The Goals of Environmental Enforcement and the Range of Enforcement Methods in Israel and in the United States

Marcia R. Gelpe
Mitchell Hamline School of Law, marcia.gelpe@mitchellhamline.edu

Publication Information

Repository Citation
http://open.mitchellhamline.edu/facsch/174
The Goals of Environmental Enforcement and the Range of Enforcement Methods in Israel and in the United States

Abstract
The article examines enforcement of the environmental laws of Israel and of the United States. It concentrates on provisions for enforcement of the laws by government authorities--that is, either by administrative authorities or by the courts at the request of an administrative authority. Environmental laws in many jurisdictions may also be enforced by private actions. These private enforcement actions are not addressed specifically in this article, although much of what is said is also applicable to such actions.

Keywords
environmental law, comparative legal studies, Israeli environmental law, environmental enforcement, administrative law, private law enforcement

Disciplines
Administrative Law | Environmental Law
THE GOALS OF ENVIRONMENTAL ENFORCEMENT AND THE RANGE OF ENFORCEMENT METHODS IN ISRAEL AND IN THE UNITED STATES

MARCIA GELPE*

I. Introduction

Many different types of enforcement actions may be taken against those who violate environmental laws. This article describes a variety of methods of enforcing environmental laws, evaluates each one, and recommends changes in the enforcement provisions of Israeli environmental laws.

The article examines enforcement of the environmental laws of Israel and of the United States. It concentrates on provisions for enforcement of the laws by government authorities—that is, either by administrative authorities or by the courts at the request of an administrative authority. Environmental laws in many jurisdictions may also be enforced by private actions. These private enforcement actions are not addressed specifically in this article, although much of what is said is also applicable to such actions. Also beyond the scope of this article are permits and other arrangements for implementa-

* Professor, William Mitchell College of Law, St. Paul, Minnesota, U.S.A.; Professor, Netanya Academic College, Netanya, Israel.

tion of the requirements of environmental laws. Although permits could be considered part of the enforcement system insofar as they are used to achieve compliance, they are not covered here. This article deals with enforcement only in the sense of actions taken against parties who have violated the requirements of environmental laws. Permits, on the other hand, affect compliance mainly by preventing violations before they occur.

Finally, this article does not consider compensatory remedies, even though they may have the effect of a means of enforcement. If a person who violates environmental laws must pay compensation for personal, property, and natural resource injuries, some of the effects upon the behavior of that person may be similar to those of penalties, particularly civil and administrative penalties. This article addresses only more direct means of enforcement.

The nature of the requirements of the law is not relevant for the purposes of this article. It is of no consequence whether the law requires observance of a certain emission standard, or payment of an effluent charge, or reporting of a discharge. Nor does it matter whether the requirement is in a statute, a regulation, a permit, or in another document given legal force by the applicable law. In all cases, if a party violates a legal requirement, the question arises as to what is to be done about the violator — which method of enforcement should be used.

II. Evaluating Methods of Enforcement

Each method of enforcing environmental laws is evaluated based on the criteria of efficacy, workability, substantive fairness, and procedural fairness.

"Efficacy" refers to how successful a particular enforcement action is in reaching its goal. For example, one goal of enforcement is to deter future violations by third parties. Enforcement by some means, such as a criminal fine, is efficacious if it actually deters others from violating the law.

Workability refers to whether the enforcement method will be used by the government authority that is responsible for enforcing the law. An enforcement method is not workable if there is some practical barrier, such as high administrative costs, to its utilization.

Substantive fairness relates to whether there is a fair proportionality between the severity of the sanction imposed and the seriousness of the violation. Procedural fairness addresses the issue of whether the procedures used for imposing the sanction give sufficient protection to the alleged violator.
ENFORCEMENT GOALS & METHODS

Each one of the last three standards of evaluation is fairly clear in itself. The first, efficacy, requires further elaboration.

III. Efficacy and the Goals of Environmental Enforcement

1. Goals of Environmental Laws

In order to identify the goals of environmental enforcement, it is necessary first to identify the general goals of the environmental laws themselves.

Commentators describe two views of environmental laws. One view is that they proscribe pollution because it is inherently bad: it is harmful to health and to society. Violation of the laws is deemed immoral behavior. Under this view, those who violate environmental legal norms are just like any other criminal.

The second view posits that environmental laws limit activity that would not occur if the market worked properly in regard to polluting activities. Market defects lead polluters to engage in activities that cause harm to the environment. As the extensive literature shows, we overuse the air, water, and land as waste dumps because we do not have to pay the full cost of using these common resources. Environmental laws provide a substitute for the payments the market would demand if it set a price for use of common resources. While the substitute set in the laws could be in the form of a charge for use of these resources, it is most commonly a standard that limits the amount of permissible discharges. The source must then meet the standard instead of paying the cost of using the resource. Under this view, the law does not define or proscribe activity that is immoral, but, rather, only tries to assure the allocation of resources that would be achieved in a well-functioning market. If this is achieved, the proper level of environmental protection will be provided.


3 See Charney, supra note 2, at 496.

4 The discharger does not have to pay the full cost because of the common nature of the resource into which the discharge is made (see, e.g., Garrett Hardin’s classic essay, The Tragedy of the Commons, 162 Sci. 1243 (1968)), because of the lack of information on the effects of the discharge, and because of the inadequacy of the tort system as a means of forcing the discharger to internalize the costs that the discharge imposes on others.
It is not necessary to debate here which of these two goals, definition of bad behavior or correction of a market defect, is most essential to environmental regulation. Clearly both are goals of the environmental laws currently in force.

2. Goals of Environmental Enforcement

How we define the purpose of environmental law influences how we view enforcement of these laws. To the extent that we define the objective as setting out unacceptable norms of behavior, the goals of enforcement are the traditional goals of criminal punishment: retribution — "the deserved infliction of suffering on evildoers";\(^5\) specific deterrence — deterring the violator from repeating the violation; general deterrence — deterring others from violating the legal norm; incapacitation; and rehabilitation.\(^6\)

Some comments on general deterrence in environmental law would be helpful in understanding concepts presented below. The theory of general deterrence posits that a sanction imposed on one person deters another from violating because the second person takes into account the possibility that the sanction will be imposed on him before he commits the violation. If the sanction appears serious enough, the second person will be dissuaded from committing the violation.

This theory assumes that the potential violator considers the possible sanction before committing the violation. This assumption is probably valid for a great many violations of the environmental laws, which are designed to control the behavior of organizations (corporations or governmental units). These laws address planned activity, not impulsive actions.\(^7\)

Some environmental laws, such as laws against littering, do address individual, more impulsive activity. For these laws, Packer's theory of the second way in which general deterrence functions is more apt. Packer tells us that the calculated consideration of sanction is less important than the role

---

6 Id., at 35-61.
7 As Packer points out, this is a very rationalist model of how general deterrence works and has been rejected or modified by some. Packer, supra note 5, at 40–45. The rationalist model is probably more applicable to environmental laws that govern behavior of organizations (corporations and governments) than it is to traditional criminal laws. On the other hand, the rationalist model is probably less valid for some environmental violations, especially those committed by individuals, such as littering. In the latter type of cases, Packer's observation that general deterrence may work by creating general societal norms of behavior is more relevant. Packer, supra note 5, at 43–45.
of the law in creating general societal norms of behavior that will influence
the actor in more subtle ways.\footnote{Packer, \textit{supra} note 5, at 43--45.}

In either case, the degree of deterrence also depends on the size of the
sanction and the probability that it will be imposed. If the probability of
imposition of the sanction increases, the same deterrent effect can be achieved
through a smaller sanction, so long as the sanction remains greater than the
gain to be had from the violation. The reverse is also true: if the size of the
sanction shrinks, it will still have a deterrent effect if the probability of
imposition of the sanction increases (again, with the proviso that the sanction
exceed the gain from the violation). This relationship is fortunate because
there becomes reason to believe that as the size of the sanction decreases, it is
easier to impose the sanction, and the probability that it will be imposed can
rise.

It is easier to impose smaller sanctions for two reasons. Courts and other
actors are probably less reluctant to impose relatively smaller sanctions. In
addition, we can expect that if the sanction is not very large, the subject of
the sanction will be less likely to fight against its imposition. On the other
hand, administrative agencies may be somewhat reluctant to try to impose
small sanctions if the procedures for doing so are burdensome, because the
payoff is not perceived as high enough to justify the effort. This suggests that
general deterrence is best achieved by relatively small sanctions imposed
through relatively simple procedures.

Both the size of the sanction as well as the probability of its imposition
should be considered from the point of view of the potential polluter. Even if
the sanction is large and there is a high likelihood that it will be imposed, it
will have no general deterrent effect if the potential polluter is not aware of
the sanction. In other words, to achieve the effect of general deterrence,
those who might violate the law must be aware of the size of the sanction and
the likelihood of its imposition. Awareness is probably created where the
chance of the sanction being imposed is high. Word gets around. On the
other hand, special publicity, such as through news items, will occur only in
cases in which the sanction is large enough to attract media attention.

Turning to the second view of the goals of environmental law, we see that
to the extent that the aim is to create a proper allocation of resources,
specific and general deterrence are primary goals of enforcement. An addi-
tional goal is recapture of ill-gotten gains. Recapture is important, in part
because it contributes to general deterrence. Recapture of ill-gotten gains shows potential violators that they will not be better off due to the violation.

Recapture is even more important for a distinct reason: the need to remove the competitive advantage received by the violator. This is essential for ensuring that the person who voluntarily complies with the law will not be put at a competitive disadvantage as compared to the violator. In part, we want to do this in order to deter the potential competitor from also violating the law in order to maintain his market position. Put another way, we always want to encourage voluntary compliance with the law. Compliance with environmental laws is usually costly. Therefore, in order to encourage compliance, we must try not to create a situation where the person who complies voluntarily is worse off because he bears a cost that his non-complying competitor avoids. Furthermore, it distorts the market to allow a pollution source to keep the savings it has amassed by violating the law.

Another auxiliary goal under either view of enforcement may be to restore the environment to the condition it would have been in had the law been observed. Whether pollution is the result of immoral behavior or a market dislocation, it has adverse effects, and to the extent that its impact persists, it should be reversed. This may be done by cleaning up the pollution, restoring polluted resources to their unpolluted state, or by providing alternative resources to replace the unremediable effects of pollution.

IV. Enforcement Methods: Description, Evaluation, and Prescription

This Section describes the various methods employed to enforce Israeli and American environmental laws, evaluates each method, and suggests the circumstances under which each is appropriate for enforcement.

1. Major Criminal Sanctions

a) Description

Both Israeli and American environmental statutes generally provide criminal sanctions (fines and imprisonment) for violations. Some Israeli environmental laws specify explicitly that strict liability applies. In these cases,


10 E.g., Cleanliness Law 13(f) (as added by Environmental Quality Law (Methods of Punishment) (Amendment of Statutes) ch. 2, § 2(6) (1997)) (Isr.).
liability is subject to two limitations: (1) only a fine may be imposed unless at least negligence is proven, and (2) if the accused can prove that his state of mind constituted neither intent, recklessness, nor negligence and that he did all that he could to prevent the violation, he is not liable. Other laws have no explicit statement as to scienter, and in such cases, it is necessary to show at least recklessness. American laws impose criminal liability only for knowing, or, occasionally, negligent, violations. The laws of both countries impose personal criminal liability on corporate officers, managers, and responsible employees for many violations by a business entity. In Israel, this personal liability is almost absolute, with very limited defenses available to the individual.

11 Penal Law § 22(c) (1977) (Isr.). The citation is to section I of amendment 39 to the Penal Law (1994 Sefer HaHukim [S.H.] 1481). This section adds four new sections to the original law; the new sections will be sections 19-22 of the Penal Law.

12 Penal Law § 22(b). This limitation does not apply in all cases.


14 Penal Law §§ 19, 20. If a law is silent as to the requirement of scienter, but, prior to the effective date of the 1994 amendment to the Penal Law, had been interpreted by a court as establishing a strict liability offense, then it is a strict liability offense. Penal Law § 22(a).

15 Clean Air Act § 113(c)(1)-(3), (5); Clean Water Act § 309(c)(2)-(4); Resource Conservation and Recovery Act § 3008(d), (e), 42 U.S.C.A. § 6928(d), (e) (West 1995); all these acts specify that the offense must have been done "knowingly." Courts sometimes read narrowly the requirement that the violation be knowing. For example, in United States v. Hayes Int’l Corp., 786 F.2d 1499 (11th Cir. 1986), the court held that the defendant could be held liable for knowingly transporting hazardous waste to a facility lacking a permit. The defendant did not have to know that the material shipped was hazardous or that a permit was required. It was enough that the defendant knew the identity of the material and knew that the facility did not have a permit. The court held that in a heavily-regulated industry with significant public health and safety effects, it is reasonable to charge those who operate with knowledge of the regulatory provisions. Criminal penalties for negligent violations are provided in Clean Air Act § 113(c)(4); Clean Water Act § 309(c)(1). The Refuse Act, 33 U.S.C.A. § 407 (West 1986 & Supp. 1997), is an exception among United States statutes. It sets a criminal penalty for violations without requiring scienter. This was held permissible in United States v. White Fuel Corp., 498 F.2d 619 (1st Cir. 1974).

16 The formulation of who is responsible varies from law to law. In the Israeli laws, compare Abatement of Nuisances Law § 14, 15 L.S.I. 52, 54 (1960-1961) (liability imposed on a person who controlled or supervised a person or place where the violation occurred) with Water Law § 20V (liability imposed on active managers, partners [other than limited partners] and officers responsible for the matter). In United States law, compare Clean Air Act § 113(c)(6) (responsible corporate officer is liable) and Clean Water Act § 309(c)(6) (same) with Resource Conservation and Recovery Act, 42 U.S.C.A. § 6928 (West 1983 & Supp. 1993) (parallel section on enforcement with no comparable provision).

17 See, e.g., Water Law § 20V (to avoid individual responsibility, the person must "prove
The severity of the criminal sanction varies considerably between the two countries and, to a lesser extent, among various statutes within each country. Criminal fines are much higher in the United States. The Israeli Water Law, for example, provides criminal fines of NIS 268,000 (currently about $77,000) or a year's imprisonment for each violation. The structure of the law suggests that this amount probably is not to be imposed for each day that the violation continues, at least where the violating activity is ongoing. The law also imposes a fine of NIS 17,800 (about $5,100) or imprisonment for seven days per day for an offense that continues after an official warning. In comparison, the American Clean Water Act provides criminal fines of up to $25,000 per day of violation and imprisonment for a year for negligent violations and fines of $50,000 per day and three years for knowing violations. Whether or not a warning has been given is irrelevant. Fines well in excess of $1 million have been imposed. Furthermore, the fines under the Israeli Water Law are among the highest provided in all of Israeli environmental law. While the fines for violating several other laws were recently brought into line with those imposed by the Water Law, other laws still set lower penalty amounts. For example, the fines in the Prevention of Pollution of the Sea from Land-Based Sources Law are NIS 50,000 ($14,000) or one

---

18 Water Law § 20U.
19 The Law expressly sets a fine per day for violations that continue after a warning, but only sets one fine for a violation up to the time of warning; Water Law § 20U. This probably should be read to set a fine for the violation as a whole prior to the time of warning.
20 Under both subsections, the maximum punishment is doubled for violations after the first conviction. In addition, a special provision on crimes involving "knowing endangerment" (knowingly placing a person "in imminent danger of death or serious bodily injury") provides a penalty of up to $250,000 and fifteen years imprisonment for an individual and of up to $1 million for an organization. Again, penalties are double for violations after a conviction.
22 Environmental Quality Law (Methods of Punishment) (Amendments to Statutes).
year’s imprisonment per violation, with an additional NIS 1,000 ($300) per day imposed for an offense that continues after conviction.24

In practice, Israeli courts that impose criminal fines tend to impose a fine that is lower than the maximum allowed by law, adding a higher fine that is to be paid only if the violator does not meet conditions specified in the court order, such as a requirement to desist further pollution.25

Israeli law has several features that are not found in its American counterpart. Many Israeli environmental laws provide that criminal penalties be paid into a special fund, rather than into the State treasury.26 Such a provision does not exist in American law. In Israel, but not in the United States, private persons may initiate actions for criminal sanctions under most environmental laws.27 Israeli criminal law includes a general provision that allows a court in a criminal proceeding to issue an order requiring a person convicted of a crime to pay damages for injury or suffering.28 The effectiveness of this provision is limited because the maximum amount of the payment is NIS 84,400 ($24,000), which is not likely to be full compensation in many environmental cases. In addition, several environmental statutes provide that the court order in a criminal proceeding may include an order that the guilty party repay costs of correcting the environmental damage caused by the violation to whomever took corrective action and then sought repayment as part of the proceeding.29 One statute allows the court to cancel a license issued under the law that the defendant was guilty of violating.30

26 E.g., Prevention of Sea-Water Pollution by Oil Ordinance (New Version) § 32 (1980), 1993 Isr. Envtl. Legis. E-2, E-8; Maintenance of Cleanliness Law §§ 10, 13(b), 38 L.S.L. 190, 192, 194 (1983–1984) (except that fines assessed by special local courts are paid into the treasury of the local authority, such as the municipality).
28 Penal Law § 77(a).
29 E.g., Cleanliness Law § 10c (as added by Environmental Quality Law [Methods of Punishment] [Amendments to Statutes] § 3(8)); Water Law § 20 (24)(1).
30 Dangerous Substances Law § 15a(5) (as added by Environmental Quality Law [Methods of Punishment] [Amendments to Statutes] § 5(5)).
b) Evaluation — Efficacy

Criminal sanctions inflict retribution only if the sanctions are actually imposed. This requires that the relevant actors in various parts of the criminal justice system agree that retribution for violation of environmental laws is appropriate. If there is no such consensus, the complex machinery needed to impose a criminal sanction will not operate. Prosecutors will not prosecute and judges will not convict.

Nonetheless, the criminal sanction is perhaps the main enforcement mechanism used in Israel.

In the United States, by contrast, despite the fact that almost all laws provide criminal sanctions, such sanctions are imposed primarily for violations of rules for handling wastes31 or for very serious violations of other laws.32 In these cases, retribution is probably seen as a particularly fitting goal. Wastes denominated as "hazardous" are generally seen as especially dangerous to public health, so their mishandling is much like traditional criminal activity that endangers persons. Overall, criminal sanctions are not used frequently in the United States, although its use is on the rise.33

It is not clear how well criminal fines work as a general deterrent. The usual objection to imposing any monetary fine, penalty, or other assessment for violation of an environmental law is that the violator can simply consider the assessment as one of the costs of doing business and pass the cost through to the consumer.34 If the fines are high enough to make it difficult to pass them through and are imposed frequently enough, they will have a general deterrent effect. Their efficacy in this way does not depend, however, on their criminal nature. The fact that criminal sanctions are procedurally


32 See cases cited in Environmental Crimes & Enforcement Committee, supra note 22, at 155–56.


34 For regulated industries, this requires that the violator include the assessment as part of the rate base.
difficult to impose almost certainly impacts the frequency of imposition and decreases their efficacy for general deterrence.

In theory, incarceration should be a strong general deterrent to violating environmental statutes. Incarceration is one sanction that can not be passed through to the consumer. Yet criminal incarceration will serve as a general deterrent only if it is imposed with high enough frequency to convince potential violators not to take the risk. Because incarceration appears as a very harsh sanction for environmental violations, it may be difficult to have it imposed with sufficient frequency.

In the United States, over the course of the five years dating from 1991 to 1995, between twenty-two and sixty-nine years of incarceration were imposed each year in all the criminal actions for environmental violations brought in the country. This was enough to warrant a great deal of attention in the literature, but it is not clear what the rate of incarceration was (what percentage of violators spent time in prison) or whether this represents enough of a threat to change substantially the behavior of those corporate officials who would not otherwise follow the law. In Israel, which has a low record of criminal incarceration for violation of the environmental laws, the threat of such incarceration may have some effect, but it is hard to measure.

The same questions arise regarding the efficacy of the criminal sanction for specific deterrence.

Criminal fines that are suspended on the condition that the violator meet specific requirements set out in a court order or not repeat the violation, can work well for promoting the goal of specific deterrence. Nonetheless, they cut against general deterrence. If most of the fine is suspended, much of the general deterrent effect is lost. A source can then violate, wait to be caught, pay a small fine, and thereby avoid the larger fine by belatedly coming into compliance.

Criminal sanctions are not well-suited to recovering the savings of non-compliance, since that savings is not necessarily taken into account in fixing the penalty amount.

Israeli criminal orders require clean-up help to restore the damaged

35 Bellew & Surtz, supra note 33. This figure excludes suspended portions of prison sentences.
37 See Ministry of the Environment, supra note 25.
environmet, although this is a problematic method for obtaining the civil remedy of restoration. Because the orders are issued only against those convicted for environmental crimes, increased standards of proof and other complications of criminal proceedings apply. Such remedies should not be seen as an effective way of obtaining environmental clean-up. Rather, they serve as a nice addendum to the criminal sanction when it is otherwise imposed.

Criminal sanctions may help to restore the damaged environment in a different way under those Israeli statutes that provide for the payment of criminal fines into a special fund. This fund can be used for environmental restoration. The use of special funds for criminal fines may be criticized as encouraging “overzealous” enforcement. The argument is that if administrative authorities believe that their own programs will benefit from increased funding from the collection of criminal fines, they will be excessively eager to identify violations and to bring criminal enforcement actions. This argument is not convincing. First, it would apply only for substantial violations where the size of the probable fine makes the enforcement action worthwhile. In regard to such violations, vigorous enforcement is appropriate and not “overzealous.” Second, the argument about enforcement incentives works both ways. The fact that in the absence of special funds, the agencies responsible for enforcing the laws must spend time and money to do so, without seeing any programmatic benefit, may be a disincentive to reasonably aggressive enforcement. Therefore, the special fund only removes the disincentive. It does not “overcorrect,” because it still does not give agency personnel anything except indirect rewards (recognition, increased budgets) for enforcement.

c) Workability

Criminal sanctions have a low degree of workability for a number of reasons. The costs to the enforcing agency of imposing such sanctions are high. The need to involve authorities not well-versed in environmental law and more accustomed to pursuing more traditional criminals or else with

38 See, e.g., Prevention of Sea-Water Pollution by Oil Ordinance (New Version) § 14 (1980), 1993 Isr. Envtl. Legis. E-2, E-3; Maintenance of Cleanliness Law § 10. The number of statutes under which criminal penalties are paid into special environmental funds was recently expanded. Environmental Quality Law [Methods of Punishment] [Amendments to Statutes].
differing political agendas can pose a real barrier to criminal enforcement. Similarly, it is difficult to get a court to impose a criminal sanction, due to both heightened requirements of proof as well as to the view of some judges that a criminal penalty is not appropriate for a "mere" environmental violation. This latter problem is certainly more pronounced in Israel, where awareness of environmental matters is still in its embryonic stage in comparison to the United States.

d) Substantive and Procedural Fairness

It may be claimed that criminal sanctions generally are substantively fair, if only because both the protections for defendants in the criminal justice system as well as the hesitancy to recognize environmental violations as crimes prevent imposition of such sanctions for any except the most egregious of environmental offenses. Still, as with other administrative offenses, the question may be raised as to whether it is fundamentally fair to label the violator a criminal. The answer depends in part on how the objective of environmental law is defined. If environmental law is seen as proscribing immoral behavior, then the label is deserved; but as discussed above, not everyone agrees with this rationale for environmental laws. Furthermore, in many cases it is difficult to prove a connection between the outlawed activity and any real harm to the health or other interests of the community. Therefore, the deservedness of the criminal label is questionable, particularly for minor violations of technical requirements.

Strong procedural protections are provided to an alleged violator before imposition of major criminal sanctions.


40 See Zamir, supra note 39. Zamir questions whether this lack of a clear relationship between violation and sanction will generate disrespect for the law. Professor Kenneth Mann raises another concern; he says that in cases where only the criminal sanction is available, concerns that the criminal sanction is too harsh will lead authorities to hesitate to impose any sanction at all on violators deserving of some sanction. Furthermore, if the criminal sanction is employed, its use will be unfair, since it will be imposed only on a small number of violators, while other violators will escape any sanction. Mann, supra note 1, at 243–44.
e) Summary

While major criminal sanctions may serve several enforcement goals, many of these goals are better served by other types of sanctions, to be discussed below. Moreover, there are significant drawbacks to the criminal sanction. Therefore, major criminal sanctions should be reserved for those cases where these drawbacks are minimized, that is, for violations that are regarded as sufficiently “bad” for prosecutors to prosecute, for judges to impose criminal sanctions, and for the community to see imposition of the sanction as fair. This will also solve some of the workability problems insofar as it will free the mechanism of the criminal process from dealing with all but the most egregious of violations.

2. Minor Criminal Fines

a) Description

Several Israeli laws set up a special mechanism for imposing small criminal fines. For example, the law on marine pollution by oil provides that when a summons for a criminal proceeding is issued, the authority issuing the summons may offer the recipient of the summons the option of paying a stated fine instead of being subject to a criminal trial. Under this statute, the amount of the fine is set by regulations. If a person pays the fine, it is to be considered a determination of guilt in a criminal proceeding. The amounts of the fine are smaller than the amounts a court could impose in a criminal proceeding, with the maximum fine for a first offense set at NIS 6,250 (about $1,800), as compared with the NIS 37,500 ($10,800) maximum for court-imposed fines.

A general law on criminal procedure sets up a similar system for imposing minor fines for violations of the laws on air pollution and on maintenance of cleanliness. While the small criminal fines used to be quite low, recent amendments provide for fines in an amount of up to ten percent of the fines

42 Prevention of Sea-Water Pollution by Oil Ordinance (New Version) § 25(a).
43 Prevention of Sea-Water Pollution by Oil Ordinance (New Version) § 26.
44 Compare Prevention of Sea-Water Pollution by Oil Ordinance (New Version) § 25(b) (on fines by summons) with § 18(a) (on court-imposed fines). The maximum fine by summons for a repeat offense is NIS 12,500 ($3,700).
that a court could impose. For example, the maximum fine by summons under the Maintenance of Cleanliness Law used to be NIS 490 ($140), but it is now either NIS 4,980 ($1,400) or NIS 15,000 ($4,300), depending on the violation.46 Similar fines are provided under the laws on air pollution and public health (which covers a variety of environmental nuisances), and higher fines can be imposed under the law on dangerous substances.47 Furthermore, higher fines are provided for violations by organizations, for continuing violations, and for repeated violations.48

As described above, some Israeli statutes establish special funds that can be used for cleaning up pollution caused in violation of these statutes and for other uses related to the statutory purpose. Minor criminal fines assessed under these statutes are also paid into the special funds and not into the national treasury.49

b) Evaluation — Efficacy

It is questionable whether small criminal fines, as they have been employed in Israel, are an effective general deterrent. In the past, these fines were quite low, and it is not clear whether they were sufficient to affect behavior. On the other hand, the ease with which such fines can be imposed suggests that they could be used with sufficient frequency to have some general deterrent effect. As the amount of the fines grows, the deterrent effect may become stronger. However, if the amount seems too large, the alleged violator will have an incentive to fight its imposition, which will prevent the frequent application necessary for achieving general deterrence. If the amount is small, the fines can be easily imposed, but they do not deter violations that save significant sums of money for the violating source.

It is in their capacity as special deterrents that small criminal fines are most important. In this regard, they are probably highly effective with respect to minor violations, since they play an important educational role.

46 Maintenance of Cleanliness Law § 13(a) (as added by Environmental Quality Law [Methods of Punishment] [Amendment of Statutes] § 2[7]); Abatement of Nuisances Law § 11(d) (as added by Environmental Quality Law [Methods of Punishment] [Amendment of Statutes] § 3[10]).
47 Environmental Quality Law [Methods of Punishment] [Amendment of Statutes] chs. 3, 5, 6 (air pollution, dangerous substances, and public health, respectively).
48 Environmental Quality Law [Methods of Punishment] [Amendment of Statutes] chs. 2, 3, 5, 6.
49 E.g., Prevention of Sea-Water Pollution by Oil Ordinance (New Version) § 32.
An individual who is subjected to a fine for a violation such as littering is probably less likely to repeat the violation. If the small fines are paid into a special fund, they may be used to clean up pollution and restore polluted areas.

c) Workability

The greatest advantage of small criminal penalties is related to their measure of workability: as long as the violator does not request a full court hearing, the fines are easily imposed. This advantage may decrease as the amounts of the fines sought increase.

d) Substantive and Procedural Fairness

In at least some cases, small criminal fines may seem to present a problem with regard to substantive fairness. Since the amounts of the fines, even after the recent increases, are relatively small, they are most likely designed to be used in cases of minor infractions. Yet it is exactly for such minor offenses that it seems inappropriate to attach a criminal stigma. On the other hand, it may be claimed that environmental violations, even minor ones, harm the entire community and warrant the criminal sanction. Furthermore, when the fines are imposed for actions such as polluting the ocean with oil from ships, the argument against the fairness of a criminal sanction is less persuasive.

Since the issue of substantive fairness is not clear-cut, it seems logical to ask whether there is a genuine need to attach the criminal label to such fines. If the purpose of the sanction is to deter violations by making them costly, it seems that this end would be served just as well if the fines were civil in nature. This also would be true if the purpose were educational.

Small criminal fines present no procedural fairness problem. An alleged violator can choose to stand trial in a full criminal proceeding. In the trial, he will receive all the protections granted in criminal proceedings.

3. Civil Compliance Orders

a) Description

Israeli environmental law differs mostly from the American law in the scope of the authority that is granted to the courts to impose civil remedies. American statutes provide courts with extensive authority to impose civil

50 E.g., Prevention of Sea-Water Pollution by Oil Ordinance (New Version) §§ 24, 27.
remedies on those who violate environmental laws. These remedies are imposed in civil proceedings, at the behest of the government. These civil proceedings are not public nuisance actions, but special statutory proceedings designed to enforce the environmental laws with special statutorily provided remedies.

For example, under both the Clean Air Act and the Clean Water Act, the Administrator of the Environmental Protection Agency (hereinafter "EPA") may bring an action for injunctive relief against alleged violators. Injunctive relief may include orders to cease violations or orders to take specific steps to cease the violation.

American courts, at times, have used their civil remedy authority to fashion rather creative remedies. Courts have imposed receiverships on public facilities not complying with environmental laws, directing the receiver to bring the facility into compliance. Other courts have appointed administrators with a different set of formal powers, but essentially with the same obligation to ensure that the facility complies with the law. They have also imposed sewer moratoria. These are orders prohibiting the hook-up of new sewerage connections to sewage treatment plants that violate water pollution control laws. Such orders have a nice rationality: if a plant cannot adequately treat the sewage it is receiving, it should not be allowed to receive additional sewage. The orders also have an important political dimension in that they mobilize building contractors to pressure the plant to comply with the law. Courts have also ordered companies that violated reporting requirements under environmental laws to conduct audits at their facilities. Given an appropriate request from the enforcing agency and a flexible judge, the possibilities are virtually unlimited.

51 Clean Air Act 113(b), 42 U.S.C.A. § 7413(b) (West 1995).
52 Clean Water Act §§ 309(b), (d), (f), 402(h), 33 U.S.C.A. §§ 1319(b), (d), (f), 1342(h) (West 1986 & Supp. 1997).
54 E.g., People v. Sanitary Dist. of Decatur, No. 82-3375 (C.D. Ill. Dec. 29, 1982); described in M. Gelpe, Pollution Control Laws Against Public Facilities, 13 Harv. Envt'l. L. Rev. 69, 127 (1989).
56 The cases, which arose under the Toxic Substances Control Act, are discussed in 3 Rodgers, supra note 31, § 6.10 (1988). This could lead to detection and remediation or prosecution of additional violations.
57 See the cases under the Resource Recovery and Conservation Act, which are discussed in
In some cases, the authority of American courts to issue such creative types of orders derives from general statutory authorization. For example, the Clean Water Act explicitly authorizes courts to provide “appropriate relief.” But such explicit authorization may not be necessary; even without it, federal courts have considerable discretion in shaping injunctive remedies.

Israeli laws do not explicitly provide comparable authority. The closest thing is the authority courts have under a few laws to issue orders to violators to comply with the requirements of the laws, to prevent future violations, or to clean up pollution caused by a violation and to restore the area to its pre-violation condition. Such powers differ from the broad authority found in American law in many important respects. To begin with, not all Israeli laws provide such authority. Those that do generally authorize issuance of only a limited range of types of orders, and sometimes the orders have only a very limited duration. Most importantly, Israeli courts are authorized to provide such relief only against a person who has been convicted of a criminal violation and only in the context of criminal proceedings. In some cases, the courts have authority to issue such a “civil” type of order only for the period between indictment for a crime and decision on the criminal charge.

4 Rodgers, supra note 31. Stipulated penalties are another type of special feature that may be included in court orders. Discussion of such penalties, which are similar to liquidated damages in contracts, is beyond the scope of this paper. See Gelpe, supra note 54, at 108–15.

58 Clean Water Act § 309(b).


60 E.g., Water Law § 20X (1959), 1993 Isr. Envt!.. Legis. D-2, D-13 (order to pay clean-up costs incurred by any person, to do what is needed to stop the pollution, to clean up the water, and to restore the condition that existed before the violation). The statute that applies to air, odor, and noise pollution used to provide the authority for courts to issue orders “to refrain from any act which caused the offence of which [the person] has been convicted.” Abatement of Nuisances Law § 11(b). This statute was recently amended, and such authority was deleted; Environmental Quality Law [Methods of Punishment] [Amendment of Statutes] § 3(9).

61 E.g., Maintenance of Cleanliness Law § 14a. This provision was added by a recent amendment (Environmental Quality Law [Methods of Punishment] [Amendment of Statutes] § 2[8]). The Water Law has an unusual provision authorizing the court to issue an order to prevent, cease, or reduce pollution to someone who is merely suspected or accused of committing an offense under the law; Water Law § 20W(a). Such orders could be a potent tool, but they are severely limited in duration. In the case of someone who has
Several of the Israeli statutes provide for a different type of judicial relief. Courts may order a person convicted of violating an environmental law to compensate anyone who cleaned up the pollution for the costs he incurred.\(^{62}\)

**b) Evaluation --- Efficacy**

Civil orders are designed mainly as specific deterrents; that is, they are aimed at bringing a violating facility into compliance. Even as such, there is a question as to whether they actually accomplish this goal. What good does it do to have a court order a facility to do what the law already requires the facility to do? If a facility has already shown that it will violate the law, what is there to suggest that it will now obey a court order?

One answer is that an order by a court carries extra weight, because the honor of the court and the remedy of contempt stand behind the order. A second answer is that facilities pay more attention to court orders because they are specific rather than general. The order of a court is directed at a specific party, whereas the requirements of the law are directed at all sources. Yet another answer proposes that civil orders work mainly in cases where some special remedy is ordered, such as a receivership or a sewer moratorium. These are remedies that go beyond the prima facie requirements of the law.

Civil orders should not be expected to have much value in general deterrence. After all, they basically require the violator to do what was required of him to begin with. If not accompanied by some extra "pain," they provide no motivation for sources not to ignore the requirements of the law and to wait until they are caught. "Pain" can be inflicted by publicity, but whether this is effective depends on the attitude of the particular society toward environmental violations. At present, American polluters are probably more sensitive to adverse publicity regarding environmental problems than their Israeli counterparts.

Only in their more creative form are civil orders well-suited for purposes other than specific deterrence. For example, a civil order to publicize viola-

---

\(^{62}\) E.g., Abatement of Nuisances Law § 10a(c) (as added by Environmental Quality Law [Methods of Punishment] [Amendment of Statutes] § 3[8]); Dangerous Substances Law § 15a(c).
tions may work as a general deterrent. Orders may also require clean-up and restoration of polluted areas.

c) Workability

It is easier for an American administrative authority to get a civil order than it is for an Israeli authority to obtain a civil-type remedy, since the Israeli authority must bring a criminal, rather than civil, proceeding. The costs of civil litigation still present a significant barrier, of course, but it is not as high a barrier as is posed by the special procedural and other requirements of criminal proceedings.

d) Substantive and Procedural Fairness

Civil court orders raise no fairness problems for defendants against whom the law is being enforced. With regard to substantive fairness, a defendant can raise no reasonable objection that the remedy is disproportionately harsh, even in the context of the creative remedies ordered by American courts, as long as the requirements in the court order are closely connected to those imposed in the underlying laws. As for procedural fairness, since the remedy is civil, the protections offered by the civil proceeding in court are sufficient.

There is, however, some cause for concern regarding substantive and procedural fairness to third parties connected to some of the creative remedies ordered by American courts. In cases such as sewer moratoria, the court order may affect such third parties as building contractors and property buyers who are not represented in the litigation between the government and the violating facility. Courts should allow representatives of affected third parties to participate in the formulation of the remedy in order to protect their legitimate interests. It should be recalled, however, that insofar as what such third parties want (such as unrestricted development) will cause violations of pollution control laws, their interests do not warrant strong legal protection.

4. Civil Penalties

a) Description

Many American statutes provide for enforcement through court-imposed civil penalties. These penalties are imposed by courts at the request of the

---

63 E.g., Clean Air Act § 113(b); Clean Water Act § 309(d); Resource Conservation and Recovery Act, 42 U.S.C.A. § 6928(a), (g) (West 1995).
government, are paid into the treasury, and are denominated by the statutes as civil rather than criminal in nature. The amounts of the penalties may be substantial — up to $25,000 per day per violation. Courts have imposed total civil penalties in the millions of dollars, although smaller assessments are typical and substantial portions of the large penalty assessments are sometimes later forgiven.

The fact that these penalties are denominated as "civil" suggests that they are not designed to be punitive. Yet some facets of the authorizing statutes and of the case law suggest otherwise. The Clean Water Act provides that in "determining the amount of a civil penalty the court shall consider the seriousness of the violation . . . , any history of such violations, any good-faith efforts to comply with the applicable requirements, . . . and such other matters as justice may require." These factors resemble those that are typically considered when determining whether a defendant is deserving of punishment through a criminal sanction. In addition, the case law indicates that for some purposes, the civil penalties are to be considered penal. No doubt, at least when the penalties are large, they do have a retributive character.

Other features of the penalties are clearly civil in nature. For example, the economic benefit secured by the violator is relevant in fixing the penalty amount, which should work to recapture that benefit. Moreover, labels do matter. The stigma attached to criminal convictions probably does not attach to these civil assessments.

No comparable enforcement method is found in the Israeli laws.

64 E.g., Clean Air Act § 113(b); Clean Water Act § 309(d). Some penalties under the Resource Conservation and Recovery Act are limited to $25,000 per violation. 42 U.S.C.A. § 6928(g) (West 1995).
66 Gelpe, supra note 54, at 89–92.
67 Clean Water Act § 309(d).
68 E.g., United States v. Edwards, 667 F. Supp. 1204 (W.D. Tenn. 1987) (holding that civil penalties are punitive for purposes of determining whether they survive the death of the violator).
69 Clean Water Act § 309(d).
71 In fact, it has been suggested that one of the main advantages of such penalties is that they preserve the special quality of criminal sanction for serious transgressions involving culpable conduct. Id., at 1346.
b) Evaluation — Efficacy

While these penalties may have some retributive effect, their principal value is in their role as general deterrents. Large penalties create headlines, which can be assumed to have a deterrent effect. Even small penalties, if applied to a great many sources, send a clear message that the law must be obeyed.

Civil penalties are also effective for achieving the economic goal of enforcement: recapturing savings from non-compliance. For example, the Clean Water Act provides explicitly that a court should consider “the economic benefit (if any) resulting from the violation” in setting the penalty. The purpose of this provision — to prevent violators from obtaining an economic advantage over their competitors — can be attained if penalties are imposed on a consistent basis.

Other factors considered in determining penalty amounts under American law include the ability of the violator to pay and the seriousness of the violation. The relevance of such factors may be fairly debated. It has been argued that both fairness and effective deterrence require consideration of ability to pay. On the other hand, if the main element of the penalty is recapture of savings, ability to pay should be irrelevant. Compliance would have required the expenditures in the first place, regardless of ability to pay. Therefore, ability to pay should be considered only in determining how much higher than the economic savings should the penalty be set, and in setting a payment schedule. For sources in strong economic condition, the ability-to-pay factor requires setting the penalty high in order for it to be an effective specific and general deterrent. For sources with more limited means, the ability-to-pay factor may mean adding a smaller extra amount beyond the economic savings or providing for payment over a longer period. For such sources, deterrence will work without a large penalty amount.

The relevance of the seriousness of the violation in setting penalty amounts is also questionable. If this is a surrogate for determining the degree of

72 Cf. Cheh, supra note 70, at 1347–48 (the civil remedy of forfeiture encourages those dealing with transgressors to monitor their behavior to avoid impacts of the forfeitures).
73 On the findings as to consistent use of small civil penalties in the state of Wisconsin, see Gelpe, supra note 54, at 88–90.
74 Clean Water Act § 309(d). See also Clean Air Act § 113(e).
76 See Clean Air Act § 113(e).
77 Decriminalization, supra note 2, at 388.
environmental harm, it is an acceptable consideration. It is also acceptable as a consideration in determining whether the cost to the government of an enforcement action is justified at all. But if seriousness is used to measure deservedness of punishment, it is of questionable relevance in a civil proceeding. It is preferable to keep the civil nature of the penalty clear by basing the penalty amounts on savings recapture plus an additional sum sufficient to deter.

Because civil penalties are paid into the general treasury, they are not useful for clean-up and restoration of areas affected by pollution. Still, the mere existence of civil penalties in fact often leads to clean-up and restoration activities. Suits for civil penalties tend to be settled between the parties, because under American law, liability is clear and the penalty amounts are high. It is not unusual to find, as part of a settlement, an agreement by the alleged violator to fund clean-up and restoration work. Although this practice has stirred some debate, it has been recognized in the Clean Air Act. Since 1990, this Act has authorized courts to order that up to $100,000 of an assessed civil penalty be used for clean-up, restoration, or other “beneficial mitigation projects” that serve the purposes of the Act and “enhance the public health or the environment.” This authorization is limited, however, to enforcement actions brought by citizens and does not extend to enforcement actions brought by government authorities.

As in the context of criminal fines, courts must be careful with allowing forgiveness of civil penalties for sources that later come into compliance with the law. Forgiveness can provide a good motivation for a source to comply, but sources are supposed to comply with the law without this added motivation. If a penalty is completely or almost completely forgiven, all value for general deterrence is lost. Violators must always be required to pay the full economic savings from their earlier non-compliance. The mere fact that they came into compliance late will almost always entail a savings in that the source had use of the funds not expended on timely compliance. In addition, there must always be some penalty for violation in order to give an economic advantage to those sources that have complied voluntarily.

78 1 Rodgers, *supra* note 31, at 539.
80 Clean Air Act § 304(g)(2), 42 U.S.C.A. § 7604(g)(2) (West 1995).
c) Workability

It is easier for enforcing agencies to obtain civil penalties than criminal penalties, for the same reason that it is easier to obtain civil enforcement orders. The criminal law system can be avoided.

d) Substantive and Procedural Fairness

The main difficulties with civil penalties arise in this area. Since the penalties are imposed in civil proceedings, there is a question as to whether the procedures used are sufficient to guarantee a fair proportionality between the penalty and the violation and as to whether further procedural protections are due the alleged violator by virtue of the quasi-punitive nature of the penalties.\(^\text{81}\)

To the extent that the penalties are based on recovering economic gain, they are civil in nature and require no further procedures than those usually available in a civil trial. More troublesome is the issue of procedural fairness in relation to the punitive aspect of the penalties. American courts have largely overlooked this issue in the environmental context, finding that a penalty denominated by the legislature as civil is indeed civil and no criminal procedural rights attach.\(^\text{82}\) Some dissenting voices have been heard in the case law and, to an even greater extent, in the literature. The literature generally addresses broader issues of civil-type remedies under many different types of statutes and suggests that some of these remedies are sufficiently punitive in nature to require that at least some of the procedural guarantees of criminal proceedings be provided.\(^\text{83}\)

Some commentators suggest jettisoning the distinction between civil and criminal proceedings as determinative of the procedures due a defendant and finding an intermediate ground for the types of special enforcement actions found in modern regulatory statutes.\(^\text{84}\) Specifically, it has been suggested that in the United States, the necessary procedural guarantees could be decided on a case-by-case basis, using the procedural due process

\(^{81}\) See Decriminalization, supra note 2, at 370–74; Mann, supra note 1, at 260–61.

\(^{82}\) E.g., Tull v. United States, 481 U.S. 412 (1987). For a discussion of cases not limited to the environmental area, see Mann, supra note 1, at 254–55.

\(^{83}\) See Mann, supra note 1, at 254–55; Decriminalization, supra note 2, at 397–419. In the United States, even if the penalties are considered to be civil in nature, procedural issues arise regarding the right to trial by jury. These were settled in Tull, 481 U.S. at 412.

\(^{84}\) See Mann, supra note 1.
test set out by the Supreme Court.\textsuperscript{85} The problem with this proposal is that it requires case-by-case determination of rights due a defendant. Until the case law decides enough cases under enough statutes, the uncertainty will be high, as will the cost of litigating to settle that uncertainty.

Israeli law already provides a perhaps more viable, alternative solution to this problem. As under the laws for small criminal penalties, the defendant could be offered the option of a criminal adjudication. An agency could file a civil complaint against an alleged violator, asking for court-imposed civil penalties in a stated amount. The defendant would then have the option of requesting a criminal proceeding in which he would be subject to any criminal penalty provided by law and also to the opprobrium that a possible criminal conviction would carry.

5. Administrative Compliance Orders

a) Description

Under most environmental statutes in both Israel and the United States, the administrative agency charged with implementing the statute may order a violating facility to comply with the requirements of the law.\textsuperscript{86} Under some statutes, the agency is granted general authority to issue an order.\textsuperscript{87} Other statutes delineate more specifically the types of requirements that may be imposed in an order.\textsuperscript{88} Usually the agency is given a free hand in issuing such orders; a few statutes impose specific procedural requirements, although even these tend to be minimal.\textsuperscript{89}

Administrative orders differ from civil compliance orders issued by courts in that the former do not carry the weight of a judicial determination. This may affect the willingness of a violator to comply with the order. Under American law, while a civil court order may be enforced by relatively

\textsuperscript{85} This suggestion is advanced by Cheh, \textit{supra} note 70, at 1394. The Supreme Court case that Cheh refers to is Matthews v. Eldridge, 424 U.S. 319 (1976).

\textsuperscript{86} Examples from Israeli law include Abatement of Nuisances Law § 8(a), 15 L.S.I. 52, 53 (1960–1961); Water Law § 20G, 20H (1959), 1993 Isr. Envtl. Legis. D-2, D-8, D-9. These orders may be called “orders,” “instructions,” or “notices.” The term used is of no legal importance. In American law, examples are found in the Clean Air Act § 113(a)(1), (3)(B); and the Clean Water Act § 309(a)(3).

\textsuperscript{87} E.g., Abatement of Nuisances Law § 8; Clean Air Act § 113(a)(1).

\textsuperscript{88} E.g., Water Law § 20H.

\textsuperscript{89} The Clean Air Act requires that the person to whom certain orders are issued have “an opportunity to confer with the Administrator concerning the alleged violation.” § 113(a)(4).
abbreviated contempt proceedings, an administrative order may be enforced only by a full civil or criminal proceeding. Still, a court proceeding for enforcing an administrative order may be abbreviated if the court gives great deference to the administrative determination in formulating the order.

b) Evaluation — Efficacy

Administrative orders are useful as specific deterrents, but only in a limited class of cases. Where a violator does not realize that the law applies to him or does not believe that the agency is serious about requiring compliance with the law, the order may deliver a needed message. Moreover, if a source does not understand which specific steps it must take to comply with the law, the order may be helpful in spelling out those steps. The order may also be helpful if there is judicial enforcement against the violator at a later point; a specific order eliminates the defense that the violator did not know either that the law applied to him or what action was required for complying with the law. While neither of these "defenses" may be cognizable strictly according to the law, they do have the potential to sway judges into giving a violator a second chance. In effect, the order becomes the first chance, making the judicial proceeding the second chance.

However, use of orders may counteract the general deterrent effect of statutes and regulations. If violators realize that the enforcing agency will always resort first to orders before turning to more serious enforcement methods, they may see no reason to engage in costly compliance activities before an order is issued. Issuing orders, rather than resorting to stronger enforcement methods, may only delay compliance. Furthermore, because administrative orders in themselves carry no clear, specific sanction, a facility that ignored the legal requirements of the law in the first place may pay no more attention to the administrative order.

90 Court orders can be enforced by civil contempt. In contempt proceedings, the only issues that a court considers are whether the order was violated and, as a defense, whether compliance was possible. United States v. Ciampitti, 669 F. Supp. 684 (D.N.J. 1987). Infeasibility of compliance may be a defense, unless the court considers closing the facility as a possible means of compliance. In Commonwealth Dep't of Envtl. Resources v. Pennsylvania Power Co., 461 Pa. 675, 337 A.2d 823 (1975), the court recognized infeasibility of compliance as a defense without considering whether the facility could have complied by closing.

91 A study of enforcement actions against public facilities identified this problem. Gelpe, supra note 54, at 102.
c) Workability

Administrative orders are, in theory, relatively easy to issue procedurally, so they would be expected to have a high degree of workability. This ease, however, is at times illusory. In Israel, especially, issuance of such orders may be quite politicized, so the administrative authority may find it quite difficult in practice to issue such an order.\(^{92}\) In addition, it may be difficult for the agency to draw up specific schedules to include in the order. Sometimes this requires intimate knowledge of the processes operated by the facility, of production schedules, etc., and such information is not likely to be available within the agency and may be difficult to acquire. If a specific schedule is not realistic, it will encourage resistance rather than compliance.

d) Substantive and Procedural Fairness

Administrative orders, since they are not self-enforcing, do not raise problems of procedural fairness, even if they are not issued through formal proceedings. An alleged violator who objects to an order can seek immediate judicial review, or he can challenge the legality of the order in a defense to an enforcement proceeding.\(^{93}\) The procedures can be supplied by the courts on judicial review.

Enforcing authorities should, however, extend certain procedural rights to those against whom the orders are issued for two reasons. First, substantive fairness demands it because the agency is more likely to make mistakes in its requirements, asking for more expensive than necessary compliance techniques or imposing unrealistic requirements, if it does not first consult with the pollution source. Second, good procedure can protect the order if it is later reviewed by a court, either in an administrative action to enforce the order or on direct judicial review of the order. A court would be expected to give a greater degree of deference to the authority's formulation of requirements in the order if the source were given some voice in its formulation.

\(^{92}\) Issuance of administrative orders regarding air pollution from the refinery and power station in the Haifa bay area went through many stages and involved several governmental and academic committees.

\(^{93}\) In the United States, courts generally do not allow immediate judicial review of orders under the doctrine of ripeness requiring sources to wait until an agency tries to enforce the order. *E.g.*, Southern Pines Assocs. v. United States, 912 F.2d 713 (4th Cir. 1990); Solar Turbines, Inc. v. Seif, 879 F.2d 1073 (3d Cir. 1989). In Israel, immediate judicial review is theoretically available in a petition to the Supreme Court sitting as the High Court of Justice, although the Court does not always agree to consider such petitions on their merits.
This is not to suggest that full trial-type procedures must be provided. Rather, the alleged violator should be informed of the information in the hands of the agency and should be given notice of, and a chance to react to, the proposed order. To maintain workability, reasonably tight time limitations should be maintained in these procedures.

6. Administrative Corrective Actions

a) Description

A provision common to many Israeli environmental laws, but rare in the American laws, allows the authority responsible for administering a statute to step in and cure a violation by itself and then to collect the costs of its actions from the violator. First, the authority must order the source responsible for the violation to remedy it; the authority can step in only if the actions required by the order are not executed. In the United States, similar authority is found in the Superfund Law for clean-up of contamination at hazardous waste disposal sites, and much more limited authority, relating only to extreme emergencies, is provided for in other statutes.

b) Evaluation — Efficacy

Administrative corrective actions, if they are used, can have general deterrent value. Facilities that are concerned that government will "botch" the job and try to charge them with unnecessary costs have an incentive to prevent violations that are serious enough for the administrative authority to invoke this enforcement method.

These actions also recapture at least some of the economic gain of a violation, since they force the violator to pay for the cure. The cost of the cure can even exceed the economic gain from the violation.

c) Workability

This remedy is not highly workable for administrative agencies that lack the expertise, manpower, or funding to undertake the clean-up. Even if an

94 E.g., Water Law § 20G(b) (disposal of junk cars); Maintenance of Cleanliness Law § 13(b) (disposal of waste or construction waste into a public area or littering a public area); Abatement of Nuisances Law § 11A, 15 L.S.1. 52, 54 (1960–1961) (relating to stopping operation of a car alarm which is causing noise pollution); Abatement of Nuisances Law § 11b (all causes of air, noise, and odor pollution).


agency uses contractors to do the work, oversight is necessary. Moreover, the prospect of recovering clean-up costs does not eliminate the need for funds for the initial outlay. In the United States, the government finances the clean-up from a special superfund, but even these funds have not proven to be sufficient, and the government works hard to get the responsible parties to do the clean-up without initial government funding. In Israel, the monies available from special funds under some of the laws can, in theory, be used, but again the adequacy of the funds is likely to be a problem.

d) Substantive and Procedural Fairness

The use of administrative corrective actions carries a risk of substantive unfairness. The government agency may, indeed, spend excessive amounts of money on its actions. A source's claim that charging it such excessive expenditures is unfair is mitigated if the source responsible for the pollution has received prior notice that action is needed and has had the opportunity to do the work itself or if an emergency exists. Procedural fairness claims can be alleviated by providing the source with procedural rights at the collection stage, although to the extent that collection becomes more cumbersome, this remedy is less useful for administering agencies.

7. Withholding Administrative Benefits

a) Description

Sometimes violating facilities need something from the enforcing agency. They may need benefits associated with the violating facility, such as renewal of its operating permit, or benefits associated not with that specific facility but with other operations of the same company. Thus, one method of enforcement is for the regulating agency to deny such permits or other benefits to the violator.

Several American statutes prohibit the federal government from entering into a contract on any matter with a person convicted of criminal violation of the statute. Other provisions prohibit granting a construction or operating permit for a facility if the owner or operator has another facility that is violating applicable emission limitations or impose other limitations on


98 Clean Air Act § 173(a)(3), 42 U.S.C.A. § 7503(a)(3) (West 1995). This prohibition applies in areas that are already polluted according to the statute's standards.
federal provision of financial assistance, contracts, or permits to violating activities. 99

Israeli law also provides for withholding administrative benefits from those who violate environmental laws. A planning commission, when requested to approve expansion of a facility, can require that equipment in the existing facility be upgraded for pollution prevention. 100 Presumably, the commission also can require other steps toward the same goal. Under Israel's law on oil pollution of the seas, the Port Master can prevent a ship from leaving port if a fine regarding that ship has not been paid. 101

b) Evaluation — Efficacy

This remedy is likely to work as both a specific and general deterrent, but only with regard to those facilities in need of a government benefit. In cases where a facility requires a permit that must be renewed periodically, this remedy can work quite well. If permit renewal is conditioned on compliance, the authority could refuse to renew the permit for any violating facility. In the United States, such permitting schemes are the norm. In Israel, permits are not required under most of the environmental statutes, so this remedy is less effective. 102 It can be of use only if a facility wants to undertake the kind of expansion that requires planning approval.

c) Workability

This remedy is easy to use if the proper legal framework is in place. The agency need only wait for the facility to seek the benefit and then ask that the facility demonstrate compliance. If the facility does not need a permit or the

99 E.g., Clean Air Act §§ 176, 306, 42 U.S.C.A. §§ 7506, 7606 (West 1995). Federal rules provide for suspension and debarment of a firm as government contractors if that firm has been found to have performed poorly on a public contract or to have demonstrated a lack of business integrity or competency. A federal official engaged in enforcing these regulations reports that they may be applied for environmental violations. Sims, Suspension and Debarment: Potent Government Tools, 25 Sonreel News No. 4, 1 (Jan./Feb. 1994).


102 In the United States, both the Clean Air Act and the Clean Water Act require permits for all discharges. Permits generally must be renewed every five years. Clean Air Act §§ 502(b)(5)(B), 503(a), 42 U.S.C.A. § 7661a(b)(5)(B), 7661b(a) (West 1995); Clean Water Act § 402(a), (b), 33 U.S.C.A. § 1342(a), (b) (West 1986 & Supp. 1997).
benefit is provided by some other agency or authority, workability is more of a problem. In the latter case, good communication between different governmental authorities is necessary for the remedy to work.

d) Substantive and Procedural Fairness

Substantive fairness is a problem if the violation is minor and the effect of withholding the permit is substantial. Such disproportionality will rarely arise since most minor violations can be corrected at little cost.

Procedural fairness is more troublesome. The agency determination that a violation exists must be made in a trustworthy manner; otherwise, the power wielded by an agency over a facility in need of a permit or other benefit may be too great. On the other hand, if extensive formal procedures are required, workability is lost.

8. Administrative Penalties

a) Description

Several American statutes authorize the Environmental Protection Agency to impose administrative penalties. These penalties are civil, not criminal, in nature. They are not self-enforcing; that is, the agency has no authority to collect the penalty without the assistance of a court. In a civil proceeding to collect the penalty, the court may review the propriety of the administrative decision to impose the penalty and the penalty amount; however, this review may be limited in scope. General principles of administrative law require that the court defer to the administrative decision. In addition, some environmental statutes explicitly dictate that courts defer to the agency decision in fixing the penalty or allow judicial review only within a short time-frame. On the other hand, the agency must use a complicated, trial-type procedure in assessing the penalty under such statutes.

The EPA has power to assess administrative penalties under most of its major statutory authorizations. One provision of the Clean Air Act

103 For example, the Clean Air Act § 113(d)(4), 42 U.S.C.A. § 7413(d)(r) (West 1995), provides that on review, an order should be set aside only if not supported by substantial evidence in the record or if it is an abuse of discretion. Furthermore, the person to whom the administrative order is issued may seek judicial review within thirty days of its issuance. Thereafter, it may not be reviewed by any court, including an action to enforce the order.

104 E.g., Clean Air Act § 113(d)(2).

105 Clean Air Act §§ 120, 205(c), 42 U.S.C.A. §§ 7120, 7524 (West 1995); Clean Water Act § 309(g), 33 U.S.C.A. § 1319(g) (West 1986 & Supp. 1997); Federal Insecticide, Fungicide
includes explicit instructions on how to set the amount of the penalty in order to assure recapture of economic benefits from non-compliance;\textsuperscript{106} other statutory provisions provide more wide-ranging and general instructions for considering not only economic benefit but also such factors as the gravity of the violation, compliance history, and the violator's ability to pay the penalty.\textsuperscript{107} Other provisions offer even less guidance on how to fix the penalty amount.\textsuperscript{108} Some statutes specify use of formal proceedings in setting penalties,\textsuperscript{109} while others authorize informal proceedings.\textsuperscript{110}

Israeli small criminal fines, discussed above, are comparable to the American administrative penalties in that they may be imposed without the involvement of a court, and an administrative agency determines the amount of the fine. They differ from the American administrative penalties in that the Legal Advisor to the Government, and not the agency charged with implementing the law, may impose the fine. More importantly, these fines are not really administrative fines in that they bear the stigma and any other implications of a determination of criminal guilt. A person who has paid such a fine is seen to have admitted his guilt before a court, to have been judged guilty, and to have fulfilled his punishment.

Recent amendments to the Israeli laws on corrective action include provisions that resemble administrative penalties, but only within a very limited context and with the amount of the penalty strictly controlled. These laws provide that if an authority issues a corrective action order and the responsi-
ble party does not do as ordered, he can be required to pay twice the amount that the authority paid to take the corrective action requested.\textsuperscript{111}

One Israeli law does authorize true administrative penalties, but it has only very limited potential application to environmental enforcement and has not, in fact, been used at all in this area. The Administrative Offenses Law\textsuperscript{112} authorizes various ministers to establish by regulations that violations of specified laws are administrative violations, and to impose administrative penalties. The only environmental law covered by the Law is the Public Health Ordinance,\textsuperscript{113} which, as its name indicates, deals mainly with health issues proper and only incidentally with environmental regulations. Furthermore, the ministers involved have never used their authority to enact regulations that make violations of the Public Health Ordinance subject to administrative penalties.

b) Evaluation — Efficacy

These penalties are similar to civil penalties in terms of how effectively they achieve the goals of enforcement.

c) Workability

These penalties are somewhat easier for agencies to impose than are civil penalties, because the enforcing authorities do not have to turn to the courts. This ease is partially offset by the procedures required to the extent that formal administrative hearings are used and also by the need for a court hearing in order to force payment from a recalcitrant source. Consistent with this point, one report suggests that the EPA use its authority to impose administrative penalties more frequently under statutes providing flexible administrative procedures and less frequently under those requiring the agency to use trial-type procedures and to make highly technical findings relating to the penalty amount.\textsuperscript{114}

d) Substantive and Procedural Fairness

Administrative penalties are substantively unfair if they are disproportional to the violation. To the extent that the statutes provide specific

\textsuperscript{111} E.g., Maintenance of Cleanliness Law § 13(a)(2).
\textsuperscript{112} 1986 S.H. 1160 (1985).
\textsuperscript{113} Id., app.
considerations that must form the basis for the penalty amounts and to the extent that these considerations are directed at recapture of economic savings, the problem of disproportion is reduced.

Procedural fairness can be ensured through trial-type proceedings before the agency or via judicial review of the penalty, either through direct judicial review or through review when the agency goes to court to collect the penalty. To the extent that the court defers to the agency decision, the procedural rights of the source are less protected. Again, this is less troublesome when the penalty amount is based on fairly technical economic factors. However, to work as effective deterrents, the penalty amounts must be higher than the economic savings of the non-complying source, and consequently, the amounts must sometimes be very large.

V. Conclusion and Recommendations

Both Israeli and U.S. environmental laws provide several different methods of enforcement. This allows the regulator to suit the enforcement method to the needs of a specific case. It is important that regulators be allowed such flexibility, and it is, therefore, also important that they have at their disposal a range of enforcement tools. If anything, the range of enforcement alternatives should be expanded for enforcement of those statutes that provide only limited enforcement options. The following recommendations, addressed mainly to changing Israeli law, include suggestions on how this range should be expanded.

If the regulator is to have so many choices, it is imperative that the regulator understand in which circumstances each method is best. The recommendations below also address the best application of each recommended method of enforcement.

1. Major Criminal Penalties

While the environmental laws should provide criminal penalties for violations, the criminal sanction should not be relied upon as a major enforcement method. Such penalties are most appropriate for cases involving real endangerment of public health or welfare. Criminal penalties are also appropriate for general deterrence where the likelihood of obtaining criminal prosecutions and convictions is high. This is the case when there is widespread agreement on the seriousness of the violation. Non-reporting cases are thus regarded in the United States, because the American environmental law
system relies heavily on self-reporting. Israel, however, does not currently have as extensive a self-reporting regime.

There are those who may support use of criminal penalties because of the stigma that these penalties attach to violations. They give environmental violations a certain "status." But paper "status" unsupported by actual convictions is more likely to encourage disrespect for the law than recognition of the importance of compliance.

2. Small Criminal and Administrative Penalties

The current Israeli system in regard to such penalties should be retained, but with two changes. First, those statutes that impart a "criminal" character to such penalties should be changed. The penalties should simply be administrative. Second, the penalties system should be made applicable to all the environmental statutes. Recent amendments to the Israeli laws have partially accomplished this second task.

The use of small administrative penalties for specific deterrence through education is a good idea. Similarly, these fines may achieve some general deterrence. Neither of these objectives requires use of a criminal sanction.

There is no need to provide extensive procedural rights for imposition of these fines, since they involve no essential stigma or deprivation of freedom. Further, small fines involve no significant deprivation of property. To be certain that no objections are raised regarding the absence of procedure, the existing system of allowing violators to opt to be subjected to a criminal procedure should be maintained. When relatively small penalty amounts are imposed, it can be expected that few violators will choose to exercise the right to go to trial.

3. Civil Orders

Israeli courts now have authority under some statutes to issue civil-type injunctions, negative and mandatory, to stop pollution and to clean up polluted areas, but only within the framework of criminal proceedings. There is no reason to tie this authority to a criminal proceeding; if there is a need for court orders in such matters, they should be available, even against polluters who are not subjected to criminal proceedings. Furthermore, there is no need to provide criminal-type protections to the defendant when a court is ordering the type of relief it might, in any case, order in a civil proceeding brought by a private party.

The more difficult question is whether giving courts civil order authority
would add a remedy of significant importance to the already-available authority of the administrative agencies to issue compliance orders. Civil orders issued by a court are effective if a court can add another dimension to the order that is not provided in an administrative order. A court order adds a certain measure of prestige and, therefore, urgency to the order. Court prestige may be particularly important in Israel, where the Ministry of the Environment still lacks political clout and the Ministry and the local authorities are still working to establish a strong record of administrative enforcement. In addition, an agency that turns to the courts to enforce the law may free itself of the almost interminable political debates that sometimes accompany formulation of administrative orders in Israel. Finally, court orders are useful where creative orders would be helpful. Courts can give more formalized consideration to the interests of affected third parties.

4. Civil Penalties

The major innovation I would suggest is to provide Israeli courts with statutory authorization to issue civil penalties. These penalties would be distinguished from criminal penalties by their civil nature. They would be larger in amount than the administrative penalties discussed in Recommendation 2 above.

Civil penalties have the potential to become a major enforcement tool. As compared to criminal fines, they are easier to impose and therefore should be imposed on a greater number of violators. Civil penalties serve the important objectives of recapturing benefits obtained from violations and general deterrence. Administrative authorities should request, and courts should set, penalty amounts at a level sufficient to recapture these benefits, and they should add enough extra penalty for a genuine deterrent effect.

The major problem presented by civil penalties arises in the realm of procedural fairness. There are several possible solutions to this problem. One is to provide some of the procedural protections of a criminal trial and not others. The specific protections could be set out legislatively, but this would be a difficult task, given the difficulty that would be encountered in deciding which procedural protections are warranted for all types of cases. A second solution would be to adopt the American approach, namely, to leave it to the courts to sort out which procedural protections are needed. But this is a slow process, sure to take many years, and in the meantime, the validity of civil penalties in Israel will be uncertain. If the validity is uncertain, ministries and other authorities will hesitate to seek such penalties for fear of
wasting resources without securing a positive result, or for fear of making bad law in hard cases. In addition, courts unsure of the procedural issue will hesitate to impose substantial penalties. So the real advantage of this potentially important enforcement tool will not be realized for many years. Moreover, if the courts in Israel, unlike those in the United States, find it necessary to encumber the granting of civil penalties with heavy procedural requirements, the utility of this enforcement tool will be diminished.

A third, and preferable, alternative is to use the procedure already established in the Israeli laws for small criminal penalties, namely, to give an alleged violator the option of having criminal proceedings instead of civil penalty proceedings brought against him. In this way, the violator will be guaranteed full procedural rights. While this route will expose the violator to the risks of opprobrium of a criminal determination, a possibly higher fine, and to the penalty of imprisonment, the violator can hardly object. The violator will then receive all the procedural rights granted in a criminal proceeding, rights that are designed to provide the appropriate degree of protection against these risks.

One might ask whether this solution will eliminate civil penalties as a realistic option because alleged violators will always opt for the procedural protections of a criminal proceeding. This is an empirical question about expected behavior. There seems to be little basis for assuming that this will, indeed, be the case, unless the State seeks extremely harsh civil penalties. Most alleged violators cannot be expected to prefer the stigma of a criminal adjudication and the risk, however remote, of incarceration.

This solution should have the salutary effect of deterring public enforcement authorities from asking for extremely harsh civil penalties. Mann has noted that in some cases, imposition of a civil penalty may cause greater hardship to a violator than would imposition of a criminal penalty, and this is unjust if the civil penalty is imposed without the procedural protections of a criminal trial. The suggested option of the criminal sanction would not only deter the authority from creating such a situation by seeking a harsh civil penalty, but would also give the alleged violator a voice in determining which type of penalty is harder to bear. Mann correctly points out that this is a subjective judgment and that this solution gives voice to that subjective judgment.

115 Mann, supra note 1, at 257–58.
For this solution to work, one innovation is necessary. At the beginning of the civil penalty proceeding, the potential liability of the alleged violator should not be open-ended. The statute or statutes authorizing civil penalties should set a maximum amount and should specify that in the complaint for a specific case, the enforcing public authority should ask for a specific penalty. The court in a civil proceeding should not be permitted to impose a higher penalty unless it finds good cause in facts not available to the agency at the time of filing the complaint, or else it finds that the agency request was unconscionably low. The amount requested by the authority in the civil proceeding would have no influence on the amount of a potential fine in a criminal proceeding, should the defendant choose that route.116

5. Administrative Orders

Administrative orders are helpful for achieving three objectives: (1) to get the attention of a source, particularly a small facility, not familiar with the requirements imposed by environmental laws; (2) to give a source technical assistance in determining what it must do to comply with the law; and (3) to prevent the alleged violator from later claiming, either honestly or disingenuously, in a civil or criminal enforcement action before a court that it did not know what the law required. To deal with these circumstances, the Israeli Ministry of the Environment, or other ministries and public authorities charged with enforcing environmental laws, should have authority to issue administrative enforcement orders that include orders to cease pollution, to prevent renewed pollution, and to clean up and restore polluted areas. The law should state that orders should include specific requirements and timetables. Such detailed authority now exists under some of the environmental laws, such as the Water Law,117 but not under others.

Formulation of complex orders that include specific requirements and timetables will place a heavier burden on the agencies, but issuance of more general orders requiring only compliance with the law in broad terms is

116 This rejects the approach found in the current law on oil pollution of the sea, which prohibits the court in a criminal proceeding from setting a fine lower than that requested by the agency, unless the accused proves special conditions that justify a lower fine. Prevention of Sea-Water Pollution by Oil Ordinance (New Version) § 27(b).

117 The authority to issue these orders under the Water Law is held by the Water Commissioner and not by the Minister of the Environment. Water Law § 20E, G, H. It would be preferable to transfer the authority to the Minister, but this is not the subject of the present analysis.
likely to accomplish little. In cases where it is only necessary to get the attention of a small facility, a letter, rather than a formal administrative order, would be sufficient. Other justifications for administrative orders all require that they be detailed.

An agency that issues administrative orders can reduce the drain on its resources and alleviate the problem of its limited information regarding which steps should be specified in the order by requiring the source of the pollution to propose the specifics of the order, along with a detailed written justification for the proposed order. This has proven to be quite successful in some cases in the United States, where there is an active industry of pollution control specialists ready to develop such proposed orders as consultants to violating sources. Although consultants will try to reduce the costs to their clients, they also are motivated not to devise proposals that are “too soft” on the violators. The consultants must satisfy the regulatory authorities; if they do not, the work will have to be redone, the client will be unhappy, and other sources will not seek their services in the future.

To the greatest extent possible, orders should include multi-step timetables. Failure to meet the requirements of any step of an order should be deemed a violation of the order. This allows the administering authority to detect problems early on. For example, if the final requirements of an order were to come into effect at the end of three years and no intermediate steps or timetable had been specified in the order, then the authority might discover only at the end of the three-year period that even initial steps toward compliance had not been taken. Furthermore, the authority would almost certainly have to wait until the end of the three years to take any action regarding the non-compliance. With a set timetable specified in the order, the authority would be more likely to know that the source is not on schedule in correcting the problem, and it could take legal action against the source without delay. For the same reason, orders should also include self-reporting requirements to facilitate tracking compliance.

Administrative orders are also useful if accompanied by either a carrot or a stick that makes them self-enforcing. Orders issued as conditions attached to expansion permits or funding grants provide a carrot. The permit or grant would provide that the document is effective only if the violator first meets the requirements of an attached administrative order. Orders that specify civil penalties that the agency will seek for non-compliance have sticks. There should be a penalty specified for each individual action required by the order and for each violation of the specified timetable.
Fairness issues should be handled by giving the affected facility some voice in the formulation of the order. This can be achieved by providing prior notice and an opportunity to raise objections either in writing or in an informal conference.

Administrative agencies should not issue orders such as sewage moratoria with direct effects on third parties. To preserve the substantive and procedural rights of third parties, only courts should issue such orders.

6. Administrative Corrective Actions

Israeli laws currently authorizing agencies to take the steps needed to stop, prevent, and clean up pollution should be retained, and such authority should be added to all the environmental laws. This remedy is, however, of only limited utility. It is most effective for dealing with emergency situations and only where some designated source of interim funding is available. Administrative authorities should always try to provide prior notice and opportunity to conduct the clean-up and to consult on the work plan to the alleged source of the pollution.

7. Administrative Penalties

Although the Israeli Ministry of the Environment, or any other authorities charged with enforcing environmental laws, should be authorized to impose small administrative penalties, the American model of using large administrative fines should not be adopted. Large administrative penalties are of limited utility. Most American laws allow their imposition only through highly formal administrative proceedings, so it is not easy for agencies to impose the penalties. If ministries and other authorities in Israel are given the option of going to court for a civil penalty, they will have an alternative method of collecting penalties that is not much more burdensome than administrative proceedings. In fact, because administrative penalties are not self-enforcing, resort to court may be needed in any event. Because of the differences between the Israeli and American political systems, Israeli government ministries tend to be more politically charged than the American environmental agencies, and it is questionable as to whether they can use direct administrative order authority in an efficient and even-handed manner. Finally, since enough changes in the law have been suggested here, there is no need to add this, the most dubious and potentially most drastic change.
8. Consistency among Enforcement Methods

To the greatest extent possible, enforcement provisions for all statutes should be identical. Not only would this avoid senseless differences between the statutes, but it also would reduce the possibility of wasting resources in seeking judicial interpretation of the differences. It would allow reliance on cases that arose through enforcement actions under one statute as precedents for cases concerning violations of other statutes. With identical enforcement provisions, it would be easier for personnel in both the ministries and the local authorities to learn and understand their enforcement powers, and it would enable citizens to understand what they may expect of the authorities that are supposed to protect them from violators. In addition, it would be easier for sources subject to regulatory requirements under several different statutes to understand the enforcement sanctions to which they may be subject. This understanding is essential if the laws are to have a deterrent effect and also for fairness. The changes introduced by a 1997 law are a positive step in this direction.

To accomplish the goal of identifying enforcement methods, it would be optimal to enact one law on uniform enforcement of environmental statutes, rather than separate enforcement provisions appearing in each statute. Such exceptions and special provisions as are needed could be included in the specific laws. A second best option is to insert identical enforcement provisions in the various environmental statutes.

9. Special Funds for Penalties

In addition to the changes recommended for Israeli law, I propose one recommendation for a change in U.S. law. Many Israeli laws provide that monetary penalties be paid into special funds that can be used for cleaning up the environment. The closest thing to a similar provision in American law is found in the Clean Air Act, which allows payment of some civil penalties assessed under that statute into a special fund to be used to finance "air compliance and enforcement activities." This provision is much more

---

118 This may not be a major problem in the American federal laws because the federal regulator, the Environmental Protection Agency, concerns itself mainly with violations by large companies. These large companies may have as advisors lawyers who specialize in one or two of the environmental laws.

119 Environmental Quality Law [Methods of Punishment] [Amendment of Statutes].

120 Clean Air Act § 304(g)(1), 42 U.S.C. § 7604(g)(1) (West 1995).
limited than the Israeli provisions. It applies only to actions under one statute, and even within the framework of that statute, it applies only to enforcement actions brought by citizens and not to those brought by the federal government. Furthermore, it is restrictive in terms of the purposes for which the funds may be used, for example, not allowing their use for clean-up. American lawmakers should contemplate more extensive use of special environmental funds.