



Essential Readings in Environmental Law
IUCN Academy of Environmental Law (www.iucnael.org)

UNITED STATES ENVIRONMENTAL CRIMINAL LAW

Sarah Adams-Schoen, Touro College, USA

OVERVIEW OF KEY SCHOLARSHIPS

General Introduction to Criminal Enforcement of Environmental Laws in the United States

1. Brickey, K. F., *Environmental Crime: Law, Policy, Prosecution* (Wolsters Kluwer, 2008).
2. Mintz, J. A. *et al.*, *Environmental Enforcement: Cases And Materials* (Carolina Academic Press, 2007).

U.S. Environmental Criminal Law: A Tug-of-War with Moral Culpability and Deterrence Pulling in Opposite Directions

A. Culpable Mental State

3. Lazarus, R. J., “Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves” (1996), 7 *Fordham Env'tl. L.J.* 861.
4. Mandiberg, S. F., “The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example” (1995), 25 *Env'tl. L.* 1165.
5. Uhlmann, D. M., “Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme” (2009), *Utah L. Rev.* 1223.

B. The Intersection of Administrative and Criminal Law

6. Eskridge Jr., W. N., and L. E. Baer, “The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan” (2008), 96 *Geo. L.J.* 1083.
7. Kahan, D.M., “Is Chevron Relevant to Federal Criminal Law?” (1996), 110 *Harv. L. Rev.* 469.
8. Solan, L. M., “Law, Language, and Lenity” (1998), 40 *Wm. & Mary L. Rev.* 57.

C. Government Investigatory Authority and Parallel Proceedings

9. Tenpas, R., Department of Justice, Environmental and Natural Resources Division Directive 2008-02, Parallel Proceedings Policy, Dec. 12, 2000, available at

http://www.justice.gov/enrd/ENRD_Assets/Directive_No_2008-02_Parallel_Proceedings_Policy_508.pdf.

10. Nakayama, G. Y., Final OECA Parallel Proceedings Policy, Sept. 24, 2007, available at <http://www2.epa.gov/sites/production/files/documents/parallel-proceedings-policy-09-24-07.pdf>.

D. Prosecutorial Discretion and Overcriminalization

11. Uhlmann, D.M., “Prosecutorial Discretion and Environmental Crime, (2014) forthcoming in 37 Harv. Envtl. L. Rev.

General Introduction to Criminal Enforcement of Environmental Laws in the United States

Environmental criminal prosecutions in the United States typically involve charges under one or more federal environmental statutes as well as charges under more traditional federal criminal statutes, such as the conspiracy, false statement or fraud statutes.

1. **K. Brickey** wrote the first and only law school text focused exclusively on environmental criminal law, *Environmental Crime: Law, Policy, Prosecution*. The New York Times referred to **K. Brickey**, who passed away in June 2013, as “the dean” of the white-collar criminal law field. **K. Brickey**’s text provides an accessible introduction to environmental criminal law. **K. Brickey** blends coverage of the criminal provisions of key federal environmental statutes with coverage of conventional white-collar criminal statutes federal prosecutors often invoke in environmental prosecutions. Although **K. Brickey**’s 2008 textbook has not been comprehensively updated, **K. Brickey** published a new chapter in 2011, which is accessible online. This recently added chapter examines criminal enforcement issues arising from the BP Deepwater Horizon Oil Spill.
2. **J. Mintz, C. Rechtschaffen, and R. Kuehn**’s textbook, entitled *Environmental Enforcement: Cases and Materials*, provides a good compliment to **K. Brickey**’s text. Although they limit their discussion of environmental criminal enforcement issues to a single chapter, their text fills in a number of gaps left by **K. Brickey**’s 2008 text. First, unlike the latter, **Mintz, Rechtschaffen, and Kuehn** comprehensively updated their text in 2012. Second, while **Brickey**’s expertise in white collar criminal law provides an important perspective for anyone studying environmental criminal law, **Mintz, Rechtschaffen, and Kuehn**’s text reflects the authors’ expertise in environmental law. Third, their text covers areas that, although not exclusively within the domain of the criminal lawyer, should be understood by any practitioner or scholar of environmental criminal law—including government investigative authority, parallel administrative enforcement, and alternatives to traditional enforcement.

Culpable Mental State

3. Through an examination of a colloquy between U.S. Supreme Court Justice Sandra Day O'Connor and counsel in the 1994 oral argument in the case, *Babbitt v. Sweet Home*, **R. Lazarus** explores a number of significant tensions in environmental criminal law in his essay, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*. *Sweet Home* involved a facial challenge to the validity of a U.S. administrative agency's interpretation of the scope of a provision of a federal environmental law. As **R. Lazarus** notes, *Sweet Home* presented a statutory construction question in an exclusively civil-administrative law matter, raising no obvious criminal law implications.

So, why point readers to a discussion of what essentially boiled down to a single footnote in a nearly 20-year old case? Because the issues raised by Justice O'Connor's questions remain both unresolved and of paramount importance to the legitimacy and operation of U.S. environmental criminal law. Specifically, Justice O'Connor's questions in the *Sweet Home* oral argument highlight the tension that existed in 1994 (and still exists today) between what **R. Lazarus** calls the morality and deterrence functions of criminal law. As **R. Lazarus** illustrates, these tensions play out most prominently with respect to the *mens rea* requirement, the intersection of administrative and criminal law (discussed below), and resulting uncertainties about the scope of environmental crimes—which leads to pervasive complaints about the breadth of prosecutorial discretion in this area of the law (discussed below).

4. In her article, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, **S. Mandiberg** demonstrates that the tug-of-war between punishing moral wrong doing and deterrence is not inherent to environmental crime specifically, but rather is a tension of regulatory crimes that has plagued courts and commentators since the inception of U.S. regulatory criminal laws in the early nineteenth century. Like **R. Lazarus**, **S. Mandiberg** criticizes the interpretation of the *mens rea* requirement adopted by most lower courts, which allows prosecution based on knowledge of the underlying conduct (e.g., discharging wastewater or draining a pond) despite a reasonable belief that the conduct was legally permissible. **S. Mandiberg** goes further, however, by carefully examining the history of Supreme Court regulatory crime jurisprudence, ultimately arguing that the prevailing approach to the *mens rea* requirement disregards the Court's application of common law *mens rea* principles to the term "knowingly" in regulatory criminal statutes. Consistent with most of this Supreme Court jurisprudence, **S. Mandiberg** recommends an approach to the *mens rea* requirement that would treat public welfare environmental crimes as general intent crimes and non-public welfare environmental crimes as specific intent crimes. Because a reasonable mistaken belief that the circumstances make one's conduct lawful is a defense to a general intent crime, this approach would overcome the current problem that allows

for felony conviction of persons who have a reasonable belief that their conduct was permitted. Indeed, by closing this trap for the unwary, such a construction of the *mens rea* requirement in environmental crimes statutes would respond to the concerns implicit in Justice O'Connor's questions in *Sweet Home* by striking a balance between moral culpability and deterrence.

Of course, the discourse on the *mens rea* requirement is not one-sided, and students, scholars, and practitioners interested in this topic should also read arguments in favor of the lower courts' current prevailing approach to the meaning of the knowledge requirement in federal environmental statutes

5. **D. Uhlmann** contends, in his article, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, that corporations and individuals subject to the environmental laws should be presumed to know their legal obligations. Among other things, he argues that "to hold otherwise might create an incentive for companies to be ignorant of the law, which would undermine environmental protection efforts. By requiring knowledge of the facts, Congress properly imposed on prosecutors the burden of proving that defendants knew about the conduct involved, while placing the burden on the regulated community to conform its conduct to the environmental laws."

Integration of Administrative and Criminal Law

In addition to highlighting the central tug-of-war of the *mens rea* requirement in environmental criminal law, **R. Lazarus's** article discussed above also shows how Justice O'Connor's questions in *Sweet Home* highlighted one particular tension in dual civil-criminal enforcement schemes — the unresolved question of how much deference courts should apply to agency constructions of a statute that has criminal implications in light of a competing canon of statutory construction—the "rule of lenity." Under the agency deference doctrines, courts defer to an agency's reasonable interpretation of an ambiguous statute the agency is charged with implementing. However, under the rule of lenity, statutory ambiguities are resolved in favor of the criminal accused. Agency deference doctrines arguably further accountability, consistency and efficiency interests. The rule of lenity furthers due process and fair notice interests, and promotes separation of powers principles by "strick[ing] the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." Thus, as **R. Lazarus** argues, the tension between these competing approaches to statutory construction is another example of the tug-of-war between "two reinforcing, yet potentially divergent functions" — "an important symbolic statement regarding the moral culpability of the transgressor [and]... [the prevention of] irreversible, irremediable harm to the natural environment, the precise magnitude of which is often highly uncertain given the inevitable complexity of ecosystems." Students, scholars and practitioners of environmental criminal law—and

indeed environmental law generally—should therefore familiarize themselves with the issues underlying this debate.

6. **W. Eskridge Jr. and L. Baer's** article, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, is an excellent analysis of the Supreme Court's treatment of deference doctrines and the rule of lenity, which the authors refer to as an "anti-deference doctrine." **W. Eskridge Jr. and L. Baer** present data from their empirical study of all 1,014 Supreme Court cases between Chevron and Hamdan in which an agency interpretation of a statute was at issue. As their data demonstrates, the Court has applied the entire continuum of deference doctrines, no deference, and the rule of lenity in various post-Chevron criminal cases, with little to no explanation as to why in any given case a doctrine does or does not apply.
7. and 8. Two articles that will give readers an understanding of some of the range of positions on the subject include *Is Chevron Relevant to Federal Criminal Law?* by **D. Kahan** and *Law, Language, and Lenity* by **L.M. Solan**. **D. Kahan** argues that the values of coherence, temperance and judiciousness would be served by giving the Department of Justice the authority to interpret vague criminal statutes, because, he argues, the Department of Justice has more experience than the courts with issues of crime and punishment and is not swayed by the agendas of aggressive U.S. Attorneys. **L. M. Solan**, on the other hand, argues that, although a Department of Justice interpretation would create a more coherent jurisprudence at any particular time than one in which the circuits are split, coherence over time would decrease as a result of the elimination of *stare decisis* in criminal law and the varying interpretations that would be put forth by the agency under different administrations.

Government Investigatory Authority and Parallel Proceedings

The dual enforcement mechanisms of most federal environmental statutes also raise serious concerns regarding the investigative authority of government agencies. One such area of concern surrounds parallel investigations of alleged administrative or civil and criminal violations.

- 9 and 10. Students, scholars, and practitioners of environmental criminal law should be familiar with the numerous policy and training documents published by the U.S. Department of Justice's *Environmental and Natural Resources Division and the Environmental Protection Agency's Office of Enforcement*. Two such documents are *ENRD's Directive 2008-02, Parallel Proceedings Policy* and *EPA's OECA Parallel Proceedings Policy*. These policy directives describe the agencies' policies for coordinated enforcement of criminal and civil provisions of federal environmental statutes, including policies for joint investigations, charging and litigation decisions, and case resolutions.

Prosecutorial Discretion and Overcriminalization

Federal environmental statutes make few distinctions between acts that could result in criminal, civil, or administrative enforcement, and, where distinctions exist, they often lack rationality. Not surprisingly, the lack of clear, rational distinctions between culpable and non-culpable conduct, combined with minimal mental state requirements, and arguably overwhelmingly complex regulatory schemes lead to persistent complaints by both supporters and critics of environmental enforcement of inappropriate prosecutorial discretion and overcriminalization.

11. In his forthcoming article, *Prosecutorial Discretion and Environmental Crime*, **D. Uhlmann** asks: “If the same violation often could give rise to criminal, civil, or administrative enforcement—and if mental state requirements only preclude criminal enforcement for a small subset of violations—what determines which environmental violations result in criminal prosecution?” He answers: “The answer is the exercise of prosecutorial discretion...” **D. Uhlmann** argues that this discretion is appropriate as long as prosecutors reserve criminal enforcement for violations that “involve one or more of the following aggravating factors: (1) significant environmental harm or public health effects; (2) deceptive or misleading conduct; (3) operating outside the regulatory system; or (4) repetitive violations.” **D. Uhlmann** then presents results of an empirical study that shows that these factors were present in nearly all cases investigated by EPA that resulted in criminal charges from 2005 to 2010. He argues that this data suggests that prosecutors are exercising their discretion reasonably under environmental laws. Query, however, whether this data also suggests, among other things, that interpreting the *mens rea* requirement in environmental criminal laws as allowing for a defense based on a reasonable belief that the conduct was legally permissible would not unduly burden the majority of environmental criminal prosecutions?