57] Such statutes can withstand constitutional challenge because of the closely regulated industry doctrine.[58] Agriculture, food sales, commercial fishing, and hazardous waste disposal have already been designated by the courts as closely regulated industries for purposes of Fourth Amendment analysis. In light of the plethora of environmental rules concerning air, water, and "ecosystems," the alarming question for civil libertarians and business-people is what industries will not fall into the closely regulated exception to the administrative warrant requirement. In 1987 Justice William Brennan recognized that the so-called exception was well on its way to becoming the rule: "If New York City's administrative scheme renders the vehicle-dismantling business closely regulated, few businesses will escape such a finding."[59]

Although the closely regulated industry doctrine poses the most serious threat to Fourth Amendment privacy rights, there are at least three other significant search and seizure problems. First, the lower probable cause standard for the issuance of administrative warrants has spawned interagency "bootstrapping" searches. One of the original justifications for the administrative warrant was the notion that the government was interested only in making sure that civil regulations were being followed. In Camara v. United States (1967), for example, the Supreme Court noted, "A routine inspection of the physical condition of private property [was] a less hostile intrusion than a typical policeman's search for the fruits and instrumentalities of crime."[60] With that distinction in mind, the Court held that administrative warrants did not have to meet the probable cause standard that had been set for criminal matters.

The criminalization of environmental infractions, however, means that the courts must now grapple with situations where prosecutors and investigators have used administrative inspections as pretexts for searching for evidence of criminal activity. The Environmental Crimes Unit of the Federal Bureau of Investigation, for example, has enlisted the help of local health officials in gathering evidence for criminal prosecutions when the local officials conduct their "routine" inspections.[61] The Supreme Court appears to be untroubled by such interagency cooperation. A 1987 decision held that "the discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect."[62]

Second, ranchers and farmers have no Fourth Amendment protection from governmental agents who want to trespass on "open fields." In Oliver v. United States (1984), the Supreme Court held that a governmental "intrusion upon . . . open fields is not [an] unreasonable search proscribed by the text of the Fourth Amendment."[63] The Oliver ruling effectively gives federal and state agents carte blanche to trespass on private land to conduct searches and to monitor private activity. Agents of the U.S. Fish and Wildlife Service, for example, trespassed on a Maryland farm without a warrant when they suspected a possible violation of the Migratory Bird Treaty Act. The agents discovered that Paul Swann had failed to remove a strip of corn from his land before the first day of hunting season, which is apparently what the law decreed. Swann was prosecuted for "aiding and abetting the taking or attempted taking of migratory waterfowl with the aid of bait."[64]

Third, government agencies do not have to obtain a warrant to inspect garbage bags from apartment houses and homes. In 1988 many conservative lawyers and commentators scoffed when civil libertarians urged the Supreme Court to overturn a drug conviction that was secured through a warrantless police search of garbage bags. With more and more communities enacting mandatory recycling statutes, those conservatives may rue the day the Supreme Court sanctioned such searches. In New York City, for example, "recycling cops" rummage through neighborhood garbage during the early morning hours and impose fines on individuals and businesses for "noncompliance."[65] If history is any guide, the penalties for recycling violations will get stiffer in the years to come as environmental groups pressure lawmakers to "get tough with repeat offenders."

The warrant and probable cause safeguards of the Fourth Amendment have suffered serious erosion in recent years. Lawmakers and prosecutors who are sympathetic to the environmental agenda have taken advantage of the Supreme Court's dubious precedents to extend the regulatory hand of government. The abuses that have followed will not cease until the courts return to first principles. Ideally, of course, the judiciary should apply the traditional probable cause criteria to all governmental inspections of private property.[66] The "administrative" search warrant, which was created out of whole cloth by the judiciary, should be jettisoned.

Such a far-reaching and principled reform, however, is not likely to occur in the short term. It is therefore appropriate to consider a few interim measures that would help to curb the most egregious bureaucratic overreaching. First, the wide-open doctrine of "closely regulated" industries ought to be brought within the procedural framework of administrative warrants. Second, lawmakers ought to require administrative agencies to obtain inspection warrants in nonemergency situations.[67] If the Fourth Amendment means anything, it means that the propriety of a search cannot rest on the unreviewable discretion of law enforcement officials and administrative bureaucrats. In nonemergency situations, those officials should have to obtain a warrant from an independent magistrate. To paraphrase Judge Prettyman, environmental laws ought to be subject to the same constitutional limitations as other police powers.[68] If those modest steps are not taken soon, the Fourth Amendment will lose all vitality.

Liability without Fault

One of the principal differences between an ordinary criminal prosecution and an environmental prosecution concerns the issue of "criminal intent." In ordinary criminal prosecutions, the government has to prove that the accused had some prescribed bad state of mind. That principle was expressed by the Latin maxim actus not facit reum nisi mens sit rea (an act does not make one guilty unless his mind is guilty).[69] A different legal standard, however, applies to persons accused of environmental offenses.[70] Congress and state legislatures have passed environmental laws that permit criminal punishment without a finding of fault or culpability on the part of the defendant. Unfortunately, the courts have held that such laws do not deprive individuals of due process. That is because both courts and legislatures are imbued with the modern view that places the interests of a "larger public good over the need to protect individual rights."[71]

The Question of Intent

Two basic premises that undergird Anglo-American criminal law are the requirements of mens rea (guilty mind) and actus reus (guilty act).[72] The first says that for an act to constitute a crime there must be "bad intent." Dean Roscoe Pound of Harvard Law School writes, "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."[73] According to that view, for example, a man could not be prosecuted for leaving an airport with the suitcases of another if he mistakenly believed the luggage to be his own. As the Supreme Court of Utah noted in State v. Blue (1898), mens rea was considered an indispensable element of a criminal offense. "To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other, the principle that the wrongful or criminal intent is the essence of crime, without which it cannot exist."[74]

By the same token, bad thoughts alone do not constitute a crime if there is no "bad act." If a policeman discovers a diary that someone has accidently dropped on the sidewalk, and the contents include references to wanting to steal the possessions of another, the author cannot be prosecuted for a crime. Even if an off-duty police officer overhears two men in a tavern discussing their hatred of the police and their desire to kill a cop, no lawful arrest can be made if the men take no action in furtherance of a cop-killing scheme. The basic idea, of course, is that the government should not be in the business of punishing "bad thoughts."

When mens rea and actus reus were fundamental prerequisites for criminal activity, no person could be branded a "criminal" until a prosecutor could persuade a jury that the accused possessed "an evil-meaning mind with an evil-doing hand."[75] That understanding of crime--as a compound concept--was firmly entrenched in the English common law at the time of the American Revolution.

The Erosion of Mens Rea

Over the years, however, the moral underpinnings of the Anglo-American view of criminal law fell into disfavor. The mens rea and actus reus requirements came to be viewed as burdensome restraints on well-meaning lawmakers who wanted to solve social problems through administrative regulations. As Professor Richard G. Singer observes, "Criminal law . . . has come to be seen as merely one more method used by society to achieve social control."[76]

The change began innocently enough. To protect young girls, statutory rape laws were enacted that flatly prohibited sexual intercourse with girls below the age of legal consent. Those groundbreaking laws applied even if the girl lied about her age and consented to the intercourse and the man reasonably and in good faith believed the girl to be over the age of consent. Once that exception to the mens rea principle was accepted by the courts, legislators began to identify other activities that had to be stamped out-- even at the cost of convicting innocent-minded people.

"Strict liability" criminal offenses have exploded during the 20th century as legislators have created hundreds of "public welfare offenses" relating to health and safety. Each time an innocent-minded person has argued that criminal punishment would violate his right to due process of law, the Supreme Court has responded that there is "wide latitude" in the legislative power to create offenses and "to exclude elements of knowledge and diligence from [their] definition."[77] Those strict liability rulings have been sharply criticized by legal commentators. Professor Henry Hart, for example, asks, "What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?"[78]

The courts have also sanctioned laws that dispense with the actus reus requirement. The seminal case was United States v. Park (1975).[79] Park was the president of Acme Markets, Inc., a large national food chain. When the Food and Drug Administration found unsanitary conditions at an Acme warehouse in April 1970, the agency sent Park a letter demanding corrective action. Park referred the matter to the company's vice president for legal affairs. When he was informed that the regional vice president was investigating the situation and would take corrective action, Park thought that was the end of the matter. But when unsanitary warehouse conditions were found on a subsequent inspection, prosecutors indicted Acme and Park for violations of the Federal Food, Drug and Cosmetic Act. An appellate court overturned Park's conviction because it found that the trial court's legal instructions could have "left the jury with the erroneous impression that [Park] could be found guilty in the absence of 'wrongful action' on his part" and that proof of that element was constitutionally mandated by due process. The Supreme Court, however, reversed the appellate ruling. Chief Justice Warren Burger opined that the legilature could impose criminal liability upon "those who voluntarily assume positions of authority in business enterprises" because such persons have a duty "to devise whatever measures [are] necessary to ensure compliance" with regulations. That low threshold of culpability is a far cry from the common law requirements of an "evil-meaning mind" and a "evil-doing hand." Under the rationale of Park, an honest executive can be branded a "criminal" if a low-level employee in a different city disobeys a supervisor's instructions and violates a regulation--even if the violation causes no harm whatsoever.

Although many state courts have followed the reasoning of the Park decision with respect to their own state constitutions, some courts have recoiled from the far-reaching implications of the "responsible corporate officer" doctrine. The Supreme Court of Pennsylvania, for example, has held that "a man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment."[80] That Pennsylvania ruling, it must be emphasized, is an aberration. It is a remnant of the common law tradition that virtually every other jurisdiction views as passe.

Punishment without Intent or Action

Although the common law requirements of mens rea and actus reus are still considered necessary for ordinary criminal convictions--such as assault and burglary--many of the major federal environmental laws dispense with one or both of those elements. The Refuse Act, for example, dispenses with mens rea so that criminal intent is irrelevant to guilt. In

1974 the White Fuel Corporation was prosecuted under the Refuse Act when the Coast Guard discovered that oil from a storage tank on the company's shoreline property was seeping into Boston Harbor. The trial court "denied White Fuel's offer to present evidence that it had not known of the underground deposit, had not appreciated its hazards, and had acted diligently when the deposit became known."[81] The trial judge found that, under the Refuse Act, the seepage was a "public welfare offense" and that the government did not have to prove any malevolent purpose or even negligence. The appellate court rejected White Fuel's arguments on appeal and found "no unfairness in predicating liability on actual non-compliance rather than intentions or best efforts."[82]

The Clean Air Act and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) also dispense with mens rea. In 1991 Paul Buckley was prosecuted under those statutes when some asbestos was released into the environment in the course of a demolition project. No one was injured, but regulations were violated. The trial court told the jury that the government did not have "to prove a wrongful intent or awareness of wrongdoing." The question of whether Buckley acted in good faith was deemed "immaterial" to the case. On appeal, Buckley's attorneys argued that those instructions "violated due process by eliminating knowledge as an element of the crimes."[83] The appellate court affirmed Buckley's conviction because "the very nature of asbestos" and other hazardous substances put those who deal with them "on notice that they may incur criminal liability for emission-related actions."

Hunters and farmers are routinely ensnared by the Migratory Bird Treaty Act (MBTA) for inadvertent violations. In United States v. Catlett (1984), 13 men were convicted of hunting migratory birds on a baited field even though there was no evidence that "any of the defendants either baited the field or knew that it was baited at any time."[84] The appellate court acknowledged the harshness of the law but explained that it was bound by clear legal precedents. Thus, the Catlett convictions were "reluctantly" affirmed.

In 1989 prosecutors brought criminal charges against Ronald Rollins, an Idaho farmer. Rollins applied a mixture of registered pesticides to 50 acres of seed alfalfa growing on his farm. A flock of geese came to the field, ate the alfalfa, and died from ingesting the pesticides. The magistrate found Rollins guilty even though he had applied the chemicals "in the recommended quantities [and] at the appropriate time."[85] The fact that the farming community had used the pesticides "for a number of years without major incident" was irrelevant because the MBTA imposes strict liability on anyone who kills a migratory bird.

It is difficult to see what purpose is served by such heavy-handed enforcement. Those "environmental criminals" did not deserve to be hauled into court like common criminals. They did not set out to break the law, nor were they "cutting corners" in an attempt to increase a profit margin. The argument that such prosecutions will deter others is without merit. As Hart notes, there is an "inherent unlikelihood that people's behavior will be significantly affected by commands that are not definitely brought to their attention."[86] But even if a string of prosecutions prompted every midwestern farmer to memorize the provisions of the MBTA, how in the world could farmers possibly keep the birds off their crops?

Federal environmental laws have also dispensed with the actus reus requirement. In 1982 Congress expanded the legal definition of "person" in the Clean Air Act and the Clean Water Act to include "any responsible corporate officer."[87] Those amendments will allow prosecutors to indict corporate chief executive officers--as in the Park case--for the acts and omissions of low-level employees.[88] Once the government has shown that a company employee has run afoul of a regulation, the prosecutor merely has to find the corporate organizational chart to indict executives.[89] The mens rea of corporate officers can usually be established by inference from circumstantial evidence. As one legal treatise explains, "Environmental laws permit the presumption of [guilty] knowledge under a myriad of circumstances."[90] The courts, for example, allow juries to draw inferences about a corporate officer's knowledge from evidence indicating a "hands-on management style."[91] The courts also allow juries to infer criminal intent from "circumstantial evidence of lax management practices."[92]

Over the past 70 years lawmakers have so lowered the standards for criminal liability that the traditional distinctions between civil liability and criminal liability are vanishing.[93] As a result, indictment and conviction under America's environmental criminal laws are rapidly losing any associated stigma because the general public does not accept all of the government's environmental norms as legitimate and deserving of compliance. There may indeed be a place for criminal sanctions in environmental regulation, but the threshold for such sanctions should be very high. Reform of current law should begin with the immediate reintroduction of the mens rea and actus reus requirements to environmental criminal law.

Double Prosecutions and Double Jeopardy

The Fifth Amendment's double jeopardy clause bars government from subjecting any person to multiple prosecutions for the same offense. But that provision has been interpreted in a way that allows separate state and federal prosecutions for the same conduct. Environmental crimes differ from ordinary criminal offenses such as homicide and burglary in that they are often investigated by joint federal-state task forces. Those task forces work with prosecutors to "decide in which jurisdiction it is most appropriate to prosecute."[94] Thus, if a jury should acquit an individual or company of a state environmental crime, the task force can immediately bring a separate indictment in federal court and try the case all over again. If a second jury should happen to acquit the defendant on the federal charge, the task force can resort to federal and state civil actions, which can result in serious financial penalties. With such enormous leverage over their "targets," prosecutors can bludgeon guilty pleas from the innocent as well as the guilty.

An Ancient Principle of Justice

The double jeopardy clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." As Justice Hugo Black observed, the underlying principle of the double jeopardy clause was recognized long before the American Revolution.

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of early Christian writers. . . . While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong to "be brought into Danger for the same Offense more than once." Few principles have been more deeply "rooted in the traditions and conscience of our people."[95]

The double jeopardy principle was firmly established in the English common law when the Constitutional Convention met in 1787. The principle was explicitly incorporated in the Constitution's text when the Bill of Rights was ratified in 1791.

The Creeping Power of "Dual Prosecution"

American courts were vexed early on by "the question of whether [the] State and Federal Governments could make the same conduct a crime."[96] The powers of the federal government are set forth in article I, section 8 of the Constitution, and the Tenth Amendment makes it clear that "the powers not delegated to the United States by the Constitution" are reserved to "the States respectively, or to the people." The early courts believed that, by virtue of the separation of powers and the creation of separate jurisdictions, "double trials would virtually never occur in our country."[97] In the rare instances of concurrent jurisdiction, the courts expected the prosecutors themselves to respect the double jeopardy principle. In Jett v. The Commonwealth (1867), for example, the Supreme Court of Virginia stated, "We must suppose that the criminal laws will be administered, as they should be, in a spirit of justice and benignity to the citizen, and that those who are entrusted with their execution will interpose to protect offenders against double punishment, whenever their interposition is necessary to prevent injustice or oppression; and that if, in any case, they should fail to do so, the wrong will be redressed by the pardoning power."[98]

As long as the concurrent jurisdiction of the federal and state governments was limited, the potential for prosecutorial mischief was relatively minor. But the legal landscape was drastically altered after the turn of the century as the federal government expanded its criminal jurisdiction beyond "the unique areas of national concern listed among its constitutionally enumerated powers."[99] Attorney Daniel A. Braun writes,

The criminal legislation enacted during this century, especially the sweeping crime control measures passed since the 1960s, has greatly increased the quantity of substantive criminal offenses covered by parallel federal and state statutes.

The criminal codes of the states and the nation presently identify many of the same wrongs and share many of the same goals. For this reason, an individual who violates the criminal law of a state stands a considerable chance of violating a provision of the federal code as well.[100]

The Supreme Court has repeatedly upheld successive state and federal prosecutions. The Court's legal analysis typically emphasizes the law enforcement interests of government over the potential abuse of individual defendants. A common argument is that one sovereign might try to subvert the policies of the other. A state, for example, might try to undermine a national law by enacting a similar statute with a very light penalty so that defendants would rush to plead guilty in state court and thereby avoid a stiffer punishment under federal law. Although there may be some merit to that argument, the Court all but ignores the risks associated with its current rule, namely, that federal and state authorities may join forces to pursue common governmental interests. Justice Black, among others, insisted on viewing the legal issue "from the standpoint of the individual who is being prosecuted." In a biting dissent, Black observed, "If danger to the innocent is emphasized, the danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone."[101]

The concurrent jurisdiction of the federal and state governments has exploded over the years. The number of federal offenses has grown from 3 to 3,000.[102] During the 1980s state and federal officials often teamed up to prosecute drug offenders under both state and federal law.[103] Although those aggressive tactics have provoked sporadic criticism from sentencing judges and commentators, the law remains unchanged. Government officials retain the option of dual prosecution for a wide variety of offenses.

A Trump Card in Plea Negotiations

Outside the drug war context, there may be no other area of the law with as much potential for dual prosecution abuse as environmental criminal law. Many states have enacted environmental regulations that mirror the major federal environmental statutes. The very existence of such overlapping statutes creates a danger of arbitrary multiple prosecutions. The danger is heightened when state and federal officials work together on investigative task forces, and when the money generated from criminal and civil fines is plowed back into the budgets of the various enforcement agencies.

When defendants in environmental cases invoke the double jeopardy principle in successive prosecutions, the courts invariably reject the argument on the basis of the Supreme Court's "dual sovereignty" doctrine. In United States v. Louisville Edible Products Inc. (1991), for example, the federal government brought charges against a Kentucky corporation under the Clean Air Act.[104] Since the federal charges were based on conduct for which the company had already been fined by a local environmental enforcement agency, the company argued that it was protected by the double jeopardy clause of the Fifth Amendment. The federal appellate court found that claim to be "misplaced." Following Supreme Court precedents, the court simply noted that the case involved successive prosecutions by separate sovereigns and that each sovereign could "pursue claims against Louisville Edible for the same conduct without subjecting the defendant to double jeopardy."[105] An EPA Enforcement Accomplishments Report lauded the decision for its important "precedential" value.[106]

The dual sovereignty exception to the double jeopardy principle is based on the notions that each sovereign has different interests and that those interests can be advanced only by multiple prosecutions. That rationale is infirm. Even if that rationale was an accurate description of our federalist legal system 100 years ago, it is obviously at odds with modern practices. As Braun observes, "In light of the extensive cooperation between state and federal law enforcement officials, the story of two independent sovereigns pursuing their independent goals is a transparent fiction."[107] That is especially true in the environmental context. First, the major federal environmental statutes invite the states to participate in the federal regulatory program. The Clean Water Act, for example, explicitly contemplates "a partnership between the States and the Federal government."[108] And the courts readily acknowledge that such partnerships are "animated by a shared objective."[109]

Second, the federal regulatory structure has created a situation where state and federal officials have frequent and regular contact with one another. In testimony before Congress, Deputy Assistant Attorney General George W. Van Cleve boasted about the close contact his office had enjoyed with environmental investigators and prosecutors on the state level.

We regard the process of criminal enforcement of environmental law as very much a cooperative process. On a daily basis we work with our colleagues from the States and rely on them for much of our information, resources, and prosecutorial assistance.[110]

There is, of course, nothing inherently wrong with cooperation between federal and state officials. The issue is whether those officials ought to be able to "harass the accused so as to deny him his protection under the Fifth Amendment."[111] After all, if a Justice Department official can pick up a telephone and have a state prosecutor initiate criminal proceedings against a person who has just been acquitted of charges in federal court, the double jeopardy clause might as well not exist.

Environmentalists point out that there have been only a few reported cases of dual prosecution. Although that is strictly true, it gives a distorted impression of how the criminal law is actually administered. No one would dispute the proposition that the dual sovereignty doctrine gives the prosecution enormous leverage over defendants in plea negotiations. Since approximately 95 percent of the cases in America's criminal justice system never go to trial, any abuse will become readily apparent in plea bargaining. If an industrial accident occurs at an oil refinery operated by a midsized company, for example, and federal prosecutors bring criminal charges under environmental law, the chief executive officer must face the reality of the government's dual prosecution powers. Even if the CEO sincerely believes that no criminal law was violated, he cannot ignore his fiduciary responsibility to weigh the costs of a legal battle. The decision is a tough one. Even if a jury acquits the company in federal court, another prosecution may be initiated in state court. And even if a second jury acquits, prosecutors can pursue stiff civil fines in both state and federal court. Because of the costs of attorneys fees and the adverse publicity that would accompany a drawn-out fight, medium- and small-sized businesses will probably decide to "cut their losses" and plead guilty to the lowest criminal charge and pay the lowest fine that their attorneys can negotiate. In such a climate, only large corporations and individuals that have the financial wherewithal to wage a battle have a chance of successfully resisting flimsy and unsubstantiated charges.[112] If the double jeopardy principle were respected and only one criminal trial were possible, more defendants would be able to force prosecutors to prove their allegations in a court of law.

It is interesting that the Supreme Court will not tolerate dual prosecutions when the separate sovereigns are city and state governments.[113] In such situations, the Court allows city and state agencies to work together to bring the strongest possible case against a lawbreaker--but only one prosecution is permitted for any given act. That simple rule ought to apply with equal force when the sovereigns happen to be the federal and state governments.

"Self-Confession" Programs and Self-Incrimination

In the environmental crimes context, federal and state governments have successfully perverted the Fifth Amendment privilege against self-incrimination. Environmental law seems to be the only area of the law where it could be a crime not to report a crime. The "compliance data" that the EPA and state authorities monitor is derived "almost entirely from self-reporting requirements."[114] As unbelievable as it may seem, environmental "criminals," unlike burglars and rapists, are expected to reveal their identities whenever a rule or regulation is violated.[115] Should a corporate executive or the manager of a small business fail to confess regulatory violations in a timely manner, prosecutors promise crippling, "no-holds-barred" enforcement actions.[116]

A Lesson from the Star Chamber

The most notorious procedure associated with the English Star Chamber of the 15th to 17th centuries may have been compulsory examination under oath. Accused individuals had to swear on the Bible that they would answer all questions truthfully. Anyone who refused to take the oath could be cited for contempt and sent to prison. Henry VIII used the procedure against individuals who questioned the religious teachings of his ministers. Dissenters had either to reveal their honest religious convictions under oath and risk torture and execution or to lie under oath and be, as they believed, eternally damned.

The Star Chamber was eventually abolished, of course, and the privilege against self-incrimination became a hallmark of the common law. After the American Revolution, the privilege was incorporated into the Bill of Rights and became binding in 1791. The Fifth Amendment states: "nor shall [any person] be compelled in any criminal case to be a witness against himself." Although the privilege was originally regarded in England as a rule of testimonial evidence, the American judiciary took the principle further. The American courts held that the Fifth Amendment guarantee protected individuals not only against compulsory courtroom testimony but also against the government's investigatory processes.

Boyd v. United States (1886) is the paradigmatic example of the early view of the privilege and its purposes.[117] In Boyd, the Supreme Court considered the constitutionality of a law that required defendants in civil forfeiture cases to produce invoices and receipts. If a defendant refused to produce the paperwork that would show payment of the government's import duties, the law would assume his guilt and assess penalties. The Court found the law inconsistent with both the Fourth and Fifth Amendments.

[A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.[118]

Despite the fact that nearly a hundred years had passed since the ratification of the Constitution, the Supreme Court continued to recognize that the core rationale of the Fifth Amendment guarantee was to keep the government from coercing suspects (who are, after all, presumed innocent) into any type of participation in the state's investigation and prosecution. Because of that fundamental American principle, police and prosecutors are required to produce evidence of guilt by their own "independent labors."[119]

Government Power Begins to "Evolve"

The author of the Boyd opinion, Justice Joseph Bradley, echoed the Founders when he warned future jurists that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and by slight deviations from legal modes of procedure."[120] The best way of guarding against such tendencies, he cautioned, was to give "constitutional provisions for the security of person and property" a liberal construction. Unfortunately, Justice Bradley's wisdom would go unheeded. Twenty years later, the Supreme Court issued a series of extraordinary precedents that greatly expanded the prosecutorial powers of government.

The first two decisions were issued in the early 1900s. In Hale v. Henkle (1906), the Supreme Court held that corporate officers could not invoke the privilege against self- incrimination on behalf of corporations.[121] That ruling took two justices by surprise because, as they noted in a dissenting opinion, corporations were entitled to all of the other "immunities and protections" contained in the Bill of Rights.[122] Three years later, in New York Central and Hudson River Railroad v. United States (1909), the Court held that corporations could be charged with crimes.[123] What is remarkable about those cases is that their respective holdings are completely incongruous with one another. The Hale decision was based on the obvious and undeniable distinction between "natural" persons and the artificial nature of corporations. But the common law relied on the very same distinction for the proposition that corporations could not be charged with crimes. Artificial entities were simply incapable of committing bad acts and forming the requisite intent for criminal liability.[124] In New York Central the Court repudiated a long line of common law cases when it held that a corporation could be charged with a crime because of the actions or omissions of its agents.[125] To this day, the Supreme Court appears to be completely oblivious to the discordance of its own rulings. After those decisions were issued, corporations could be held criminally liable for the actions of their agents, but the agents could not, under any circumstances, invoke the Fifth Amendment privilege on behalf of the corporation.

Since the Hale and New York Central decisions were issued, the Supreme Court has held that corporate employees cannot invoke the privilege against self-incrimination to protect themselves--as opposed to the corporation itself--from a criminal prosecution.[126] An accountant, for example, cannot resist a grand jury subpoena for the tax records of a corporation that is suspected of tax evasion--even if the records would incriminate the accountant personally. Law- makers have exploited such tax-related precedents by requiring business firms to keep records of other activities and to make such records available to government agents. But as Justice Robert Jackson, among others, recognized, the Fifth Amendment is essentially nullified if the government can "require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who then can use it to convict him" of a crime.[127] Indeed, Justice Jackson noted sarcastically that government could simplify law enforcement by merely requiring every citizen "to keep a diary that would show where he was at all times, with whom he was, and what he was up to."[128]

The Supreme Court reaffirmed the modern trend in Braswell v. United States (1988).[129] In that case, Chief Justice William Rehnquist reviewed the Court's treatment of the self-incrimination privilege over the years. He observed that if the Fifth Amendment privilege were applicable to corporate officers, there would almost certainly be a "detrimental impact on the Government's efforts to prosecute 'white-collar crime.'"[130] While that observation is undoubtedly accurate, it is a curious justification for limiting the scope of a constitutional guarantee. After all, the very purpose of the Constitution is to limit the scope of governmental power. Many of our most celebrated constitutional rights and procedural protections (e.g., the right to trial by jury, the right to be represented by an attorney, the presumption of innocence) can all be said to have a "detrimental impact" on the government's ability to obtain convictions. The judicial approach outlined by Chief Justice Rehnquist in Braswell is not only at odds with the principles set forth by Justice Bradley in the Boyd case, it is, essentially, the opposite.

Unfortunately, the Supreme Court appears to be committed to its "new course in Fifth Amendment analysis."[131] Justice Byron White summed up the modern trend when he blithely noted that "several of Boyd's express or implicit declarations have not stood the test of time."[132]

A Catch-22 for Businesspeople

Lawmakers have taken full advantage of the Supreme Court's cramped reading of the Fifth Amendment. Elaborate environmental regulatory systems have been constructed at both the state and federal levels, and those systems are replete with reporting and record-keeping requirements. The criminalization of those regulations leaves no doubt that American lawmakers are attempting to exercise the kind of "despotic power" the Court denied them in Boyd. As one environmental law treatise notes, "[T]he new [sentencing] guidelines place companies between the Scylla of reporting an offense that might otherwise go undetected by the government and the Charybdis of a finding of nondisclosure, non- cooperation, or, still worse, active concealment."[133]

Ordinary criminal suspects enjoy the constitutional option of remaining silent during an official inquiry, but environmental criminal suspects have no choice but to cooperate with regulators as they proceed with their inspections and investigations. The Toxic Substances Control Act, for example, gives the EPA the authority to subpoena any report, paper, or document that the agency "deems necessary."[134] The EPA can even subpoena "answers to questions."[135] Such prosecutorial powers are unheard of outside the regulatory context. According to the modern constitutional orthodoxy, agents of the FBI have an affirmative obligation to warn suspected bank robbers and kidnappers about the consequences of uttering an incriminating statement, but EPA investigators have been given the constitutional power to coerce confessions of environmental infractions from business- people.

The penalties for noncompliance with reporting requirements are serious--and so are prosecutors. A Missouri corporation, for example, was indicted because it failed to report an oil spill in the Mississippi River. In that case, a low-level employee was the only witness, and he kept the information to himself. Despite the fact that no officer or director of the corporation was aware of the spill, the company was prosecuted. A $20,000 fine was upheld on appeal because of a legal fiction that says, "The knowledge of the employees is the knowledge of the corporation."[136]

The federal reporting regulations have remarkable breadth. A "reportable release" under CERCLA, for example, includes

any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leach- ing, dumping, or disposing into the environment (including the abandonment or discarding of bar- rels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant). . . .[137]

The definitions are so comprehensive that innocuous activities can trigger legal obligations under federal criminal law. A New York maintenance supervisor, for example, was criminally prosecuted under CERCLA because he had a work crew bury old cans of waste paint. When the supervisor steadfastly refused to plead guilty to a criminal offense, the

Justice Department filed a 43-count indictment against him. The jury rejected all of the charges except two: the notification counts. The defendant, David Carr, now has a criminal record because he failed to notify federal authorities of the burial of old cans of paint.[138]

Environmentalists extol the noble purpose of the reporting regulations. They point out that two public policy objectives are advanced by notification requirements. First, such regulations provide government officials with pertinent information about the scope of industrial accidents and the risks associated with possible fallout. Innocent lives might be saved by public dissemination of information about such accidents. Second, a timely report would prompt initiation of a government-supervised cleanup effort, which would probably lessen the risk of any additional damage to the environment.

The legitimacy of those governmental objectives cannot be denied, nor are environmental notification procedures unconstitutional per se. The Fifth Amendment only prevents the government from prosecuting an individual or company for something it reports. The public policy objectives of the notification requirements are not lost when prosecutorial immunity attaches. And prosecutorial immunity does not mean polluters will escape the consequences of their actions. The government would still be able to pursue an irresponsible polluter for cleanup costs under civil law. Private individuals and corporations who are harmed by pollution would also be able to sue polluters for proven damages. There is, in short, no conflict between the privilege against self-incrimination and workable environmental policies.

Conclusion

In its zeal to stamp out pollution, the federal government has assumed extraordinary police and prosecutorial powers over the citizenry. Instead of developing environmental policies within the American constitutional framework, federal and state actors have relentlessly sought the modification of constitutional principles to accommodate their own regulatory agendas.[139] That growing threat to civil liberties is frightfully real. The idea that Americans must sacrifice their constitutional rights to "save the earth" has been gaining currency in the legislative chamber and in the courtroom for 25 years. To reverse that dangerous trend, Congress should take the following actions:

* Reduce the injustice of vaguely written environmental rules by restoring traditional legal defenses such as diligence, good-faith, and actual knowledge.[140]

* Restore the rule of lenity for environmental criminal cases by enacting a statute that will explicitly provide for the "strict construction" of federal criminal laws.(141

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* Limit prosecutorial discretion with respect to the decision to charge. Most regulatory violations should be handled through civil enforcement procedures. Criminal enforcement should be reserved for flagrant or repetitive violations of law. Congress should either legislatively mandate that administrative or civil remedies are prerequisite to criminal proceedings or require U.S. attorneys to seek authorization from the attorney general before filing criminal charges in environmental cases.[142]

* Restore Fourth Amendment privacy rights by repealing every federal law that authorizes warrantless entry onto private property. Absent consent or exigent circumstances, government agents should be required to obtain a warrant from an independent magistrate.

* Restore the traditional elements of criminal liability--mens rea and actus reus--to environmental law. Congress should abolish the doctrine of strict criminal liability as well as the "responsible corporate officer" doctrine. Those theories of criminal liability are completely inconsistent with the Anglo-American tradition and have no place in a free society.

* Restore the Fifth Amendment guarantee against double jeopardy by flatly prohibiting successive prosecutions by federal and state agencies. As an alternative, Congress could require U.S. attorneys to seek authorization from the attorney general before initiating a successive prosecution.

* Restore the Fifth Amendment privilege against self- incrimination by extending prosecutorial immunity to reporting and record-keeping requirements. The abominable practice of compulsory self-incrimination should cease immediatel

y.

Those reform measures should be only the beginning of a fundamental reexamination of the role of the federal government, as well as the role of the criminal sanction, in environmental law. If more significant reforms are not forthcoming, federal and state agencies will continue to run roughshod over constitutional principles. In the present climate it is especially important for Americans to understand that the Bill of Rights is incapable of enforcing itself. That task necessarily falls upon the citizens and organizations who wish to retain their rights. Private individuals and organizations must exert pressure on legislators and judges through litigation, public criticism, and elections. If the American people continue to allow their legislators and judges to rationalize exceptions to time- honored principles, the Bill of Rights will eventually be emptied of all content, and that would be the greatest crime of all.

Notes

[1] Junius Americanus [pseud.], letter, New York Daily Advertiser, July 13, 1790; quoted in Charles Warren, Con gress, The Constitution, and The Supreme Court (Boston: Little, Brown, 1930), p. 105.

[2] See, for example, "Justice Department Announces Record $2 Billion Year for Environmental Enforcement," press re lease, U.S. Newswire, October 29, 1992; and "Justice Depart ment Announces Third Straight Record Year for Environmental Enforcement," press release, U.S. Newswire, May 8, 1992.

[3] See Celia Campbell-Mohn, Barry Breen, and J. William Futrell, Sustainable Environmental Law (St. Paul: West, 1993), p. 13. The authors note that "Congress [eventually] used creeping federalization rather than direct legislation because it [remained] unclear whether the federal government could constitutionally operate air and water pollution programs" (p. 38). For a persuasive case that the federal government is not authorized to operate comprehensive air and water pollution systems, see Roger Pilon, "A Government of Limited Powers," The Cato Handbook for Congress (Washing ton: Cato Institute, 1995), pp. 17-35.

[4] 33 U.S.C. 407.

[5] Campbell-Mohn, Breen, and Futrell, p. 55. See also F. Henry Habicht II, "The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side," Environmental Law Reporter 17 (1987): 10,479.

[6] Nan Robertson, "Earth's Day, Like Mother's, Pulls Capital Together," New York Times, April 23, 1970, p. 30.

[7] On Nelson, see "Earth Day: Five Who Care," Look, April 21, 1970, p. 33. Humphrey was quoted in Gladwin Hill, "Activity Ranges from Oratory to Legislation," New York Times, April 23, 1970, p. 1.

[8] See Paul R. Portney, ed., Public Policies for Environ mental Protection (Washington: Resources for the Future, 1990), p. 10. See also Budget of the United States Govern ment, Fiscal Year 1996: Historical Tables, Table 4.1, pp. 59, 62; and Budget of the United States Government, Fiscal Year 1996: Analytical Perspectives, Table 12-1, p. 180. Even adjusting for inflation, the EPA budget has more than doubled from $2.6 billion to over $6 billion.

[9] See Richard Thornburgh, "Criminal Enforcement of Environmental Laws--A National Priority," George Washington Law Review 59 (1991): 776n. 3.

(10) See Joseph G. Block, "Environmental Criminal Enforce ment in the 1990s," Villanova Environmental Law Journal 3 (1992): 37.

(11) Personal communication of the author with Brett Grosko of the Policy, Legislation and Special Litigation Section of the Environment and Natural Resources Division, U.S. Depart ment of Justice, March 24, 1995; and Henry J. Reske, "Record EPA Prosecutions," ABA Journal, March 1992, p. 25.

(12) "Review of Mid-year Enforcement Activity," EPA internal memorandum from Michael B. Cook, director, Office of Waste- water Enforcement and Compliance and John W. Lyon, acting enforcement counsel for water to Water Management Division directors and regional counsels, Regions I-X, May 14, 1993. This memorandum was obtained under the Freedom of Informa tion Act

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In 1994 Charles L. Grizzle commented, "Regulatory enforcement is often a numbers game and we have now un leashed a bean-counting frenzy." Grizzle, "EPA--An Agency in Need of Strategic Realignment," Corporate Environmental Strategy 2 (1994): 51.

(13) See Brent Bowers, "Small Businesses Face Charges in Pollution Crackdown," Wall Street Journal, June 8, 1994, p. B2.

(14) Quoted in ibid.

(15) EPA literature is filled with references to increasing the "output" of its criminal program. "Output" is "the number of defendants charged with criminal environmental violations, the amount of criminal months sentenced in cases successfully prosecuted, and the amount of fines resulting from prosecutions." EPA, Enforcement Accomplishments Re port: FY 1992, p. 2-2. This report, for example, explains how the hiring of additional criminal agents "yielded sig nificant increases in most of the key outputs of the crimi nal program."

(16) Christopher Harris, Raymond C. Marshall, and Patrick O. Cavanaugh, Environmental Crimes (Colorado Springs: Shep- ard's/McGraw-Hill, 1994), p. INT-8. See also Kenneth A. Grady and Craig H. Zimmerman, "Preparing for the Onslaught: Search Warrants and Inspections in Environmental Criminal Cases," Natural Resources & Environment 8 (1994): 7. "It is impossible to be in 100 percent compliance with all the environmental laws all the time, and a candid EPA manager will admit as much" (p. 54).

(17) Quoted in Jonathan Weber, "Corporate Crime of the '90s," Los Angeles Times, November 25, 1989, p. A1.

(18) As the president of the American Civil Liberties Union, Nadine Strossen, has observed, "The central principle of the Bill of Rights is the indivisibility of rights. If any person or any group is deprived of any right, then all rights are endangered for all people and all groups." Strossen, "Politically Correct Speech and the First Amend ment," Cato Policy Report 13, no. 2 (March-April 1991): 6. Many environmental activists appreciate that point. Eco- activist Nancy Burnet, for example, has noted the importance of standing up for other people's rights. "You'd better do it, because your rights could be at stake next," she said. Quoted in Rik Scarce, Eco-Warriors: Understanding the Radi cal Environmental Movement (Chicago: Noble, 1990), p. 264.

(19) Wayne R. LaFave and Austin W. Scott Jr., Criminal Law, 2d ed. (St. Paul: West, 1986), p. 73.

[20] Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

[21] At least one lawyer has been indicted for advising a client to not clean up waste. Don J. DeBenedictis, "Hazardous Advice," ABA Journal, September 1991, p. 16.

[22] See Parker v. Levy, 417 U.S. 773 (1973) (Stewart, J., dissenting). "The absence of specificity in a criminal statute invites abuse on the part of prosecuting officials, who are left free to harass any individuals or groups who may be the object of official displeasure" (p. 775).

[23] United States v. Wiltberger, 18 U.S. 76, 96 (1820). "The rule that penal laws are to be construed strictly, is perhaps not much less old than [judicial] construction itself" (p. 95). See also United States v. Bass, 404 U.S. 336, 347-48 (1971); and Liparota v. United States, 471 U.S. 419, 427 (1985).

[24] 1 Paine 32, 34 (1810).

[25] 52 F. 917, 919 (1892).

[26] Nash v. United States, 229 U.S. 373, 377 (1913). But note Holmes's oft-cited opinion in McBoyle v. United States, 283 U.S. 25 (1931): "Although it is not likely that a crimi nal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear" (p. 27).

[27] United States v. Ragan, 314 U.S. 513, 523 (1942).

[28] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); and Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).

[29] "[It is] not unfair to require that one who deliberate ly goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Ibid. Compare Ricks v. District of Columbia, 414 F.2d 1097 (1968). "Liberty under law extends to the full range of conduct which the individual is free to pursue. Since most people shy away from legal violations, personal liberty is uncon stitutionally dampened when one can but doubt whether he is actually free to pursue particular conduct" (p. 1101).

[30] Marianne Lavelle, "Environmental Vise: Law, Compli ance," National Law Journal, August 30, 1993, p. S8.

[31] Judson W. Starr, Joseph G. Block, and John F. Cooney, "Prosecuting Pollution," in "Special Report: Protecting the Heavens and the Earth," Legal Times, May 31, 1993, pp. 8-10. One EPA official has been quoted as saying that approximate ly five people within the agency understand what a "hazard ous waste" is. According to that official, "What's hazard ous one year isn't--wasn't hazardous yesterday, is hazardous tomorrow, because we've changed the rules." Quoted in United States v. White, 766 F. Supp. 873, 882 (1991).

[32] See American Min. Congress v. U.S.E.P.A., 824 F.2d 1177, 1189 (1987).

[33] 384 U.S. 224, 226 (1966).

[34] Ibid., p. 234 (Harlan, Black, and Stewart, J.J., dis senting). Notwithstanding the strong argument of the dis senters, federal courts often rely on the Standard Oil precedent for the proposition that "federal water pollution laws, including their penal provisions, are [to be] con strued in a broad, rather than a narrow fashion." See United States v. Boldt, 929 F.2d 35, 41 (1991). See also Paul G. Nittoly, "Environmental Criminal Cases: The Dawn of a New Era," Seton Hall Law Review 21 (1991): 1135-36.

[35] 391 F. Supp. 1181 (1975).

[36] Ibid., p. 1187 (emphasis added).

[37] Former attorney general Richard Thornburgh acknowledged that the felony charges brought against the Exxon Corpora tion for the 1990 oil spill in Alaska's Prince William Sound were based on an "innovative" legal theory. See Mary Ellen Kris and Gail L. Vannelli, "Today's Criminal Environmental Enforcement Program: Why You May Be Vulnerable and Why You Should Guard against Prosecution through an Environmental Audit," Columbia Journal of Environmental Law 16 (1991): 237.

[38] This is another important difference between ordinary street criminals and environmental "criminals." Attorney Paul Kamenar writes, "Bank robbers and rapists cannot be hauled before an Administrative Law Judge or civilly en joined; the only remedy society has chosen for these malum in se crimes is criminal punishment." Kamenar, "The Truth: 'There Are No Environmental Crimes,'" California Lawyer, August 1993, p. 89.

[39] Quoted in Leslie Spencer, "Designated Inmates," Forbes, October 26, 1992, p. 100. See also Kevin A. Gaynor, Jodi C. Remer, and Thomas R. Bartman, "Environmental Criminal Prose cutions: Simple Fixes for a Flawed System," Villanova Envi ronmental Law Journal 3 (1992): 1-31. "[W]hether a viola tion is treated criminally, civilly or

administratively is more a function of what type of investigator learns of the violation first and in what judicial district the violation occurs, not the nature or environmental severity of the violation" (p. 4).

[40] James Madison, Federalist Paper 62, in The Federalist Papers, ed. Clinton Rossiter (New York: New American Li brary, 1961), p. 381.

[41] William L. Gardner and Adam H. Steinman, "'Knowing' Remains Key Word," National Law Journal, September 2, 1991, p. 28. See also Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984). "[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of government agents to the contrary" (p. 63). Campbell-Mohn, Breen, and Futrell point out that "[t]rying to 'know' environmental law may be impos sible. There is too much of it" (p. 66).

[42] Quoted in William P. Kucewicz, "Grime and Punishment," ECO, June 1993, p. 54.

[43] Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting).

[44] Steven T. Wax, "The Fourth Amendment, Administrative Searches and the Loss of Liberty," Environmental Law 18 (1988): 916.

[45] See U.S.E.P.A. v. Alyeska Pipeline Service Co., 836 F.2d 443, 447 (1988).

[46] Donovan v. Dewey, 452 U.S. 594, 612 (1981) (Stewart, J., dissenting).

[47] Quoted in John Wesley Hall Jr., Search and Seizure, 2d ed. (New York: Clark Boardman Callaghan, 1991), vol. 1, p. 7n. 35.

[48] Quoted in Davis v. United States, 328 U.S. 582, 604 (1946) (opinion of Frankfurter, J.).

[49] Wax, p. 912.

[50] District of Columbia v. Little, 178 F.2d 13, 17 (1949).

[51] Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).

[52] 328 U.S. 582 (1946).

[53] 452 U.S. 594, 598 (1981).

[54] Hall, vol. 2, p. 376. Justice Tom Clark observed in 1967 that this "newfangled" warrant system was "entirely foreign to Fourth Amendment standards." See v. City of Seattle, 387 U.S. 541, 547 (1967) (Clark, J., dissenting).

[55] 406 U.S. 311 (1972).

[56] Hall, vol. 2, p. 390.

[57] 42 U.S.C. 6928(d). See also Harris, Marshall, and Cavanaugh, p. 2-17, where the authors note that it is a felony under the Clean Air Act for a company to refuse an inspection of an "emissions source"; and Eva M. Fromm, "Com manding Respect: Criminal Sanctions for Environmental Crimes," St. Mary's Law Journal 21 (1990): 839-40, where she discusses sanctions under the Toxic Substances Control Act.

[58] See National Standard Co. v. Adamkus, 685 F. Supp. 1040, 1046n. 5 (1988); and Commonwealth of Pennsylvania v. Fiore, 526 A.2d 704 (1986).

[59] New York v. Burger, 482 U.S. 691, 721 (1987) (Brennan, J., dissenting).

[60] 387 U.S. 523, 530 (1967).

[61] See Spencer, p. 100. See also the discussion of coop eration between the Occupational Safety and Health Adminis tration and the EPA in James M. Strock, "Environmental Criminal Enforcement Priorities for the 1990s," George Washington Law Review 59 (1991): 925n. 48.

[62] New York v. Burger, 482 U.S. 691, 716 (1987).

[63] Oliver v. United States, 466 U.S. 170, 177 (1984). See also Robert W. Martin Jr., "EPA and Administrative Inspec tions," Florida State University Law Review 7 (1979): 123-37.

[64] United States v. Swann, 377 F. Supp. 1305 (1974). See also Dow Chemical Co. v. United States, 476 U.S. 227 (1986); Air Pollution Variance Board v. Western Alfalfa, 416 U.S. 861 (1974); and Department of Environmental Protection v. Emerson, 616 A.2d 1268, 1271 (1992).

[65] See Allan R. Gold, "For 'Recycling Cops,' Dragnets Turn Up Bottles," New York Times, November 23, 1990, p. B1. The Supreme Court sanctioned the warrantless search and seizure of garbage left for collection in California v. Greenwood, 486 U.S. 35 (1988).

[66] For some historical evidence that this is the appropri ate rule, see Dennis Stewart, "Administrative Searches and the Fourth Amendment: The Definition of 'Probable Cause' in Camara v. Municipal Court of the City and County of San Francisco," University of Missouri-Kansas City Law Review 36 (1968): 127n. 85.

[67] "[T]he most logical constitutional approach would be to require administrative inspection warrants in all situations where voluntary informed consent is not given, or where 'emergency circumstances' . . . do not exist." Michael R. Sonnenreich and Robert G. Pinco, "The Inspector Knocks: Administrative Inspection Warrants under an Expanded Fourth Amendment," Southwestern Law Journal 24 (1970): 434.

[68] See Little, p. 20. See also Frank v. Maryland, 359 U.S. 360, 382 (1959) (Douglas, J., dissenting).

[69] See LaFave and Scott, p. 212.

[70] See M. Diane Barber, "Fair Warning: The Deterioration of Scienter under Environmental Criminal Statutes," Loyola of Los Angeles Law Review 26 (1992): 105; and Judith Ianel li, "Lessening the Mens Rea Requirement for Hazardous Waste Violations," Vermont Law Review 16 (1994): 419.

[71] Harris, Marshall, and Cavanaugh, p. 5-6.

[72] LaFave and Scott, pp. 193-94.

[73] Quoted in Morissette v. United States, 342 U.S. 246, 250n. 4 (1952).

[74] 53 Pac. 978, 980 (1898).

[75] Morissette, p. 251.

[76] Richard G. Singer, "The Resurgence of Mens Rea," Boston College Law Review 30 (1989): 337.

[77] Lambert v. California, 355 U.S. 225, 228 (1957).

[78] Henry M. Hart Jr., "The Aims of the Criminal Law," Law and Contemporary Problems 23 (1958): 431. Professor Herbert Packer argues that the creation of strict liability crimes is both inefficacious and unjust. "It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventative or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of mens

rea." Packer, "Mens Rea and the Supreme Court," Su preme Court Review (1962): 109.

[79] 421 U.S. 658 (1975).

[80] Commonwealth v. Koczwara, 155 A.2d 825, 830 (1959).

[81] United States v. White Fuel Corporation, 498 F.2d 619, 621 (1974).

[82] Ibid., p. 623.

[83] United States v. Buckley, 934 F.2d 84, 87 (1991).

[84] 747 F.2d 1102, 1103-4 (1984).

[85] United States v. Rollins, 706 F. Supp. 742, 743 (1989). While it is true that Rollins's conviction was overturned by a sympathetic federal district court, the case is yet anoth er example of the injustices that take place when legisla tors pass strict liability legislation and then rely on the "sound discretion" of prosecutors with respect to case selection. Rollins is entitled to a full pardon and ought to be fully compensated for any legal expenses he incurred. [86] Hart, p. 423.

[87] Clean Air Act, 42 U.S.C. 7413(c)(3) (1982); and Clean Water Act, 33 U.S.C. 1319(c)(3) (1982).

[88] "[T]he willfulness or negligence of the actor [will] be imputed to him by virtue of his position of responsibility." United States v. Brittain, 931 F.2d 1413, 1419 (1991). See also United States v. Johnson & Towers, Inc., 741 F.2d 662, 665n. 3 (1984)

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[89] "Often, the responsible corporate officer will have played no role in the offense other than having failed to prevent it." Lisa Ann Harig, "Ignorance Is Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines," Duke Law Journal 42 (1992): 162.

[90] Harris, Marshall, and Cavanaugh, p. 5-11.

[91] See United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 50 (1991).

[92] Harris, Marshall, and Cavanaugh, p. 5-11.

[93] See Benjamin S. Sharp, "Environmental Enforcement Excesses: Overcriminalization and Too Severe Punishment," Environmental Law Reporter 21 (1991): 10,658. See also James V. DeLong, "The Criminalization of Just About Every thing," American Enterprise, March-April 1994, p. 26; and John C. Coffee Jr., "Does 'Unlawful' Mean 'Criminal'?: Reflections on the Disappearing Tort/Crime Distinction in American Law," Boston University Law Review 71 (1991): 193.

[94] James M. Strock, "Environmental Criminal Enforcement Priorities for the 1990s," George Washington Law Review 59 (1991): 929.

[95] Bartkus v. Illinois, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting).

[96] Ibid., p. 159.

[97] Ibid.

[98] Jett v. The Commonwealth, 18 Gratt. (59 Va.) 933, 959 (1867).

[99] Daniel A. Braun, "Praying to False Sovereigns: The Rule of Successive Prosecutions in the Age of Cooperative

Feder alism," American Journal of Criminal Law 20 (1992): 4.

[100] Ibid., p. 5.

[101] Bartkus, p. 155 (Black, J., dissenting).

[102] See David Masci, "Crossing State Lines: Criminal Law and the Federal Government," Congressional Quarterly, Novem ber 21, 1992, p. 3676. For a critique of this trend, see H. Scott Wallace, "The Drive to Federalize Is a Road to Ruin," Criminal Justice (Fall 1993): 8.

[103] See, for example, Dennis Cauchon, "Dual Prosecution Can Give One Crime Two Punishments," USA Today, March 29, 1993, p. 10A.

[104] 926 F.2d 584 (1991).

[105] Ibid., p. 587.

[106] EPA, Enforcement Accomplishments Report: FY 1993, p. 3-85.

[107] Braun, p. 10.

[108] See Arkansas v. Oklahoma, 60 U.S.L.W. 4176, 4178 (1992).

[109] Ibid. See also United States v. Colorado, 990 F.2d 1565 (1993).

[110] U.S. House Committee on the Judiciary, Environmental Crimes Act: Hearing on H.R. 3641 before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 101st Cong., 1st sess., December 12, 1989, p. 41. Robert Abrams, attorney general of New York, has said, "Looking to the future, it is certain that state and federal authorities will increasingly cooperate in their prosecutions." Abrams, "The Maturing Discipline of Environmental Prosecution," Columbia Journal of Environmental Law 16 (1991): 279.

[111] Bartkus, p. 169 (Brennan, J., dissenting).

[112] Thus, "in the Valdez oil spill case, a top Justice Department attorney began to signal--after a proposed $500 million settlement with Exxon collapsed--that the federal government might not be able to support the long-reaching, novel indictment it had brought under little-used environ mental laws." Stanley S. Arkin, "Be a Good Corporate Citi zen: Fight the Feds," Wall Street Journal, March 13, 1990.

[113] See Waller v. Florida, 397 U.S. 387 (1970).

[114] Robert W. Adler and Charles Lord, "Environmental Crimes: Raising the Stakes," George Washington Law Review 59 (1991): 813. See also Paul R. Portney, ed., Public Policies for Environmental Protection (Washington: Resources for the Future, 1990), pp. 249-53; and Lee Fisher, "Environmental Compliance," Daily Register, March 18, 1994, p. 3.

[115] The Toxic Substances Control Act (TSCA), for example, requires the owner of any polychlorinated biphenyl (PCB) equipment to report any spill of 10 or more pounds of mate rial containing PCBs at concentrations of 50 ppm or greater. See 40 CFR 761.120-.135. This regulatory system has been aptly referred to as the "TSCA self-confession program." EPA, Enforcement in the 1990s Project: Recommendations of the Analytical Workgroups (October, 1991), p. 5-1.

[116] "Companies will have the book thrown at them . . . if it is determined that managers have condoned or concealed crimes." Linda Himelstein and Catherine Yang, "A Warning Shot to Scare Polluters Straight," Business Week, November 22, 1993, p. 60. The federal sentencing guidelines "place an unprecedented premium on self-disclosure." Harris, Mar shall, and Cavanaugh, p. 9-20.

[117] 116 U.S. 616 (1886)

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[118] Ibid., pp. 631-32. The Court went on to say, "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself" (p. 633).

[119] Miranda v. Arizona, 384 U.S. 440, 460 (1966). Note that this legal principle existed well before the controver sial Miranda holding in 1966. One 19th-century English legal commentator sarcastically observed, "It is far pleas anter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." Quoted in Ellen Alderman and Caroline Ken- nedy, In Our Defense: The Bill of Rights in Action (New York: William Morrow, 1991), p. 171.

[120] Boyd, p. 635. During the Virginia ratification debate, James Madison said, "I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." Ratification of the Constitution by the States: Virginia, vol. 9 of The Documentary History of the Ratification of the Constitution, ed. John P. Kaminski and Gaspare J. Saladino (Madison: State Historical Society of Wisconsin, 1990), p. 990.

[121] 201 U.S. 43 (1906).

[122] Ibid., pp. 83-89 (Brewer, J., and Chief Justice Fuller, dissenting).

[123] 212 U.S. 481 (1909).

[124] Ibid. For a strong defense of the common law rule, see Jeffrey S. Parker, "Doctrine for Destruction: The Case of Corporate Criminal Liability," Managerial and Decision Economics (Sussex, England: John Wiley & Sons, forthcoming). See also "Developments in the Law--Corporate Crime: Regulat ing Corporate Behavior through Criminal Sanctions," Harvard Law Review 92 (1979): 1227.

[125] Many states continue to adhere to the common law rule. See Steven L. Humphreys, "An Enemy of the People: Prosecut ing the Corporate Polluter as a Common Law Criminal," Ameri can University Law Review 29 (1990): 351n. 263. [126] See, for example, Braswell v. United States, 487 U.S. 99 (1988).

[127] Shapiro v. United States, 335 U.S. 1, 70-71 (1948) (Jackson, J., dissenting).

[128] Ibid., p. 71.

[129] 487 U.S. 99 (1988).

[130] Ibid., p. 115.

[131] Ibid., p. 109. For a critique of this trend, see California v. Byers, 402 U.S. 424 (1971), in which Justice Black said, "One need only read with care the [older] cases cited in today's opinions to understand the shrinking proc ess to which the Court today subjects a vital safeguard of our Bill of Rights" (p. 459).

[132] Fisher v. United States, 425 U.S. 391, 407 (1976). The seriousness of this development can be appreciated by re calling Justice Louis Brandeis's famous dissent in Olmstead v. United States, 277 U.S. 438 (1928): "[The Boyd decision] will be remembered as long as civil liberty lives in the United States" (p. 474). Brandeis's warning was remarkably prophetic. See, for example, James Bovard, Lost Rights: The Destruction of American Liberty (New York: St. Martin's, 1994).

[133] Harris, Marshall, and Cavanaugh, p. 9-20.

[134] 15 U.S.C. 2610(c).

[135] Ibid.

[136] Apex Oil Co. v. United States, 530 F.2d 1291, 1295 (1976). See also United States v. Texas Pipe Line Co., 528 F. Supp. 728, 733 (1978), where reporting requirements of the Clean Water Act are held not to violate the privilege against self-incrimination.

[137] 42 U.S.C. 9601(22).

[138] United States v. Carr, 880 F.2d 1550 (1989).

[139] For an environmental vision that is consistent with the American constitutional framework, see Jerry Taylor, "Envi ronmental Reform," in The Cato Handbook for Congress (Wash ington: Cato Institute, 1995), pp. 253-63. See also Fred L. Smith Jr. and Kent Jeffreys, "A Free-Market Environmental Vision," in Market Liberalism: A Paradigm for the 21st Century (Washington: Cato Institute, 1993), pp. 389-402.

[140] Congress should also nullify the old maxim that igno rance of the law is no excuse. See Timothy Lynch, "Igno rance of the Law: Sometimes a Valid Defense," Legal Times, April 4, 1994, p. 22.

[141] Pennsylvania has protected its citizens from overzeal ous prosecutors with such a law for many years. See 1 Pa.C.S.A. 1208.

[142] See United States v. Freezo Brothers, Inc., 602 F.2d 1123, 1125-27 (1979); and United States v. Phelps Dodge Corporation, 391 F. Supp. 1181, 1183 (1975), in which a similar enforcement approach advocated by Sen. Edmund Muskie (D-Maine) and Rep. William H. Harsha (R-Ohio) is cited.