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SENTENCING TRENDS IN ENVIRONMENTAL LAW: AN "INFORMED" PUBLIC RESPONSE

LAUREN A. LUNDIN*

INTRODUCTION

DURING the last two decades, unprecedented numbers of people have been sentenced to prison in the United States. A number of explanations for this phenomenon abound, but at least one primary factor is the justice system responding to what it perceives to be a growing public demand for prison sentences. Other reasons for the increase in incarceration include: increased media emphasis on crime, the abandonment of rehabilitation as a method for dealing with criminals, the introduction of sentencing guidelines, the equating of punishment with imprisonment, the political advantage politicians perceive in a "tough" approach to crime and the continued conviction that punishment deters criminal behavior.

As was the case with street crime in the 1980's, current environmental law enforcement efforts focus on expanding the definition of behavior that may be subject to incarceration.¹ As environmental law looks to the option of imprisonment, however, the balance of the criminal justice system is beginning to develop alternatives to imprisonment in reaction to the rise in street crime.² State and local governments seek alternatives to prison because they can no longer justify the high costs and overcrowding in prison when the goals of deterring crime and reducing the number of criminals on the streets are not being achieved.³ This Article attempts to highlight some of these

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1. See generally Joseph F. Sheley, *Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination*, 67 TUL. L. REV. 2273 (1993) (custody-deterrence approach has failed to reduce crime levels); Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149 (1990) (examines the reasons for incarceration and its impact on prisoners).

2. Walter J. Dickey, *Sentencing, Parole, and Community Supervision*, in DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY 136, 152 (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

3. See generally David H. Norris & Thomas Peters, *Fiscal Responsibility and Criminal Sentencing in Illinois: The Time for Change is Now*, 26 J. MARSHALL L. REV. 317 (1993) (examination of more cost-efficient alternatives to imprisonment); John Doble, *Using Alternative Sentences: The Views of the People of Alabama*, 73 JUDICATURE 220 (1990) (states are increasingly considering the use of intermediate

changing criminal justice practices and their impact on environmental law enforcement.

Parts I through III evaluate sentencing policies in environmental law and discuss problems encountered when environmental law offenders are given prison terms. Part I traces the history of sentencing in the environmental context and then addresses the impact that changes in criminal law enforcement have had on the environmental law field in the past decade. It examines the expansion of criminal liability as a result of the changing definition of environmental crimes and the increasingly severe sentences under the Federal Sentencing Guidelines.

Part II explains why incarceration, as a response to environmental crimes, is increasingly favored, but questions whether offenders are actually serving time in prison. This section also posits the theory that the trend in environmental law is part of a larger trend against white-collar crime.

Part III discusses several problems associated with imprisoning environmental offenders and suggests that the legal system could gainfully impose less costly, non-prison sentences. This alternative is supported by legal scholars who are apprehensive about using prison sentences, not only because of the cost and overcrowding, but also because imprisonment might actually deter socially desirable behavior and harshly punish those who inadvertently break complex laws and commit minor violations.⁴ Additionally, critics claim that imprisonment will not aid the goal of reducing the generation and improper disposal of hazardous wastes.⁵ After exploring these problems, this Article discusses possible solutions.

Part IV incorporates a survey which demonstrates how the public perceives sentencing policies, and challenges the policy of subjecting environmental offenders to incarceration. The survey is used in determining how members of the public respond to the imprisonment trend and whether the participants, after learning about the specifics of the offense, the offender and the sentencing guidelines, favor prison or an alternative sentence.⁶ It starts with a pre-test, during which the participants sentenced three offenders based upon details about the offense and offender. Next, the participants discussed the purposes and costs of sentencing and learned about alternatives to prison. Following the discussion, participants resented the offenders during a post-test. Consistent with similar surveys in Alabama and Delaware,

sanctions or alternatives to incarceration because of limited financial resources and prison overcrowding).

4. See discussion *infra* part III.A.

5. See discussion *infra* part III.B.

6. Lauren A. Lundin, A Wisconsin Survey: Public Perceptions Regarding the Punishment of White-Collar Offenders (Summer 1992) (unpublished survey, on file with author) [hereinafter Survey].

the post-test results make greater use of alternative sentences such as community service.⁷

The final section of the survey analyzes the significance of these conclusions. The survey found that the informed participants favored alternative sentences over prison for certain offenders. The section questions the imprisonment trend in environmental law, partially in response to the survey results and argues for the need for further study to gauge public attitudes toward sentencing.

I. THE HISTORY OF SENTENCING AND SENTENCING TRENDS IN ENVIRONMENTAL LAW

This section's historical overview, which focuses on society's response to street crime as an analog to the environmental crime problem, offers insight into designing sentences for environmental offenders. The environmental law field must grapple with many of the same sentencing problems that street crimes have dealt with since the 1980's: high prison costs, prison overcrowding and problems with deterrence.

A. *History of Sentencing*

Before one can understand how environmental offenders are sentenced, the environmental punishment scheme must first be placed into its historical perspective. This section provides a brief overview of three major sentencing periods: the classical, indeterminacy and rules and punishment periods. Exploring past and present sentencing trends raises the question of who has been, and who should be, responsible for constructing sentencing policies and designing sentences.

1. Classical Period

The classical or "justice" model dominated sentencing philosophies during the nineteenth and early twentieth centuries.⁸ During that period, the sole purpose of sentencing was viewed as punishment and was directly proportional to society's determination of the seriousness of an offense. The legislature created statutes that contained fixed punishments, so that an offender's personal background and individual personality usually did not factor into his sentence.

7. *Intermediate Sanctions and Public Opinion*, OVERCROWDED TIMES, May 1991, at 12 and *Survey Shows Alabamians Support Alternatives*, OVERCROWDED TIMES, Jan. 1991, at 2, reprinted in WISCONSIN CORRECTIONAL SYSTEM REVIEW PANEL, FINAL REPORT app. at 14-23 (1991) [hereinafter FINAL REPORT].

8. Dickey, *supra* note 2, 136-38.

2. Indeterminacy Period

Around the 1920's and 1930's, the positivist, rehabilitative and indeterminacy sentencing period replaced the justice model.⁹ The offender's character was viewed as a more significant factor in sentencing than the seriousness of the offense. The courts designed sentences to reflect the defendant's cultural background and personal deficiencies. The system perceived a person's crime as an outgrowth of personal illness rather than an intentional act. Trained probation and parole agents examined the offender to determine the specific illness and to propose treatment. The goal was to treat and to "normalize" an offender, not merely to punish him.¹⁰ The system used probation, parole and frequently indeterminate sentences to rehabilitate the offender. Society preferred that administrative courts, such as parole boards, determine sentences rather than leave the process in the control of the legislature.

3. Rules and Punishment Period

In the 1970's, rules and punishment usurped the rehabilitative model of sentencing for environmental crime. Rehabilitation was viewed as too lenient and unable to affect offenders. The legal system was perceived as unfairly using its discretion in imposing harsh sentences, particularly when dealing with poor, non-white offenders.¹¹ The hopes for rehabilitation were eclipsed by the goal of punishment, and prison became its most utilized form.

Rigid rules were promulgated to fix standard levels of punishment. The expectation was that the rules would remove the court's discretion and its ability to impose discriminatory sentences. The Federal Sentencing Guidelines (Guidelines) reflect a rule-based punishment scheme, harkening back to the classical period.¹² However, legislatures, courts and administrative tribunals still contribute substantially to sentencing decisions, and states also have not automatically and uniformly changed their sentencing statutes.¹³

4. Recent Developments

The punishment scheme is largely responsible for the current unprecedented problems with jail overcrowding. Due to the continued perception that prison can deter and punish, the system is sending more people to jail. Increased prison sentencing is a product of the

9. SANDRA SHANE-DUBOW ET AL., U.S. DEP'T OF JUSTICE, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 6 (1985).

10. *Id.*

11. Dickey, *supra* note 2, at 152-53.

12. See discussion *supra* part I.A.1.

13. Dickey, *supra* note 2, at 152-53.

legal system's response to public pressure to lock up dangerous criminals.¹⁴

It may be no coincidence that a movement is underway to find alternatives to prison sentencing. State and local governments are considering intermediate sanctions that try to mitigate prison costs and overcrowding. These sanctions are favored because people no longer strongly believe that issuing prison terms can deter crime or accomplish other goals.

Who should design these alternative sentences? From observations about the sentencing practices of Wisconsin parole agents, this section proposes following the suggestion of legal scholars: allow people who have daily experience with sentencing to influence sentencing decisions.¹⁵

Legal scholars explain that the beliefs of lawmakers regarding sentencing and the goals they accomplish influence how the laws are written and enforced.¹⁶ As these convictions are modified, the laws change in response. This accounts for the dramatic changes from punishment to indeterminate sentencing and then back to the classical model. Legislators design sentences based more upon their own opinions and the political reaction than on whether a sentence actually accomplishes a particular goal. For example, today's prevailing notion continues to be that prison can deter, despite the fact that those who have direct experience with imprisoned offenders state that prison does not, in fact, accomplish this goal.¹⁷ Legal scholars argue that the legal system should not rely on ideology to design sentences, but instead should directly observe sentencing practices and design sentences based on that information.¹⁸

A Wisconsin-based sentencing system exemplifies how sentencers can design effective sentences once they understand how sentencing works. Probation and parole agents in Wisconsin have achieved some success in sentencing because they had the discretion to design sentences according to their experience and expertise,¹⁹ as well as the needs of the individual and the community. Before designing their systems, agents spent time with the offenders and the community to determine the sentence that would be most beneficial for both. This is a system where people "in the field" determined "what works for what offenders in what settings."²⁰ Although the system is not regulated by a strict rules and punishment model, the sentences are

14. *Id.*

15. *Id.* at 157-58.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 160.

20. *Id.* at 163.

"checked by guidelines, supervisors, the people in the community with whom they work, and the culture of the correctional system" ²¹

B. *Sentencing Trends in Environmental Law*

Environmental law is going through a trend similar to the cycle experienced during the classical era, in stark contrast with the current attitude supporting alternative sentencing for street crimes. Specifically, the environmental law field is labelling more offenses as criminal and attempting to punish offenders through prison sentences. In the same fashion that sentencers changed their attitude in punishing street crime, those who sentence environmental offenders should question this imprisonment trend. The trend is reflected by: (1) the Guidelines' harsher sanctions for criminal environmental offenders; (2) more prosecutions because of expanded definitions of criminal behavior; and (3) the government's increasing interest in criminal prosecution of environmental offenders.

1. *Harsher Sanctions Under the Guidelines*

Before the 1980's, administrative or civil sentences were common for all but the most egregious environmental offenders.²² Today, administrative and civil sanctions are touted as punishments of the past, as the justice system attacks environmental offenders through criminal prosecutions and threats of mandatory jail sentences under the Guidelines.²³ For example, under the Guidelines, an environmental offender received a thirty-six month prison sentence for filling

21. *Id.*

22. Kevin A. Gaynor, *A System Spinning Out of Control*, ENVTL. F., May-June 1990, at 28; David Stipp, *Toxic Turpitude: Environmental Crime Can Land Executives in Prison These Days*, WALL ST. J., Sept. 10, 1990, at A1.

23. *Sentencing Rules are Tough on White-Collar Crime*, PA. L.J. REP., Apr. 20, 1987, at 5F; Stuart E. Abrams & Vincent J. Connelly, *Prosecutors Get Tough on White-Collar Crime*, NAT'L L. J., Nov. 27, 1989, at 15; Stipp, *supra* note 14, at 1; Paul Thomson, *A New Cost of Business for Environmental Violators*, ENVTL. F., May-June 1990, at 32; Marianne Lavelle, *Guidelines Get Tepid Reception; Defining Environmental Crimes*, NAT'L L.J., Aug. 26, 1991, at 3; Allan R. Gold, *Increasingly, Prison Term is the Price for Polluters*, N.Y. TIMES, Feb. 15, 1991, at B6; Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work That Remains*, 59 GEO. WASH. L. REV. 900, 900-02 (1991); Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889, 893-99 (1991); Robert I. McMurray & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1143-44 (1986); see generally Linda S. Weiss-Malik, *Imposing Penal Sanctions on the Unwary Corporate Executive: The Unveiled Corporate Criminal*, 17 U. TOL. L. REV. 383 (1986).

in wetlands,²⁴ an offense that traditionally carried only civil penalties.²⁵

Harsher criminal penalties were designed for environmental violators under the Guidelines²⁶ which became effective on November 1, 1987.²⁷ The Guidelines contain sentences that are mandatory, fixed and virtually inflexible to ensure uniformity and certainty in sentencing.²⁸ The lengths of sentences are computed through rigid mathematical equations.²⁹

The Guidelines' strict sentencing policies prohibit courts from considering most aspects of a defendant's background when sentencing. The Guidelines reflect the congressional mandate that "in recommending a term of imprisonment or length of a term of imprisonment," it is inappropriate to consider the defendant's "education, vocational skills, employment record, [or] family ties"³⁰ This

24. *United States v. Pozsgai*, 20 Env't Rep. (BNA) 579 (E.D. Pa. July 21, 1989), *aff'd*, 897 F.2d 524 (3d Cir. 1990), *cert. denied*, 498 U.S. 812 (1990); *see also United States v. Mills*, 19 Env't Rep. (BNA) 2633 (N.D. Fla. Apr. 17, 1989) (twenty-one month prison sentence); Paul D. Kamenar, *Environmental Protection or Enforcement Overkill*, ENVTL. F., May-June 1990, at 29 (discussion of recent criminal prosecutions).

25. Judson W. Starr & Thomas I. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come and it is Hard Time*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,096, 10,097 n.9 (1990) (citing *United States v. Holland*, No. 83-891 (S.D. Fla. filed May 27, 1988)); *see also United States v. Marathon Dev. Corp.*, No. 87-129 (D. Mass. filed Apr. 4, 1987), *aff'd*, 867 F.2d 96 (1st Cir. 1989) (suspended six-month sentence and one year probation); *United States v. Bill Walters Cos.*, No. 88-375 (D. Colo. filed Dec. 22, 1989) (pre-sentencing guidelines case where defendant was fined \$10,000 and received no prison term).

26. Chapter Eight of the Guidelines contains strict sentences for most corporate defendants. However, Chapter Eight partially bars environmental offenses from its fine provisions, thereby forcing courts to follow pre-Guideline sentences for corporate environmental offenders. United States Sentencing Commission, *Guidelines Manual*, §§ 8A1.1-8E1.3 (Nov. 1992); Gary S. Lincenberg, *Sentencing Environmental Cases*, 29 AM. CRIM. L. REV. 1235, 1239-40, 1256-57 (1992); Richard S. Gruner, *U.S. Sentencing Commission Proposals on Corporate Fines and Probation May Shock Corporate America Because They Propose Treating White-Collar Offenders as Criminals*, NAT'L L.J., Apr. 2, 1990, at 13; *Environmental Crimes and the Sentencing Guidelines*, *supra* note 17, at 10,102; Jeffery M. Kaplan & William K. Perry, *The High Cost of Corporate Crime*, MGMT. ACCT., Dec. 1991, at 43. Chapter Eight's provisions correspond to the culpability and pecuniary gains of a company. U.S.S.G. § 8C2.4, comment.

27. Rules are contained in the United States Sentencing Commission, *Guidelines Manual* (Nov. 1992). *See Gold*, *supra* note 15, at B6 (potential criminal penalties for white-collar offenders under the Guidelines); Stephen D. Ramsey, *Corporate Officer and Director Liability Under Superfund and the Resource Conservation and Recovery Act*, C317 ALI-ABA 271 (1988) [hereinafter Ramsey I]; Stephen D. Ramsey, *Corporate Officer and Director Liability Under Superfund and the Resource Conservation and Recovery Act* (PLI Corp. L. & Prac. Course Handbook Series no. 660, 1989) [hereinafter Ramsey II]; Thomson, *supra* note 23, at 26.

28. Starr & Kelly, *supra* note 25, at 10,097.

29. Some of the goals of the Guidelines are to remove jurisdictional disparity and ensure consistency in sentencing. *Id.*, *Sentencing Rules are Tough on White-Collar Crime*, *supra* note 23, at 5F.

30. 28 U.S.C. § 994(e) (1988).

attempt to stop courts from unfairly sentencing various offenders results in limiting a court's discretion in sentencing.

Though the Guidelines are quite rigid, they do contain some flexibility; however, this flexibility works, in most instances, to the detriment of the environmental offender.³¹ For example, if defendants abuse their position of trust or use their education, training, or position to commit an offense, the Guidelines allow an upward adjustment,³² possibly subjecting the offender to mandatory incarceration. The Guidelines also make certain upward adjustments if the defendant was an organizer, leader, manager or supervisor.³³

2. Recently Expanded Definitions of Criminal Environmental Behavior

The justice system's ability to criminally prosecute is now simpler as a consequence of legally expanded definitions of criminal behavior. The Guidelines treat first-offenders, regulatory offenders and those who have not harmed the environment as criminals. In addition to case law support of the Guidelines' treatment of these offenders, the federal criminal environmental statutes and the "responsible corporate officer" doctrine (RCO) lower the culpability standard. This combination expands the scope of behavior subject to criminal prosecution beyond anything previously seen.

a. Guidelines

Under the Guidelines, the spectrum of environmental offenses subject to criminal sanctions has been greatly widened. First-offenders, permit violators and those responsible for the emission of non-toxic substances into the environment are subject to criminal sentences under Chapter Two, Part Q, entitled "Offenses Involving the Environment."

31. See Starr & Kelly, *supra* note 25, at 10,098 (detailed discussion of flexibility and rigidity of Guidelines in relation to environmental offenders); Edward M. Shaw, *Plea Bargaining White-Collar Offenses Under Federal Sentencing Guidelines*, N.Y. L.J., May 25, 1990, at 1; Robert G. Morvillo, *Upward Mobility Under the Sentencing Guidelines*, N.Y. L.J., Oct. 1, 1991, at 3. For a detailed analysis of criminal environmental provisions under the Guidelines, see generally Lincenberg, *supra* note 26.

The following Guidelines' sections provide flexibility in sentencing: (1) U.S.S.G. § 3B1.2 allows a downward adjustment if the defendant played a "mitigating role" in the crime; (2) under 18 U.S.C. § 3553(b), a court is free to depart from the guidelines based upon any "aggravating or mitigating circumstance, of a kind, or to a degree, not adequately taken into consideration" by the guidelines. U.S.S.G. § 5K2.0; (3) several specific departures are listed in U.S.S.G. §§ 5K2.1-5K2.16.

Section 5K2.0 (Grounds for Departure) states that it is impossible to make an exhaustive list of mitigating factors. Section 5K2.16 provides circumstances under which voluntary disclosure will result in downward departures, but few cases may meet the six requirements.

32. See U.S.S.G. § 3B1.3.

33. See U.S.S.G. § 3B1.1(c).

First-time environmental offenders are subject to criminal penalties under the Guidelines' "knowing endangerment" section despite a previously clean criminal record.³⁴ For example, if a first-time offender violates this section under RCRA, CWA or CAA, he will receive a base offense level of twenty-four points which translates into a mandatory jail sentence of fifty-one to sixty-three months.³⁵

An offender is also subject to criminal penalties if he does not have a permit for his environmental activities,³⁶ regardless of whether or not the activities caused environmental harm.³⁷ The Guidelines require a court to enhance an environmental offender's base offense level of eight levels to twelve levels if the "offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit."³⁸ Under the "Sentencing Table," an offense level of twelve requires mandatory imprisonment ranging from ten to sixteen months.³⁹

Finally, under section 2Q1.2(b)(1), even if a discharge of "hazardous or toxic" substances does not harm the environment, the base offense level of eight, automatically increases by four levels.⁴⁰ An offense level of twelve subjects the offender to a mandatory ten to sixteen month jail sentence.⁴¹

b. Case Law Supports These Expansions

Case law supports the Guidelines' use of prison sentences for first-offenders for contamination violations which do not result in harm.⁴² In *United States v. Ellen*,⁴³ the court held that first-time environmental offenses are serious enough to warrant incarceration. While *United States v. Bogas*⁴⁴ stated that a court can make an enhancement based

34. See U.S.S.G. § 2Q1.1.

35. See discussion *infra* part I.B.2.c.

36. The Commission refers to regulatory offenses as reporting, recording, keeping, tampering, and falsification violations involving hazardous substances or other pollutants, as well as mishandling of toxic substances or other pollutants. See U.S.S.G. § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification); U.S.S.G. § 2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification); U.S.S.G. Ch.1, Pt. A(4)(f). See also Lincenberg, *supra* note 26, at 1240-41.

37. See U.S.S.G. § 2Q1.2(b)(4).

38. *Id.*

39. After determining the offense level and the Criminal History category under Chapter Four, the court uses the sentencing table in Chapter Five to compute the sentence. U.S.S.G. Ch. 5, Pt. A (Sentencing Table).

40. U.S.S.G. § 2Q1.2(b)(1)(B). A continuous discharge of such a substance increases the offense level by 6. U.S.S.G. § 2Q1.2(b)(1)(A).

41. U.S.S.G. Ch. 5, Pt. A (Sentencing Table).

42. *United States v. Sellers*, 926 F.2d 410, 418 (5th Cir. 1991) (allowing a four-level increase under subsection (b)(1) after discovering one barrel of hazardous waste was leaking, although the discovery occurred one day after the disposal).

43. 961 F.2d 462 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 217 (1992).

44. 920 F.2d 363, 367-68 (6th Cir. 1990); see U.S.S.G. § 2Q1.2(b)(1)(B) (1991); Lincenberg, *supra* note 26, at 1242.

upon actual contamination and not harm. Furthermore, *United States v. Goldfaden*⁴⁵ held that regardless of contamination or harm to the environment, under section 2Q1.2(b)(1)(A), a six-level increase for continuous discharge is acceptable.

Not only do the Guidelines and cases broaden the scope of the definition of criminal behavior, but many cases have expanded criminal liability through the interpretation of the knowledge element contained in federal criminal environmental statutes.

c. Lower Knowledge Standard

Environmental offenders are subject to criminal sanctions under the following federal environmental statutes: Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund),⁴⁶ the Resource Conservation and Recovery Act (RCRA),⁴⁷ the Clean Water Act (CWA),⁴⁸ the Clean Air Act (CAA),⁴⁹ the Toxic Substances Control Act (TSCA)⁵⁰ and many other non-environmental criminal statutes.⁵¹ Under most of these federal environmental statutes, knowledge is a required element for criminal prosecution.

1. Courts' Interpretations of the Knowledge Element

Courts frequently interpret the statutes in a manner that lowers the level of knowledge necessary for a criminal conviction.⁵² This is exemplified by judicial interpretations of RCRA.

Under RCRA,⁵³ criminal liability attaches if one: (1) "knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter . . ." to an unpermitted facility,⁵⁴ or (2) "knowingly treats, stores, or disposes of any hazardous waste . . . (A)

45. 959 F.2d 1324, 1331 (5th Cir. 1992), *appeal after remand*, 987 F.2d 225 (5th Cir. 1993).

46. 42 U.S.C. § 9603(b)(3) (Supp. 1993). *See generally* 42 U.S.C. §§ 9601-9657 (1988).

47. 42 U.S.C. §§ 6928(d)-(e) (Supp. 1993). *See generally* 42 U.S.C. §§ 6901-6987 (1988); 15 U.S.C. §§ 6991-6992k (Supp. 1993).

48. 33 U.S.C. §§ 1319(c), 1319(c)(3) (Supp. 1993). *See generally* 33 U.S.C. §§ 1251-1376 (1986); 15 U.S.C. §§ 1377-1387 (Supp. 1993).

49. 42 U.S.C. § 7413(c) (Supp. 1993). *See generally* 42 U.S.C. §§ 7401-7642 (1988); 15 U.S.C. §§ 7651-7671q (Supp. 1993).

50. 15 U.S.C. § 2615(b) (Supp. 1993). *See generally* 15 U.S.C. §§ 2601-2629 (1982); 15 U.S.C. §§ 2641-2692 (Supp. 1993).

51. *See Ramsey I, supra* note 27 (detailed and comprehensive list of criminal sanctions under federal environmental statutes); *Ramsey II, supra* note 27.

52. *See generally* Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821 (1990) (comprehensive discussion of the criminal liability requirements and corresponding case law under RCRA, CERCLA, CWA, CAA, TSCA, as well as other applicable criminal statutes).

53. 42 U.S.C. § 6928(d); *see also* 42 U.S.C. § 6928(e) (provision on "knowing endangerment").

54. 42 U.S.C. § 6928(d)(1).

without a permit . . . ; or (B) in knowing violation of any material condition or requirement of such permit; or (C) in knowing violation of any material condition or requirement of . . . " a regulation or standard.⁵⁵

Courts differ on how to interpret the knowledge requirement under RCRA.⁵⁶ The question is whether to require knowledge for every element of the statute. If such knowledge were required, potential offenders would have to (1) know that they are handling waste identified or listed as hazardous, (2) know that they must have a permit to handle such waste, and (3) know that they are lacking a permit or are operating in violation of permit requirements.

The Third Circuit has interpreted RCRA as requiring such knowledge.⁵⁷ Other courts have disagreed and have held that a defendant does not have to know whether the statute lists the waste as hazardous or whether the receiving facility has a permit. The following court decisions illustrate the lower standard promulgated under RCRA.

In *United States v. Dee*,⁵⁸ the lower court said that an offender must have "knowledge of the hazardous character of the wastes."⁵⁹ The Fourth Circuit noted one case where the standard was that a "defendant had to know that the chemicals had potential to harm others or the environment."⁶⁰ Since most chemicals have that potential, the court's interpretation treats the knowledge standard as a strict liability standard.⁶¹

In contrast, the court in *United States v. Greer*,⁶² held that the government need not prove that a defendant knew the Environmental Protection Agency (EPA) listed or identified the waste as hazardous.

55. 42 U.S.C. §§ 6928(d)(2)(A)-(C).

56. See generally Fromm, *supra* note 52 (detailed discussion of case law interpreting the knowledge requirement for federal criminal environmental statutes).

57. *United States v. Johnson & Towers*, 741 F.2d 662, 664-65 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). For a discussion of the knowledge requirement as applied to corporate officers, see Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders*, 45 Sw. L.J. 1199 (1991)). *Contra United States v. Hoflin*, 800 F.2d 1033, 1038-39 (9th Cir. 1989) (holding that "knowledge of the absence of a permit is not an element of the offense"), *cert. denied*, 493 U.S. 1083 (1990); see also *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1503-04 (11th Cir. 1986) (holding that permit knowledge was required, but admitting that it was unclear as to how broadly the requirement extended).

58. 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).

59. *Id.* at 745.

60. *Id.* (citing *United States v. Greer*, 850 F.2d 1447, 1450 (11th Cir. 1988), *reh'g denied*, 860 F.2d 1092 (11th Cir. 1988)).

61. Jed S. Rakoff, *Moral Qualms About Environmental Prosecutions*, N.Y. L.J., July 11, 1991, at 3; see Fromm, *supra* note 52, at 832 n.71, for a list of cases where the court has imposed a jail sentence under RCRA. See also *Hayes Int'l Corp.*, 786 F.2d at 1503 (government need only prove the substance had the "potential to be harmful to others, or the environment").

62. 850 F.2d 1447, 1450 (11th Cir. 1988), *reh'g denied*, 860 F.2d 1092 (11th Cir. 1988).

The court in *Greer* imposed a five-year prison term, suspending all but ninety days of the sentence.⁶³ Hence, an offender can face criminal prosecution regardless of whether they knew their actions were illegal.

In *United States v. Johnson & Towers, Inc.*,⁶⁴ the defendant sent waste to an unpermitted facility. The court required proof that the defendant knew the facility did not have a permit.⁶⁵ The court left room for future courts to lower the threshold level required to prove knowledge. The court said that the jury need not find actual knowledge. Rather, it could infer knowledge based upon that person's position in the company and his relationship to other employees.⁶⁶ Again, it was established that even if the officers were unaware of the illegality of their actions — in this case that the facility did not have a permit — they would be deemed to have violated the relevant criminal provisions.

ii. RCO Doctrine

Corporate officers are also subject to greater criminal prosecution under the RCO doctrine. Prosecutors can use the RCO doctrine to avoid proving knowledge under federal criminal environmental statutes. The RCO doctrine comes from case law based on the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA).⁶⁷ Courts borrowed the RCO doctrine from FDCA case law because both are public welfare statutes.⁶⁸ The theory of the RCO doctrine is that corporate officers are criminally accountable for the illegal activities of their employees. More precisely, they are accountable if they "had, by reason of [their] position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct the violation complained of, and that [they] failed to do so."⁶⁹ Under the RCO doctrine, courts can criminally convict officers regardless of whether they knew of the illegal activities.⁷⁰

The Supreme Court promulgated this doctrine in *United States v. Dotterweich*.⁷¹ In *Dotterweich*, the court first debated the issue of

63. See *Enforcement: Hazardous Waste Site Operator to be Jailed for Criminal Actions at Florida Facilities*, 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 832 (1986).

64. 741 F.2d at 662.

65. *Id.* at 669.

66. *Id.* at 670; *contra* *United States v. Hoflin*, 800 F.2d 1033, 1038-39 (9th Cir. 1989) (holding that "knowledge of the absence of a permit is not an element of the offense"), *cert. denied*, 493 U.S. 1083 (1990).

67. 21 U.S.C. § 342(a) (1988).

68. *McMurray & Ramsey*, *supra* note 23, at 1152-53.

69. *United States v. Park*, 421 U.S. 658, 673-74 (1975).

70. *Ramsey I*, *supra* note 27; *Ramsey II*, *supra* note 27; Keith A. Onsdorff & James M. Mesnard, *The Responsible Corporate Officer Doctrine in RCRA Criminal Enforcement: What You Don't Know Can Hurt You*, 22 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,099, 10,101-05 (1992); Morgan & Obermann, *supra* note 57, at 1200-09.

71. 320 U.S. 277 (1943) (federal government prosecuted a corporate president under the Food, Drug and Cosmetic Act for shipping adulterated drugs).

criminally convicting a corporate officer because of his position.⁷² And as much as thirty years later, the Supreme Court in *United States v. Park*⁷³ affirmed its policy of holding a corporate officer criminally liable because of his position in the corporation. The Court imposed a duty upon the officer to detect and remedy violations of the FDCA.⁷⁴

Prosecutors have, with varying success, used the language of the RCO doctrine to avoid having to prove that the officers knew of employees' illegal activities. The following two cases highlight the use of the RCO doctrine. In the first case, the government explicitly argued RCO doctrine language but without success. In the second case, the government used more subtle language.⁷⁵ Establishing the officer's knowledge through circumstantial evidence, the latter arguments succeeded.

In *United States v. MacDonald & Watson Waste Oil Co.*,⁷⁶ the government charged the president of the defendant corporation under RCRA with knowingly transporting and causing such transportation of hazardous waste to an unpermitted facility. The government admitted that it lacked evidence that the defendant knew of the violations. Nonetheless, the government argued under the RCO doctrine that the officer either knew or should have known about the illegal transport. The court sentenced the officer to three years imprisonment,⁷⁷ but the United States Court of Appeals for the First Circuit vacated and remanded the conviction.⁷⁸ The court refused to apply the RCO doctrine because the statute specifically required knowledge and the president would be subject to mandatory jail time under the Guidelines.⁷⁹ The court, however, left the door open for future arguments and said that the government could prove knowledge based upon circumstantial evidence, such as the officer's "position and responsibility" within the company or the "willful blindness to the facts constituting the offense."⁸⁰

In *United States v. Baytank (Houston), Inc.*,⁸¹ the government achieved greater success. Here, the United States Court of Appeals for the Fifth Circuit did not mention the RCO doctrine, but the opinion did contain RCO language. The court said that knowledge could be inferred from circumstantial evidence of the corporate officer's

72. *Id.*

73. 421 U.S. at 658.

74. *Id.* at 673-74.

75. Rakoff, *supra* note 61, at 3.

76. 933 F.2d 35 (1st Cir. 1991).

77. OFFICE OF ENFORCEMENT, EPA, SUMMARY OF CRIMINAL PROSECUTIONS RESULTING FROM ENVIRONMENTAL INVESTIGATIONS 75-76 (1992) [hereinafter SUMMARY 1992].

78. *MacDonald*, 933 F.2d at 61.

79. *Id.* at 55.

80. *Id.*

81. 934 F.2d 599 (5th Cir. 1991).

"detailed knowledge of and control over" company operations.⁸² Therefore, the jury was free to conclude, based upon only circumstantial evidence, that the defendant participated in the illegal storage.⁸³

The government can now use RCO doctrine language to subject corporate officers to a greater risk of being imprisoned. The RCO doctrine allows the government to criminally convict more offenders because it eases the burden of proving the officers' knowledge of their subordinates' activities.

iii. States

An environmental violator is also subject to criminal penalties under state environmental laws. Various states have increased the number of criminal prosecutions and lowered the requisite standard of proof of knowledge.⁸⁴ Not all states have followed suit. Some states use higher culpability standards or lighter sentences to protect an offender from criminal prosecution.⁸⁵

Nevertheless, environmental offenders are now subject to greater threats of incarceration because the Guidelines, environmental statutes and case law are defining more forms of environmental behavior as criminal.

3. Increased Interest in Criminally Prosecuting Offenders

Today, prosecutors have the necessary weapons to imprison environmental offenders and have openly discussed their desire to aggressively prosecute.⁸⁶ The justice system has vowed to prosecute not only "midnight dumpers," those who intentionally dump waste, but also

82. *Id.* at 617.

83. *Id.* at 616-17. The executive vice-president and operations manager obtained new trials because the court felt the jury confused them with the corporate defendant. *Id.* at 618. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?*, *Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) (discussion of white-collar crime prosecutions).

84. Most states have statutes containing criminal provisions. See John DeCicco & Edward Bonanno, *A Comparative Analysis of the Criminal Environmental Laws of the Fifty States: The Need for Statutory Uniformity as a Catalyst for Effective Enforcement of Existing and Proposed Laws*, 5 J. LAND USE & ENVT'L. L. 1, 2 & n.1 (1989); James M. McElfish, Jr., *State Hazardous Waste Crimes*, 17 ENVT'L. L. REP. (ENVT'L. L. INST.) 10,465 (1987) (a discussion of particular states that utilize strict liability statutes, such as California, New Jersey, Pennsylvania and Michigan); Robert J. Kafin & Gail S. Port, *Criminal Sanctions Lead to Higher Fines and Jail*, NAT'L L.J., July 23, 1990, at 20.

85. McElfish, *supra* note 84.

86. Fromm, *supra* note 52, at 823; see generally Onsdorff & Mesnard, *supra* note 70 (discussion of the justice department's expansive prosecution of corporate officers, whose action often ignores the traditional requirement of personal knowledge of criminal conduct); Ramsey II, *supra* note 27 (discussion of the EPA's and the DOJ's increased use of criminal indictments to improve deterrence by holding corporate officers directly responsible).

environmental offenders who have never faced criminal prosecution.⁸⁷ "[T]he days of community service and probation are over."⁸⁸ "Our message about environmental law is simple. Polluters will pay Environmental crime is no less a crime than theft or blackmail or assault. And more and more assuredly, if you do the crime, you'll do the time."⁸⁹

Statistics suggest that many environmental offenders have spent time in jail, adding to the belief that impending criminal prosecution is a reality.⁹⁰ Business magazines caution the business community to take note of new and existing laws because "[m]ore than half the individuals convicted for environmental crimes in fiscal year 1990 were given prison sentences; [and] about 85 percent of those serve their time."⁹¹ These magazines warn that the average prison term is "in excess of one year."⁹² Other articles indicate even greater sanctions, stating that individuals convicted of environmental felonies "will likely serve two years in jail."⁹³ One article warns the environmental industry that they are targets for criminal prosecution.⁹⁴ An EPA spokesperson states that "[w]hite-collar corporate criminals can expect no breaks from this administration . . . and those we convict can count on stiff sentences."⁹⁵

Thus, an arsenal of criminal sanctions is in place to translate the tough-on-crime attitude into appropriate action. Environmental offenders are on notice that they may face jail time. All of the legal tools are available to successfully prosecute and imprison environmental violators.

II. FACTORS ACCOUNTING FOR THE INCARCERATION TREND

Before examining the factors accounting for the trend, it is important to understand that the following list of reasons is not exhaustive. Explaining the reasons behind a legal change is a complex and potentially impossible task. A multitude of factors must be considered, such

87. *Criminal Enforcement of Environmental Laws Seeks Deterrence Amid Need for Increased Coordination, Training, Public Awareness*, 17 Env't Rep. (BNA) 800 (Sept. 26, 1986) [hereinafter *Criminal Enforcement of Environmental Laws*].

88. Gaynor, *supra* note 22, at 28.

89. *Enforcement: Enforcement Actions at EPA Continue to Climb in Civil, Criminal Cases, Penalty Assessments*, 22 Env't Rep. (BNA) 1832 (Nov. 29, 1991) (statement of previous EPA Administrator, William K. Reilly) [hereinafter *Enforcement Actions at EPA*].

90. Morgan & Obermann, *supra* note 57; see generally Jane M. Kravcik & Vicki O. Materman, *A Private Sector Perspective on Federal Environmental Enforcement*, C722 ALI-ABA 509 (1992).

91. Ripley Hotch, *A Criminal Trap For Business*, 79 NATION'S BUS., Sept. 1991, at 56.

92. *Id.*

93. Gaynor, *supra* note 22, at 28; Stipp, *supra* note 22, at 1.

94. Hotch, *supra* note 91, at 56.

95. *Enforcement Actions At EPA*, *supra* note 89, at 1832.

as the influence of various activist groups, lawmakers, lobbyists, the media, the historical context, etc.⁹⁶ Hence, this section highlights some of the factors driving the imprisonment trend.

A. *What Accounts for the Trend?*

Several factors account for the tough-on-crime stance in environmental law. Environmental law violations are a subset of white-collar crime, and therefore incarceration is more frequent as a result of the national repugnance towards white-collar crime. The law is responding to public opinion polls demanding the incarceration of white-collar criminals, particularly in the context of environmental law.

1. What Is White-Collar Crime?

Legal scholars do not agree on the definition of white-collar crime. Some scholars define the term as "a crime committed by a person of respectability and high social status in the course of his [or her] occupation."⁹⁷ Other socio-legal theorists flatly reject this definition. They argue against making a distinction between street crime and white-collar crime. They consider these definitions meaningless and "a lion's den from which no tracks return."⁹⁸ They argue that anyone can embezzle, evade taxes or murder. More precisely, the status of the individual committing the crime does not correlate to an offense. Thus, some legal theorists consider any distinction between white-collar crime and street crime without merit. In short, there is no particular person nor crime that is exclusively white-collar.

Even though legal scholars disagree on the precise definition, there is a vague public perception of what the term "white-collar" crime means. This Article's purpose is not to define the term, but rather to convey an understanding of how the term relates to sentencing in environmental law. For the most part, the term white-collar crime represents a stereotype to which the public and justice system react. The stereotype includes assumptions about an offender's social status, education, employment and economic situation and drives the tough-on-crime movement.

96. See generally Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 YALE L.J. 1545 (1989); Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579 (1989); David M. Trubek & John Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program, or Pandora's Box?*, 14 LAW & SOC. INQUIRY 3 (1989).

97. John Braithwaite, *Challenging Just Deserts: Punishing the White-Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723, 724 (1982).

98. Travis Hirschi & Michael R. Gottfredson, *The Significance of White-Collar Crime For a General Theory of Crime*, 27 CRIMINOLOGY 359, 362-63 (1989).

2. Factors That Explain The Criminalization Trend

Numerous events have combined to produce the societal hostility toward white-collar crime. For instance, statistics support the belief that certain white-collar offenses cost the community more money than common crimes.⁹⁹ Additionally, continued production of industrial waste and pollution has sparked calls for holding producers accountable.¹⁰⁰ Oil spills, securities trading manipulations, defense procurement frauds and the collapse of many savings and loans are high profile incidents that capture the public eye. Continual media exposure increases the public awareness of and hostility toward those who caused such calamities.¹⁰¹ These incidents aided in producing the negative public reaction to white-collar offenders.

The adverse attitude towards white-collar crime stems not only from high profile incidents, but also from a belief that the legal system rarely imposes jail sentences on these offenders. Many feel that those of higher social class possess an unfair legal advantage which allows them to avoid harsh legal punishment.¹⁰² "There is a feeling in America . . . that the white-collar criminal is able to steal with the pencil and get away with it. . . . [However, a]n 18-year-old kid who steals with the gun goes to prison for a long time. . . . There is something unfair . . . about that system, I think. We're going to change it."¹⁰³ The Guidelines address this incongruity by ensuring that prison sentences are meted out without regard to socio-economic status.¹⁰⁴

Despite the Guidelines' attempt to remedy the inequalities, the public has lost faith in their country's ability to treat all citizens fairly. Incarcerating a white-collar offender instills the sense of fairness and equality that society feels is lacking. This exemplifies the public's wish to fight economic imbalances between social classes, and relieve current social and economic problems. "Americans believe that 'the rich

99. Braithwaite, *supra* note 97, at 743.

100. Michele Kuruc, Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93 (1985); Charles F. Helsten & Lynn A. Williams, *Individual Liability for Corporate Environmental Violations: An Unpleasant Consequence of Obtaining Corporate Control*, 2 DEPAUL BUS. L.J. 97 (1989).

101. Gruner, *supra* note 26, at 13. See Elkan Abramowitz, *White-Collar Crime: From Wrist Slaps to Hard Time*, N.Y. L.J., Jan. 8, 1991, at 3 (discussing the S & L scandals and public disgust for the greed of the 1980's).

102. See David Weisburd et al., *Class, Status, and the Punishment of White-Collar Criminals*, 15 LAW & SOC. INQUIRY 223, 224 (1990) (discussing findings that for the same type of offense, those of higher social status were more likely to be imprisoned than those of lower status).

103. *Sentencing Rules Are Tough on White-Collar Crime*, *supra* note 23, at 5F "A person who mugs a city by polluting should receive at least as strong a punishment as the person who mugs an individual," states James M. Strock, the Environmental Protection Agency's criminal enforcement chief. Stipp, *supra* note 22, at 1.

104. See *Sentencing Rules Are Tough on White-Collar Crime*, *supra* note 23, at 5F (statement of Commission Chairman and Federal Appeals Court Judge, William Wilkins, Jr.).

get richer and the poor get prison.'"¹⁰⁵ The public wants to hold the rich and poor equally accountable for their misdeeds.¹⁰⁶ The movement against white-collar crime is an attempt to reassert equal justice for all.¹⁰⁷

3. Public Opinion Reflected in Polls

The justice system is beginning to put environmental offenders in jail in response to a clear public support for jail terms.¹⁰⁸ Public pressure is "causing agencies to seek criminal enforcement when administrative or civil actions were previously deemed sufficient in similar situations."¹⁰⁹ "Enforcement of criminal liability for environmental crimes is on the rise . . . [i]n response to . . . growing public pressure."¹¹⁰

Indeed, numerous public opinion polls show that popular support exists for incarcerating white-collar offenders. For instance, some polls find that the public ranks both pollution and worker safety offenses as equal to, or more serious than, robbery and certain violent crimes.¹¹¹ Articles discussing prison sentences for environmental offenders either state as fact that the public supports prison sentences, or cite a poll which reflects that support.¹¹²

The following discusses only a small sample of the polls showing public disdain for environmental offenders. A recent survey conducted by the Opinion Research Corporation found that "eighty-four

105. See Steven C. Bennett, *Developments in the Movement Against Corporate Crime*, 65 N.Y.U. L. REV. 871-72 (1990) (quoting F. CULLEN ET AL., *CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND* (1987)). See Abramowitz, *supra* note 101, at 3 (discussion of public frustrations over the widening gap between the rich and the poor).

106. John E. Stoner, *Corporate Criminal Liability for Homicide: Can the Criminal Law Control Corporate Behavior?*, 38 Sw. L.J. 1275 (1985); Starr, *supra* note 23, at 900-02.

107. Bennett, *supra* note 105, at 873.

108. Abramowitz, *supra* note 101, at 3.

109. Fromm, *supra* note 52, at 823.

110. Morgan & Obermann, *supra* note 57, at 1199.

111. Judson W. Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379, 380 n.1 (1986); Braithwaite, *supra* note 87, at 732-38; F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How To Remain on the Civil Side*, 17 ENVTL. L. REP. (ENVTL. L. INST.) 10,478, 10,485 (Dec. 1987); *Criminal Enforcement of Environmental Laws*, *supra* note 86.

112. Michael L. Benson et al., *Local Prosecutors and Corporate Crime*, 36 CRIME & DELINQUENCY LITERATURE 356 (1990); Abramowitz, *supra* note 92, at 3; Gruner, *supra* note 26, at 13; Starr, *supra* note 111, at 380 n.1; Ramsey I, *supra* note 27; Rakoff, *supra* note 61, at 3; Weiss-Malik, *supra* note 23, at 386-87; Stoner, *supra* note 106; Habicht, *supra* note 111, at 10,485; Hedman, *supra* note 23; Steven L. Humphreys, Comment, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311, 354 (1990); *General Policy: Americans Say Environment Worsening, Greater Regulation Needed, Survey Says*, 21 ENV'T REP. (BNA) 818 (Aug. 24, 1990); *Criminal Enforcement of Environmental Laws*, *supra* note 86.

percent of Americans believe that damaging the environment is a serious crime."¹¹³ Another survey stated that seventy-five percent of the public favors holding executives personally liable for their company's environmental offenses.¹¹⁴ Correspondingly, about eighty percent of the executives polled said that price fixing and insider trading are as serious as environmental crimes.¹¹⁵ A Department of Justice poll found that the public ranks environmental offenses as the seventh most severe type of crime, behind violent crimes such as murder. The poll ranked environmental offenses as more serious than certain white-collar offenses such as public corruption.¹¹⁶

The legal system is therefore increasing the criminal prosecution of environmental violators in response to the perception that the public desires such action.¹¹⁷ "In today's environment, there are new expectations of the American public that we have a responsibility to prosecute environmental crimes to the fullest extent possible," stated a spokesperson for the Department of Justice.¹¹⁸ Criminal prosecution for the Exxon Valdez oil spill is an example of the government's response to public demands for justice.¹¹⁹ The criminal statutes used against Exxon require proof that it willfully or knowingly violated the acts, even though "it stretches the imagination to even infer that Exxon had the intent to willfully or knowingly spill the oil."¹²⁰

The tough-on-crime stance developed because of current social and political sentiment. Negative public response to recent white-collar crimes and certain environmental disasters has created a social climate that is decidedly "anti-offender". At the same time, our legal system seems to be acutely aware of, and responsive to, public opinion. Accordingly, this combination of the public's reactions and our legal system's response has created a substantial threat to future offenders.

B. *Is This Threat Real?*

This section examines whether prison sentences are merely threatened, or whether environmental offenders are actually spending

113. Hotch, *supra* note 91, at 56.

114. David Stipp, *Execs Get Little Sympathy For Crimes Against Nature*, WALL ST. J., Mar. 11, 1992, at B2 (referring to a survey conducted by Arthur D. Little Inc., a Cambridge, Massachusetts consulting firm).

115. *Id.*

116. *Criminal Enforcement of Environmental Laws*, *supra* note 87; see also Stipp, *supra* note 114, at B2; Starr, *supra* note 111, at 380 n.1.

117. Hotch, *supra* note 91, at 56 (regulators assume the public favors increasing criminal prosecution of white-collar offenders).

118. *Id.*

119. Fromm, *supra* note 52, at 824. On the other hand, no criminal charges were brought against any corporate officers, which exemplifies the limited use of criminal sanctions. Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 784 (1991).

120. Fromm, *supra* note 52, at 824.

time in jail.¹²¹ It will present sentencing statistics compiled by the EPA, DOJ and various legal researchers. The section will also examine who the justice system is sending to jail and for what reasons.

The EPA and DOJ compiled federal sentencing statistics for environmental offenders. Unfortunately, exact statistical data on sentencing is unavailable because not all prosecuted cases or sentences are published.¹²² Comprehensive data is also not available for state environmental criminal enforcement.¹²³

In the annual "Enforcement Accomplishments Report,"¹²⁴ the EPA explains that "... 53% of all referrals, 65% of all months sentenced, and 68% of all penalties assessed have occurred during the last three years."¹²⁵ In 1991, the government prosecuted forty-eight criminal environmental cases, resulting in seventy-two convictions, forty-five of which were against individuals and twenty-seven of which were against organizations.¹²⁶ Although more environmental offenders are being prosecuted, these statistics do not reflect the actual incarceration rate.

The following are some known statistics on the incarceration rate for federal environmental offenders. In 1991, individuals were sentenced to 963 months (eighty years) of incarceration before suspen-

121. The statistics do not examine whether offenders from small companies are being sent to jail more than other criminals. One detailed American study concluded that "those of higher status were more likely to receive an imprisonment sanction, and when sentenced to prison, they were likely to receive longer prison terms than comparable offenders of lower status." Weisburd et al., *supra* note 102, at 224.

122. See generally Abramowitz, *supra* note 101, at 3 (discussion of jail sentences imposed on those involved in the S & L scandals); Braithwaite, *supra* note 97, at 747 (discussion of the impossibility of accessing statistics on the number of white-collar crimes committed).

123. OFFICE OF ENFORCEMENT, EPA, FY 1991 STATE-BY-STATE ENFORCEMENT DATA SUMMARIES 3 (1992).

124. The following articles also list statistical data: Kafin & Port, *supra* note 84, at 20; Ramsey I, *supra* note 27; *Enforcement: Stewart Reflects on DOJ's Status, Limits in Environmental Enforcement Litigation*, 21 Env't Rep. (BNA) 1564 (Dec. 14, 1990); *Criminal Enforcement: 1990 Record Year for Criminal Enforcement of Environmental Violators, Justice Announces*, 21 Env't Rep. (BNA) 1397 (Nov. 23, 1990); see generally Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. CRIM. L. & CRIMINOLOGY 1054 (1992).

125. OFFICE OF ENFORCEMENT, EPA, FY 1991 EPA ENFORCEMENT ACCOMPLISHMENTS REPORT 3-3 (1992) [hereinafter FY 1991 EPA REPORT].

126. *Environmental Enforcement Reaches Record Levels in Fiscal Year 1991*, EPA Press Release (Nov. 25, 1991). Most of the 1991 criminal cases were prosecuted under RCRA for violations of hazardous waste regulations and under the CWA for dumping waste into waterways or municipal sewer systems. The EPA reclaimed over \$1.75 billion in civil penalties, private party cleanup commitments, and EPA cleanup cost recoveries. *Id.* The Department of Justice released statistics indicating that between 1983 and 1989, 569 defendants were indicted, 165 were corporations and 404 were individuals. Of the 432 convictions, 127 were corporations and 305 were individuals. The government imposed a total of 270 years, 6 months, and 10 days of jail time. Carol E. Dinkins, *Criminal Prosecution of Environmental Violations*, C640 ALI-ABA 23 (Apr. 18, 1991).

sion, and 610 months (fifty-one years) of incarceration after suspension but before parole.¹²⁷ The average jail time was 8.5 months, based on seventy-two convictions and 610 months of court-ordered jail time. Of course, these statistics do not reflect the amount of time actually served. For violations of federal environmental statutes in 1991, courts suspended over thirty percent of all jail sentences.¹²⁸ The actual average jail time per offender is probably less than 8.5 months. Hence, one can conclude that jail sentences are becoming more common for environmental offenders, although the average jail sentence is less than a year.

Even as jail sentences become more common, they are not equally distributed among large and small companies. One researcher found that between 1984 and 1988, most federal criminal environmental prosecutions of organizations involved small, closely held companies.¹²⁹ Since 1984, only six percent of the corporations prosecuted for federal criminal environmental violations were Fortune 500 companies.¹³⁰ The conviction rate for large and small companies was the same; however, sentencing records differed greatly. Despite similar violations, employees at large companies had an eighteen percent chance of going to jail, compared to a forty-three percent chance for employees of small companies.¹³¹ In other words, employees of smaller companies are more likely to receive prison sentences than those of larger companies.¹³² Thus, an employee's likelihood of incarceration may depend upon the company's size.¹³³

Based on these statistics, one can conclude that jail time is more likely to be meted out today than ten years ago. Nevertheless, since the average sentence is fairly low in comparison to statutory and Guideline maximums, and since courts are shying away from sending employees of larger companies to jail, the threat may be more important than the actual punishment.

127. FY 1991 EPA REPORT, *supra* note 125, app. at 11. For more statistics and sentencing information, see OFFICE OF ENFORCEMENT, EPA, SUMMARY OF CRIMINAL PROSECUTIONS RESULTING FROM ENVIRONMENTAL INVESTIGATIONS (1991); SUMMARY 1992, *supra* note 76; OFFICE OF ENFORCEMENT, EPA, FY 1990 EPA ENFORCEMENT ACCOMPLISHMENTS REPORT (1991).

128. See generally Ramsey II, *supra* note 27 (discussion of the amount of suspended sentences between 1982 and 1988).

129. Mark A. Cohen, an associate professor of management, conducted his research at Vanderbilt University's Owen Graduate School of Management.

130. Gold, *supra* note 23, at B6; Adler & Lord, *supra* note 119, at 796.

131. Big corporations are defined as being large enough to be on the Standard & Poor's Register, which requires 50 or more employees and annual sales of at least \$1 million. Frank E. Allen, *Few Big Firms Get Jail Time for Polluting*, WALL ST. J., Dec. 9, 1991, at B1, B5.

132. *Id.* at B1.

133. Adler & Lord, *supra* note 110, at 795-97, 808-11 (providing a detailed statistical analysis of prison sentences); Cohen, *supra* note 123, at 1073-75.

1. Using Threats to Deter

Statistics suggest that the justice system uses the threat of jail to deter offenders. "There is no question . . . that even the idea of criminal enforcement has significant deterrent value."¹³⁴ In order to "scare" the community into complying with environmental regulations, the legal system might publicize a large prison sentence rather than increase the frequency of actual sentences imposed.¹³⁵ It is unclear whether these threats of imprisonment have deterred criminal behavior. Even if the government has not strictly enforced criminal laws, many suggest that jail threats will become real under the Guidelines.¹³⁶ "[J]udges now cannot impose a sentence only to suspend it in favor of a period of probation."¹³⁷ Whether prison will become a more common sentence due to the Guidelines is an unanswered question. Based on the present statistics, however, jail remains merely a threat.

2. Some Explanations for the Statistics

What accounts for the limited use of jail sentences? It is arguable that the judiciary is reluctant to incarcerate corporate offenders and would rather impose fines to take advantage of a company's wealth.¹³⁸ Also, research shows that juries are lenient toward corporate offenders.¹³⁹ Legal scholars note inadequate funding as a major obstacle in prosecuting white-collar offenses, including environmental violations,¹⁴⁰ while the justice system is directing the bulk of its resources toward drug prosecutions. Commentators also state that poor cooperation between state and federal prosecutors, as well as a general lack of expertise partially accounts for the low prosecution rate.¹⁴¹

134. *Criminal Enforcement of Environmental Laws*, *supra* note 87, at 802 (statement of E. Dennis Muchnicki, Ohio Assistant Attorney General and Chief of the Environmental Enforcement Section).

135. Ramsey II, *supra* note 27; Gaynor, *supra* note 22, at 28.

136. *Sentencing Rules Are Tough on White-Collar Crime*, *supra* note 23, at 5F (provides rationales for the courts' reluctance to impose prison sentences on corporate offenders committing environmental offenses); Kafin & Port, *supra* note 84, at 20; see generally Cohen, *supra* note 124; Kuruc, *supra* note 100, at 95.

137. Judson W. Starr & Thomas I. Kelley, *Environmental Crimes and the Sentencing Guidelines*, NAT'L ENVTL. ENFORCEMENT J. 3, 3-4 (June 1990) (analysis of environmental criminal sentencing practices under the Guidelines), noted in Adler & Lord, *supra* note 119, at 799 n.105 (1991).

138. Allen, *supra* note 131, at B1; Adler & Lord, *supra* note 119, at 797; Kuruc, *supra* note 100, at 95; Humphreys, *supra* note 112, at 319 n.46.

139. Allen, *supra* note 131, at B1; Adler & Lord, *supra* note 119, at 797.

140. A 1989 national survey of district attorneys concluded that a small minority of local prosecutors prosecuted no more than three white-collar crimes per year. Barbara H. Doerr, *Prosecuting Corporate Polluters: The Sparing Use of Criminal Sanctions*, 62 U. DET. L. REV. 659, 665 (1985).

141. Benson et al., *supra* note 112, at 357-59.

III. PROBLEMS ASSOCIATED WITH PRISON SENTENCES AND ALTERNATIVES

The following section explores some of the problems associated with prison sentencing. It examines what the sentencing objectives in environmental law should be, and whether prison can achieve those goals. In addition, the section questions whether prison can deter and suggests that alternative sentences might be more appropriate for some environmental offenders.

A. *A Fierce Debate Prevails About the Appropriateness of Prison Sentences*

It is not surprising that while many are pushing to expand criminal liability, others stand in opposition. Legal scholars differ over the movement to prosecute offenders under lower culpability standards. Additionally, some oppose prison because it is extremely costly, it can damage one's reputation, deter socially desirable behavior and harshly punish those who fail to follow complex laws and commit only minor violations.

1. The Debate over a Lower Culpability Standard

Scholars argue over how to interpret the knowledge element found in federal criminal environmental statutes.¹⁴² Most of the statutes require proof of knowledge for a conviction. The debate is over whether or not prosecutors must prove knowledge for all elements of the statute. According to some courts, knowledge is not necessary for every element.¹⁴³ Such holdings make the government's task of criminal prosecution easier.

Proponents for a lower standard assume that offenders did know or should have known about the violations. "[I]t is naive to think that every corporate official is unaware that his plant is violating an emissions standard."¹⁴⁴ The government would be unable to convict corporate offenders if it were required to prove actual knowledge in every case.¹⁴⁵ Given the extensive publicity about criminal environmental enforcement, offenders either had or should have had knowledge about any violation.

Those opposing the lower knowledge standard believe it is immoral to imprison one who was unaware that he was committing a crime.

142. See *supra* notes 37-57 and accompanying text (discussion of the debate on the "knowledge" element in criminal environmental statutes).

143. *Id.*

144. Kuruc, *supra* note 100, at 98.

145. Robert A. Milne, Note, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFF. L. REV. 307, 319 (1988).

Without proving intent, the system violates one's constitutional right¹⁴⁶ to due process under the law.¹⁴⁷

Typically, offenders do not deserve jail time if they lack the moral culpability required for a criminal conviction.¹⁴⁸ The court must show proof of fault before incarcerating an offender. Without such proof, prison sanctions are unfair and unjust.¹⁴⁹ The system is placing more concern on punishing and deterring offenders than on actually determining whether they deserve punishment.¹⁵⁰ As stated by Professor Hart in his framework on criminal law:

they squarely pose the question whether there can be any justification for condemning and punishing a human being as a criminal when he has done nothing which is blameworthy. It is submitted that there can be no moral justification for this, and that there is not, indeed, even a rational, amoral justification.¹⁵¹

Opponents to the use of a lower standard of knowledge further argue that Congress did not intend to have an offender criminally convicted based upon a lower standard. Congress purposely included a "knowledge" requirement in most criminal environmental statutes. Lowering the standard contravenes Congressional intent.¹⁵²

In addition, it is inappropriate to use the RCO doctrine under environmental statutes that include a knowledge requirement. The RCO doctrine comes from strict liability public welfare statutes, such as the FDCA. Those statutes are unlike environmental statutes because they do not contain the same knowledge requirements.¹⁵³ Therefore, the RCO doctrine is contradictory to environmental statutes that do require knowledge.¹⁵⁴

146. See Jonathan Weber, *Corporate Crime of the '90s: Prosecutors are Aiming for the Boardroom in a Growing Push Against Polluters - Critics Argue They're Going Overboard*, L.A. TIMES, Nov. 25, 1989, at 1 (debate about using easily obtained administrative search warrants to gather evidence for a criminal prosecution, a practice which is denied by others); see Paul G. Nittoly, *Prosecutors' New Tacks in Environmental Cases*, 125 N.J. L.J. 650 (1990) (discussion of constitutional concerns of using civil discovery rules in criminal cases).

147. Weber, *supra* note 146, at 1; Nittoly, *supra* note 146, at 74.

148. Benjamin S. Sharp, *Environmental Enforcement Excesses: Over-Criminalization and Too Severe Punishment*, 21 ENVTL. L. REP. (ENVTL. L. INST.) 10,658, 10,664-65 (Nov. 1991).

149. See Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Due Process*, 24 WAYNE L. REV. 1571, 1572 (1978).

150. Sharp, *supra* note 148, at 10,660-65.

151. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422 (1958).

152. Karen M. Hansen, "Knowing" Environmental Crimes, 16 WM. MITCHELL L. REV. 987, 1015-22 (1990).

153. See Hansen, *supra* note 152, at 997-1004, 1015-22 (discussion of other public welfare statutes). Commentators note the irony in CAA's and CWA's criminal provisions which make reference to a "responsible corporate officer." Rakoff, *supra* note 61, at 3.

154. Rakoff, *supra* note 61, at 3; Ramsey I, *supra* note 27; Ramsey II, *supra* note 19; Onsdorff & Mesnard, *supra* note 69, at 10,104-05.

2. Prison Sanctions Questioned for Other Reasons

Some legal scholars believe that certain violations do not warrant a prison sentence.¹⁵⁵ Offenders, they argue, do not deserve imprisonment if they are merely uncooperative with environmental agencies, are first-offenders, or have not harmed the environment.¹⁵⁶ Furthermore, offenders who commit technical violations, such as transporting waste to an unpermitted facility, also do not deserve a jail sentence. Those who are against prison state that jail may be an inappropriate sentence for an upstanding citizen who has no criminal record, but who commits a job-related crime.¹⁵⁷

Some state that jail is inappropriate for one who negligently fails to follow complex and ever-changing laws.¹⁵⁸ This kind of standard is unrealistic and too demanding.¹⁵⁹ The regulated community feels that "criminal sanctions have been directed at conduct that is vaguely defined, and consequently, difficult to avoid."¹⁶⁰ "Any failure to comply with any regulation is a misdemeanor, and I challenge anyone to be 100% in compliance with these laws," states one attorney.¹⁶¹ Because of legal complexities, a *negligent* offender should not face a *criminal* conviction.

Another argument stems from a sentiment that it is unfair to single-out businesses for criminal prosecutions since farmers and consumers are some of the largest sources of pollution.¹⁶² In fact, estimates show that farmers and consumers generate over one-half of all solid and hazardous waste.¹⁶³ Farmers and consumers, as with big business, must learn to use cost-effective methods of disposing of waste. Hence, the government should place greater emphasis on farmers and consumers as generators of large levels of waste.

Because imprisonment is such a severe sentence, the government should use it selectively. Prison sentences could emotionally damage offenders, ruin their business reputations, or leave them financially bankrupt.¹⁶⁴ Due to the severe consequences, the legal system must deliver prison sentences with great caution.

155. Sharp, *supra* note 148, at 10,662-65.

156. Others argue that given the nature of hazardous chemicals and pollution the harm may not show up for years. The harm to the public and the environment is difficult to detect immediately after an incident. Starr, *supra* note 111, at 383.

157. Gaynor, *supra* note 22, at 28-29.

158. The Justice Department has provided information on who is subject to criminal prosecution and how companies should conduct self-audits to avoid prosecution. Businesses welcome the advice but believe that no company can meet the standard for completing an effective audit. Lavelle, *supra* note 23, at 3.

159. Stipp, *supra* note 22, at 1.

160. Hotch, *supra* note 91, at 56.

161. Weber, *supra* note 146, at 1 (statement of Fred M. Blum of the San Francisco law firm Jaffe, Trutanich, Scatena & Blum).

162. Cohen, *supra* note 124, at 1104.

163. *Id.* at 1104 n.168.

164. Gaynor, *supra* note 22, at 28.

Scholars also contend that criminal sanctions may cause social harm by deterring those engaged in socially desirable activities.¹⁶⁵ Environmental offenses, unlike street crimes, are often an outgrowth of "legitimate business activities."¹⁶⁶ The justice system should not impose a prison sentence on a well-intentioned company that engaged in economically efficient conduct.¹⁶⁷ For example, a company engages in socially desirable behavior if it transfers and disposes hazardous waste in an economically efficient fashion.¹⁶⁸ If it does not have a permit, the company has violated certain criminal environmental statutes and is subject to criminal penalties. The criminal sanction deters socially desirable conduct such as the disposition of hazardous waste in an economically efficient manner. Also, prosecution of a company may put it out of business, and in turn, economically damage its employees and community.¹⁶⁹ Finally, criminal prosecution may make the company ineligible for a permit or decrease the company's desire to continue in that business. Thus, prison sentences may reduce the instances of socially desirable conduct.

Commentators state that both prison costs and problems with overcrowding must factor into the justice system's decision to administer a prison sentence.¹⁷⁰ Estimates show that the prison population will triple by the end of this decade.¹⁷¹ The estimated annual cost of prison construction to accommodate future inmates is \$340 million to \$420 million. This does not include \$170 million, which represents the current annual cost of operating prisons, and which amounts to \$22 thousand per inmate.¹⁷² Staggering costs and limited space must factor into deciding whether to send an environmental offender to jail.

Given the high cost of imprisonment as well as the additional problems associated with prison sanctions - the inappropriateness for unknowing offenders and minor violations, the potential to deter socially desirable behavior, and the harshness of the sentence - it is prudent to explore other sentencing options, such as alternative or intermediate sentences. Before considering such alternatives, one must examine the sentencing goals of environmental law and the ability of imprisonment to achieve those goals.

165. Sharp, *supra* note 148, at 10,664-65; Cohen, *supra* note 124, at 1104.

166. Cohen, *supra* note 124, at 1104.

167. Stephen L. Humphreys, *Possible Legal Challenges to Prosecution of Environmental Crime*, 5 TLF L. Rep. (BNA) 295 (1990) (criminal prosecution of nonegregious violations will chill legitimate business decisions).

168. Sharp, *supra* note 148, at 10,664-65.

169. Braithwaite, *supra* note 97, at 729.

170. See generally FINAL REPORT, *supra* note 7. Some judges may already be leery about imposing a prison sentence on an environmental offender because many other crimes warrant prison, and jail space is limited. *Criminal Enforcement of Environmental Laws*, *supra* note 85.

171. FINAL REPORT, *supra* note 7, app. 1 at 19.

172. *Id.*

B. *What are the Sentencing Objectives?*

An exploration of environmental law sentences must first begin with the purpose for the laws. The challenge is then to determine what sentences can accomplish a desired goal. Many within the legal system believe that prison is the best sentence to accomplish the primary goal of environmental law deterrence. The prime assumption, however, is that prison can deter. But, what if it cannot? This section questions whether prison can deter and whether the environmental law field should acknowledge other sentencing objectives, such as education, prevention and rehabilitation. Section C considers whether alternative sentences can accomplish those objectives.

Several years ago, compliance and cleanup, and not deterrence, were the major objectives of environmental law enforcement.¹⁷³ Today, deterrence¹⁷⁴ is the primary sentencing goal.¹⁷⁵ The justice system bases this belief upon the assumption that industry is afraid of incarceration and the subsequent damage it may do to its reputation.¹⁷⁶ "Authorities are focusing on the business community's fear of prison and the stigma of criminal status as a means of achieving compliance."¹⁷⁷

Prison is furthermore taking the place of fines, which lawmakers consider to be an ineffective deterrent. The belief is that companies do not view fines as a punishment, but rather as a cost of doing business, a cost they pass onto the consumer.¹⁷⁸ The expectation is that prison will be perceived as punishment, and businesses will not be able to transfer the "costs" of imprisonment, as they do fines, onto the consumer.¹⁷⁹ While fines are commonly perceived as an acceptable business occurrence, the hope is that the consumer will reject the convicted felon's company in the marketplace.¹⁸⁰

Opponents of imprisonment argue that the legal system relies too heavily on prison sentences by assuming prison can change behav-

173. Ramsey I, *supra* note 27, at 273-77.

174. Gold, *supra* note 23, at B6; Stoner, *supra* note 106. Both unanimously agree that the state seeks deterrence in every criminal white-collar case.

175. The Environmental Crimes Unit has listed the following as legal objectives: "(1) to afford an adequate deterrence against other potential misconduct and environmental abuse; (2) to promote respect for this nation's environmental laws; (3) to seek a just punishment of the offenders; and (4) to remove the competitive advantage and economic incentive realized when a defendant disregards the requirements of the environmental statutes." Starr, *supra* note 111, at 381-82.

176. Kuruc, *supra* note 100, at 94-95.

177. Robert G. Morvillo, *An Interview with District Attorney Morgenthau*, N.Y. L.J., Oct. 2, 1990, at 3; Kafin & Port, *supra* note 84, at 20.

178. Weiss-Malik, *supra* note 23, at 387; *Criminal Enforcement of Environmental Laws*, *supra* note 87; Ramsey II, *supra* note 27, at 24; Lloyd W. Landreth, *How the Government Prosecutes Environmental Crime*, FORT., Aug. 15, 1992, at 21.

179. Lavelle, *supra* note 23, at 3.

180. Landreth, *supra* note 178, at 21.

ior.¹⁸¹ They doubt that people will automatically view noncompliance as immoral simply because the activity might result in a prison sentence.¹⁸² Another problem with the assumption that prison can define behavior as immoral depends in part on whether the regulated community thinks imprisonment is likely to occur, an assumption which may not be true.

Prison becomes a successful deterrent when the regulated community starts believing that noncompliance will result in a prison sentence. Deterrence becomes more questionable if many doubt the likelihood of incarceration. The legal profession, in fact, has already started questioning the infrequency of imprisonment. Legal scholars criticize the justice system for not imposing more prison sentences. They argue that mere threats without sentences nullify prison's deterrent effect.¹⁸³ Prosecutors agree that potential offenders will not obey the law unless they see that violators spend time in jail.¹⁸⁴ It is only a matter of time before the regulated community learns what the legal profession has already discovered, and prison's value as a deterrent becomes greatly diminished.

If the goal is deterrence and prison sentences cannot deter, whether because of nonuse or prison's innate inability to deter, one must consider other sentences.¹⁸⁵ More effective methods to reduce the production and improper disposal of environmental wastes may consist of education, prevention and rehabilitation.¹⁸⁶

1. Education

Through education, the legal profession can increase public awareness about the need to protect and restore the environment. Education should include conveying the importance of protecting and restoring the environment, along with the importance of creating and implementing systems that generate less waste and prevent environmental damage.

The legal community should educate businesses as well as the major waste producers, consumers and farmers. Once people understand the significance of protecting the environment, there may be in turn an incentive to develop less polluting production processes and prod-

181. Hedman, *supra* note 23, at 895.

182. *Id.* Offenders may internalize the moral position and refrain from taking action or possibly learn that they will be treated as morally reprehensible. Coffee, *supra* note 82.

183. Kuruc, *supra* note 100, at 94; Doerr, *supra* note 140, at 668; Brian E. Concannon, Jr., Comment, *Criminal Sanctions for Environmental Crimes and the Knowledge Requirement: United States v. Hayes International* 786 F.2d 1499 (11th Cir. 1986), 25 AM. CRIM. L. REV. 535, 537-38 (1988).

184. Benson et al., *supra* note 112, at 362.

185. Sharp, *supra* note 148, at 10,665.

186. *Id.*

ucts.¹⁸⁷ Informed citizens might also produce less waste or dispose of waste more safely.

One must determine whether prison sentences should be the sole form of deterrence. The success of prison's ability to frighten a potential violator into compliance depends on whether the wrongdoer learns about the sentence. Also, if past offenders do not learn why their previous actions were wrong or how to comply with the law and produce less waste, they will be likely to continue their criminal behavior. Additionally, prison is a severe form of persuasion. Certain offenses and offenders may not deserve such harsh "education." Given these concerns about prison, the justice system has an obligation to look for less severe and more effective forms of education.

2. Rehabilitation

A rehabilitative sentence allows the justice system to do more than punish offenders. For example, a sentence that forces the offender to educate potential violators might assist in rehabilitating the offender himself. By teaching others about their own infractions, an offender might simultaneously learn how he can comply with environmental regulation.

3. Prevention

The environmental law field should also consider how to prevent the improper disposal and unnecessary production of waste. The prospect of prison may frighten industry officials into compliance, although other sentencing options such as educational and rehabilitative sentences might more effectively accomplish the goal of prevention. Also, deterrence is not the only vital sentencing goal in environmental law and thus should not be singled out for consideration. Education, rehabilitation and prevention, in addition to being important sentencing tools, are themselves goals worthy of attention.

C. *Alternative Sentences*

Because of the problems associated with prison and a determination of which goals prison can accomplish, the value of non-prison sentences should be considered,¹⁸⁸ particularly when prison is not the only criminal sanction available. Criminal law sanctions have become synonymous with prison sentences. Many in the legal field assume that incarceration is the best criminal sanction to punish and deter. But other non-prison criminal sanctions are available and may actually punish and deter offenders more effectively than prison.

The following is a brief description of alternative or intermediate sentences which originate from efforts to deter street crime. In Wis-

¹⁸⁷ Cohen, *supra* note 124, at 1107

¹⁸⁸ Hedman, *supra* note 23, at 895-99.

consin, intermediate sanctions cost an average of \$8,300 per offender.¹⁸⁹ The offenders receive sentences customized for their particular needs.¹⁹⁰ Sanctions are intensive, highly structured, and may include some form of incarceration. Intermediate sanctions can include a period in jail, electronic monitoring, intensive supervision, rehabilitative programs, community service and restitution.¹⁹¹ Hence, the legal system can impose alternative sentences on criminal or non-criminal environmental offenders.

Intermediate sentences may effectively mitigate the cost of damages, restore and protect the environment and educate businesses, consumers and farmers. Increasing the choice of sentencing options to include alternative sentences ultimately increases the legal system's chance of accomplishing its various objectives.¹⁹²

Although not exhaustive, the following is a suggested list of alternative sentences.¹⁹³ Sentences such as these may reach some of the

189. FINAL REPORT, *supra* note 7, app. 1 at 10.

190. *Id.* app. 3 at 21.

191. *Id.* app. 3 at 22.

192. Alternative sentences are fairly uncommon and may lack support from the judiciary. See generally Donald W. Stever, *Environmental Penalties and Environmental Trusts — Constraints on New Sources of Funding for Environmental Preservation*, 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,356 (Sept. 1987); Cohen, *supra* note 124, at 1082-84.

193. These sentences were gathered from the following sources: *State v. Bohnert*, 22 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,080 (Ohio Ct. C.P. Hamilton County 1991) (owner and operator of company sentenced to pay a fine, serve jail time, pay restitution, perform 1,000 hours of community service and become a member in good standing of the Sierra Club); *Enforcement: Criminal Enforcement Action, No Longer Limited to 'Midnight Dumpers,' Lawyer Tells Conference*, 22 *Env't Rep. (BNA)* 2406 (1992) (company sentenced to pay a fine, give restitution to a state environmental fund and to the city, placed on probation and voluntarily surrendered its hazardous waste license); *Criminal Enforcement: Nebraska, Manufacturer, Managers Sentenced for Water Act Reporting, Monitoring Violations*, 20 *Env't Rep. (BNA)* 520 (1989) (company paid a penalty and was placed on a two year compliance schedule during which the company was subject to unannounced inspections by the EPA and required to place a public apology in the Omaha World Telegraph); *Criminal Enforcement: Court Sentences Criminal Storage Firm, Orders New Trial on Water Act, CERCLA Counts*, 19 *Env't Rep. (BNA)* 2070 (1989) (corporation sentenced to a suspended prison term, probation and ordered to perform an unspecified amount of community service for the purpose of supporting conservation at Galveston Bay and increasing the public understanding of the cleanup efforts surrounding Galveston Bay); *Criminal Enforcement: Bathroom Fixture Manufacturer Sentenced for Illegally Dumping Waste on Reservation*, 19 *Env't Rep. (BNA)* 1160 (1988) (company sentenced to probation, ordered to perform an unstated number of community service hours, required to place an apology in the local newspaper and create a system to properly dispose of hazardous waste); *Criminal Enforcement: Court Orders Sea Bright Official to Advertise His Guilt in Newspapers*, 19 *Env't Rep. (BNA)* 614 (1988) (corporate official sentenced to a suspended jail sentence, probation and required to place a notice in Cincinnati newspapers outlining his guilt in violating environmental laws); *Enforcement: EPA Alleges GM Violated Clean Air Act, Seeks More Than \$10 Million in Civil Penalties*, 18 *Env't Rep. (BNA)* 1264 (1987) (president fined, placed on probation and ordered to give three lectures to professional organizations on the dangers of not following hazardous waste laws); *Enforcement: Pennsylvania Waste Site Operator*

goals discussed above, but this Article does not offer any empirical evidence.

1. Require defendants to purchase advertising space to publicize their violations in a newspaper or other publication, to place a public apology in a publication and to run advertisements about the importance of abiding by the laws that they violated.
2. Require chief executive officers to enter a plea in court.
3. Require defendants to assist in educating their particular industry or several other industries, as well as their community about their violations, their guilt, the appropriate methods of compliance and agencies which can provide information on environmental protection.
4. Require defendants to assist in the cleanup and restoration efforts as a part of their community service and probation.¹⁹⁴
5. Require violators to create environmental trust funds or fund research.
6. Require them to conduct research to find more cost effective systems of producing less waste and more affordable means of disposing of waste.¹⁹⁵
7. Require environmental audits to ensure that organizations or individuals do not repeat environmental law violations.
8. Require the defendant to perform free services or provide free educational courses related to its industry.
9. Require a period of probation, through which the court could watch the defendant to see whether he completes the alternative sentence.
10. Require the defendant to do charitable community service work related to or unrelated to his offense.

If one acknowledges the limitations on the use of incarceration, and has an interest in objectives other than deterrence, one must consider

Jailed, Fined for Violations of State Law, 17 Env't Rep. (BNA) 2128 (1987) (company required to enroll in county's accelerated rehabilitative disposition program, pay a fine to a state environmental waste fund as restitution for damage to the environment, pay for consultants to conduct environmental audits at five other printing companies in the area and pay money to the Graphic Arts Association to educate the industry on state waste disposal laws); *Enforcement: Sentence for Wisconsin Printing Firm Requires Placement of Ad in Newspapers*, 17 Env't Rep. (BNA) 832 (1986) (Wisconsin printing company was ordered to pay for cleanup costs and place a newspaper advertisement warning the corporate community not to commit environmental crimes).

There exists a wealth of commentary on alternative sentencing. See, e.g., Doerr, *supra* note 140, at 669-70; Kravcik and Materman, *supra* note 81; Cohen, *supra* note 124, at 1082; Dean M. Cordiano and Deborah J. Blood, *Individual Liability for Environmental Law Violations*, 64 CONN. BAR. J. 214 (1990); Bennett, *supra* note 105, at 884-90; see generally Adler & Lord, *supra* note 119; Priscilla J. Gottsch, Comment, *United States v. William Anderson, Co., "Crime in the Suites" Alternative Sentencing of Corporate Defendants*, 16 CREIGHTON L. REV. 1025 (1983); Paul G. Nittoly, *Current Trends in the Prosecution of Environmental Offenses*, 5 TOXICS L. REP. (BNA) 161 (1990); Mary Beth Regan, *Nature Police Get Tough but Face Hurdles*, ORLANDO SENTINEL, Nov. 4, 1990, at B1; Nittoly, *supra* note 137, at 74.

194. Sharp, *supra* note 148, at 10,663.

195. See generally Stever, *supra* note 192.

other sanctions. Alternatives can deter offenders and accomplish goals including education, rehabilitation and prevention in a cost-effective manner. This Article advocates conducting research to determine exactly how these sentences affect offenders before imposing imprisonment or alternative sentences. It is to the legal system's advantage to have several sentencing options available.

IV. STRUCTURE OF THE SURVEY AND ITS FINDINGS

Although incarceration of environmental offenders remains uncommon, the likelihood of criminal prosecution has become greater as recently enacted environmental laws subject more offenders to criminal prosecution. This trend is in part a response to the perception that the public wants the legal system to incarcerate more offenders. Even though many appear to favor the use of prison sentences, others are questioning the imprisonment trend because of the problems associated with prison and concerns over whether prison can accomplish the goals of deterrence and rehabilitation. The list of possible alternative sentences offered in this section could provide solutions to some of these problems.

Part IV examines the issues raised above in terms of how an informed member of the public might respond to recent trends in environmental law enforcement. It questions whether informed people favor prison or imposing alternative sentences for environmental offenders. The issue is a significant one because the imprisonment trend is a response, in part, to perceptions about public opinion. This section concludes by suggesting that the legal system should reevaluate its current position on environmental law enforcement.

During the summer of 1992, a small group of Wisconsinites participated in a survey that attempted to test whether the public favors prison sentences for environmental offenders.¹⁹⁶ The question is pivotal if the incarceration trend is partially a response to the perception that the public wants to imprison environmental offenders. Section A presents the survey results. Section B is a brief explanation of the survey methodology, provided to enable a better understanding of the significance of the survey results. It includes the survey design and provides a description of the offenses and the offenders. It also includes an explanation of the sentencing information provided after the pre-test, and a listing of the pre-test and post-test sentence choices. Section C explores more thoroughly the importance of considering public opinion, particularly when perceptions about public opinion influence legal changes. Section D examines the significance of the survey findings. This section suggests that the legal system should question the trend towards imprisonment for environmental offenders. Section E points out the need for further research.

196. See Survey, *supra* note 6.

A. Survey Results

The bar graphs¹⁹⁷ and following discussion show how participants changed their sentence choices between the pre-test and post-test. Only half the participants chose prison during the pre-test and most chose an alternative during the post-test. Overall, the survey shows that informed participants favor alternative sentences over prison sentences for certain environmental offenders.

Fourteen groups, totalling sixty-five participants, completed the survey. The groups consisted of thirty-one males and thirty-four females. The sample evenly represented all age and education levels.¹⁹⁸ The following graphs show the results of the pre-test and post-test. Figure 1 indicates how many of the sixty-five participants chose prison during the pre-test. Overall, about half the participants favored prison sentences in all three cases. In Case One, more than half (thirty-nine) chose prison for the corporate offender. In Cases Two and Three, less than half favored prison for the environmental offenders (twenty-seven and thirty, respectively).

Figure 1 also reveals how many of the sixty-five participants chose prison during the post-test. In all three cases, a significantly smaller number of participants chose prison during the post-test than in the pre-test. In Case One, the number who chose prison dropped from thirty-nine to twenty-four, in Case Two the number fell from twenty-seven to thirteen, and for Case Three the number who chose prison decreased from thirty to fourteen.

Figure 2 reports the number of participants, out of sixty-five, who selected an alternative sentence during the post-test. Most participants chose the alternative sentence during the post-test: forty-seven in Case One, fifty-eight in Case Two, and fifty-one in Case Three.

Participants had the option during the post-test of choosing prison in addition to an alternative sentence. Figure 3 shows the majority of participants who chose an alternative sentence, and did not select prison either: thirty-four in Case One, forty-nine in Case Two, and forty-three in Case Three.

Figure 4 shows how many of the sixty-five participants switched from choosing prison during the pre-test to choosing alternative sentencing during the post-test period. A quarter of the participants switched entirely from prison to another sentence between the pre-test and post-test: sixteen in Case One, sixteen in Case Two, and eighteen in Case Three.

In sum, Figures 1 and 2 contain the most significant findings. Figure 1 shows that fewer participants than expected chose prison during the

197. See *infra* figs. 1-4.

198. The demographics are as follows: Gender - Female = 31, Male = 34; Age - 20 to 30 = 18, 31 to 40 = 19, 41 and above = 28; Education - Little or no college = 26, College degree = 39.

pre-test, and that the number who chose prison dropped even further during the post-test. Figure 2 shows that most participants favored alternatives to prison during the post-test. The results indicate that half the participants favored prison in the pre-test, but most favored alternative sentencing arrangements during the post-test.

B. *Organization and Structure of the Survey*

1. Survey Format

The following is a brief description of how the survey was conducted. Participants took the survey in groups of two or more people, and received the same three cases during the pre-test¹⁹⁹ and the post-test.²⁰⁰ An informational discussion took place between the two tests.²⁰¹ These three cases, entitled Case One, Case Two and Case Three, contained case facts and personal information on the defendants, sentencing options and space for the participants to explain their sentence choices for each case.

The purpose of the survey was to determine how members of the public, having knowledge of the details of the alleged crime, would sentence environmental offenders in a real case. To achieve this result, the hypothetical included specific facts and allowed the participants to choose a sentence based upon their understanding of what happened in each case.

2. Offenses

The survey cases included two environmental offenses and one corporate fraud offense in order to test the assumption that the public favors imprisonment for environmental offenses over general white-collar offenses. As the imprisonment trend in environmental law is part of a larger trend toward imprisonment for white-collar criminals, the responses to the corporate fraud offense provide insight into how the public would sentence other types of stereotypical white-collar criminals, not just environmental law offenders.

The survey cases were patterned after real cases in which the justice system incarcerated an offender for behavior recently defined as criminal. The hypotheticals were designed to gauge public reaction to cases involving harm and whether or not defendants' knowledge played a role in sentencing. The offenses included environmental contamination without harm, and violations prosecuted under a lower "knowledge/standard" than is found in criminal environmental statutes.

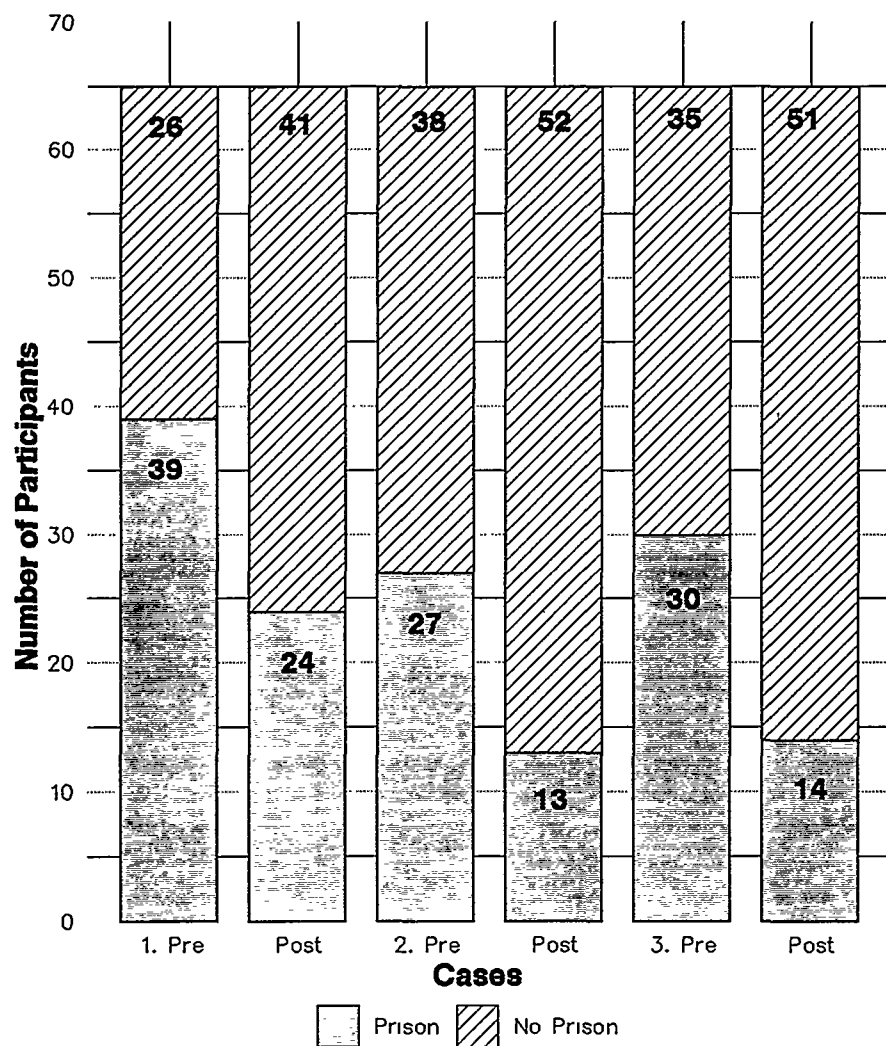
The survey cases were the result of an extensive search to find two real environmental cases that resulted in a prison sentence based upon

199. *See infra* app. (pre-test cases).

200. *Id.* (post-test cases).

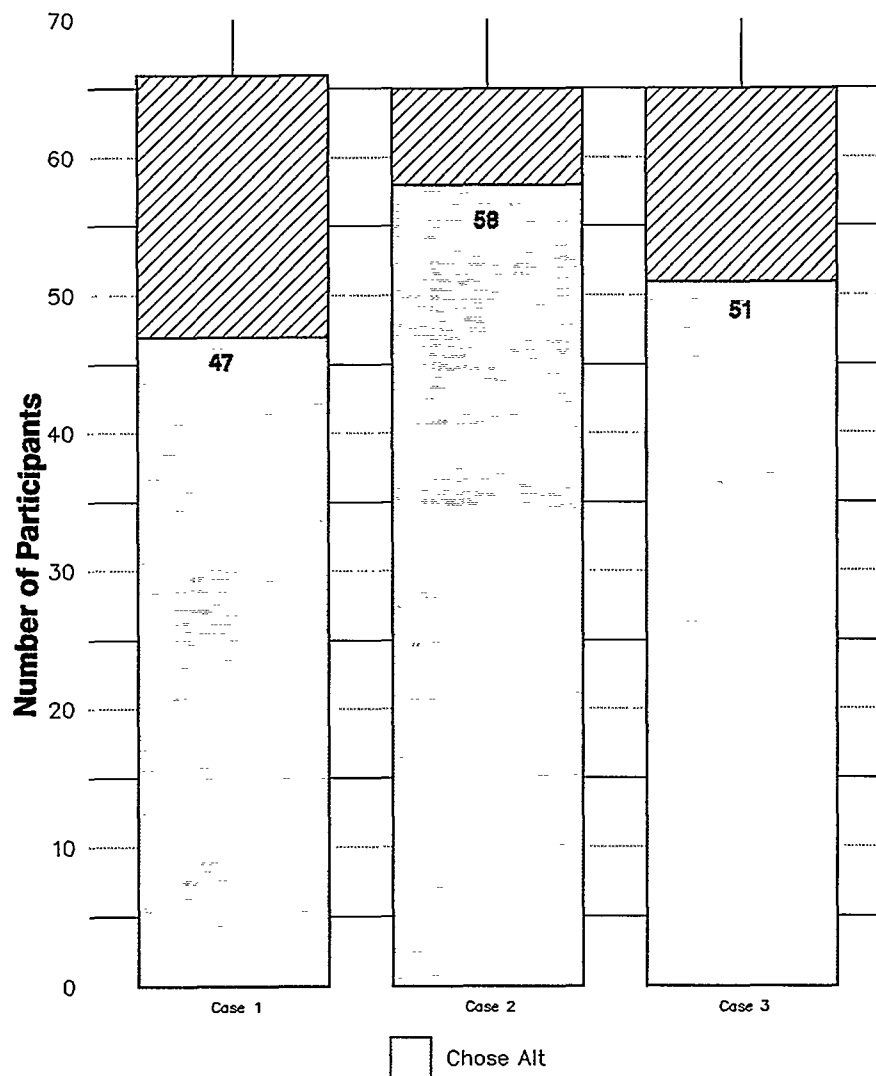
201. *Id.* (information sheet).

FIGURE 1
Prison Selections:
Pre-Test v. Post-Test



environmental contamination, and not harm, and/or where the defendant's knowledge of the violation was in question, and a real corporate fraud offense that resulted in a prison sentence, even though the offender lacked knowledge of the violation. The survey excluded criminal convictions based on egregious facts, such as an intentional dumping of pollutants into a river which resulted in harm to the environment.

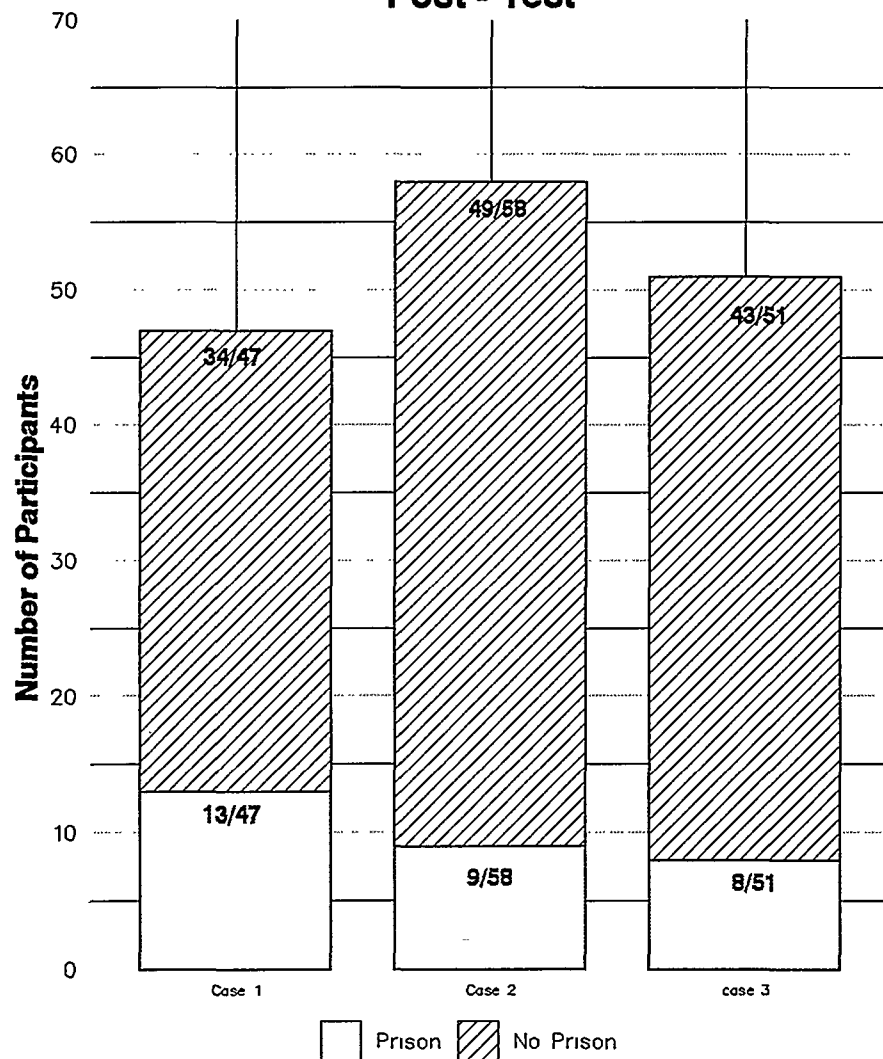
FIGURE 2
Chose Alternative Post-Test



3. Offenders

In order to make the offenders appear realistic, the survey cases included facts about the offender's current employment situation, financial situation and personal life. The cases also included information concerning whether his or her company was still in business, and if so, its economic situation, as well as whether this was the defendant's first offense.

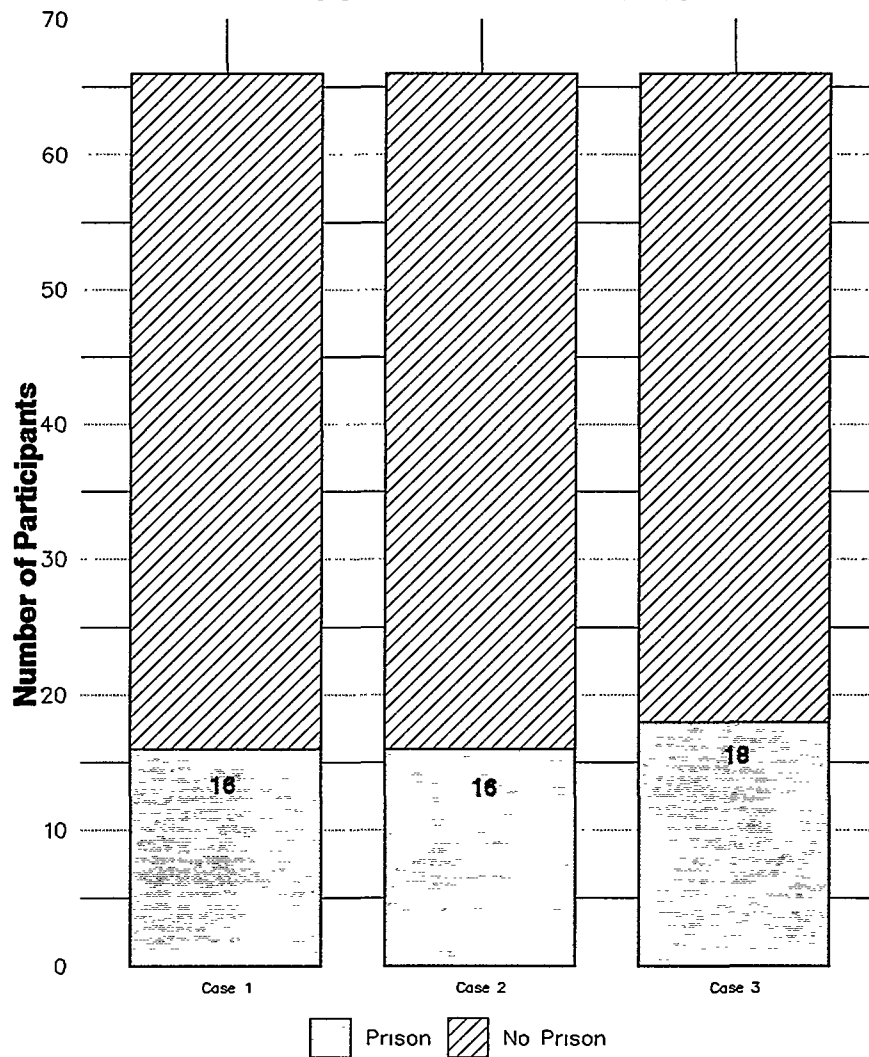
FIGURE 3
Chose Alternative
With or Without Prison
Post - Test



The survey also included facts which made the offender fit the profile of a stereotypical white-collar offender. For example, the participants were told whether the offender had a college degree or was the president of a company employing thirty or more people.

The defendant in Case One founded his company. In Case Two, the defendant and his company, which employed thirty people, were in extreme financial debt. In Case Three, the offender was a Korean War veteran and former head of a Chamber of Commerce, and the

FIGURE 4
Switched Away From Prison
Pre-Test to Post-Test



offender's company, which employed 300 people, had gone out of business.

4. Information on Sentencing Issues

The survey provided information on the sentencing issues as well as on the offense and offender. After the pre-test, participants received a two-page handout containing information on sentencing. After par-

ticipants received this information, they engaged in a discussion which allowed them to learn about sentencing issues.

The information sheet contained statistical data on prison costs and problems with overcrowding, as well as the costs of alternative sentences. The discussion focused on how farmers and consumers produce the most pollutants, what goals environmental laws should accomplish, whether prison can accomplish the desired goals cost effectively, and whether the legal system should incarcerate unknowing violators.

The survey tested whether participants would incarcerate various types of offenders or whether they would prefer an alternative sentence after they understood more about the offense, the offender, prison costs and sentencing objectives. The information session helped the participants make an informed choice about specific types of cases and offenders. The hope was that participants would choose a sentence based on their understanding of both the case and the sentences.

5. Sentence Choices: Pre-Test and Post-Test

During the pre-test, participants were given a choice of probation, fines and three traditional sentences. But, during the post-test, participants could choose a sentence from an expanded list of sentences that included: court-supervised work, prison, strict or regular probation, house arrest and fines.

In each case, the alternative sentence was a court-supervised work sentence designed specifically for each particular offense and offender. The sentence was designed to be less expensive than prison and to act as a general and specific deterrent, a rehabilitative and educational tool and a method of retaining socially desirable behavior. The sentence required the offender to perform tasks related to his/her offense, such as placing advertisements in newspapers about his offense and lecturing businesses about her sentence and advice on how to comply with environmental laws. All three cases contained a different court-supervised work sentence.

6. Reasons for Using a Pre-Test and Post-Test

The survey compared participant's pre-test and post-test choices to determine what choices participants made after they read and discussed sentencing information. Post-test participants learned more about sentencing than did participants in the pre-test. Changes in sentencing patterns suggest that the information and additional sentence choices affected how participants sentenced.

The survey compared the pre-test results with other polls' results to determine whether the facts about the offense and offender affected sentence choices. Unlike the post-test participants, the pre-test par-

ticipants did not have the additional sentence choices and sentencing information. The survey compared the pre-test results with other polls to determine whether facts about the offense and offender influenced whether participants chose prison.

This survey used a format similar to recent surveys in Alabama and Delaware, which considered whether participants favor prison sentences or would favor alternative sentences for a wider array of offenses.²⁰² The surveys told participants about sentencing issues and provided alternative sentences during the post-test. The surveys revealed that informed participants favor alternative sentences for non-violent crimes.

In sum, the survey tried to determine how members of the public would sentence offenders once they know who, what and why they were sentencing. The point was to compare the pre-test and post-test results to determine whether informed participants make different sentencing choices from uninformed participants and what those choices were. The survey also compared the pre-test responses to other polls to determine whether providing extra facts about the offense and offender had any influence on participants' choices.

C. *Questions About Public Opinion*

It is necessary to question the justice system's perception that the public wants more environmental offenders imprisoned because this perception has influenced sentencing policies in environmental law. As an initial matter, the legal system should be cautious about relying on its perceptions of public opinion because "public opinion" is chimerical. The legal profession should be skeptical about using poll results to determine public opinion as polls can yield misleading results. However, this survey's format cures many inaccuracies found in public polls, and may be an alternative tool to understanding the public's preferences in sentencing environmental offenders.

1. No True Public Opinion

The danger in relying on public interest to design sentences lies in the difficulty in truly understanding the public's desires.²⁰³ "Public opinion" is a misleading concept because it implies that there is an actual consensus. Given the multitude of citizens and the potential

202. FINAL REPORT, *supra* note 7, app. at 14-23.

203. For instance, the legal system may pass a law because judges, politicians, attorneys, interest groups, etc. have successfully manipulated public opinion in their favor. These groups or a single group may use continual media coverage to present their side of an issue. Eventually, members of the public accept the "slanted" information as fact and accept the opinion offered as their own. The manipulation is a success when citizens repeat the learned opinion and demand that the legal system respond to their "interests." This is one possible scenario on how groups can mold opinion and influence legal change. See generally Macaulay, *supra* note 96; Friedman, *supra* note 96; Trubek & Esser, *supra* note 96.

diversity between each person's opinion, it is unlikely that true public opinion can ever exist.²⁰⁴

An appearance of public opinion may, in fact, inaccurately reflect the general public's opinion. It may magnify the views of a small percentage of the population, such as interest groups or lobbyists, and take them to be representative of the general public's opinion on a particular topic. The legitimate opinion of the public at large may not accurately be disclosed.²⁰⁵

2. Problems with Polls

Polls may also be manipulated to justify or reinforce legal changes. For example, polls may be designed to infer that the public wants to incarcerate environmental offenders. This practice presents problems because a poll may provide the participant with incomplete information and elicit responses which do not adequately reflect how the participant would actually sentence an offender. The following two paragraphs explain the difficulty in more detail.

First, some polls determine public opinion by asking participants whether they believe certain environmental offenses are "serious," or by questioning them on how they would rank the severity of such offenses. The problem is that "serious" is a vague term that does not always correlate with desirability of incarceration. However, if the participant thinks a crime is "serious" or ranks a crime as severe, the poll might conclude that the public favors incarceration. "Serious" may mean four years of jail to one individual, but only 1,000 hours of community service to another.

Participants' explanations in this survey reinforce this discrepancy. Some stated that they favored a harsh sentence, but imposed only a light fine or three years of probation. Others wanted a light sentence, but chose two years in prison and a large fine. Hence, if someone thinks an offense is "serious" or "severe," that does not mean they favor incarceration. It is therefore dangerous to rely on polls that use vague questions to define public opinion.

Second, other polls specifically ask participants to impose sentences, and neglect to provide information about the offense or offender. The poll forces the participant to create his own impression about whom he is sentencing. Without specific facts, the offender becomes a vague, one-dimensional abstraction. Poll participants may visualize offenders like those in the Savings & Loan scandals or the Exxon Valdez oil spill. Therefore, it may be that participants who offer their opinions on how they would sentence an abstract person may base the opinion on those who represent the most egregious and well-known environmental offenders.

204. *Id.*

205. *Id.*

These polls merely produce opinions about a stereotype and do not take a participant's understanding of sentencing issues into account. Those opinions do not reflect how citizens would sentence an actual offender once they understood more about sentencing costs, purposes and alternative sanctions. "While people might be in favor of directing fire and thunder at white-collar criminals in the abstract, when confronted with a remorseful businessman . . . condemnation mellows."²⁰⁶

Hence, one must be skeptical about the results of polls. Given their format, the polls might not reflect how a person with more information would sentence an offender. And given more information, participants may impose different sentences. This survey reinforces this conclusion.

3. Survey Format

Unlike other polls with differing formats, this survey did not find that the public overwhelmingly favors incarcerating environmental offenders. While some polls ask vague questions about abstract offenders, this survey provided participants with literal information about the offense, offender and sentencing. The results of polls that do not provide such information might not accurately reflect how a participant would actually sentence an offender.

In all fairness, this survey does not reproduce public opinion, nor could it. Instead, the survey tries to provide participants with more information so that its results will more truly reflect the public's preferred sentences in specific cases. This effort is an attempt to avoid reproducing typical stereotypes about environmental offenders.

Because polls may represent opinions regarding only the most egregious offender and not include information on sentencing, the justice system should be skeptical about using them to create sentencing policies. This survey shows that participants who are informed will make different sentencing choices than those who are uninformed. The contradictory results between this and other polls reveal, at a minimum, the difficulty in determining how members of the public would sentence certain offenders. Thus, when creating enforcement policies for environmental offenders, the justice system should not rely solely on its own perceptions about public opinion.

D. Findings

Participants informed about sentencing favor alternative sentences for certain environmental offenders. This conclusion was reinforced by the pre-test, which found that participants informed about the offense and offender will not overwhelmingly favor prison. This section reveals the significance of the survey's findings, and looks at the rea-

206. Braithwaite, *supra* note 97, at 738.

sons participants gave for making their sentencing decisions. It examines why participants did or did not chose prison during the pre-test, and why some chose prison in the pre-test only to switch to an alternative in the post-test. This Article concludes that the justice system should reconsider whether to continue subjecting more environmental offenders to jail. This suggestion is made under the assumption that informed participants would favor alternative sentences, largely because of the problems associated with prison and the availability of alternative sentencing options.

1. Additional Sentencing Information

Between the pre-test and post-test, the participants' choices changed in response to both the sentencing information and expanded sentencing choices provided. While half of the participants favored prison in the pre-test, most favored alternatives during the post-test. The change occurred because the sentencing options and information had by pre-test participants differed from that used during the post-test. Therefore, the results show that when participants are more informed about sentencing, they will favor alternative sentences for certain environmental and corporate fraud offenses.

2. Findings—Specific Offenses and Offenders

One purpose of the pre-test was to compare its results to those of other polls. The pre-test revealed that even without the additional sentencing information and sentencing choices provided in the post-test, a significant number of participants would not select prison. The results differ from other polls that state that the public overwhelmingly favors prison sentences for environmental offenders. This suggests that a participant's sentence choice might change if he believes he is sentencing a "real" person, and knows some facts about the case. Information on the offense and offender would influence a participant's decision not to choose prison.

3. Findings—Written Explanations

Participants' explanations provide insight into precisely why they chose certain sentences during the pre-test and post-test. The explanations for choosing prison parallel the expected rationale, that prison can punish and deter. Those who favored alternative sentences expressed concern that prison is harsher than necessary for unknowing violators and first-offenders, overly expensive, and unsuccessful as a deterrent. The pollsters turned to the alternative sentences not only in response to these apprehensions, but also because they felt that in terms of cost effectiveness, an alternative could accomplish at least as much as a prison sentence. The explanations, particularly from the post-test, exemplify how informed citizens support the use of punish-

ments other than prison. They blatantly contradict the assumption that citizens hope to imprison environmental offenders.

a. *Why Participants Did and Did Not Select Prison in the Pre-Test*

The participants' explanations for choosing prison in the pre-test are in keeping with the commonly stated reasons for incarcerating offenders. The following is a general list extracted from participants' written responses. First, participants favored prison because they felt the sentence could punish offenders and teach future violators to comply with laws. Second, some stated that environmental offenders deserve prison sanctions because the justice system should treat all offenders equally. For example, knowingly committing corporate fraud and burglarizing someone's home are equivalent crimes that *both* deserve imprisonment. Third, some stated that because environmental harm is difficult to detect, violations warrant prison sentences. Fourth, some felt that a corporate officer must be held accountable for company violations, regardless of his personal knowledge. Prison was his punishment for failing to prevent or detect the violation. An educated offender should be under a higher duty to ensure that his company does not violate the law, and prison is a severe enough sentence to ensure that compliance. Even though participants expressed their reserve in criminally prosecuting unknowing offenders, most did not truly believe that the officer possessed no knowledge. They thought that given the complexities of a business organization, an officer could obfuscate his involvement and appear to have no knowledge. Fifth, some felt the justice system should make an example out of an offender to scare other offenders into compliance.

While the above explanations represent the standard reasons cited for incarcerating white-collar offenders, only half the participants expressed these views. Many did not select prison after receiving additional facts about the offender and the offense. Others did not think that first-offenders or those who lost their jobs or were financially devastated deserved jail sentences. Still others did not want to imprison someone who may have contaminated, but not harmed the environment, or who did not personally profit from his actions. In addition, participants felt that due to an organization's complexity, the continual changes in the law, and the concern over sending a morally blameless offender to jail, prison was inappropriate for unknowing offenders. Even some who thought the offender really knew or should have known of the consequences of his actions nonetheless chose an alternative sentence because they felt that probation or a fine was a better punishment and deterrent. Hence, the additional facts provided steered participants away from imposing prison sentences.

b. *Why Participants Did Not Favor Prison During the Post-Test*

Participants did not like prison sentences because the expense outweighed the value. Most lost faith in prison's ability to punish and deter, and felt that other sentences could accomplish those goals in a more effective and less costly fashion. They thought prison was a luxury whose cost the defendant should incur as rent. They were against having society bear the cost of the offender's sentence. They felt that taxpayers who pay for sentences will expect something positive in return for the expense. Since it is thought that prison does not produce anything positive, it follows that society would benefit by keeping offenders out of jail.

Participants did repeat some of the reasons given in the pre-test for not choosing prison. Most viewed nonegregious or nonviolent offenses as not serious enough to warrant incarceration. Participants felt that prison was too harsh for unknowing offenders who are morally blameless. Also, participants did not want to incarcerate certain offenders merely because of their personal circumstances. They felt that first-offenders and those who suffered extreme financial hardship or loss of employment did not deserve incarceration.

Further, participants did not agree with imprisoning an offender as a scapegoat for another's wrongs. They were uncomfortable with using an offender as an example to others, if the offense did not warrant as harsh a sentence. They wanted to sentence an offender according to that person's actions, and not in response to the actions of past or future wrongdoers.

c. *Why Participants Favored Alternative Sentences*

Participants viewed alternative sentences as a solution to the problems associated with prison. The following is a list of reasons why the alternative sentences were chosen, and such reasons should be viewed in combination with all others.

1. Alternative sentences were less costly than prison, and would result in taxpayers incurring less expense.
2. The sentence was less harsh than prison, and therefore more appropriate for first-offenders, technical violators, unknowing offenders, and environmental contaminators.
3. An offender could maintain a job, continue as a productive member of the community, and avoid becoming a financial burden to society.
4. Keeping the offender employed at a company that needs the offender for its vitality helps both the individual business and the financial situation of the community as a whole.
5. The sentence could assist in reaching goals such as education and deterrence. The offender could educate businesses, consumers and farmers through publicity, lectures, or offender-funded education programs. The offender or others could discuss topics including the

actual violation, compliance with the laws, the appropriate agencies to contact to inquire about compliance, the sentences that a particular violation may carry, and the importance of protecting the environment, generating less hazardous waste and creating processes that produce less waste.²⁰⁷

6. Education might deter the public from violating laws or from improperly disposing of or generating hazardous wastes. Members of the public might comply with laws and properly dispose of waste after learning of the importance of protecting the environment and producing less pollution.

7. Education could teach consumers and farmers both proper waste disposition and responsible management of the environment.

8. Education could induce the public to create systems that generate less waste.

9. Ultimately, the offender might learn something valuable from the completion of his sentence.

Hence, participants felt that alternatives were cost effective, and might punish and deter better than prison and produce something positive for both society and the offender. They viewed a combination of the post-test sanctions—court supervised work, probation, fines²⁰⁸ or house arrest—as equally if not more effective than prison. These sanctions were less expensive and could punish and deter better than prison, and could accomplish further objectives as well. The combination of these sanctions might place a heavier burden on the offender, and therefore serve as a greater punishment and deterrent.

While almost all participants selected alternative sentences, prison nonetheless remained an important sentencing tool. Many felt that under different circumstances, prison would represent their first choice. Some said they would impose a jail sentence on someone who intentionally violated the law, damaged the environment, or took money from innocent shareholders. However, one should not use these results to guess when participants would favor prison.

207. It is noteworthy that some participants were skeptical about publicizing the name of the offender or the company. The concern stemmed from a fear that personal publicity could damage the person's or company's reputation. For the same reason, some participants did not favor prison.

208. Participants wrote a monetary sum for each offense. The cases provided some statutory guidelines, but they were informed that they could raise or lower that level. The participants were specifically told that they were fining the individual offender and not the corporation. The following summarizes what fines participants chose during the survey:

	<u>Pre-Test</u>	<u>Post-Test</u>
Case One	28/56 = \$1 mil. - \$100K	20/53 = \$1 mil. - \$100K
Case Two	28/53 = \$50K - \$25K	14/41 = \$50K - \$25K
	18/53 = \$10K - \$5K	14/41 = \$10K - \$5K
Case Three	32/59 = \$50K - \$25K	24/51 = \$50K - \$25K
	18/59 = \$5K	14/51 = \$5K

In sum, the explanations show that once participants are informed about the context of the crime, they may favor the use of sanctions other than prison. This finding contradicts the popular belief that citizens want only prison sentences for environmental offenders. Even during the pre-test, participants did not favor prison sentences. The explanations reinforce the conclusion that informed participants would like to see the justice system consider sentences other than prison for certain environmental offenders.

a. *Informed Participants Did Not Favor Subjecting More Offenders to Incarceration*

The results show that informed participants do not agree with specific legal changes in environmental law. Participants did not favor imposing prison sentences upon certain behavior that had only recently been defined as criminal. Also, participants opposed the rigidity of the Sentencing Guidelines by preferring flexibility in sentencing by allowing for the consideration of an offender's background. Accordingly, three state surveys have similarly revealed that informed citizens do not favor subjecting certain offenders to incarceration.

If the justice system is expanding the scope of criminal liability based upon the perception that it is giving the public what it thinks the public wants, and the public does not in fact want these expansions, one should contemplate whether the justice system should continue focusing upon punishment and deterrence linked to threats of incarceration. The findings specifically show that the participants did not agree with recent legal changes which subject more offenders to incarceration. This Article considers how to design sentences, and questions whether it is prudent for the legislators to continue designing sentences based on their current emphasis on imprisonment.

b. *The Survey Results Raise Questions About the Imprisonment Trend*

If the criminal justice system truly wants to placate the public, and understands that informed citizens will prefer sentences different from those of uninformed citizens, it must determine which audience it wants to appease. The justice system can either leave the public uninformed, thereby giving it the freedom to increase criminal convictions, or, it can choose to educate the public. If after providing education, the system discovers that informed citizens do not want incarceration, it must then determine whether the results should influence its policy of criminally prosecuting more offenders. The justice system does not need public support for all legal changes, but the results do raise an interesting question. Should the system take the simpler route by leaving citizens uninformed, proceed under the perception that the public favors prison and continue to criminally convict more offenders? Or, should it attempt to educate the public about sentencing, and

face the possibility that the public might want alternatives other than prison sentences?

c. *Questioning the Imprisonment Trend as a Trend*

Although this Article debates the tough-on-crime stance in response to the survey, it also questions the imprisonment trend in terms of the prudence of a whole system designing sentences in response to one philosophy. The justice system is so focused on prison, punishment and deterrence that it could overlook other sentences and goals, including intermediate sanctions or rehabilitation. The current system must consider all possible sentences and objectives. The field of environmental law might benefit as well from considering sentencing options and objectives other than prison, deterrence and punishment.

This Article examines whether environmental law should subject more offenders to the threat of incarceration. Because of the problems associated with prison and the concern over whether prison can deter, one should question its increased use. One must also be aware of the danger in writing all laws in response to one set of ideologies. Doing so leaves the system with no room to incorporate other worthwhile sanctions and objectives.

E. *More Research*

The need exists for further research to retest the findings of this and the other two state surveys. The Wisconsin-based survey included only three types of offenses. Other surveys could contain a larger participant sample size and geographic scope, more types of offenses and offenders, more case information, more alternative sentence choices, and more sentence choices during the pre-test. The results of such surveys might provide greater insight into what types of sentences informed citizens want.

The research must go beyond determining how the public wants to sentence various offenders. One should conduct research to determine the impact a sentence will have upon various offenders and design sentences based upon that research.²⁰⁹ To determine the impact of a sentence, one should directly observe the effect a sentence has on an offender. The system must grant those people who have direct experience with sentencing the authority to advise on the construction of sentences.

CONCLUSION

Prosecutors are now attempting to subject more offenders to criminal prosecution and liability. Over the past decade prosecutors have

209. Dickey, *supra* note 2.

placed greater reliance on criminal rather than civil or administrative laws. A larger umbrella of environmental behavior is subject to criminal liability due to expanded definitions of environmental crimes as seen under the Guidelines, cases and interpretations of environmental statutes. Due to the Federal Sentencing Guidelines, most criminal environmental offenders face mandatory jail sentences. Also, risks of incarceration are greater because the justice system is aggressively prosecuting environmental offenders.

The reliance on imprisonment parallels the national imprisonment trend. The dominant objectives of the national pro-prison trend are punishment and deterrence. Prison is viewed as the best punishment and deterrent. Public opinion influences this trend because the legal system believes that the public expects the system to incarcerate more criminals. The trend is similar in the field of environmental law. The justice system thinks that prison can accomplish the leading sentencing aims, which include punishment and deterrence. The justice system is increasing criminal prosecutions partially in response to the perception that the public wants to imprison environmental offenders.

The entire legal profession, including the field of environmental law, must struggle with the problems associated with incarcerating more offenders. Due to the imprisonment trend, the legal system faces overwhelming prison costs, prison overcrowding, problems with deterrence and a lack of emphasis on goals such as rehabilitation. The law enforcement system must address the following concerns: whether prison is the most appropriate sentence for all offenders, whether the sentence is too harsh, particularly for unintentional and nonnegligious behavior, whether prison deters socially undesirable behavior, whether prison or the threat of prison can deter, whether the field should focus on other goals such as education, and whether other less expensive sentences can achieve the desired goals.

Prosecutors should also question, as many have with street crimes, the effectiveness of placing so much emphasis on the criminal conviction and incarceration of more offenders. In an attempt to solve some of the problems associated with prison, the justice system is creating and employing alternative sentences for street crimes. Prosecutors should call for alternative sentences to solve some of the problems associated with imprisoning environmental offenders, particularly when the sentences might be a more cost-effective means to punish and deter as well as to educate and rehabilitate.

Given the above problems with the imprisonment trend, one must question whether the public favors prison or other alternatives. It is important to examine the public's perspective on the current sentencing philosophies because the imprisonment trend is due in part to the justice system's response to public demands for incarceration. This Article used a survey to determine how the public would respond to recent legal changes, the problems associated with prison and the use

of alternative sentences. To determine how an informed citizen would respond to the above questions, this survey used a format different from most other polls. The survey provided participants with information about the offense, the offender and sentencing. By providing this information, the survey more accurately showed how informed citizens would sentence a "real life" environmental offender. Other polls do not provide this extra information. Instead, they run the risk of reflecting opinions regarding the most egregious of the offenders. Hence, this survey better determines what sentences informed participants favor.

The results show that when a person understands more about sentencing issues and alternative sentences he/she do not agree with subjecting more environmental offenders to jail, and would prefer alternative sentences. Informed members of the public do not favor prison sentences and do favor alternative sentences for nonegregious and unintentional environmental violators. The results contradict the current direction of environmental law enforcement.

The environmental law field must also question whether or not it should follow the national imprisonment trend and increase criminal convictions and prison sentences. The trend is questionable due to the following: the problems associated with prison, the results of this survey which show that informed participants do not favor prison and the inherent problems with designing all sentences according to the philosophies of one trend. In short, this Article urges that greater scrutiny be given to the current sentencing practices.

APPENDIX

A. *Pre-Test*

Case One

FACTS

Mr. Roland Blake was the president and the chief executive officer of Compusoft, a publicly held software company in Dallas, Texas, that employed approximately 800 people. Mr. Blake and another employees were charged with violating federal securities laws. This case concerns Mr. Blake.

Mr. Blake founded Compusoft in 1968. He has a college degree and a master's degree in Industrial Engineering.

For approximately a year and a half, Mr. Blake and other company employees conspired to defraud shareholders by issuing financial statements which overstated the company's revenues and profits by 40%.

This was Mr. Blake's first offense. Mr. Blake did not make any money from his securities activities.

CONVICTION*

The defendant was found guilty of violating federal securities laws. According to the statute, a violator shall be imprisoned between twenty-one and thirty-six months and fined not more than \$1,000,000, or both.

SENTENCE

Circle the sentence you feel is appropriate. You may select more than one. Acting as a judge, you may increase or decrease the prison length and fine amount. You are *not bound* by the prison length and fine amount provided above.

1. Prison _____ (Indicate a time length)
2. Probation _____ (Indicate a time length)
3. Fine _____ (Indicate the amount of the fine)

In the following space, please write down why you chose the particular sentence:

* The author acknowledges that the offense may warrant a higher sentence under the statute.

Case Two

FACTS

Mr. Dan Johnson, the owner of Metals, Inc., violated federal environmental laws between February 1987 and February 1989. Metals, Inc., in Maryville, Ohio, is a metal-finishing firm that employed approximately thirty people.

Mr. Johnson is a college graduate.

Metals, Inc. discharged into the City of Maryville sewer system wastewater containing substances in excess of federal substance limits. The City of Maryville alleged that it spent approximately \$1,000 to \$10,000 per month above normal public utility operating costs to pretreat the water to make it safe for public use. The cost is an estimate because the city could not exactly determine how much the substances increased the operating costs of the utility. The public utility is the sewer system that cleans the city water.

This was Mr. Johnson's first offense. Mr. Johnson has suffered extreme economic debt as a result of the litigation and the financial problems of Metals, Inc.

The government did *not* present any proof that the wastewater discharge by Metals, Inc. *harmed* the public water. One violates an environmental law by *simply* discharging waste into a public utility. The violation is not based upon the level of harm, but the potential harm to the environment.

CONVICTION*

The defendant was found guilty of violating federal environmental laws. According to the statute, a violator shall be imprisoned between fifteen and twenty-one months and fined not less than \$5,000 nor more than \$50,000, or both.

SENTENCE

Circle the sentence you feel is appropriate. You may select more than one. Acting as a judge, you may increase or decrease the prison length and fine amount. You are *not bound* by the prison length and fine amount provided above.

1. Prison _____ (Indicate a time length)
2. Probation _____ (Indicate a time length)
3. Fine _____ (Indicate the amount of the fine)

In the following space, please write down why you chose the particular sentence:

* The author acknowledges that the offense may warrant a higher sentence under the statute.

Case Three

FACTS

Mr. John Watson was the president of Printers, Inc., a printed circuit board company in Glendale, Indiana that employed approximately 300 people. He and three other employees were charged with violating federal environmental laws based upon activities between 1987 and 1989.

Mr. Watson is a college graduate and a Korean War veteran. He was the head of the Chamber of Commerce in Glendale.

Printers, Inc. discharged electroplating process waste into the Glendale sewer system and into a small brook that led into the Glendale river. The sewer system cleans out waste from the water making it safe for public use.

Printers, Inc. alleged that it employed a state-of-the-art pollution control system to clean out the waste before the water went into the sewer. The prosecution asserted that the company bypassed the pollution control system, thereby discharging untreated wastewater.

The president denied knowing that the company was violating environmental laws. For a criminal conviction in this case, the law *does not require* that the president knew of the discharged wastes. The Judge said that he was unsure as to whether the president knew of the discharged wastes.

CONVICTION*

The president pled guilty to twelve counts of violating federal environmental laws. According to the statute, a violator shall be imprisoned between ten and sixteen months and fined not less than \$5,000 nor more than \$50,000, or both.

SENTENCE

Circle the sentence you feel is appropriate. You may select more than one. Acting as a judge, you may increase or decrease the prison length and fine amount. You are *not bound* by the prison length and fine amount provided above.

1. Prison _____ (Indicate a time length)
2. Probation _____ (Indicate a time length)
3. Fine _____ (Indicate the amount of the fine)

In the following space, please write down why you chose the particular sentence:

* The author acknowledges that the offense may warrant a higher sentence under the statute.

B. *Post-Test*

Case One

FACTS

Mr. Roland Blake was the president and the chief executive officer of Compusoft, a publicly held software company in Dallas, Texas, that employed approximately 800 people. Mr. Blake and another employee were charged with violating federal securities laws. This case concerns Mr. Blake.

Mr. Blake founded Compusoft in 1968. He has a college degree and a master's degree in Industrial Engineering.

For approximately a year and a half, Mr. Blake and other company employees conspired to defraud shareholders by issuing financial statements which overstated the company's revenues and profits by 40%.

This was Mr. Blake's first offense. Mr. Blake did not make any money from his securities activities.

CONVICTION*

The defendant was found guilty of violating federal securities laws. According to the statute, a violator shall be imprisoned between twenty-one and thirty-six months and fined not more than \$1,000,000, or both.

SENTENCE

Circle the sentence you feel is appropriate. You may select more than one. Acting as a judge, you may increase or decrease the prison length and fine amount. You are *not bound* by the prison length and fine amount provided above.

1. Court Supervised Work

Not less than 750 hours of court-supervised work to include the following:

- a. Give lectures to ten professional computer organizations explaining the defendant's violations and sanctions and providing names of agencies to contact for information about existing securities laws.
- b. Place advertisements, which will run for three weeks in local papers, about the defendant's violations and encouraging compliance with securities laws.
- c. Advertise and run a free six-week workshop open to the public on how to run basic word processor computer programs.
- d. If any hours are remaining, the defendant shall work for local charitable organizations.

2. Prison _____ (Indicate a time length)

* The author acknowledges that the offense may warrant a higher sentence under the statute.

3. House Arrest _____ (Indicate a time length)
4. Regular Probation _____ (Indicate a time length)
 - Offender visits the probation officer once a month
5. Strict Probation _____ (Indicate a time length)
 - Offender sees the probation officer up to five times a week
6. Fine _____ (Indicate the amount of the fine)

In the following space, please write down why you chose the particular sentence:

Case Two

FACTS

Mr. Dan Johnson, the owner of Metals, Inc., violated federal environmental laws between February 1987 and February 1989. Metals, Inc., in Maryville, Ohio, is a metal-finishing firm that employed approximately thirty people.

Mr. Johnson is a college graduate.

Metals, Inc. discharged into the City of Maryville sewer system wastewater containing substances in excess of federal substance limits. The City of Maryville alleged that it spent approximately \$1,000 to \$10,000 per month above normal public utility operating costs to pretreat the water to make it safe for public use. The cost is an estimate because the city could not exactly determine how much the substances increased the operating costs of the utility. The public utility is the sewer system that cleans the city water.

This was Mr. Johnson's first offense. Mr. Johnson has suffered extreme economic debt as a result of the litigation and the financial problems of Metals, Inc.

The government did *not* present any proof that the wastewater discharge by Metals, Inc. *harmed* the public water. One violates an environmental law by *simply* discharging waste into a public utility. The violation is not based upon the level of harm, but the potential harm to the environment.

CONVICTION*

The defendant was found guilty of violating federal environmental laws. According to the statute, a violator shall be imprisoned between fifteen and twenty-one months and fined not less than \$5,000 nor more than \$50,000, or both.

SENTENCE

Circle the sentence you feel is appropriate. You may select more than one. Acting as a judge, you may increase or decrease the prison length and fine amount. You are *not bound* by the prison length and fine amount provided above.

1. Court-Supervised Work

Not less than 500 hours of court-supervised work to include the following:

- a. Partially reimburse the city \$10,000 for increasing operating costs to pretreat the wastewater created by the defendant's company.
- b. Implement programs designed to educate the public about environmental issues such as recycling, the depletion of the ozone layer, etc.

* The author acknowledges that the offense may warrant a higher sentence under the statute.

c. Give lectures to the management of five metal-finishing companies that explain the defendant's violations and the hazards of disobeying federal and state environmental laws. Provide the names of agencies to contact for information about complying with existing environmental laws.

d. If any hours are remaining, the defendant shall assist the EPA in any environmental cleanup efforts being conducted within the state.

2. Prison _____ (Indicate a time length)
3. House Arrest _____ (Indicate a time length)
4. Regular Probation _____ (Indicate a time length)
 - Offender visits the probation officer once a month
5. Strict Probation _____ (Indicate a time length)
 - Offender sees the probation officer up to five times a week
6. Fine _____ (Indicate the amount of the fine)

In the following space, please write down why you chose the particular sentence:

Case Three

FACTS

Mr. John Watson was the president of Printers, Inc., a printed circuit board company in Glendale, Indiana that employed approximately 300 people. He and three other employees were charged with violating federal environmental laws based upon activities between 1987 and 1989.

Mr. Watson is a college graduate and a Korean War veteran. He was the head of the Chamber of Commerce in Glendale.

Printers, Inc. discharged electroplating process waste into the Glendale sewer system and into a small brook that led into the Glendale river. The sewer system cleans out waste from the water making it safe for public use.

Printers, Inc. alleged that it employed a state-of-the-art pollution control system to clean out the waste before the water went into the sewer. The prosecution asserted that the company bypassed the pollution control system, thereby discharging untreated wastewater.

The president denied knowing that the company was violating environmental laws for a criminal conviction in this case, the law *does not require* that the president knew of the discharged wastes. The Judge said that he was unsure as to whether the president knew of the discharged wastes.

This was the defendant's first offense. The company is out of business.

CONVICTION*

The president pled guilty to violating federal environmental laws. According to the statute, a violator shall be imprisoned between ten and sixteen months and fined not less than \$5,000 nor more the \$50,000, or both.

SENTENCE

Circle the sentence you feel is appropriate. You may select more than one. Acting as a judge, you may increase or decrease the prison length and fine amount. You are *not bound* by the prison length and fine amount provided above.

1. Court-Supervised Work

Not less than 1,000 hours of court-supervised work to include the following:

- a. Implement programs designed to educate the public about environmental issues such as recycling, the depletion of the ozone layer, etc.

* The author acknowledges that the offense may warrant a higher sentence under the statute.

b. Place an apology to run for three weeks in a local newspaper explaining in detail what were the defendant's environmental violations and encouraging compliance with environmental laws.

c. Give lectures to the management of ten printed circuit board companies, which explain the defendant's violations and the hazards of disobeying federal and state environmental laws. Provide names of agencies to contact for information about complying with existing environmental laws.

d. If any hours are remaining, the defendant shall assist the EPA in any environmental cleanup efforts being conducted within the state.

2. Prison _____ (Indicate a time length)

3. House Arrest _____ (Indicate a time length)

-Offender must stay home except to go to work

4. Regular Probation _____ (Indicate a time length)

- Offender sees the probation officer once a month

5. Strict Probation _____ (Indicate a time length)

- Offender sees the probation officer up to five times a week

6. Fine _____ (Indicate the amount of the fine)

In the following space, please write down why you chose the particular sentence:

C. Information Sheet

1. Consider the following information regarding prison costs:
 - a. It costs a state more than \$23,000 per year to house a prison inmate.
 - b. In Wisconsin, it is projected that 13,000 more prison beds will be needed by the year 2000 at a cost of \$2 billion 1991 dollars. The current costs of prison construction are \$75,000 per inmate. Financing the construction doubles the cost to \$150,000 per inmate.
 - c. An alternative sentence costs approximately \$8,300 per offender and does not require the state to build more prisons.
2. Consider the following information about environmental laws and sentences other than prison:
 - a. The goals of environmental laws are to minimize the generation and improper disposal of hazardous wastes. Will prison achieve these goals?
 - b. What should be the purpose of a sentence and how does the purpose relate to the goals of the law?
 - (1) To restore the environment;
 - (2) To punish those who have harmed the environment;
 - (3) To impose a prison term on a violator in order to deter other violators;
 - (4) To punish offenders that are uncooperative with environmental agencies;
 - (5) To educate the public about environmental laws;
 - (6) To rehabilitate the offender.
 - c. Is it fair to send a violator to prison not just because of what the violator did, but because the justice system wants to use this offender as an example to deter future violators?
 - d. If the purpose is to educate and deter future violators consider whether prison can effectively deter future violators if no one hears about the sentence.
 - e. Is it appropriate in Case Three to send a corporate officer to jail based upon an assumption that the president should have known that the company was violating environmental laws?
 - f. Should some of the tax dollars spent on prosecuting a small number of environmental violators also be used to assist companies in developing processes that generate less pollution?