The Reality of Environmental Law in the
Prosecution of Environmental Crimes: A Reply to
the Department of Justice

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Presumably, the title of the Department of Justice’s response to my
environmental crimes article1—The Reality of Prosecuting Environmental
Criminals: A Response to Professor Lazarus2—is intended to suggest that
the article is yet another example of academic commentary divorced from
the “real” world of criminal prosecutions. There are, however, real problems
with the existing program, as defined by Congress, as implemented by
the executive branch, and as construed by the courts. The political contro-
versy that recently engulfed the Justice Department’s environmental crimes
program was quite real, with substantial costs for the program’s long term
viability and for the lives of individual career prosecutors who found
themselves swept into the imbroglio. The D.C. Circuit’s recent ruling in
General Electric Co. v. EPA,3 suggesting judicially-imposed due process
limitations on federal environmental criminal prosecutions is unlikely to
be an aberration.

Perhaps, as the Department maintains, the political controversy has now
subsided. But the Department would be mistaken to assume that the seeds
of that controversy have disappeared with a simple shift in personnel. For
the reasons described in my article, those seeds are deeply embedded in
the structure of environmental lawmaking and the competing features of
environmental and criminal law. The controversy will therefore likely
reoccur in the future, generated by either end of the political spectrum.
Such is the general pattern of the last twenty-five plus years of federal

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1. Richard J. Lazarus, Meeting the Demands of Integration in the Evolution of Environmental
Environmental Criminal Law].
Response to Professor Lazarus, 83 GEO. L.J. 2531 (1995) [hereinafter Justice Response]. The
response cautions that “[t]he views expressed in this response are the authors’ and do not
necessarily reflect the views of the Department of Justice.” Id. at 2531 n.*. Because the
article was coauthored by the Assistant Attorney General and Deputy Assistant Attorney
General of the Environment and Natural Resources Division, who were assisted by earlier
drafts written by the Chief of the Environmental Crimes Section and a senior trial attorney
in the Environmental Crimes Section, it seems fair to refer to the response as one prepared
by the Justice Department rather than merely by two persons who happen to work at the
Department. In so doing, however, I appreciate that the response does not necessarily
represent the Department’s formal views.
3. 53 F.3d 1324 (D.C. Cir. 1995); see Reforming Environmental Criminal Law, supra note 1,
at 2528 & nn. 512–18.

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environmental law. The current calm presents an opportunity to identify the problems underlying the federal environmental crimes program and to consider how they may be best redressed.

The report to the Associate Attorney General prepared by Department career lawyers in the spring of 1994, following a lengthy review of the federal environmental crimes program, includes the kind of thoughtful discussion that is needed. In contrast, the Department's public response to my article misses the opportunity to admit existing problems and to undertake a more thoughtful discussion concerning how best to reform the current program. The Department's response instead focuses on a parade of misdirected hypotheticals that sidesteps the Department's actual disagreement with my article. Nothing in my article suggests that the government would or should be incapable of prosecuting, convicting, and incarcerating individuals for the kind of conduct described in the Department's three hypotheticals. I agree with the Department's claim that the activities described in those hypotheticals are "clearly wrong and culpable" and that "[c]riminal laws should not be changed to hinder prosecution of these and similar violators." None of my suggested reforms, however, should prevent successful prosecution in those cases.

The Department's actual disagreement with my article instead concerns two interrelated issues: (1) the extent to which federal prosecutors should have discretion to decide what conduct is sufficiently culpable to warrant the felony incarceration remedy; and (2) the extent to which environmental law needs to criminalize nonculpable conduct to make it easier for prosecutors to obtain felony convictions of those individuals who are truly culpable. My article concludes that prosecutors currently have too much discretion because too much conduct is subject to felony sanctions, and that the resulting difficulties prosecutors have had in exercising that overly broad discretion are a primary cause of the environmental crimes controversy.

This reply is divided into two Parts. In Part I, I respond to the Department's erroneous claims that my thesis would "undermine . . . legitimate law enforcement" and "allow people guilty of egregious, culpable conduct to go free." In Part II, I refocus the discussion on the proper scope of

6. See Justice Response, supra note 2, at 2531.
7. Id. at 2532.
8. Id. The Department's claims are also unfortunate. They are sadly reminiscent of the kind of exaggerated rhetoric so recently (and mostly unfairly) directed at the Department by those claiming that the Department had failed to prosecute meritorious cases of environmental crimes.
prosecutorial discretion, which appears to be the issue on which the Department and I fundamentally disagree.

I. THE DEPARTMENT’S MISDIRECTED HYPOTHETICALS

The Department’s claim that my article’s proposals would cause individuals who engaged in the “egregious, culpable conduct” in the Department’s three proffered hypotheticals to “go free” rests on two mischaracterizations: (1) a claim that I recommend imposition of a “willfulness” standard for all environmental crimes,9 and (2) a claim that I recommend replacing all existing environmental criminal provisions with a statutory provision that would require the government to prove the defendant willfully or knowingly engaged in conduct that caused readily quantifiable or provable environmental harm.10 The Department may be right about what the impact of those proposals would be. My article, however, contains neither recommendation.

First, I do not state that Congress should adopt a willfulness standard that would apply to all environmental crimes.11 The article includes a threshold statement that “Congress needs to consider” the appropriateness of such a heightened mens rea requirement applicable to felonies.12 But in then addressing the merits of a willfulness standard, the article offers several specific reasons why such a higher standard “may be much too demanding” in environmental law.13 The article goes on to acknowledge explicitly the propriety of felony sanctions based on a reduced “knowing” or even the lesser “recklessness” mens rea, at least when the defendant’s conduct creates heightened environmental or health risks.14 A recommendation in favor of general congressional consideration, followed both by reasons why willfulness may generally be inappropriate and by an affirmative proposal for a felony offense with reduced mens rea, can hardly be fairly characterized as a recommendation in favor of an across-the-board congressional adoption of a willfulness standard.

The Department’s second characterization is likewise inaccurate. My article never endorses the notion that all existing environmental criminal provisions be “replaced” by a criminal penalty that applies only when the government proves that the defendant willfully (or knowingly) engaged in

9. Id. at 2536.
10. Id. at 2536-37.
11. The Department also overlooks that persons can be sent to jail for either misdemeanor offenses or felony offenses, albeit for significantly less time for a misdemeanor. My article never suggests that a willfulness standard should apply to misdemeanor sanctions, although current federal occupational health and safety laws have such a standard. See Reforming Environmental Criminal Law, supra note 1, at 2511 & n 448.
12. Id. at 2512.
13. Id.
14. Id. at 2515.
conduct that causes "readily quantifiable or provable" environmental harm. To be sure, the article states that the environmental laws could be amended to "include" a stand-alone felony endangerment provision in which the government could obtain a felony sanction without having to show a violation of any independent statutory or regulatory requirement. But the significant word here is "include." The article does not state that such a felony endangerment provision should "replace" all existing penalty provisions. Of course it shouldn't. As the article makes clear elsewhere, having distinct criminal penalty provisions applicable to the regulations themselves is essential to the integrity of the regulatory scheme. For this reason, the Department's criticism of my suggested stand-alone criminal endangerment provision is misdirected. Adding my proposed endangerment provision would make it possible for the government to bring criminal felony prosecutions in additional, not fewer, circumstances.

Finally, also lacking merit is the Department's claim that a "mistake of fact" defense would serve no purpose because "a defendant who can show an honest mistake of material fact avoids prosecution by negating the intent required for a felony conviction." What the Department overlooks is that the government is not required under existing case law to prove the defendant's knowledge of those facts that are made material by the underlying statutory or regulatory requirement at issue. That distinct prosecutorial advantage amounts to a significant departure from traditional criminal law norms, at least in the felony context. There is likely sufficient reason for some departure, given the complex nature of the facts relevant to environmental regulatory requirements, but there is also need for some balance. For some felony offenses, either the government should have to prove knowledge of certain critical facts, or an affirmative defense regarding those facts should be allowed.

II. THE PROPER SCOPE OF PROSECUTORIAL DISCRETION

There is an even more basic flaw in the Department's claim that my proposals would "seriously undermine legitimate law enforcement." The Department assumes that it should be the sole judge of what constitutes "legitimate" enforcement. As a practical matter, the Department currently

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15. Id. at 2515-16.
16. This point is underscored by the article's explicit reference to the civil endangerment provision already existing in most federal environmental laws as a possible model for a criminal endangerment provision. Id. at 2516 & n.468. Each of those existing civil provisions serves to supplement, not to replace, civil enforcement provisions that require the government to demonstrate a violation of a separate statutory or regulatory requirement.
17. See id. at 2510-12.
18. Justice Response, supra note 2, at 2537.
20. See id. at 2515, 2517.
is the sole judge, which is part of the problem. For reasons outlined in my article, the other two branches of government, both legislative and judicial, should be playing a more active role in making those determinations consistent with their constitutionally-assigned functions.\footnote{See Reforming Environmental Criminal Law, supra note 1, at 2507-29.}

The Department's response never faces this fundamental issue. The Department provides examples to support its view that "criminal environmental cases are brought to punish egregious and plainly wrongful conduct."\footnote{Id. at 2533 (emphasis added).} The Department states that "[i]n practice . . . prosecutions are not brought for failure to meet aspirations, but rather for specific bad conduct as measured against specific and definite standards."\footnote{Id. at 2532.}

What the Department does not acknowledge is that environmental criminal law does not itself impose any of those limitations. The scope of felony criminal liability under environmental law is far more sweeping. The issue is not just whether the Department has in fact brought many meritorious cases. Of course it has. The real question is to what extent does environmental criminal law confine potential felony liability to those kinds of cases. The Department is, in effect, saying that the public should simply trust the government to bring the right cases—against truly egregious conduct—as a matter of prosecutorial discretion.\footnote{Id. at 2533 (emphasis added).}

My own view is that it is wrong to rely so heavily and exclusively on the proper exercise of prosecutorial discretion.\footnote{The only external safeguard the government offers is the notion that the jury will, presumably by way of jury nullification, prevent the government from obtaining a conviction of those who are technically subject to felony sanction but are not morally culpable in the minds of the jurors. Id. (arguing that "in every case the prosecutor must be prepared to persuade a judge and jury that the defendant committed serious criminal conduct"). The possibility of jury nullification of the law in extreme cases, however, is hardly a reliable or consistent check on prosecutorial overreaching, let alone a sensible way to make public policy.} Prosecutors are not the sole experts in making these kinds of determinations, which ultimately reflect significant policy determinations. Nor are individual prosecutors immune from abusive overreaching, which may never be checked by a jury because of plea bargaining. As described in my article, Congress and the courts have legitimate, albeit different, roles to play in identifying the kinds of conduct warranting the imposition of a felony sanction, particularly the incarceration remedy, against an individual. The same kinds of factors prosecutors have properly taken into account (and should take into account in a more structured way)\footnote{A significant aspect of my thesis is that the Justice Department has in fact done a better job of exercising its prosecutorial discretion than its recent detractors appreciate. The Department nonetheless faults my characterization of the Department's past integrative efforts as "ad hoc." See Justice Response, supra note 2, at 2535 n.24. That characterization and}
environmental law's complexity, are factors that Congress should consider in defining the felony offenses in the first instance and that the courts should consider in their judicial construction. Notwithstanding the Department's claims, there is nothing radical or untoward about my recommenda-

other comparable ones, however, are precisely those used in the Department's own exhaustive review of the functioning of the Environmental Crimes Section. See JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 5, at 84 ("abrupt, seemingly ad hoc determinations"); id. at 114 (stating that from 1984 to 1987, the Environmental Crimes Section "reviewed prosecutions on an ad hoc basis" and from 1989 to 1992, "the Division departed further from the ideal"); id. at 115 (stating that "[t]he 1993 Bluesheet [in the United States Attorneys' Manual delineating the division of authority between Main Justice and the United States Attorney Offices] moves farther away from the most rational method for developing and implementing policy"); Reforming Environmental Criminal Law, supra note 1, at 2455 & n.221, 2463-64 & nn.251-55; see also JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 5, at 128 (stating that "prosecutors believe that the determination at the EPA whether a case is to be handled as a civil or criminal matter is a largely random process, rather than a considered decision"). Based on that internal departmental review of the operations of the Environmental Crimes Section, its authors recommend a series of specific measures aimed at reducing the ad hoc way in which the Section has exercised its prosecutorial discretion. See id. at 120-22. The Department's response to my article does not suggest that it has adopted those recommendations. The more recent changes in the United States Attorneys' Manual, adopted at the instigation of Congressman Dingell, see Reforming Environmental Criminal Law, supra note 1, at 2524 n.501, would seem instead to amount to a step away from the recommendations of the Department's internal review.

28. The Department also mistakenly claims that I have overstated the significance of environmental law's complexity in the fashioning of criminal penalties. Referring to the kinds of complex forensic evidence found in murder trials, the Department states that I have failed to distinguish the "occasionally complex types of proof that are required at trial from the far more straightforward facts confronted by the actors involved in the conduct at issue." Justice Response, supra note 2, at 2534; see also id. at 2534 n.18. Not so. The kind of complex inquiries at issue in environmental law, unlike in the classic murder trial upon which the Department relies, are not questions of identification. They pertain to the basic issue of whether a crime has been committed at all (i.e., whether the material is a "waste," whether the source is a "point" or "nonpoint" source, whether the property at issue is sufficiently inundated with water to constitute "navigable waters"). See Reforming Environmental Criminal Law, supra note 1, at 2432-36. Moreover, because those complex factual inquiries go to the existence of a statutory or regulatory violation in the first instance, those facts are relevant to the defendant's culpable mens rea. For those are facts that a defendant must know to be culpable. Ignorance of material facts, as the Department (at times) recognizes, is a defense. Finally, although the Department's response discounts the significance of environmental law's complexity in criminal prosecutions, both the Department's internal review of the federal environmental crimes program and its more focused review of the Rocky Flats prosecution advanced a very different view. Each saw environmental law's complexity as presenting significant challenges to prosecutors exercising their prosecutorial discretion in environmental cases. See JUSTICE ENVIRONMENTAL CRIMES REVIEW, supra note 5, at 37-41; Memorandum from Mark H. Dubester, Acting Chief, Public Corruption/Government Fraud Section of the United States Attorney's Office for the District of Columbia, and Steven Bunnell, Assistant United States Attorney, United States Attorney's Office for the District of Columbia, to Webster L. Hubbell, Associate Attorney General 11-12 (Apr. 8, 1994) (on file with The Georgetown Law Journal); see also Reforming Environmental Criminal Law, supra note 1, at 2497-503. (describing the impact of environmental law's complexity on prosecutorial discretion).
tion that the other two branches play a more active role: it is sensible policy.

But even more significant is what the Department fails to acknowledge. What the Department seeks to preserve here is not just the sweeping discretion it currently possesses to decide against whom to seek (or at least threaten to seek) felony conviction. At stake is what the government has to prove at trial once it initiates a prosecution. The Department does not want to have to prove facts approximating the kinds of facts traditionally required in felony prosecutions. The government asks, in effect, to be trusted to prosecute only those truly culpable defendants but then wants to be able to secure a conviction at trial against such a defendant without proving the facts that would be required to support a showing of culpability.

For the reasons described in my article, I do not believe that the government should be able to have it both ways. I can certainly understand why the Department of Justice prefers to retain such enormous prosecutorial power. But, absent a showing that the Department would somehow be unable to prove the necessary facts against defendants whose culpability warrants felony incarceration, I see no good reason why the Department should possess that power. As described in my article,\(^{29}\) there are many ways in which Congress can fashion environmental criminal laws that retain the Department’s ability to obtain felony convictions against those individuals deserving such sanctions, while simultaneously safeguarding against possible prosecutorial overreaching and abuse.

III. Conclusion

The Department and I certainly share a common premise: “Environmental crimes are real crimes with real victims, and . . . criminal enforcement is critical for an effective environmental protection program.”\(^{30}\) My appreciation for existing environmental protection laws, including their aspirational quality, required pervasiveness, inevitable complexity, and dynamic tendency is likewise no less than that of the Department’s. Those laws have accomplished much.

Where we part ways is in determining how best to establish the needed criminal dimension of environmental protection law and the respective roles of all three branches of government in that lawmaking process. Nothing in any of the various options I describe in my article would interfere with the establishment of a program that would serve as an effective “means of assuring a clean and healthy environment for the

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29. Reforming Environmental Criminal Law, supra note 1, at 2510-21.
American public.”31 They would instead enhance the program by providing for more focused consideration of the relevant issues by the executive branch, as well as by the other two branches of government. The Department should welcome the discussion of these reforms rather than succumbing to natural bureaucratic impulses to resist any suggestion of a reduction of the enormous power it wields in the current scheme.

31. Id.