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> "(Man) has become the tyrant of the earth, the waster of its resources, the creator of the most prodigious imbalance in the natural order which has ever existed."[1]

Numerous irremediable scars on the earth's surface bear witness to man's destruction and desecration of our natural environment. We have neither the resources nor the knowledge to restore felled native forest areas to their natural state, nor to take all of the pollution out of our waters. But undoubtedly we do have the means to avoid further environmental damage, although it is less certain that we are in fact willing to take the first steps back from "Progress" which are crucial for us if we are to escape the disastrous consequences of "euological overshoot"[2]

In pre-historical times man was directly dependent on nature for providing him with the essentials of life, and the detrimental effects which he had on the earth were minimal and did not last long.[3] But once he had begun to domesticate nature through the development of techniques of husbandry, and the suppression of natural competitors for his food, he began to produce beyond his needs. Instead of passively relying on nature to provide, man started to transform the natural order to suit his own needs, and with his "conquests" of nature he began to see himself as superior to and somewhat

set apart from the rest of nature. Man's perception of his relationship with nature, then, underwent a fundamental change when he started to extract from his environment a surplus of produce over and above that which he needed to survive.

With widespread private land ownership, and the development of technology designed to extract and to use natural resources more efficiently, during the last four and a half centuries man has driven nature as a slave to serve his own ends in his endeavour to increase his surplus of produce, or "profits" .

Seyyed Nasr[4] suggests that presented with seemingly limitless resources by the discovery of the New World in the last half of the sixteenth century, man transferred his transcendant quest for the infinite from the realms of cosmic mysticism to the natural order of the world. In man's new and completely secular philosophy

> "nature appears increasingly under the aspect of university as the generalised object of investigation, experimentation, and an open-ended technological applicability (sic). When human consciousness no longer projects itself into external nature in search of security and validation of standards of conduct, nature can be viewed merely as a system of matter in motion, as purely an object or field of conquest for human theoretical and practical intelligence."[5]

This perception of nature was an integral part of the world view which accompanied the industrial revolution, and legitimated the pursuit of profit - maximisation at the expense of the environment.

We can understand and, to an extent perhaps, even excuse man's exploitation of nature in the first years after the discovery of the New World, since there were no real indications that he was depleting resources which could not be renewed. But we cannot ignore the hard scientific evidence which

proves beyond all doubt that if we continue the environmental exploitation started centuries ago, then man's future existence, along with that of the rest of nature, is in grave doubt.[6] If we choose to continue depleting the earth's resources and dumping our noxious wastes into the atmosphere and waters of the earth, we may no longer plead ignorance of the consequences. We must admit that we are choosing to put our own interests ahead of any consideration for future generations.

Of course, we may avoid such an unpalatable confession if we profess faith in "Scientific and Technological Progress" , which, it is hoped, will provide some panacea for all the environmental damage which we do today. Thus we produce nuclear wastes in the hope that one day science will discover a safe way to dispose of them. However, there may be less complete confidence in science in 1979, the year of the Three Mile Island nuclear power station disaster; the crash of the D.C.10 aeroplane at Chicago Airport; and Skylab's uncontrolled re-entry to earth.

Short of scientific miracles, then, we will break up our natural habitat quite irredeemably unless we take steps to protect the environment. To ensure the survival of the human race, and to preserve the remaining natural beauties of our planet for future generations to enjoy, we must move away from industrial society's domination and abuse of nature in the name of profit, and we must aim instead to achieve a harmonious ecological balance between man and nature. But for this an attitudinal and philosophical development is essential. We must all learn to accept that the natural environment functions according to natural laws which man cannot change. We must see that we are not outside nature - we are very much a part of it. Everything which we do to damage our precious environment ultimately threatens our own welfare. Only when we have come to recognise these fundamental truths will we move into

Nico Stehr's "socialization" phase of harmonious relations between man and the environment.[7]

Later on I wish to discuss the role which the criminal law in particular has to play in helping to bring about this attitudinal change, but first of all I wish to consider how we may protect the environment at a more general level. It should be made clear at this point perhaps, that the following discussion relates only to the means of protecting the environment which may be employed within the economic, social and political framework which prevails in Western society and in New Zealand at present. If we continue along the road to environmental Armageddon at our present rate, however, it may well be that we will not be able to afford the degree of liberty which these institutions currently allow us.

> "If we will not freely and joyfully place 'moral chains' on our will and appetite, then we shall abdicate to the brute forces of nature or to a political leviathan what should be our own moral duty."[8]

But will we be able to rely on "moral chains" without any punishment for those who break out of them and damage the environment to serve their own ends? The temptation to continue maximising our profits through exploitation of nature is inevitably very hard to resist.

William Ophuls summarises Garrett Hardin's analysis[9] of the nature of this temptation and its result, which he calls the "Tragedy of the Commons" as follows:

> "Men seeking gain naturally desire to increase the size of their herds. Since the common is finite , the day must come when the total number of cattle reaches the carrying capacity; the addition of more cattle will cause the pasture to deteriorate and eventually destroy the resource on which the herdsman depend. Yet, even knowing this to be the case, it is still in the rational self - interest of each herdsman to keep

> adding to his herd. Each reasons that his personal gain from adding animals outweighs his proportionate share of the damage done to the commons; for the damage is done to the commons as a whole and is thus partitioned amongst all the users. Worse, even if he is inclined to self-restraint an individual herdsmen justifiably fears that others may not be. They will increase their herds and gain thereby, while he will have to suffer equally the resulting damage. Competitive over-exploitation of the commons is the inevitable result." [10]

The tragedy of the commons also appears in problems of pollution, where rational man finds that the cost of suffering the wastes which he has discharged is less than the cost of purifying his wastes before releasing them. So long as this is true, "we are locked into a system of fouling our own nest..." This begs the question of how we are to overcome man's rational inclination to exploit the environment.

There is some support from theorists who, like Jean-Jacques Rousseau, believe that we should reject all coercive forms of restraint of man's liberty and instead rely on "small, self-sufficient, frugal, intimate communities inculcating civic virtue so thoroughly that citizens become the 'general will' incarnate."[12]

However, there is another school of thought which quite clearly prefers to protect the environment with the adoption of overt coercion rather than relying on appeals to individual conscience and guilt as the primary means of ensuring compliance with moral rules which demand respect for the environment. Cesare Beccaria was openly cynical about relying on conscience for

> "No man has ever freely sacrificed a portion of his person liberty merely on behalf of the common good. That chimera exists only in romance." [13]

Both William Ophuls and G. Hardin believe that ideological or psychological

coercion is "likely to have the same effect repression has on the individual psyche - the repressed force returns in an unhealthy form."[14]

> "When we use the word responsibility in the absence of substantial sanctions are we not trying to browbeat a free man in a commons into acting against his own interest? Responsibility is a verbal counterfeit for a substantial quid pro quo. It is an attempt to get something for nothing."[15]

In any case, so far as environmental protection is concerned, it seems extremely unlikely that we have a sufficiently well developed altruism and concern for future generations for any appeal to conscience in this field to be taken heed of by the majority of the population. It seems then that we must take positive steps to mitigate the tragedy of the commons.

It may not, however, always be appropriate to use direct coercion in order to protect the environment. For example, although it would obviously maximise environmental quality to place an absolute prohibition on the discharge of untreated wastes into our rivers, this course of action would seem to be entirely unrealistic under our present political and economic system. Only the most modern factories are designed with the facilities to treat their wastes before discharging them into the rivers, and the older plants are authorised to discharge their wastes within the limits of the water classification system established by the Water and Soil Conservation Act 1967.[16] A complete prohibition would be impracticable since the cost of incorporating waste treatment processes into existing industrial plants is often very high,[17] and many industries which are authorised to discharge their untreated wastes would be unable to meet the costs of the necessary adaptations. So a blanket prohibition would inevitably result in either frequent

and blatant contravention of the law and a consequent loss of respect for it; or else factories would simply be closed down.

In these circumstances overt coercion seem less appropriate than adopting a persuasive system of incentives to encourage industrial enterprises to treat their wastes. For example, by introducing taxing devices which make it cheaper for industries to treat their wastes than to discharge them untreated the chain of factors leading to the tragedy of the commons would be broken. To this end the Physical Environment Committee of the National Development Conference has recommended that: -

> "Urgent consideration should be given by Government to the Land and Income Tax Act to develop a suitable scheme for taxation incentives to encourage the treatment of industrial wastes."[18]

We have seen that for the time being we may have to tolerate a certain amount of water pollution, but this in no way detracts from the fact that all pollution is totally undesirable. Overt coercion is therefore undoubtedly appropriate to ensure that the amount of pollution which is authorised is not exceeded. From this point on I wish to examine the means of coercion which are provided by the New Zealand legal system to protect the environment, with particular emphasis on the use of criminal sanctions.

Private nuisance

An individual whose personal rights have been infringed by an act which damages the environment may bring an action of private nuisance in order to recover damages for the loss which he has suffered. Here the coercion which is provided to preserve the environment is in the form of a court order for the defendant to pay damages to the plaintiff in compensation for the damage which he has caused to the plaintiff's environment.

In contrast to the punitive nature of criminal sanctions the allocation

of damages in the law of private nuisance, as in the rest of the laws of torts, is seen merely as a means of shifting the burden of loss from the innocent plaintiff to the defendant who caused the damage. The Court may also grant an injunction to restrain the defendant from continuing the damage.

In order to succeed in a private nuisance action the plaintiff must have a legal interest in the occupation or enjoyment of the land in question.[19] The interest which he claims to have been infringed must be of a kind which the law recognises; so, for example, physical damage and damage in the nature of loss of amenities such as that resulting from noise or smell are recognised, whilst aesthetic nuisances are not. The plaintiff must prove interferences with the enjoyment of his interest in the property, and the extent of damage to the environment which must be proved will depend on the nature of that interest.

A riparian owner need only show a "sensible alteration" in the quality or quantity of his water for a claim to be upheld;[20] whilst actual damage is required in actions against smell or noise. In addition, where the interference is with amenity rather than physical damage the plaintiff must show that the defendant's use of his land was unreasonable. Here the courts have adopted the "neighbourhood test," and analogously to a zoning process they attribute land use characteristics to specific areas.[21] Thus;

> "That may be a nuisance in Grosvenor Square which would be none in Smithfield Market."[22]

The plaintiff must also establish that the interference with his interests was actually caused by the defendant's activity according to the sine qua non test.

Public nuisance

Another common law action which may provide a remedy to redress or prevent activities damaging to the environment is the action of public nuisance.

Lord Justice Romer gave the following definition of this action in his judgment in Attorney - General v. P.Y.A. Quarries Ltd.[23]

> "It is ... clear, in my opinion, that any nuisance is public which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue."[24]

A member of the public cannot sue in respect of a public nuisance unless he has suffered special damage over and above that suffered by the public generally, or unless his private rights have been infringed. Otherwise the action must be brought with the fiat of the Attorney - General.[25] It seems that many cases of damage to the environment would constitute a successful action in public nuisance, and so it is perhaps surprising that from 1949 to 1979 there have been no cases on public nuisance included in the New Zealand Law Reports.[26]

In 1949 two cases came before the New Zealand courts which involved environmental damage.

In Bloodworth et ux V. Cormack[27] Mr. Justice Callan granted an injunction placing some restraint on the defendant's operation of Sarawai Park which was used by motor-cycles for "broad-siding." In coming to his decision the judge took into consideration:

> "that Remuera, where the plaintiffs lived, was a quiet suburb; that Auckland was nevertheless a large city' that broadsiding (by motor-cycles) had become a sport for which large cities cater in some reasonably accessible place or places; that it is a noisy sport; and that the present age is a mechanical one in which motor-engines abound".[28]

In the same year a Court of Appeal of five judges granted an injunction against stock and station agents, restraining them from permitting the use of land in Johnsonville as stock or cattle saleyards in an offensive or insanitary condition which constituted a nuisance to the residents.[29] Perhaps the most significant feature of this case is that it shows how limited is the defence which a defendant may raise claiming that the benefits of continuing the damage outweigh the public interest in environmental issues.

In contrast to private nuisance, public nuisance is concerned to protect the interests of the community at large rather than individual proprietary interests. Nevertheless, to bring an action in public nuisance one must conform with the procedural requirements for civil actions. As we have seen this means that problems of locus standi may arise, and this may explain why greater use has been made of statutory provisions to protect the environment. Where a specific type of damage to the environment is proscribed by a statute which provides for a criminal penalty for offences,

private prosecutions may be brought by any member of the public by instituting a private prosecution e.g., the Environmental Defence Society brought a private prosecution in Huntly Borough v. Williams[30]

Statutory environmental offences

Numerous Acts of Parliament are concerned with environmental protection e.g. Forest and Rural Fires Act, 1965; Marine Pollution Act, 1974; Radiation Protection Act, 1965; Animals Protection Act, 1960; Noxious Animals Act, 1956; and the Water and Soil Conservation Act 1967.

The coercion which these statutes provide takes the form of a provision for the imposition of a fine (i.e. a penal sanction) for breach of any of the provisions laid down to protect the environment. J.F. Stephen described the system of penal sanctions as

> "a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty and property if people do commit crime."[31]

In addition to the aim of punishing the offender for retributive reasons, and perhaps more importantly, criminal sanctions are imposed to deter people from committing similar offences in the future, and so to protect society from dangerous behaviour. This is in marked contrast with the rationale for awarding damages in tort, which provides for an ex post facto reallocation of loss on the basis of fault.

Conviction under a penal statute has traditionally been seen as far more serious than being found liable in a civil action. The judiciary has developed rules which reflect their greater reluctance to find against a defendant in a criminal prosecution than in a civil action.[32]

So, for example, the burden of proof is more difficult to satisfy in criminal than in civil cases. It must be proved that the defendant was responsible for the wrongdoing "beyond all reasonable doubt"

compared with just "on the balance of probabilities" in civil actions. Also there is the " penal statute presumption" of statutory interpretation, which stipulates that where there is an ambiguity in a statutory section creating an offence, the interpretation most favourable to the defendant must be applied.

In considering how appropriate it is to impose criminal sanctions for breaches of environmental laws, we must examine the aims of the criminal law and the implications of conviction and punishment.

By way of example I wish to discuss the suitability of imposing a fine for an offence against s. 34 of the Water and Soil Conservation Act 1967. (hereinafter s. 34 of the Act). The relevant provisions of s. 34 read as follows: -

"s. 34. Offences: - (1) Every person commits an offence against this Act who, otherwise than as authorised by or under this Act or in accordance with an exception from the provisions of this Act -

(a) ...

(b) Diverts any natural water or discharges any natural water or waste into any natural water; or

(c) ...

(d) knowingly causes or permits any chemical, metallic, or organic wastes, or any unsightly or odorous litter or refuse to enter any water that has been classified under s 26 E of this Act

...

(2) Every person who commits an offence against this act ... is liable on summary conviction to a fine not exceeding $2,000, and if the offence is a continuing one to a further fine not exceeding $100 for every day during which the offence continues."

I now wish to outline the evidence of the kind of "harm"[33] done by water pollution towards which the Act is directed.

Let us first of all consider the long-term implications of water scarcity and pollution as described by the W.H.O. Expert Committee on Water Pollution.

> "The demand for water, both domestic and industrial, is continually increasing, and even if the rate of increase is as low as 4% per annum, the demand will double about every twenty years. This has several important consequences.
>
> First, even supposing that the proportion of water requiring purification before use does not increase, it will be necessary to double water treatment works every twenty years. Secondly, the additional water will become increasingly costly to obtain, because the nearer and cheaper resources have already been tapped. Thirdly, polluted waste-water will also increase in volume, and expenditure on treatment plants will increase proportionately. Fourthly, even if the rivers remain the same size the amount of dilution available to absorb the resulting pollution, expressed as a ratio of river flow to effluent flow will progressively fall so that the degree of treatment provided must be correspondingly increased at an additional cost. Fifthly, the natural flow in rivers is not likely to remain as large as it is now, because increasing quantities of water will be abstracted to provide for the additional water demand. Still more efficient effluent treatment will be necessary to compensate for that."[34]

Considered in the light of these comments it becomes quite obvious that every act of pollution constitutes a future threat to society by damaging the finite water supply. This threat is no less real simply because the harm may not be immediately apparent.

In New Zealand we are luckier than many other countries in that we have an abundant rainfall and a low population. However, we cannot afford to be complacent. D. Williams warns us that: -

> "(e)ven where sufficient water is available to meet foreseeable demands, deterioration of water quality is a serious problem, and in many areas public water supplies require significant improvement if they are to meet W.H.O. standards." [35]

In New Zealand we consume something like four hundred million gallons of water each day.[36] Domestic waste in 1973 amounted to a daily discharge of approximately one hundred and fifty million gallons of dirty water from bathing, dish-washing, clothes washing and flushing toilets.[37] At the peak of the killing season in January 1973 approximately seventy-five million gallons of strongly polluted water were discharged daily from the freezing works. The average daily pollution discharged from cheese and butter processing plants came to three and a half million gallons, whilst the wood-pulping industry consumed sixty million gallons of water every day.[38]

The National Development Council made the following comments about industrial pollution in New Zealand.

> "While the intensity of industrial development does not approach that of more highly developed countries, our industries processing farm and timber products can cause heavy pollution. Oil refining, metal smelting, the manufacture of fertilizers and cement are other industries which may cause severe pollution.

"Some long-established factories commenced on a small scale and were sited for convenience with no consideration of the avoidance of pollution of water. Often factories producing large quantities of polluting wastes were sited alongside small streams which they used as a source of water and as a drain or sink for their wastes. Even so, these small factories did not originally cause much pollution, but with improved transport and the need to increase the efficiency of production, amalgamations have taken place and uneconomic units have been closed. The concentration of production at a reduced number of larger factories with subsequent expansion, has greatly increased the quantity of wastes to be disposed of at some locations."[39]

Rivers and lakes have the capacity to break down certain wastes into chemically stable processes by their natural processes. When so much pollution is being discharged into our natural waters with the authorisation of the Water Boards, it is absolutely essential that no unauthorised discharge should be added to the waters as they may thereby have their capacity exceeded and suffer irremediable damage. At present our aim must be to control unauthorised pollution before we can hope to eliminate it completely.

The effects which different categories of pollutants may bring about are summarised below.

Domestic wastes in particular may cause pollution by bacteria, viruses, and other organisms which can cause disease. This danger is less acute in New Zealand than it is in tropical and sub-tropical climates where water polluted by bacteria may cause outbreaks of cholera, typhoid fever, dysentery, infective hepatitis urban filariasis, and bilharziasis.[40] Pollution may also be caused by decomposable organic matter which absorbs the dissolved oxygen in the water and results in killing fish which need a high level of dissolved oxygen to survive. In addition, an anaerobic decomposition

process is set in motion which releases pungent and offensive methane and hydrogen sulphide. Inorganic chemicals such as acids and alkalies, toxic compounds and soluble salts are known as "refractory pollutants" which cannot be removed by any natural or conventional treatment processes and may make water quite unsuitable for drinking, irrigation or industrial uses. Potash, phosphates, nitrates etc., are plant nutrients which have a particularly devastating effect on lakes, by causing "eutrophication". The growth of algae in lakes is fostered by the nutrients and the basin of the lake becomes filled in with organic matter. Naturally this process would occur over a span of thousands of years, whereas in less than a decade the discharge of plant nutrients may result in a lake visibly "aging"[42]. Power generating plants in particular pollute rivers by discharging heated water which reduces dissolved oxygen solubility in water and fosters algal growth[43].

The W.H.O. Expert committee summarises the threats which pollution presents to society as follows: -

> "Water pollution takes many forms. Each has its own characteristic properties and each can, in its own way, make water less suitable or even unfit for many purposes. Polluted water can greatly affect human health by giving rise to outbreaks of infectious disease, some of which have been calamitous. It can also affect health in other ways, direct and indirect, and may have insidious long-term effects that are not yet fully understood. Polluted water may be unsuitable for industry or more expensive to use....
> Polluted water may be unsuitable for irrigation or may reduce crop yields....

> Polluted water may destroy or damage fisheries, which in many areas are an important source of protein for human food.
>
> Polluted water adversely affects the aesthetic and recreational values of water and may spoil areas such as coastal resorts and lakes that depend on water for their attraction." [44]

These long-term and immediate effects of water pollution must be considered to be of the utmost importance in deciding how appropriate criminal sanctions are for breaches of s.34 of the Act.

The aims of the criminal law relevant to environmental offending

Whilst the civil law governing contracts, torts etc. has developed primarily as a means of resolving impartially disputes arising between private individuals, and to produce certainty and fairness, the criminal law has evolved to protect society against undesirable conduct, by providing state imposed penalties for breaches of a series of prohibitions against dangerous or sometimes immoral behaviour. So the criminal law may be described as a system of social control, formally offering disincentives for certain behaviour.

In New Zealand all criminal offences must be created by Parliamentary enactment or regulation.[45] Since our Parliament is sovereign, in a strictly positivist sense it may quite legitimately attach criminal sanctions to any behaviour at all. However, a strong body of opinion asserts that the criminal law should be reserved for the prohibition only of such behaviour as actually threatens society, since the social costs of designating behaviour criminal are so substantial.

Quinney suggests that these costs are four-fold.

> "Offenders pay through being prosecuted, convicted, punished. Other individuals pay through having their freedom restricted. We all pay through having to foot the bill for law enforcement. Finally society pays, in some cases, by wrongly thinking that the criminal law has solved the problem and by consequently not getting properly to grips with it."[46]

Therefore criminal sanctions must only be imposed as a means of ensuring conformity if this four-fold price is justified. Where it is not, the State may be considered to be using its authority in an ethically untenable manner. Criminal sanctions may perhaps only be justifiable where the benefit to society which is produced by <u>deterring</u> people from indulging in the threatening behaviour outweighs the social costs described above.

After considering the proper scope of the criminal law I will examine in greater detail the ways in which the criminal law deters potential offenders.

Some legal theorists have criticised the attempts of the criminal law to prohibit purely "immoral" behaviour which poses no threat to society and which they believe should be governed only by the rules of personal morality. There is, however, perhaps an equally well supported theory which asserts that criminal sanctions may with propriety be imposed for these "victimless" crimes, which include prostitution, abortion, homosexuality and marijuana smoking. Thus the philosophical battle raged between John Stuart Mill[47] and Sir James Fitzjames Stephen[48] during the nineteenth century, and was continued in this century between Professor H.L.A. Hart[49] and Lord Devlin.[50]

John Stuart Mill and Professor Hart insist that the criminal law should be used only to secure conformity in such circumstances that the consequent infringement of liberty is justified.

> "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."[51]

There are substantial problems in adopting this unqualified criterion of harm as the sole reference point in deciding whether or not an act should be prohibited by the criminal law. Inevitably we must decide whether an act is sufficiently harmful to deserve criminal sanctions in terms of our own concept of the "proper" role of the criminal law. So we may decide along with H.L.A. Hart that only acts which threaten society in a direct, tangible way are sufficiently harmful; or else we may prefer to adopt Lord Devlin's argument that in addition offences which involve breaches of personal morality are sufficiently harmful in that they pose a threat to the code of morality which provides the foundation upon which society's continued existence depends.

Thankfully, perhaps, we may avoid choosing between these competing theories, since we are challenging neither in advocating criminal sanctions for environmental offences, which cause <u>actual physical damage</u> to the environment and ultimately threaten the survival of the whole human race. It is submitted that we should include environmental offences in Quinney's category of "major candidates for inclusion in the code of real crimes, (along with) crimes of violence, crimes of fraud, and crimes against peace, order and good government."[52] Even whilst acknowledging that the criminal law should not automatically be invoked to ensure conformity with purely regulatory provisions, environmental

offences may still come within this category of "real crimes" since, it is submitted, they are both dangerous ("harmful") and immoral.

The "dangerousness" of pollution

In his "theoretical reconstruction" of the criminal law, Al Katz[53] proposes that the concept of "dangerousness" should be used as the sole criterion by which criminal sanctions may be justified.

> "From the public law point of view activities which are annoying or immoral should be treated differently from those which are dangerous in order to allocate scarce resources in a rational way, and to avoid social conflicts wherever possible. The criminal law should be concerned with dangerousness only, and that means threats which generate fear, not merely anxiety."[54]
>
> "The concept of fear denotes an individual response to a threat which is proximate in time and space. Threats which are proximate in this sense are objectified by the perceiving individual, and fear is, in general, the response. On the other hand, threats which are remote in time or space remain diffuse and conceptual, the threat gives rise only to anxiety."[55] (emphasis added).

So those environmental offences which cause immediate damage to the environment may come within the ambit of Katz's concept of "dangerousness" in that they create a threat "proximate in time or space". But what of offences which only contribute to environmental decay in a way which causes no immediately

noticeable deleterious effects? Common-sense would indicate that such offences should certainly be considered dangerous since they ultimately threaten the continued existence of the whole human race as well as that of the rest of nature. It may therefore be appropriate to extend Katz's very useful concept of "dangerousness" to include, in environmental law at least, acts which may cause harm which is <u>not</u> proximate in time or space, and which may not have any serious tangible effect except in the near, or even very distant, future. All breaches of s.34 of the Act would therefore seem to be sufficiently dangerous to justify criminal sanctions.

<u>The immorality of pollution</u>

Theorists such as Quinney[56] believe that to justify criminal sanctions, behaviour must not only be undesirable because of its physical effects, but that it must also be <u>immoral</u> in terms of the prevailing morality of society at that time. Thus people who commit regulatory offences which attract no moral blame should not be tried and convicted by the criminal process, since traditionally a social stigma of moral condemnation and "criminality" is automatically attached to anyone convicted of any penal provision. If the criminal law is to retain (or perhaps we may say, if it is to regain) its ability to reinforce society's morality it is clear that only offences which have at least some degree of immorality should be dealt with by the criminal system. Undoubtedly the creation of numerous regulatory offences under which people have been convicted and officially declared "criminal" for morally neutral offences[57] have to some extent detracted from the moral stigma which is seen to accompany criminal convictions. H.M. Hart deplores

the use of criminal sanctions for offences which are merely mala prohibita.

> "In its conventional and traditional applications a criminal conviction carries with it an ineradicable connotation of moral condemnation and personal guilt. Society makes an essentially parasitic, and hence illegitimate, use of this instrument when it uses it as a means of deterrence (or compliance) of conduct which is morally neutral."[58]

We are in no danger of incurring the wrath of the purists, however, by attaching criminal sanctions to environmental offences since, although it cannot scientifically be proved, there are nevertheless very persuasive arguments which may lead us to conclude that environmental offences also constitute breaches of morality.

We cannot establish that anything about morality is true in the same way that scientific statements can be proved (quantitatively although not necessarily qualitatively); since morality, along with ethics and valuing, refers to the metaphysical dimensions of man's attitudes and behaviour, which are by their very nature not susceptible to scientific analysis and proof. The content of morality provides an answer to the question "What ought I to do...?", and this answer is reached with reference to certain values. If we adopt a purely subjective view of morality, namely that a man's moral judgments merely state or express his own attitudes, then these values will be each man's own and may be quite unique. However eccentric these values are, from a purely subjectivist point of view it cannot be said that they are either "right" or "wrong". In response to this sort of argument Bernard Williams[59]

asserts that

> "it is not true that there is no question of moral attitudes being right or wrong. One of their distinguishing marks, as against mere expressions of taste or preference, for instance in matters of food, is that we take seriously the idea of a man's being wrong in his moral views; indeed, the very concept of a moral <u>view</u> marks a difference here, leaning as it does in the direction of belief rather than of mere taste or preference. It is precisely a mark of morality that <u>de gustibus non disputandum</u> is a maxim which does not apply to it."[60]

He believes that reference may be made to a society's moral values in order to determine the truth of the moral view of the individual, and as an indication that society does in fact hold certain moral values he points out that people can only argue about individual moral issues or principles, as they do, because there are moral issues which are in the background which are not in dispute and in the light of which the argument goes on.

> "[I]t might be said that it is only about the <u>application</u> of accepted moral views that the argument goes on. So where there is no background of moral agreement, there can be no argument ... When we get outside the framework of agreed general attitudes, there is no further argument, and no way of showing any position to be right or wrong."[61]

Which "agreed general attitudes" are being applied by those who enter into debates about the protection or exploitation of the environment? Western society has only recently begun to refer

to any value other than that of fostering "Progress" and "Industrialization", which has played such a central part in the development of the western nations. Only now is man being considered as anything other than a creature of the earth with no other purpose but to dominate and exploit its resources. So for the first time in centuries the preservation and protection of nature for future generations is becoming an issue, if not an "agreed general attitude".

Whichever of these attitudes is prevalent in New Zealand society today, in the application of either to specific environmental issues it is open to anyone to assert that environmental damage is justified for industrial or economic reasons; in the same way that in a society which places a value on human life, there may be genuine moral disagreement on issues such as abortion, euthanasia and capital punishment.

In the absence of an objective valuation of choices, we may perhaps do no more than simply to <u>assert</u> that environmental offending is immoral, whilst recognising that others may not share our belief. For this proposition, however, we receive strong support from many philosophers and ecologists.

Immanuel Kant[62] postulated that any act motivated primarily from <u>self-interest</u> rather than <u>duty</u> is in and of itself ethically untenable. We may well suppose that environmental offences are therefore immoral, since offenders no doubt commit their crimes primarily to serve their own (usually financial) interests, with a complete disrespect for both present and future generations.

Environmental offences are also immoral in the sense that they desecrate the spirituality of nature, which has been rediscovered by writers such as Theodore Roszak,[63] René Dubos,[64] and Seyyed Nasr.[65]

Theodore Roszak describes the attitude which commonly accompanies the desacralization of nature.

> "Today, when 'realistic' people look at nature around them - mountains, forests, lakes, rivers - what is it they see? Not divine epiphanies, but cash values, investments, potential contributers to the GNP, great glowing heaps of money, the crude shit-wealth of the world that only exists to be taken manfully in hand and made over into something human greed will find 'valuable'."[66]

Ecologist René Dubos explains the moral dimensions of the environmental crisis.

> "Above and beyond the economic and ecological reasons for conservation, there are the aesthetic and the moral ones which are even more compelling. The statement that the earth is our mother is more than a sentimental platitude ...-we are shaped by the earth. The characteristics of the environment in which we develop condition our biologic and mental being and the quality of our life .... Were it only for selfish reasons, therefore, we must maintain variety and harmony in nature.... Saving marshlands and redwoods does not need biological justification any more than does opposing callousness and vandalism. The cult of wilderness is not a luxury; it is a necessity for the protection of humanised nature and for the preservation of mental health."[67]

Respect for the environment in such metaphysical terms as these is undoubtedly growing. But it may well be that nothing more

than the economic dimensions of the problem have yet been seriously considered by the people who inhabit the worlds of industrial and commercial enterprise, and who have a vested interest in using the environment to provide them with cheap resources and methods of waste disposal. Nevertheless, the body of scientific evidence which proves the need for environmental diversity and pollution control for ecological reasons, may create a deeper impression on "industrial" morality, and may even establish the untenability of a morality which does note value the protection of the environment. For if the deprivation of one man's life (murder) is to be considered one of the most immoral acts which may be committed, how much more immoral must an act logically be which contributes to the ruin of the environment, thereby ultimately threatening to eliminate the whole human race from the face of the earth?

The aims of the criminal law

Broadly speaking, criminal sanctions are said to be justified where the disadvantages of restricting individual liberty are outweighed by the furthering of the "common good" which may be achieved by eliminating the behaviour in question. From the discussion above it is hoped that we may see that since pollution and other environmental offences are both dangerous and immoral, we may punish them with criminal sanctions without challenging any of the accepted theories about the proper scope of the criminal law.

I move now to consider how criminal sanctions aid environmental protection by deterring people from committing offences against the environment. I wish to focus on deterrence since it

appears to be the aim of the criminal law most directly relevant to the problem of offending against environmental laws. Retribution cannot contribute to environmental protection in that it is essentially a backward looking attempt to punish any offender as his just dessert.[68] The other aims of preventive detention, reformation and rehabilitation are not of direct significance since they principally relate to the aims of imposing custodial penalties, and environmental offences are only punishable by fines.

Deterrence

Deterrence operates at two distinct levels. "General deterrence" operates to make citizens law-abiding by providing the threat of conviction and punishment for offenders, as well as by strengthening the morality of society. "Special deterrence", on the other hand, relates to the effects of punishment which has actually been imposed on convicted offenders for whom general deterrence has proved ineffective.

Professor Johs Andenaes has analysed the deterrent effect of imposing criminal sanctions in terms of firstly, the inducement of fear of conviction and punishment; and secondly, in terms of the educative or moralizing effects.[69]

The narrow "frightening" effect is achieved not only by the threat of punishment, but in part also by the accompanying stigmatisation and loss of social status which is traditionally attached to people found guilty of criminal offending.

> "[A] criminal trial followed by conviction and sentence can be seen as a public degradation ceremony in which the public identity of the convicted individual is lowered on the social scale."[70]

Together with the infliction of "pain" in the imposition of punishment, i.e. paying a fine, it is hoped that the threat of conviction offers a substantial disincentive for offending.

Jeremy Bentham firmly believed in the effectiveness of the criminal law in deterring offending. He postulated how the threat of punishment operates in the calculations of someone considering whether or not to commit an offence as follows: since man is essentially rational and hedonistic, and his over-riding aim is always to maximise pleasure and to minimise pain, he will consciously decide not to offend when he has considered the situation and realised that the potential benefits of offending are outweighed by the potential detriments provided by the criminal law.

This model may not be appropriate in offences which are committed on impulse such as sexual offences, where some psychological condition is evidently the determining influence, and a rational evaluation of the potential disadvantages of detection, conviction and punishment as opposed to the benefits to be gained from the offence is most unlikely to take place. Even in "impulse" offences, however, there seems no reason to believe that the threat of punishment does not play some part in determining behaviour along with the other, informal mechanisms of social control.

The rational model is perhaps the most appropriate way of analysing the part which criminal sanctions may have to play in deterring environmental offending. We may reasonably suppose that a member of the managerial staff of an industrial plant will weigh up the costs of paying a fine for discharging wastes untreated into natural water, against the costs of treating the waste or of disposing of it elsewhere, in a routine cost/benefit sort of

an analysis. Logically, to be effective, the fine must outweigh the cost of <u>not</u> offending. It may be that the provision for a maximum fine of $2,000[71] is not adequate to outweigh the costs of disposing of wastes lawfully in some cases. This maximum fine should therefore be significantly increased, and we should apply Feuerbach's formula of psychological coercion to reach a more suitable fine:

> "[T]he risk for the lawbreaker must be made so great, the punishment so severe, that he knows he has more to lose than he has to gain from his crime."[72]

It is the attachment of social stigma to criminal conviction that is traditionally regarded as distinguishing criminal sanctions from any other. After all, in objective financial terms the "pain" suffered by anyone ordered to pay damages in a civil action is no less than that suffered in paying the equivalent amount in the form of a fine. One problem which we may encounter in the field of environmental law is that of attaching the "stigma" of criminality to convicted corporations as opposed to individuals. It is the corporations who are likely to commit the most serious offences, but responsibility for the affairs of large corporations is effectively diffused, and it is unlikely that stigmatization as a result of conviction of the company would attach itself to an individual. Nevertheless, the status of the corporation as a whole may well drop in the eyes of those members of the public who attach moral opprobrium to environmental offending; and so a convicted corporation may lose a certain amount of economic support.

The frightening effect of the threat of conviction and punishment will be of a differing nature in the fields of special deterrence and general deterrence. Once an offender has been convicted and

punished the deterrent effect will have changed from a conditional threat of punishment to perhaps a more real threat, at least in the perception of the convicted offender, if not in fact.

Whilst the threat of detection must be considered more real for an offender who has already been caught and convicted, there is some doubt about whether the effect of the threat of punishment is more or less strong in special than in general deterrence. The fact that throughout the criminal law there is a significant rate of recidivism[72A] says very little towards proving that the special deterrent effects of punishment are nugatory, however, since we do not know what the rate of reoffending might be if there were no threat of punishment for people caught reoffending. Any empirical attempt to discover just how effective general and special deterrence actually are has not yet been made and would obviously be extremely difficult to carry out successfully.

Common-sense would nevertheless indicate that offences would be likely to increase if the threat of detection, conviction and punishment were completely taken away. In support of this notion, Professor Anderaes[73] gives the following examples of situations where the threat of detection was removed and the incidence of reported offending increased.

In the 1919 Polic strike in Liverpool nearly half of the Liverpool policemen were out of service.

> "In this district the strike was accompanied by threats, violence and intimidation on the part of lawless persons. Many assaults on the constables who remained on duty were committed. Owing to the sudden nature of the strike the authorities were

"afforded no opportunity to make adequate provision to cope with the situation. Looting of shops commenced about 10a.m. on August 1st and continued for some days. In all about 400 shops were looted. Military were requisitioned, special constables sworn in, and police brought from other centres."[74]

Similarly, offending in Denmark increased dramatically in 1944 when the German occupation forces arrested the entire police force in September.

Moreover, where the threat of detection is increased, fewer potential offenders seem prepared to take the risk of being detected. For example, the number of cases of poisoning decreased when research in chemistry and toxicology made it possible to discover with greater certainty the causes as well as the perpetrators of this type of crime.[75]

In order to maximise the deterrent effect of criminal sanctions in environmental offences it is evidently of the utmost importance that the risk of detection and prosecution should be perceived as significant by potential offenders. At present it is officially the task of the regional Water Boards to exercise surveillance and to prosecute for offences against s.34 of the Act. A positive step towards protecting our natural waters from pollution would be to increase the resources of the Water Boards so that they could more satisfactorily exercise their law enforcement role. As an alternative and perhaps ideally, we could establish a state-financed body along the lines of the Environmental Protection Agency in the United States. This body would have as its exclusive task the policing and prosecution of environmental offending. This would increase the risk of detection and also of prosecution, as the body should be charged

with prosecuting all offences which were detected.[76]

Besides the narrow view of the frightening effect of criminal sanctions we must also consider the role which the criminal law plays in upholding and strengthening society's morals and deterring offending in that way.

> "Punishment is not only the artificial creation of a risk of unpleasant consequences; it is a means of expressing social disapproval. The act is branded as reprehensible by authorised organs of society, and this official branding of the conduct may influence attitudes quite apart from the fear of sanctions."[77]

This aim of the criminal law is sometimes called "general prevention", and its effects are variously described as moralizing, educative, and socio-pedalogical.[78]

General prevention is regarded as of great significance in the Continental legal literature, and is in fact sometimes considered more important than the direct deterrent influence of the criminal law. Thus the German criminologist Hellmuth Mayer asserts that

> "The basic general preventive effect of criminal law does not at all stem from its deterrent but from its morality-shaping force .... Nothing is so convincing to man as power, provided it appears as expression of moral order."[79]

Deterrence operates not only through repression and fear, then, but also by strengthening society's moral code. Through the solemn and symbolic process of trial, conviction and punishment, the moral opprobrium which society has for a certain type of behaviour is

expressed in an authoritative and dramatic manner.

As a further point in favour of establishing a state body to enforce environmental offences it should be noted that the educative effect of the main part of the criminal law is to some extent dependent on prosecutions being brought on behalf of society by the police, a state financed body. Where the Water Boards have neither the resources nor the inclination to initiate proceedings against environmental offenders[80] it is left to voluntary organisations such as the Environmental Defence Society to bring private prosecutions. Both the public and even maybe the trial magistrates may consider that an action is not being brought so much on behalf of society as by a group of "cranks".[80A] So the establishment of a state body to enforce environmental laws would be most welcome to mitigate this kind of limitation to the educative effect of criminal sanctions in environmental law.

Even if such a procedural reform were undertaken, however, we would still not be able to rely exclusively on the criminal law to perform the educative task. Prosecutions will always be undertaken primarily against the industrial and agricultural enterprises which cause large-scale water pollution. The impact which fining these bodies will have on the public at large will be merely indirect, for example the "costs" of offending may result in increased prices to be paid by the consuming public. Moreover, the historical evidence seems to indicate quite clearly that criminal sanctions, no matter how rigidly enforced, cannot by themselves bring about attitudinal change. The educative capacity of the criminal law must therefore not be over-estimated, and we must recognise that it is impossible realistically to place any significant degree of reliance on it to create a social attitude of moral condemnation of water pollution. Rather it is the criminal law's function to strengthen such an attitude.

The aim of the criminal law in the "moralizing" area is said primarily to reflect and strengthen society's morality and so we must ask whether or not offences against environmental laws are considered immoral by the majority of the public. The Physical Environment Committee stated in its report that:

> "Public awareness of the need for maintaining a fit environment lags seriously behind that of a comparatively few people. Present conditions are indicative of serious deficiencies in personal attitudes about pollution."[81]

Nevertheless, it is most probably only an apathy resulting from a lack of consideration of ecological problems amongst the public which prevails, rather than an attitude of moral neutrality towards environmental offending. It seems likely that most people would consider pollution to be morally wrong if they knew of its inherent dangers - unless of course they believe that pollution is a reasonable price to pay for industrial development.

Here the criminal law has an important educative role to play in developing respect for the environment. It may seem somehow reprehensible in a democracy that the government should actively attempt to lead the morality of the public in a particular direction. However, where the risks of not changing society's attitudes are as great as they are in the area of environmental offending, it may be ethically justifiable.

How much reliance may we place on the criminal law to develop the "environmental ethic"?

> "The law is an excellent instrument for giving authoritative expression to the 'mores' or 'Volksgeist'... of a society and translating them into workable

> "adjustments of human relations which will be acceptable in terms of the mores. In this way the law can further and foster the purpose of a society, at the same time helping us to see more clearly what those purposes are. The main drive of sociological jurisprudence has always been to insist on the law's capacity to supply this vital social contribution, and that law deserves the high cultural value which we place upon it only insofar as it succeeds in being 'socially relevant' in this sense."[82]

Undeniably the fostering of the environmental ethic is at this time of impending ecological crisis one of the most "socially relevant" aims which the law as an institution has never had.

But we cannot reasonably expect the criminal law to develop the environmental ethic alone and unaided. Let us recall Quinney's caveat that society as a whole pays when the criminal law is invoked "by wrongly thinking that the criminal law has solved the problem and by not getting properly to grips with it."[83] There are very real limits to the capacity which the criminal law has to "cure" social problems such as the ecological crisis. In A.R. Blackshield's terms the law cannot operate successfully in a vacuum.

> "[I]f a society does not know what its basic purposes or values are, the law is deprived simultaneously of the source from which it can fashion its socially relevant contributions and of the preconditions for effective acceptance of those contributions."[84]

We must ensure that the respect which we already have for the environment is crystallised into one of society's fundamental

moral values which may be reflected in our legal institutions.

Gordon Hawkins believes that there is some limit to the criminal law's ability to shape society's morality since

> "The constraints set by the criminal law are designed to achieve social control rather than moral improvement, (and so) 'socializing' rather than 'moralising' better describes their nature and purpose, and better indicates the criteria by which their success or failure can be measured."[85]

Society may therefore obey the law out of respect for "the law" as an authoritative institution rather than out of respect for the values incorporated into those laws. It is of course of the utmost importance for us to protect society and future generations by securing conformity to environmental laws; but is it not equally necessary to cultivate a genuine respect for the environment? We must not obey the laws protecting the environment simply because they are enacted and enforced by recognised institutions nor because we fear conviction or the imposition of a fine. We must obey them because we recognise the importance of protecting our environment for both present and future generations.

Whilst it undoubtedly has an important role to play in defining acts which damage the environment as dangerous and immoral, we must recognise that by itself the criminal law is simply not able to bring about that fundamental change in attitude which is essential for us to avoid the worst consequences of the ecological crisis.[86]

Footnotes

1 Joseph W. Krutch, The Best Nature Writings of J.W. Krutch (1955) Quoted in Environmental Decay in its Historical Context ed. R. Detweiler et. al., p. 135.

2 William Ophuls, Ecology and the Politics of Scarcity - A Prologue to a Political Theory of the Steady State (1977) pp. 134-137.

3 Nico Stehr, "Man and the Environment: A General Perspective" (1978) Archiv für Rechts-und Sozialphilosophie 1, 4.

4 Seyyed Nasr, "The Metaphysical and Cosmological Roots of the Ecological Crisis." Lecture to the Lindisfarne Institution of New York.

5 Leiss, 1972. Quoted by Nico Stehr, op. cit. n. 3 p. 6.

6 For an excellent discussion of the scientific evidence of the impending "ecological crisis" see William Ophuls, op. cit. ante., n. 2 chapters 2 and 3.

7 Stehr, op. cit. ante., n. 3 pp. 13-14.

8 Ophuls, op. cit. ante., n. 2 p. 244.

9 Garrett Hardin, "The Tragedy of the Commons" 162 Science 1243.

10 Ophuls, op. cit. ante., n. 2 p. 146.

11 Hardin, op. cit. ante., n. 2 p. 150.

12 Ophuls, op. cit. ante., n. 2 p. 150.

13 C. Beccaria, On Crimes and Punishment (1764) quoted by K.I. Macduff, General Deterrence: Concepts and Implications (1971).

14 Ophuls, op. cit. ante., n. 2 p. 151.

15 Hardin, op. cit. ante., n. 9 p. 1246.

16 See I.B. Brookfield, "The Conveyancer, Water Rights and the Environment" [1975] N.Z.L.J. 645.

17 Wld. Hlth. Orz. techn. Rep. Ser., 318 "Water Pollution Control" (1966) p. 16.

18 The Physical Environment Conference 1970: Reports Papers and Proceedings p. 229.

19 A.I. Ogus and G.M. Richardson, "Economics and the Environment: A Study of Private Nuisance" (1977) 36 Cambridge Law Journal 284, 295.

20 Young v. Bankier Distillery [1893] A C 691.

21 Ogus and Richardson, op. cit. ante., n. 19 p. 298.

22 Bamford v. Turnley (1862) 3 B. and S. 66, 79. Per Pollock C.B.

23 [1975] 1 All E.R. 894.

24 ibid.

25 Sir Robin Cooke "The Concept of Environmental Law - The New Zealand Law - An Overview" [1975] N.Z.L.J. 631, 635.

26 Public nuisance was considered in Matheson and Another v. Northcote College Board of Governors [1975] 2 N.Z.L.R. 106 although the case was based on private nuisance.

27 [1949] N.Z.L.R. 1058.

28 Sir Robin Cooke, op. cit. ante., n. 25 p. 635.

29 Attorney-General v. Abraham and Williams Ltd. [1949] N.Z.L.R. 461.

30 [1974] 1 N.Z.L.R. 689.

31 J.F. Stephen, History of the Criminal Law of England (1883) p. 107.

32 It should be noted, however, that this traditional reluctance to impose criminal liability was significantly diminished with the appearance of regulatory offences which the courts were prepared to say may require no mens rea at all e.g. R. v. Woodrow (1846) 153 E.R. 907.
But see Police v. Creedon [1976] 1 N.Z.L.R. 571, which may indicate a move back towards the more traditional approach; and the "half-way house" cases of R v. Strawbridge [1970] N.Z.L.R. 909, and Sweet v. Parsley [1970] A.C. 32.

33 post, p. 23.

34 Wld. Hlth. Org. op. cit. ante., n. 17 p. 4.

35 D.A.R. Williams, "Water Quality and the Water and Soil Conservation Act 1967" [1975] N.Z.L.J. 650.

36 National Water and Soil Conservation Organisation, Problems of Water Pollution (1973) p. 4.

37 idem.

38 idem.

39 Physical Environment Conference, op. cit. n. 18 p. 132.

40 Wld. Hlth. Org., op. cit. ante., n. 17 p. 7.

41 First Annual Report of the Council on Environmental Quality, (U.S.A. 1970) p. 30.

42 National Water and Soil Conservation Organisation, op. cit. n. 36 p. 7.

43 ibid. p. 5.

44 Wld. Hlth. Org., op. cit. ante., n. 17 p. 29.

45 Crimes Act 1961 s. 9. "No one shall be convicted of any offence at common law, or of any offences against any Act of Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom."

46 R. Quinney, "Restraint in Criminal Law" from Law Reform Commission of Canada Our Criminal Law. p. 19.

47 On Liberty (1859).

48 Liberty, Equality, Fraternity (1873).

49 Law Liberty, and Morality (1963).

50 The Enforcement of Morals (1959).

51 John Stuart Mill, op. cit. ante., n. 47 ch. 1.

52 Quinney, op. cit. ante., n. 46 p. 20.

53 Al Katz, "Dangerousness: A Theoretical Reconstruction of the Criminal Law Part I." 19 Buffalo Law Review 1.

54 ibid., p. 30.

55 ibid., p. 23.

56 Quinney, op. cit. n. 46 p. 19.

57 e.g. Fisheries Inspector v. Wareham [1974] 2 N.Z.L.R. 639; Fraser v. Beckett Stirling [1963] N.Z.L.R. 480; Marine Department v. Skegg Foods [1974] 2 N.Z.L.R. 648.

58 H.M. Hart, "The Aims of the Criminal Law" 23 Law and Contemporary Problems (1958) 401, 424.

59 Bernard Williams, Morality: An Introduction to Ethics (Cambridge, 1972).

60 ibid., p. 31.

61 ibid., p. 33.

62 Immanuel Kant, Groundwork of the Metaphysic of Morals discussed by H.J. Paton The Moral Law (London, 1948).

63 Theodore Roszak, Where the Wasteland Ends: Politics and Transcendance in Postindustrial Society (New York, 1973).

64 René Dubos, A God Within (New York, 1972).

65 Seyyed Nasr, The Encounter of Man and Nature. The Spiritual Crisis of Modern Man (London, 1968).

66 Roszak, op. cit. ante., n. 63 p. 128.

67 Dubos, op. cit. ante., n. 64 p. 36.

68 This is not to say that there are no positive elements to the retributive theory. A criminal law system which aims for retribution is concerned with treating the offender as an end in himself, which is sometimes, perhaps, more ethically satisfactory than the point of view adopted by the deterrence advocates, who may regard an individual offender as only a means to an end. There may be a greater emphasis on proving moral guilt and giving a sentence proportionate to the offence in a retributive than a deterrent system.

69 Johannes Andenaes, "General Prevention - Illusion or Reality?" 43 Journal of Criminal Law, Criminology and Police Science (1952) 176.

70 Gordon Hawkins, "Punishment and Deterrence: The Educative, Moralizing and Habituative Effects" (1969) Wisconsin Law Review 550, 556.

71 S. 34 (2) Water and Soil Conservation Act. 1967.

72 Andenaes, op. cit. ante., n. 69 p. 178.

72A Gordon Hawkins, "Deterrence: The Problematic Postulate" "Aust. & N.Z. Journal of Criminology (1969: 2, 3 132.

73 Johannes Andenaes, "The General Preventive Effects of Punishment" 114 U.Pa.L.Rev. 949.

74 Mannheim, Social Aspects of Crime in England Between the Wars (1940) 156-157 cited by Andenaes, op. cit. ante., n. 73 p. 962.

75 Tarde, Penal Philosophy (1912) by Andenaes, op. cit. ante., n. 73 p. 962.

76 Water Boards do not presently prosecute for all pollution offences e.g. early this year hundreds of thousands of litres of milk were in breach of s. 34 of the Act pumped into several Waikato rivers as a result of an industrial dispute. Although the damage was substantial the Hauraki River Authority decided not to prosecute the offending Dairy Board. (see vol. 5 no. 2 E.D.S.News July 1979 pp.2-3)

77 Johannes Andenaes, "Does Punishment Deter Crime?" (1968) Criminal Law Quarterly 76, 81.

78 Andenaes, op. cit. n. 73 p. 951.

79 Hellmuth Mayer, Das Strafrecht des deutshen Volkes (1936) cited by Andenaes op. cit. ante., n. 69 p. 81.

80 supra, n. 76.

80A D.J.Moore (for the Commissioner for the Environment,April 3rd 1979) comments: "We have noted...that private prosecutions particularly are not highly succesful (which discourages people from bringing them) and are costly and time consuming to those who initiate them."

81 Physical Environment Conference, op. cit. ante., n. 18 p. 212.

82 A.R. Blackshield, "Legal Responses to Cultural Change." Australasian Universities Law Schools Association 27th Annual Conference Proceedings (1972).

83 Quinney, op. cit. ante., n. 46 p. 19.

84 Blackshield, op. cit. ante., n. 82 p. 39.

85 Hawkins, op. cit. ante., n. 70 p. 559.

86 I received support for this conclusion from Duncan Mac Intrye who stated on behalf of the Minister for the Environment:

> "I believe that criminal sanctions have a valuable role in environmental matters. But I would hope that our environmental policies, laws, and management practices would foster a general and genuine concern and awareness about environmental quality. ...I hope that criminal prosecutions will remain primarily a weapon of last resort."

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