

COMMUNICATING THE CULPABILITY OF ILLEGAL DUMPING: BANKSTOWN V HANNA (2014)

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The use of criminal law as a means to prevent harms to the environment is increasingly common. Despite this, environmental offences tend to be seen as not 'real' crimes. Research has consistently demonstrated low rates of identification of perpetrators of illegal dumping, low prosecutions and low penalties. Through a close reading of Bankstown v Hanna (2014) this paper analyses not only the criminalisation of illegal dumping by the state through legislation, but the process through which illegal dumping becomes regarded as sufficiently culpable to justify criminal sanctions, that is, that it is a 'real' crime. This paper analyses the process of substantive criminalisation in terms of the formal labelling of illegal dumping as criminal, the imposition of criminal penalties, and a normative account of illegal dumping as sufficiently blameworthy to justify the imposition of criminal penalties. Although the state has formally labelled illegal dumping criminal, this is undermined by the laws, regulation, procedures and enforcement of offences which are a mix of civil and criminal procedures. The history of cases against Hanna reveals a process of shifting from civil to increasingly serious criminal penalties, communicating not only to the general public but also regulators, courts and the wrongfulness of his behaviour. Hanna (2014) asserts a substantive normative account of illegal dumping as blameworthy, drawing upon narratives of harmful consequences and subjective culpability to emphasise the criminality of Hanna's actions. These narratives draw upon and are informed by principle that the criminal law should only be used to censure people for substantial wrongdoing. This process has accomplished the substantive criminalisation of illegal dumping, such that legal and non-legal actors now perceive this type of behaviour as sufficiently blameworthy as to justify the application of the serious criminal sanction of imprisonment in response to serious offending.

I INTRODUCTION

Pollution and illegal disposal of waste laws were first enacted in Australia in the early 1970s.¹ The use of criminal law as a means to prevent harms to the environment is increasingly common.² The criminalisation of illegal dumping specifically, and environmental offences

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¹ Samantha Bricknell, *Environmental Crime in Australia* (Australian Institute of Criminology, 2010).

² Tanya Wyatt, Piers Beirne and Nigel South, 'Special Edition: Green Criminology Matters Introduction' (2014) 3(2) *International Journal for Crime, Justice and Social Democracy* 1.

generally, has been queried in terms of efficacy,³ expense,⁴ conflicts between environmental ideals and the use of criminal law,⁵ and specific problems and features of environmental 'offending' and victims.⁶ A key issue is that although labelled criminal by the state, 'environmental crime itself is consistently undervalued in law',⁷ perceived as only a crime on paper, rather than 'real' crime. The Australian Institute of Criminology has asserted that 'compared with other crimes, environmental crime has taken longer to be accepted as a genuine category of crime'.⁸ Various reasons have been proposed for this perceived lack of criminality. Research has suggested this may be because the impact of the offending is often underestimated or marginalised,⁹ particularly because environmental crimes may not be detected or have an immediate impact,¹⁰ and thus may be perceived as 'victimless'.¹¹ National and international research has consistently demonstrated low rates of identification of perpetrators of illegal dumping, low prosecutions and low penalties, with Faure and Svatikova asserting that empirical studies have found that 'enforcement of environmental offences through criminal law is relatively low in terms of the number of prosecutions relative to the number of established violations.'¹² There are 'many cases where the criminal law is effectively not applied at all as a result of which no sanctions follow.'¹³ This leniency (both apparent and real) reflects and reinforces the perception by enforcement officers and the wider public that environmental crimes are not as important as other criminal offences in terms of their nature and gravity,¹⁴ or are not 'real crimes'.¹⁵ The attitude toward environmental offences can also be explained in terms of structures of criminal law. Environmental offences tend to be categorised as 'regulatory' or 'technical' – that is, aimed at regulating behaviour and prohibiting acts that 'are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty.'¹⁶ Regulatory offences tend to be regarded as 'quasi criminal' and not inherently wrong.¹⁷ This is despite the fact that possible penalties prescribed for regulatory offences such as environmental offences can be severe. For example, in NSW, any person found guilty of wilful disposal of waste that causes

³ Matthew Hall, 'The roles and use of law in green criminology' (2013) 3 *International Journal for Crime, Justice and Social Democracy* 96.

⁴ Michael Faure and Katarina Svatikova, 'Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe' (2012) 24(2) *Journal of Environmental Law* 253.

⁵ Kathleen Brickey, 'Environmental Crime at the Crossroads: The intersection of environmental and criminal law theory' (1996-1997) 71 *Tulane Law Review* 487.

⁶ Above n 4.

⁷ Rob White, 'Environmental Crime and Problem-Solving Courts' (2013) 59 *Crime, Law and Social Change* 267, 274.

⁸ Above, n 1, xi.

⁹ Michael Lynch and Paul Stretsky, 'Green Criminology in the United States' in Piers Beirne and Nigel South (eds), *Issues in Green Criminology* (2007) 248-269; Nigel South, 'Green Criminology: Reflections, Connections, Horizons' (2014) 3(2) *International Journal for Crime, Justice and Social Democracy* 5-20. Above n 3.

¹¹ M Halsey and Rob White, 'Crime, ecophilosophy, and environmental harm' (1998) 2(3) *Theoretical Criminology* 345-371; Rob White, *Crimes against nature: environmental criminology and ecological justice* (2008); Nigel South, 'A green field for Criminology? A proposal for a perspective' (1998) 2(2) *Theoretical Criminology* 211-233.

¹² Above n 4, 259.

¹³ *Ibid.*, 253.

¹⁴ Lars Korsell, 'Big stick, little stick: Strategies for controlling and combatting environmental crime' (2001) 2(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 127-148.

¹⁵ Above n 4, 259.

¹⁶ *Sherra v De Rutzen* [1895] 1 QB 918 at 922. Examples of regulatory offences include food adulteration and driving offences.

¹⁷ Lindsay Farmer, 'The Obsession With Definition: The Nature of Crime and and Critical Legal Theory' (1996) 5 *Social and Legal Studies* 57. The distinction between *mala in se* and *mala prohibitum*.

or is likely to cause serious environmental harm can receive a maximum fine of up to \$1 million and/or 7 years imprisonment.¹⁸

Environmental criminologists have asserted that the study of law and legal reasoning is vital to green criminology,¹⁹ and there is a need for scrutiny of criminal regulation and law enforcement.²⁰ The environmental criminologist Rob White has noted that ‘legislative change and law reform may provide abstract solutions to environmental harm, but it is in the grounded activities of enforcement officers and courtroom practices that the law in theory becomes law in practice.’²¹ There is a need for ‘continuing research and critique’²² and ‘ongoing and close scrutiny’ into how sentencing options translate into sentencing outcomes.²³ To this end, this paper presents a close reading of the Land and Environment Court Case *Bankstown City Council v Hanna* [2014] and associated legislation.²⁴ This paper focuses particularly on Chief Justice Preston’s communication of the criminal blameworthiness of the offence and offender. This paper analyses not only the criminalisation of illegal dumping by the state through legislation, but the process through which illegal dumping becomes regarded as sufficiently culpable to justify criminal sanctions, that is, that it is a ‘real’ crime.

After a long history of previous convictions and penalty notices, Hanna was again charged with further illegal dumping offences by Bankstown City Council. *Hanna (2014)* and the associated legislation can be read as cultural texts which communicate with a variety of social audiences and convey a range of meaning. The legal theorist David Garland emphasises that penalty not only has a negative capacity to suppress and silence deviancy, but also produces meaning and creates normality.²⁵

Penal signs and symbols are one part of an authoritative institutional discourse which seeks to organise our moral and political understanding and to educate our sentiments and sensibilities. They provide a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimate and illegitimate, order and disorder.²⁶

This paper reads *Hanna (2014)* for strategies of communicating criminality and blameworthiness. The process of communication requires us to consider both the audience of that communication and what is being communicated. The audience the criminal justice system is communicating with includes the offender, criminal justice officials, and the community more broadly.²⁷ Communication of culpability may operate as a form of deterrence - attempting to dissuade the specific offender but also other potential offenders – whether because potential offenders do not want to breach ‘serious’ criminal provisions or run the risk of serious penalties. *Hanna (2014)* also communicates with regulators that when illegal dumping is prosecuted it will be taken seriously, thus encouraging enforcement by regulators. The communication of criminality to the public informs people of the law so that

¹⁸ Section 119 *Protection of the Environment Operations Act* 1997 NSW.

¹⁹ Above n 3.

²⁰ Tanya Wyatt, Piers Beirne and Nigel South, 'Special Edition: Green Criminology Matters Introduction' (2014) *ibid.* 1-4.

²¹ Rob White, 'Prosecution and sentencing in relation to environmental crime: Recent socio-legal developments' (2010) 53 *Crime, Law and Social Change* 365-381, 376.

²² *Ibid.*, 379.

²³ *Ibid.*, 375.

²⁴ [2014] NSWLEC 152. Henceforth I will refer to the case in text as *Hanna (2014)*.

²⁵ David Garland, *Punishment and Modern Society* (Oxford University Press 1990).

²⁶ *Ibid.*, 252-253.

²⁷ Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2005) 71-73.

they do not unknowingly breach it, but also encourages reporting of breaches by the general public. In *Hanna (2014)*, Chief Justice Preston's judgment clearly identifies the importance of communication to different audiences. This is particularly highlighted by the order that Hanna publicise his apprehension, prosecution and punishment for the offence by publishing notices in appropriate newspapers.²⁸ Preston CJ was concerned not only to (attempt to) prevent Hanna from reoffending but also to deter other transporters of waste from unlawfully transporting and dumping waste. The publishing of notices and the imposition of criminal penalties communicated denunciation of Hanna's conduct to the general public – reflecting and reinforcing statutory provisions that express the community's moral condemnation of conduct that causes harm to the environment and human health.²⁹

This paper will focus particularly on *what* is communicated in *Hanna (2014)*. The 'criminal law invites citizens not only to obey its norms, but explains why the norms that it is constituted by are worth recognising'.³⁰ I explore the ways in which the judgment aims to establish Hanna's culpability – that is, that Hanna is sufficiently blameworthy to justify the imposition of criminal sanctions. The legal materials not only label illegal dumping as criminal and attach severe sanctions, but are also accompanied by attempts to assert a substantive normative account of illegal dumping as blameworthy, particularly through establishing fault and harm.

II CASE STUDY: *BANKSTOWN V HANNA [2014] NSWLEC 152*

In *Hanna (2014)*, Hanna pleaded guilty to unlawfully transporting (s.143 *Protection of the Environment Operations Act 1997 NSW*) and depositing waste (s.142A POEO Act) containing asbestos on private land and a public park without obtaining a license at Henry Lawson Drive, Picnic Point. The owner of the private land had demolished and removed a cottage with the intention of developing it. Hanna owned and operated a transport business which generally transported solid waste. The truck had a capacity to carry about 11 tonnes and was owned and registered in his wife's name (as was most of their property). Hanna forced the fence around the property open and then deposited 8 loads of waste containing asbestos throughout the day. Hanna was caught by the neighbour of the property who had installed CCTV at 892 Henry Lawson Drive to watch over vehicles parked in the area. The CCTV captured Hanna reversing his truck and depositing waste. The CCTV recordings were given to Bankstown Council and the EPA.

Hanna had a long record of previous convictions and penalty notices for illegal dumping, and owed more than \$200,000 in fines primarily relating to unauthorised transportation of waste:

Mr Hanna has repeatedly over the last seven years unlawfully transported and dumped building waste. He has been issued with at least 29 penalty notices and prosecuted in courts at least 11 times for offences involving the unlawful transporting and dumping of waste, failing to pay fees for cleaning up waste that he has dumped, failing to comply with requirements made of him in the investigation of unlawful transporting and dumping of waste, or obstructing an authorised officer exercising powers to investigate unlawful transporting or dumping of waste.³¹

²⁸ *Hanna (2014)* at [8].

²⁹ *Ibid*, [144].

³⁰ Above n 27, 138.

³¹ *Hanna (2014)* at [1] per Preston CJ.

In addition, Hanna pleaded guilty to the charge of contempt of court in *EPA v Hanna [2013] NSWLEC 41* for failing to comply with the order of the LEC restraining him from unlawfully transporting and depositing waste.³² The contempt charges were for the same conduct involved in *Hanna (2014)*. In *EPA v Hanna (2013)*, the EPA had requested a custodial sentence of 1-3 months, but Pain J gave a 3-month suspended sentence and placed Hanna on a good behaviour bond.³³

At the time the offences were committed in 2012, imprisonment was not available for unlawful transporting and depositing of waste. The maximum penalty for both offences of unlawfully transporting waste and polluting land was \$250,000 for an individual. In *Hanna (2014)*, Preston CJ held that Hanna should be convicted for each offence and fined \$77,000 for the offence of unlawfully transporting waste to the private land; \$48,000 for the offence of polluting the private land; \$60,000 for the offence of unlawfully transporting waste to the public land; and \$40,000 for the offence of polluting the public park – a total penalty of \$225,000. In addition, Hanna was ordered to publicise his apprehension, prosecution and punishment for the offences in newspapers and to pay the prosecutor's costs.

As a consequence of the perceived leniency of the penalties for Hanna's continued offending, particularly in response to *EPA v Hanna (2013)*, the New South Wales government introduced the *Protection of the Environment Operations Amendment (Illegal Waste Disposal) Act* in September 2013. Amongst other reforms, the amendments created a new offence of repeat offending for illegal dumping with a custodial sentence of up to 2 years³⁴ and empowered the EPA to seize and impound vehicles used in illegal waste disposal by a repeat offender. The reforms were justified thus:

Illegal dumping is a despicable criminal act. The Government is taking action to ensure that those people's illegal actions are dealt with by application of the full force of the law.³⁵

I will now consider the processes of criminalisation apparent in the legal materials of *Hanna (2014)* and the legislative reforms. I argue that in order to ensure the 'application of the full force of the law' the legal materials express not only formal criminality, but have accompanied criminalisation with substantive normative claims.

III 'ILLEGAL DUMPING IS A DESPICABLE CRIMINAL ACT'³⁶

A primary means of criminalisation available to the government is to formally identify behaviour as criminal. This process can be analysed through the positivist definition of crime:

A crime (of offence) is a legal wrong that can be followed by criminal proceedings which may result in punishment.³⁷

³² *EPA v Hanna [2010] NSWLEC 254*. Henceforth I will refer to this case as *EPA v Hanna (2013)* in text.

³³ New South Wales has a court designated to environmental offences.

³⁴ Section 144AB Repeat waste offenders

(2) A person commits an offence against this section if the person is an individual who:

(a) has been convicted of a waste offence, and

(b) commits a waste offence on a separate subsequent occasion within 5 years after that conviction.

Maximum penalty: The maximum monetary penalty provided by this Act for the commission of the waste offence by an individual or imprisonment for 2 years, or both.

³⁵ Robyn Parker, Minister for the Environment and Heritage, *Protection of the Environment Operations Amendment (Illegal Waste Disposal) Bill 2013*, Hansard, 30 May 2013, 21354.

³⁶ Ibid.

³⁷ Glanville Williams, 'The definition of crime' (1955) *Current Legal Problems* 107.

This strict legalist definition places law at the centre of the definition of criminality. It has also been mirrored in some definitions proffered of environmental crimes, such as, ‘an environmental crime is an unauthorised act or omission that violates the law and is therefore subject to criminal prosecution and criminal sanctions’.³⁸ The positivist definition centres on procedural rather than substantive law, and focuses on formal authorities, namely legislation and case law. On this account, criminal law is defined by reference to the legal norms for identifying and punishing proscribed conduct rather than by reference to the inherent wrongful *quality* of that conduct. Crime is simply whatever the law makers at a particular time have decided is a punishable crime.

Although the positivist definition of crime is circular, it provides insight into the quasi-criminal status of illegal dumping. In New South Wales, illegal dumping, particularly Tier 1 offences can be followed by criminal proceedings which may result in punishment.³⁹ Although labelled criminal by the state through legislation, illegal dumping tends not to be thought of, or responded to, as criminal.⁴⁰ This quasi criminality is reiterated in a variety of ways. For example, illegal dumping is not recorded in official crime statistics.⁴¹ Research suggests that ‘magistrates were unsympathetic to the idea that environmental crime was *real* crime.’⁴² Indeed, Hanna did not seem to appreciate the criminality of his actions:

Indeed, Mr Hanna seems not to have realised that the many offences he has committed in the past, including for transporting and depositing waste unlawfully, and for which he has been punished by way of penalty notices and convictions and other orders made by the courts, are crimes. In his affidavit... he asked the Court “to take into account the fact that I have, in my time in Australia, had no criminal convictions whatsoever. Apart from the matter presently before the Court, I have not been brought to the attention of the authorities...”⁴³

The quasi-criminal status of illegal dumping can be explained in part due to the blurring of the distinction between the civil and criminal. Critical to the positivist definition of crime is the distinction between criminal and civil wrongs – particularly as reflected in procedure and penalty:

One way of distinguishing criminal cases from civil is generally, and subject to exceptions and various hybrids, by reference to the procedure adopted – public prosecutor, conviction and sentence – rather than by reference to the content of the law itself.⁴⁴

Throughout *Hanna (2014)*, Preston CJ uses the discourse of crime. He emphasises that the burden of proof is the criminal standard, that is, beyond a reasonable doubt. Preston CJ appropriately draws upon the *Crimes (Sentencing Procedure) Act 1999 (NSW)* and precedents

³⁸ Yingyi Situ and David Emmons, *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment* (Sage 2000).

³⁹ Part 5.2 *Protection of Environment and Operations Act 1997 (NSW)*. All states and territories apart from Victoria include a custodial option for polluting and waste disposal offences.

⁴⁰ For example, convictions of tier 3 offences are not part of a criminal record.

⁴¹ The extent of illegal pollution and waste disposal in Australia has received no formal analysis recently other than that published in regulatory reports. Above n 1, xiii. However, the LEC is at the forefront in developing an environmental crime database that records sentencing statistics of environmental offences in the LEC consistent with practices for other criminal offences. Justice Brian Preston and Hugh Donnelly, 'The establishment of an environmental crime sentencing database in New South Wales' (2008) 32 *Criminal Law Journal* 214-238.

⁴² Environmental Audit Committee, *Environmental Crime and the Courts* (House of Commons, London, 2004) 11. Emphasis in the original.

⁴³ *Hanna (2014)* at [123].

⁴⁴ Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 232.

from criminal cases. He uses the language of criminality, labelling Hanna a ‘persistent offender’⁴⁵ and referring to his ‘total criminality’.⁴⁶

However, the distinction between civil and criminal law is not always clear. Hayne J observed that distinction between civil and criminal is ‘at best unstable’.⁴⁷

It seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under companies and trade practices legislation. The purposes of these proceedings include purposes of deterrence, and the consequences can be large and punishing.

The distinction has been blurred through the emergence of hybrid provisions – civil legal regulation is ultimately underpinned by the possibility of coercive enforcement via penalties for contempt of court.⁴⁸

This blurring between civil and criminal is reflected in the regulatory structures of the EPA. As is the case in many jurisdictions, the EPA plays multiple roles as regulator and enforcer of environmental law,⁴⁹ using a range of administrative, civil and criminal enforcement tools to address environmental issues.⁵⁰ This regulatory structure and approach reflects academic discourse about best practice models of regulatory practices for the prevention and deterrence of environmental crime. Both Scholz’s tit-for-tat enforcement strategy⁵¹ and Ayers and Braithwaite’s enforcement pyramid⁵² are based on the premise that best-practice regulation must involve a mix of punishment and persuasion (although they differ on how intricate or

⁴⁵ *Hanna (2014)* at [6].

⁴⁶ *Ibid*, at [7].

⁴⁷ *CEO Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 198 per Hayne J. Footnotes omitted.

⁴⁸ The lack of clarity about the civil/criminal divide also arises in contempt of court proceedings, which depend upon procedure and fault to distinguish between the two.

The Court of Appeal in *Pang v Bydand Holdings Pty Ltd* [2011] NSWCA 69 considered whether a breach of an undertaking to a court was civil or criminal and held it to be civil contempt unless it involves contumacy, in which case it was criminal contempt. *Witham v Holloway* at 542 was cited for the statement that regardless of whether the contempt was civil or criminal the criminal standard of proof was required. The issue of proof of the contempt does not arise in this sentencing matter as Mr Mihalopoulos has pleaded guilty and there is no dispute about any factual matters.

Canterbury City Council v Mihalopoulos (No 3) [2012] NSWLEC 72 at 28 per Pain J.

In *EPA v Hanna (2013)*, Judge Pain found that Hanna was contumacious and therefore criminal and subject to criminal penalties.

⁴⁹ The use of the preface ‘illegal’ before waste offences indicates a blurring of the line between lawful and criminal behaviour. Some component of these activities is still condoned and only becomes unlawful once a set boundary has been passed. Above n 1, 4.

⁵⁰ Kris Dighe and Lana Pettus, ‘Environmental justice in the context of environmental crime’ (2011) 59(4) *United States Attorneys’ Bulletin* 3-14; Above n 7.

⁵¹ John Scholz, ‘Cooperation, deterrence and the ecology of regulatory enforcement’ (1984) 18 *Law and Society Review* 179-224; John Scholz, ‘Voluntary compliance and regulatory enforcement’ (1984) 6 *Law and Policy* 385-404.

⁵² John Braithwaite, *Crime, shame and reintegration* (Cambridge University Press, 1989). John Braithwaite, ‘Taking responsibility seriously: corporate compliance systems’ in Brent Fisse and P French (eds), *Corrigible corporations and unruly law* (Cambridge University Press, 1985) 49-63; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

complex that mix needs to be).⁵³ Both models involve a transition from non-criminal regulatory strategies that emphasise an ongoing relationship between regulators and regulated and the use of persuasion, prior to any shift toward more punitive sanctions. Recent research recommends the use of criminal sanctions as complementary to administrative approaches.⁵⁴ The primary aim of agencies like the EPA is to change behaviour and ensure compliance. While a firm is cooperating regulatory models recommend that the enforcement agency should refrain from deterrent responses, particularly prosecution. Breaches should be dealt with through informal warnings, and if these fail, then formal warnings. Compliance will be secured through less intrusive interventions towards the base of the pyramid, with prosecution at the pinnacle. Punishment should be ‘in the background until there is no choice but to move it to the foreground.’⁵⁵ However, punishment must be perceived as inexorable for those who do not cooperate and adjust their behaviour following intervention at the lower levels of the pyramid. These regulatory models blur the role of agencies such as the EPA – its role is neither fully civil nor criminal.

The blurring of the line between civil and criminal is also demonstrated in the investigation and enforcement of environmental offences. Although investigated and enforced by the state, the police, the usual arm of the state in criminal matters, are not involved. Environmental crimes are not enshrined in criminal legislation, but find a home in a mix of civil and criminal offences such as the *Environment Protection and Operations Act*. In addition, separate agencies are responsible for various aspects of illegal dumping, including the EPA, councils, and Regional Illegal Dumping Squads. The primary role of these agencies is to encourage compliance, and there is consensus that the capacity to undertake formal investigations such as intelligence gathering through increased scrutiny, random checks and formal raids is compromised by a lack of resources and the enormity of the job.⁵⁶ Agencies are reliant upon the public to report suspected environmental offences. This means that the public needs to know something is criminal and to whom to report it.⁵⁷ In *Hanna (2014)*, the investigation was done by a private citizen installing CCTV who reported the offence to the local council and the EPA. There is a very small chance of getting caught, but even if caught, there are very low rates of prosecution.⁵⁸ In line with best practice models a criminal response is the

⁵³ Persuasion is not only cheaper, but has been shown to be more effective in ensuring compliant behavior than criminal sanctions: Peter Grabosky and John Braithwaite, *Of manners gentle: Enforcement strategies of Australian business regulatory agencies* (Oxford University Press, 1986); Keith Hawkins, *Environment and Enforcement* (Oxford University Press, 1984).

⁵⁴ Above n 46.

⁵⁵ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 47.

⁵⁶ See for example, Robyn Bartel, 'Compliance and complicity: An assessment of the success of land clearance legislation in New South Wales' (2003) 20(2) *Environmental Planning and Law Journal* 116-136; Helena du Rees, 'Can criminal law protect the environment?' (2001) 2(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 109-126; Neil Gunningham, 'Negotiated non-compliance: A case study of regulatory failure' (1987) 9(1) *Law and Policy* 59-67; Nicola Pain, 'Criminal law and environmental protection: Overview of issues and themes' (1993) *Environmental Crime*; above n 1. The recent homicide of Glen Turner, a compliance officer for the NSW Office of Environment and Heritage also highlights the lack of training, protection and capacity of officers to respond to threats from individuals they are seeking to regulate. <http://www.abc.net.au/news/2014-07-31/tributes-for-slain-nsw-environment-officer-glen-turner/5637656>

⁵⁷ Bartel, *ibid*.

⁵⁸ Penny Crofts and Jason Prior, *Environment Protection Authority responses to illegal dumping in NSW: An analysis of clean-up notices and prosecutions*, Report submitted to the NSW EPA (University of Technology, Sydney 2014).

last resort.⁵⁹ The EPA prosecution guidelines emphasise that the EPA has options to prevent, control and mitigate harm to the environment,⁶⁰ such as through prevention and clean-up notices issued to polluters requiring them to take action. In accordance with these guidelines, prosecution is highly selective and restricted, and there is heavy reliance upon civil and administrative responses. Between 2011 and 2015 there had been only one unsuccessful prosecution for illegal dumping offences undertaken by the EPA.⁶¹

The ALRC conducted a major inquiry into the use of civil and administrative penalties in the federal jurisdiction.⁶² The Commission identified a lack of coherence and principles governing the use of such penalties. It recommended that the distinction between criminal and non-criminal penalty law and procedure should be maintained and reinforced and that parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merited the moral and social censure that attached to conduct regarded as criminal.⁶³ This conflicts with best practice regulatory models which recommend a mix of civil and criminal.⁶⁴ It also underplays or disregards the expressive role of law as producing meaning and organising moral understandings.⁶⁵ So-called regulatory/instrumental offences can develop an element of moral opprobrium over time. For example, 20 years ago driving under the influence of alcohol would have been seen as an essentially regulatory offence, while in contemporary life it has become heavily moralised.⁶⁶ I will now turn to the techniques used in *Hanna (2014)* and the associated legislation to communicate sufficient blameworthiness to justify the imposition of criminal sanctions.

IV COMMUNICATING THE CULPABILITY OF ILLEGAL DUMPING

Prosecutions, political debates, and legislative reforms have attempted to deploy the category of crime by establishing the criminal culpability of illegal dumping. I will argue that there are

⁵⁹ Crofts and Prior have noted the use of clean-up notices in preference to prosecution. Between 2011-2013, the EPA prosecuted only 8 cases in the LEC and 16 cases in local courts. Ibid. Farrier has detailed the more aggressive approach to prosecution of pollution offences in the late 1980s and early 1990s by the NSW State Pollution Control Commission at the instigation of the Minister for the Environment and the problems this caused: David Farrier, 'In search of real criminal law' in Tim Bonyhady (ed), *Environmental Protection and Legal Change* (Federation Press 1992).

⁶⁰ *EPA Prosecution Guidelines March 2013*, NSW Environment Protection Authority: Sydney.
2.2.6 Parliament has recognised that prosecution may not always be the appropriate response. The EPA has a discretion as to how to proceed in relation to environmental breaches and section 219(3) of the POEO Act envisages that the EPA may pursue non-prosecution options to prevent, control, abate or mitigate any harm to the environment caused by an alleged offence or to prevent the continuance or recurrence of an alleged offence. Where the EPA uses these alternatives, prosecution by third parties is precluded under the POEO Act.

2.2.7 Prosecution will be used, therefore, as part of the EPA's overall strategy for achieving its objectives. Each case will be assessed to determine whether prosecution is the appropriate strategic response. It will be used as a strategic response where it is in the public interest to do so.

⁶¹ Crofts, above n 58, 26.

⁶² ALRC 95 (2002), *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*.

⁶³ Statement of Principle, para 3.110.

⁶⁴ Above n 4.

⁶⁵ Above n 25 ; Penny Crofts, *Wickedness and Crime* (Routledge 2013).

⁶⁶ Michael Greenberg, AR Morral and AK Jain, (2005) 66(5) 'Drink-driving and DUI recidivists' attitudes and beliefs: a longitudinal analysis' *J Stud Alcohol* 640. Results from multiple regression modeling showed significant protective effects associated with the beliefs that driving after drinking is immoral and that random police sobriety checks are a good idea (internal control items). Results also showed that a social desirability control measure was predictive of increased risk, at follow-up, for driving after drinking.

three strong narratives of criminality in the legislation and *Hanna (2014)* beyond the process of formal labelling. First, the possibility of very high penalties draws on the assumption that an offence must be wrong if it is penalised so severely. The latter two narratives emphasise the wrongfulness of illegal dumping through establishing the harmful consequences of illegal dumping and the subjective culpability of perpetrators. These narratives draw upon and are informed by principle that the criminal law should only be used to censure people for substantial wrongdoing.⁶⁷ I will consider each in turn.

A Culpability Through Penalty

A popular approach by contemporary governments in law and order politics is to assert wrongfulness through penalty. This draws on what Ashworth has labelled a fundamental principle of criminal law – ‘that maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing’.⁶⁸ This linking of potential penalties with the perceived seriousness of the offence was expressed by Preston CJ in *Hanna (2014)*:

The maximum penalty for the offences is relevant in determining the objective gravity of offences. The maximum penalty reflects the public expression by the New South Wales Parliament of the seriousness of the offence: see *Camilleri’s Stockfeeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 698.⁶⁹

Maximum penalties for illegal dumping have become increasingly serious, but the process of increasing available penalties has reinforced the disjunction between law on paper and the complexity of law in action.⁷⁰

The Australian Institute of Criminology has noted a:

[S]urfeit of infringement notices, with a smaller number of (non-court appointed) orders and a smaller number again of prosecutions. This distribution reflects a greater proportion of minor environmental offences than a channelling of punishments towards the lesser end of the penalty spectrum. It has been asserted, however, that the application of penalties for environmental offences has been somewhat unsystematic, with a tendency to resort of lenient sentencing options.⁷¹

If penalties are resorted to by Parliament to establish the seriousness of particular offences, then the leniency of prosecution and judicial responses to these potentially massive financial penalties and custodial sentences ostensibly indicates the continued perception of illegal

⁶⁷ Above n 4. Ashworth argues that core interlinked principles of criminal law have been breached with the proliferation of legal forms and structures.

⁶⁸ Andrew Ashworth, 'Taking the Consequence' in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Clarendon Press, 1993) 123, 126.

⁶⁹ *Hanna* (2014) at [58]. See also, *Environmental Protection Authority v Hanna* [2010] NSWLEC 98 [40] per Craig J.

⁷⁰ Sentences should have regard to maximum penalties as a yardstick, but the court must arrive at a sentence that is just in all the circumstances. *Elias v R* (2013) 248 CLR 483 at [27]. See also *Markarian v R* (2005) 228 CLR 357.

⁷¹ Above n 1, 18. See also, M Hain and Chris Cocklin, 'The effectiveness of the courts in achieving the goals of environmental protection legislation' (2001) 18(3) *Environment and Planning and Law Journal* 319-338; Pain, above n 56; Bartel, above n 56; Robyn Bartel, 'Sentencing for environmental offences: An Australian exploration' (2008) *Sentencing Conference*; Helena du Rees, 'Can criminal law protect the environment?' (2001) 2(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 109-126; above n 14.

dumping as somehow lacking in criminality.⁷² However, available sanctioning options are informed by best-practice models and reflect the complexity of the role of agencies like the EPA, the primary aim is prevention and criminal law is not by nature a preventative tool.⁷³ The difficulty is that the emphasis upon civil penalties reflects and reinforces the quasi-criminal status of environmental offending. At the least severe level, enforcers can apply administrative sanctions such as warnings, cautions or advisory letters that alert the offender that a potential or actual breach has been detected and how their breach might be amended. These sanctions tend to be posted by regulatory officers for administrative, minor or technical breaches. At the next level are infringement or penalty notices – ‘one-stop’ fines for ‘minor’, one-off breaches. No criminal conviction is recorded on payment of the fine, but persons may elect to forgo the fine and have the case tested in court. Deliberate non-payment may also result in prosecution. Fines are the predominant penalty for environmental offences. Hain and Cocklin found that the actual fines handed down for offences tried under the *Protection of the Environment and Operations Act 1997* were a fraction of the maximum penalty (15% or less),⁷⁴ and this was reinforced more recently by Crofts and Prior for cases between 2011-2013.⁷⁵ The range of sentencing options requested by the prosecution and applied by the courts ostensibly reflects and reinforces the perceived lack of seriousness. However, the picture is more complex than this. The sentencing range may be limited by offender characteristics. For example, offenders prosecuted for waste offences may be either sole operators like Hanna or relatively poor individuals unable to afford large penalties. Other offenders prosecuted have been local councils, where penalties imposed will effectively be paid for by the general community.⁷⁶

Best practice regulatory models recommend a mix of civil and criminal enforcement measures and the civil enforcement measures are clearly reflected in the legislation and the history of responses to Hanna. However, arguably what was missing in Hanna’s case by 2013 was the top of Ayres and Braithwaite’s pyramid – the inexorability of criminal punishment for those who do not cooperate and adjust their behaviour following intervention at the lower levels of the pyramid.⁷⁷ Hanna’s cases can be read as a gradual moving up the pyramid of enforcement in response to sustained repeat offending by regulators, courts and the legislature.

The history of cases against Hanna reveals a very slow build in the imposition of penalties. In *Hanna (2014)*, Preston CJ lists some of Hanna’s prior convictions and penalties for illegal dumping offences under the heading ‘Mr Hanna’s significant record of previous convictions’.⁷⁸ Penalties for 3 separate offences imposed by local court in September 2009 were of \$8,000, \$8,000 and \$10,000, and a penalty imposed by local court in September 2010 of \$5,000. In 2010, Hanna was found guilty of 4 separate incidents of dumping waste, including asbestos, on Commonwealth land, council land, and private land.⁷⁹ Craig J imposed financial penalties of \$104,000 to be paid to the Environmental Trust to be used in its Emergency Pollution and Orphan Waste Cleanup Program, an alternative sanction to rehabilitate land. In addition, Hanna was required to pay the prosecutor cleanup costs of

⁷² Above n 14.

⁷³ Pain, above 56; above n 58.

⁷⁴ Hain, above n 71.

⁷⁵ Above n 58.

⁷⁶ Ibid.

⁷⁷ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

⁷⁸ *Hanna* (2014) at [93].

⁷⁹ *Environmental Protection Authority v Hanna* [2010] NSWLEC 98.

\$8,282.60. Craig J also imposed an additional requirement that Hanna publish a notice in the local newspapers of his offence. In that case, the EPA also sought an order under s245 that whenever the defendant transports waste he disposes of it to a waste facility that is lawfully authorised to receive that waste, that is, a mandatory injunction that the defendant comply with the provision of s143 of the Act.⁸⁰ Judge Craig refused to make such an order:

A provision of that kind is hardly apposite to a requirement for an order that a defendant, in the future, obey the provisions of the POEO Act. I am not persuaded either that I have the power to make such an order or that I should do so in the circumstances of this case.⁸¹

However, several months later, Hanna was again before the LEC for dumping building waste. Craig J then imposed the order for which Hanna was then found in contempt of court in the 2013 case.⁸² By the time of *EPA v Hanna (2013)*, the EPA had shifted from civil sanctions to requesting a custodial sentence of 1-3 months. The EPA argued that a suspended sentence was not appropriate as sufficient punishment and that fines appeared to be ineffective. Justice Pain accepted that ‘the contempt is serious’ [54] and that ‘fines had become meaningless as a deterrent’ [68].⁸³ Justice Pain imposed a term of imprisonment of 3 months but:

As this is the first occasion on which Mr Hanna has faced a gaol term for any offence and for contempt of court in particular, and... Mr Hanna’s personal circumstances including that he is the sole financial support for this family, that sentence is suspended for the same period on condition that Mr Hanna enter into a good behaviour bond... [84]

As a consequence of Hanna’s repeat offending and the decision in *EPA v Hanna (2013)*, Parliament introduced the possibility of a custodial sentence for waste offences and a new offence of repeat offending with custodial penalties.⁸⁴

By the time of *Hanna (2014)*, it was clear that non-custodial penalties had not ensured compliance by Hanna. As at 2013, the State Debt Recovery Office had identified 41 enforcement orders belonging to Hanna that he had failed to pay and that were overdue. It was estimated that he needed to pay \$300 per month from February 2013 until June 2012 to pay off his fines.⁸⁵ In determining appropriate penalties for Hanna’s most recent offences, Preston CJ asserted the need for consistency in sentencing.⁸⁶ Consistency in sentencing by the specialist environment court⁸⁷ has been greatly assisted by the environmental crime

⁸⁰ Section 245(c) *POEO Act* The court may order the offender to take such steps as are specified in the order, within such time as is so specified (or such further time as the court on application may allow: (a) to prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence, or (b) to make good any resulting environmental damage, or (c) to prevent the continuance or recurrence of the offence.

⁸¹ *Environmental Protection Authority v Hanna* [2010] NSWLEC 98 at [90-91].

⁸² *Ibid.*

⁸³ The purposes of sentencing are specified in section 3A *Crimes (Sentencing Procedure) Act* 1999.

⁸⁴ Amendments to the POEO Act in 2013 created a new offence for repeat waste offenders (s144AB) allowing imprisonment for 2 years, and the *Protection of the Environment Operations (General) Amendment (Fees and Penalty Notices) Regulation 2014* increased penalties up to tenfold. [180].

⁸⁵ For the principles of consistency in sentencing see *Hill v R* (2010) 242 CLR 520.

⁸⁷ Justice Brian Preston, 'Principled sentencing for environmental offences - Part 2: Sentencing considerations and options' (2007) 31 *Criminal Law Journal* 142-164; Justice Brian Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26(3) *Journal of Environmental Law* 365-395.

sentencing database.⁸⁸ However, a difficulty in sentencing for environmental offences of this kind is that there are a fairly low number of prosecutions. Preston CJ noted that this difficulty was exacerbated by the fact that four of the prior sentences were against Hanna. Preston CJ referred to six previous cases for offences under s143, all of which reflect the imposition of penalties that were only a fraction of the available penalties.⁸⁹ Penalties imposed by the Land and Environment Court in these cases ranged from \$5,000 to a maximum of \$80,000. If earlier penalties imposed are only a fraction of available penalties, then consistency of sentencing sustains the practice of not taking illegal dumping seriously. As a consequence of these prior sentences, Preston CJ determined that fines in the order of \$75,000 and \$90,000 were appropriate. Preston CJ imposed a total fine for the four offences of \$225,000 (including a 25% discount for an early guilty plea).

The history of Hanna's cases and offending demonstrates a long, slow process in terms of requests for increasing penalties by regulators, gradual increases in penalties by the courts, in turn accompanied by increasing available penalties granted by the legislature. A 'big stick' of imprisonment is now available for repeat offenders such as Hanna. Liberal accounts view the criminal law as the ultimate prohibitory norm that should only be used as a last resort.⁹⁰ Hanna's serial offending is an example of a situation where a custodial penalty was now justified and was indeed a last resort. It is possible, given Preston CJ's comments that Hanna's offending was of 'medium seriousness' and his comments about Hanna's continued offending that if available, a custodial penalty may have been imposed:

Clearly, Mr Hanna is impervious to criminal punishment that has been imposed on him in the past... Mr Hanna may likewise be impervious to the sentences that are imposed for the current offences.⁹¹

The question is whether or not the 'big stick' will be applied in future cases. Hanna's offending history and the enforcement responses can be read as a process of communicating criminality to the regulators, courts and parliament. Custodial penalties are now available and likely to be applied for in future and to be granted by the courts where appropriate.

The foregoing analysis highlights that it is not sufficient for parliament to rely solely on labelling particular behaviour criminal and attaching large potential penalties. Whilst this satisfies the formal elements of criminality, this formal account lacks the moral opprobrium associated with criminality, and the history of low enforcement, low prosecution and low penalty for environmental offences highlights the need to establish substantive culpability. Hanna's history of offending fostered a perception of his criminality and the need for increasingly serious penalties to dissuade him (and others) from offending. I will now point to ways in which the legal materials (seek to) establish the wrongfulness or culpability of illegal dumping through narratives of harmful consequences and subjective culpability.⁹²

⁸⁸ Above n 41.

⁸⁹ *Hanna (2014)* at [161].

⁹⁰ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 5th ed, 2003) 32-37.

⁹¹ *Hanna (2014)* at [123].

⁹² The criminal legal theorist Fletcher influentially articulated three patterns of blameworthiness underlying criminal offences, that of, subjective culpability, harmful consequences and manifest criminality. The pattern of manifest criminality is based on the notion that an act that threatens the peace and order of community life should be penalised. The classic example is larceny, or acting like a thief. Early understandings of theft were based upon the single image of the thief coming at night, endangering the security of the home. Fletcher notes that manifest criminality was primarily expressed in two

B *The Harmful Consequences of Illegal Dumping*

The environmental legal materials draw upon a classic harm narrative to justify criminal sanctions. This pattern of criminality emphasises that an offender is culpable because of the harmful consequences he or she has caused.⁹³ J S Mill articulated a ‘principle of liberty’⁹⁴ that the justifying purpose of any social rule or institution must be the maximisation of happiness. Human suffering should be minimised through the prevention of harmful conduct by the most efficient means possible. The content of criminal law should be circumscribed based on the principle that the coercive power of the state should only be invoked as a means of preventing ‘harm to others’ – and never to control harmless behaviour or to prevent person from harming herself. The ‘harm principle’ represents an accommodation of the concerns of the state whilst respecting individual freedom. The narrative of harmful consequences remains influential in contemporary criminal law, underlying serious offences including manslaughter and drug offences,⁹⁵ and providing a classic narrative to justify the extension of the reach of criminal law.⁹⁶

Criminologists have noted that underlying the ambivalence towards environmental crime is the perception that it is ‘victimless’.⁹⁷ To address this, environmental criminology has particularly emphasised the harmful consequences of environmental wrongs.⁹⁸ The limited literature available indicates that in addition to the subjective culpability of a perpetrator, the decision to prosecute is also informed by harmful consequences.⁹⁹ The criminalisation of

characteristics. First, a characteristic form of conduct came to be associated with the act of thieving: thieves could be seen thieving; they could be caught in the act. Second, manifest criminality in the offence of larceny required the thief to tread on a significant boundary and enter a forbidden area. George Fletcher, *Rethinking Criminal Law* (Little Brown, 1978) 80-81. The discourse around Hanna could also be read as drawing upon manifest criminality. Hanna crosses property lines to dump waste that endangers the community. His behaviour can be constructed as manifestly wrongful.

⁹³ Ibid. Fletcher has argued that the pattern of harmful consequences was the primary pattern of blameworthiness underlying historical and contemporary homicide law.

⁹⁴ John Stuart Mill, *On Liberty* (Penguin, 1859/1982).

⁹⁵ The complexity of Mill’s harm principle is demonstrated particularly in drug law, where the harms of addiction are used to justify criminalisation, but theorists assert that the laws cause more harm than they prevent. See for example, Desmond Manderson, *From Mr Sin to Mr Big* (Melbourne University Press, 1993); Stephen Mugford, ‘Harm Reduction: Does it lead where its proponents imagine?’ in N Heather et al (eds), *Psychoactive Drugs and Harm Reduction: From Faith to Science* (Whurr Publishers, 1993) 29.

⁹⁶ Drink driving offences were and are justified on the basis of harmful consequences. Reforms to the ‘defence’ of intoxication were justified due to the harm inflicted by those who chose to become intoxicated. Paul Whelan, NSW Minister for Police, Second Reading speech, *Crimes Legislation Amendment Act 1996* (NSW). The more recent reforms introducing assault causing death (s25A) are informed by the notion that an accused is culpable for causing the prohibited consequence of death. Julia Quilter, ‘One-punch laws, mandatory minimums and ‘alcohol-fuelled’ as an aggravating factor: implications for NSW criminal law’ (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81.

⁹⁷ Rob White, ‘Environmental Issues and the criminological imagination’ (2003) 7(4) *Theoretical Criminology* 483; Rob White, *Environmental harm and crime prevention* (Willan Publishing, 2008).

⁹⁸ Ibid, White (2008). The emphasis upon harmful consequences has been relied upon by criminologists to extend analysis beyond legal definitions of crime to consider actions which are harmful to the environment. See for example, *ibid*, White (2003); Lynch, above n 9.

⁹⁹ In his analysis of the pollution control activities of the Regional Water Authorities in England and Wales, Hawkins noted that there were two situations where prosecution was seen to be appropriate: persistent failure to comply, and one-off pollution incidents causing substantial and noticeable damage, threatening

illegal dumping has been justified in terms of harmful consequences¹⁰⁰ and harm makes up three of the five elements that must be considered in imposing penalty under section 241 of the *POEO Act*.¹⁰¹ Thus Preston CJ was required to take ‘harm’ into account when sentencing Hanna, but the definition of harm is elastic and subject to debate.¹⁰² How Preston CJ communicated harmful consequences in *Hanna (2014)* is worthy of analysis.

Preston CJ devotes much of his judgment in *Hanna (2014)* to emphasising the harmful consequences of illegal dumping on a variety of different grounds. The judgment focuses on harm to the environment of dumping and potential threat to human health:

The asbestos had the potential to be blown by the wind into the air causing potential harm to the health of nearby residents who might breathe it in. The degradation of the lands, therefore, resulted in potential harm to the health of human beings.¹⁰³

water supplies or involving the agency in heavy expenditure despite the fact that liability was effectively absolute: Hawkins, above n 53, 201.

In his analysis of enforcement of health and safety legislation in the UK between 1983 and 1998, Hawkins noted that whilst offence definitions required that the prosecution only prove a risk of harm, prosecutions only occurred where actual harm had occurred. Hawkins concluded prosecution was ‘a matter reserved for the most dramatic cases, either where something appalling has happened (a worker badly injured or killed at work), where an egregious hazard threatens the workforce or public, or where an employer persistently fails to comply. Some cases almost demand prosecution, even in the face of legally weak evidence: very serious incidents, newsworthy cases prompting a great deal of public concern, multiple fatalities, an especially vulnerable victim, and so on. Note that these are all examples of accidents or other untoward events, where a risk has been realised.’

Keith Hawkins, ‘Law as Last Resort’ in R Baldwin, C Scott and C Hood (eds), *A Reader on Regulation* (1998) 441.

¹⁰⁰ In justifying the amendments to the *Protection of the Environment and Operations Act*, the Minister for the Environment asserted:

The Government estimates that each year \$100 million is lost to the New South Wales Government from incidents causing significant and long-lasting environmental harm, associated clean-up costs and unpaid waste levies...

The bill makes it clear that this Government will not tolerate serial waste dumpers – those who flout the laws that are there to protect the health of our communities and the health of our environment... We are all sick and tired of people who take the law into their own hands, flout the law, and illegal dump.

Robyn Parker, Minister for the Environment and Heritage, *Protection of the Environment Operations Amendment (Illegal Waste Disposal) Bill 2013*, Second Reading, 30 May 2013, 21354.

¹⁰¹ 241 Matters to be considered in imposing penalty

(1) In imposing a penalty for an offence against this Act or the regulations, the court is to take into consideration the following (so far as they are relevant):

(a) the extent of the harm caused or likely to be caused to the environment by the commission of the offence,

(b) the practical measures that may be taken to prevent, control, abate or mitigate that harm,

(c) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence,

(d) the extent to which the person who committed the offence had control over the causes that gave rise to the offence,

(e) whether, in committing the offence, the person was complying with orders from an employer or supervising employee.

¹⁰² See for example, Joel Feinberg, *Harm to Others* (Oxford University Press, 1984); Paul McCutcheon, ‘Morality and the Criminal Law: Reflections on Hart-Devlin’ (2002) 47 *Criminal Law Quarterly* 15. McCutcheon argues that the designation of a consequence as a ‘harm’ involves a societal judgment with moral dimensions.

¹⁰³ *Hanna (2014)* at [66].

Preston CJ also emphasised that by ignoring clean-up notices Hanna had harmed specific victims – the owners had to pay a total more than \$20,000 to remove the asbestos,¹⁰⁴ with no chance that Hanna would reimburse them.

I find, beyond reasonable doubt, that the harm to the environment and human health and the financial loss to the owners of the lands caused by the commission of the offences are ‘substantial’ and an aggravating factor under s 21A(2)(g) of the *Sentencing Act*.¹⁰⁵

In *EPA v Hanna (2013)*, Justice Pain also emphasised the harmful consequences of Hanna’s behaviour by summarising the health risks associated with asbestos in several paragraphs, quoting the NSW Health Department’s ‘Asbestos and Health Risks’¹⁰⁶ and WorkCover NSW ‘Working with Asbestos Guide’.¹⁰⁷ Justice Pain concluded:

The removal of waste is potentially even more dangerous if the nature of the waste is unknown and it is not dealt with in an appropriate way; that is by assessing the risk of clean up and the wearing of personal protective equipment including masks and protective overalls. The dangers to human health are even greater where there is the possibility of asbestos fibres being released into the air. This is the case in circumstances where broken or damaged asbestos waste is being moved around.¹⁰⁸

Preston CJ’s judgment in *Hanna (2014)* is particularly interesting because he constructs an argument of harm in terms of breach of environmental law as a public wrong in and of itself. He noted that Hanna’s offending ‘thwarts the achievement of the objects of the POEO Act... and undermines the integrity of the regulatory scheme under the POEO Act’.¹⁰⁹ Preston CJ explains the importance of environmental law for the general public by analysing the reasons why Hanna had offended. Hanna illegally dumped waste to avoid the expense of tipping fees charged by licensed waste facilities – he profited from his crimes.¹¹⁰ Preston CJ argues that this was a public wrong in terms of ‘community’s concept of fairness’:

This concept is applicable to environmental offences where all persons should bear the costs of complying with environmental law. An offender who operates a business unlawfully, such as unlawfully transporting and dumping waste without incurring the necessary costs and expenses to transporting waste lawfully and depositing it at a place that can lawfully be used as a waste facility, secures an unfair advantage compared to the offender’s law abiding competitors who incur the costs and expenses of operating lawfully. The offender has been unjustly enriched. Punishment is necessary to remove that unjust enrichment from the offender and so secure a just equilibrium – a level playing field – on behalf of those who are willing to be law abiding.¹¹¹

This argument is consistent with the idea of criminal law as a law of public wrongs. Duff has argued that a public wrong is not a wrong done to the public, but rather a wrong that is the proper concern of the public.¹¹² Preston CJ asserts that illegal dumping is a proper concern to the general public. It is in the public interest that people remove waste consistently with regulations, and those who breach these regulations that protect the community from harm

¹⁰⁴ Ibid, [67].

¹⁰⁵ Ibid, [69].

¹⁰⁶ Ibid, [29].

¹⁰⁷ Ibid, [30].

¹⁰⁸ Ibid, [31].

¹⁰⁹ Ibid, [54].

¹¹⁰ Ibid, [80-81].

¹¹¹ Ibid, [149].

¹¹² Anthony Duff, *Punishment, Communication and Community* (Oxford University Press, 2001) 60-64.

should be punished. This is a broad concept of ‘harm’ that regards a breach of environmental regulations as inherently harmful, without the need to point to actual victims. The narrative of harmful consequences was thus relied upon in *Hanna (2014)* to communicate the criminality of illegal dumping.

C *Establishing fault through Subjective Culpability*

Preston CJ’s judgment also communicates Hanna’s individual criminality by emphasising his subjective culpability, even though he was charged with strict liability offences. A major critique of ‘regulatory’ offences is that they do not require *mens rea* and thus the wrongfulness or fault of an accused has not been established. An emphasis upon subjective culpability is a central (though disputed) tenet of self-representation of the legal system by judges and legal theorists.¹¹³ It is ostensibly articulated in the Latin maxim that is often cited as fundamental to the criminal law: *actus not facit reum nisi mens sit rea* – stated by Blackstone ‘as a vicious will without a vicious act is not civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all’.¹¹⁴ Subjectivism has also been asserted as a general principle of criminal law doctrine by the High Court:

There is a presumption that *mens rea*, an evil intention, or knowledge of the wrongfulness of the act, is an essential ingredient in every offence... unless displaced by statute or subject matter.¹¹⁵

Underlying the emphasis upon *mens rea* is the harshness of holding an accused liable in the absence of any ‘fault’ on their part.¹¹⁶ A person who engaged in prohibited conduct should not be convicted unless they intentionally or knowingly did the wrong thing. Thus an accused should not be liable for outcomes that were unintended or accidental. On this account, subjective standards are the norm in the criminal justice system, and offences such as strict and absolute liability, manslaughter by criminal negligence, constitute exceptions to the general principle that an accused ought not to be convicted of an offence where their conduct did not involve an element of moral culpability.¹¹⁷

The majority of environmental offences are strict liability,¹¹⁸ and thus arguably do not satisfy the wickedness/moral opprobrium associated with the intradiscourse of the criminal law.¹¹⁹

¹¹³ Ibid.; Crofts, above n 65. I am drawing upon Goodrich’s idea of analysing how a legal system presents itself to itself in Peter Goodrich, *Legal Discourse* (Macmillan 1987) ch. 6.

¹¹⁴ William Blackstone, *Commentaries on the Laws of England. Book the Fourth* (Dawsons of Pall Mall, 1966 [1769]) 21.

¹¹⁵ *He Kaw Teh v R* (1985) 15 A Crim R 203 approving the statement in *Sherras v DeRutzen* [1895] 1 QB 918 at 921.

¹¹⁶ See also *Sweet and Parsley* [1970] AC 132, 148 per Lord Reid: There has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. This means that, whenever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea*.

¹¹⁷ *Lin Chin Aik v R* [1963] AC 160 at 174 per Judicial Commission of the Privy Council: The continuing increase in the number of crimes defined without reference to any *mens rea* represents a disturbing phenomena. The existence of crimes of strict liability constitutes an important and wide ranging exception to the general principle that an accused ought not to be convicted of an offence where his or her conduct did not involve an element of moral culpability.

¹¹⁸ See for example, *Environment Protection Act 1970* Vic. Argued by Hain above n 71, this adoption of strict and absolute liability has enabled a consistently high number of proven cases to be returned for cases of illegal pollution.

As a consequence of the perceived laxity in response to Hanna's serial offending, the government introduced a repeat offender offence.¹²⁰ Although the repeat offender offence is strict liability, the underlying presumption is that if a person continues offending after prior convictions then they wilfully breach the law, and thus have sufficient subjective blameworthiness to justify imposing criminal sanctions.

Even for those offences that are strict liability, enforcement practices often superimpose *mens rea* onto formal legislative requirements. As noted above, best practice regulatory models recommend selective prosecution. Keith Hawkins found that there was only prosecution of environmental offences in cases where there was evidence of an intentional violation of the law by the accused. This restriction applied notwithstanding the legal reality that these offences, being crimes of strict liability, did not technically require proof of intention.¹²¹ Values and policies of prosecutors, not the substantive legal definitions, were determinative of prosecution:

Practical criminal law – the enforcement of norms embodied in that branch of the law – is... founded not so much in the substantive acts it deems unlawful, but rather on the principles that define its proper realm and procedure.¹²²

In seeking compliance from the lower end of the regulatory pyramid, regulators adopt an educational role – advising a person of a breach, how to fix it, and how to comply in the future. According to these regulatory models, by the time regulators choose to prosecute an offender has had ample opportunity to understand the law and what needs to be done, but has chosen not to comply. This was demonstrated in recent research by Crofts and Prior with cases prosecuted by the EPA having a history of notices to comply prior to prosecution.¹²³

This emphasis upon subjective culpability beyond the formal requirements of the law is emphasised in response to Hanna's offending. Although not required, all the LEC cases against Hanna clearly establish his deliberate breach of environmental law. In the earlier case Justice Craig found that Hanna's illegal disposal of the waste was 'premeditated and deliberate'.¹²⁴ By the time of the 2014 case against Hanna, he was an established repeat offender. Preston CJ emphasised Hanna's premeditation with an analysis of the facts. Hanna was given about \$300 per load to transport building waste – and it would have cost \$300 per load to have disposed of the waste lawfully at the tip. 'He conceded that the only way he

¹¹⁹ Unlike many other jurisdictions New South Wales has maintained *mens rea* in Tier 1 offences. These offences require that an accused wilfully or negligently committed a waste offence that harmed or was likely to harm the environment. The legislation reflects and reinforces the emphasis upon subjective fault in terms of culpability, differentiating between the penalties available based on whether the acts were wilful or negligent. The *Protection of the Environment and Operations Act 1997* (NSW) defines Tier 1 offences as *mens rea* offences, Tier 2 offences as strict liability and Tier 3 offences as absolute liability. Section 144AB *Protection of the Environment and Operations Act 1997* (NSW)

¹²⁰ Hawkins, above n 53. See also W Carson, 'Some sociological aspects of strict liability and the Enforcement of factory legislation' (1970) 33 *Modern Law Review* 396. Carson found that legal proceedings under the *Factories Act* were usually only recommended in cases where previous warnings had been issued. Where there was no such prior warning, inspectors tended to recommend against legal action. Carson argues that this was a way to establish 'moral fault' and meet the criminal law's traditional concern with *mens rea* despite the absence of such a requirement in strict liability offences.

¹²¹ Hawkins, above n 99, 288.

¹²² Above n 58.

¹²³ *EPA v Hanna* [2010] NSWLEC 98 at [43].

could have made money from the job was to dispose of the waste unlawfully and avoid the tipping fee.¹²⁵

Throughout the judgment Preston CJ underlines Hanna's subjective culpability. Preston CJ commented that 'a strict liability offence that is committed intentionally, negligently or recklessly will be objectively more serious than one not so committed.'¹²⁶ Hanna's actions were 'premeditated and intentionally done with knowledge of its illegality'.¹²⁷ Hanna also knew that the waste was not clean and could have reasonably foreseen harm caused or likely to be caused to the environment. Great emphasis was also placed on Hanna's prior convictions, he 'persistently and habitually offended',¹²⁸ which meant that he was under no doubt that his actions were unlawful. Preston CJ examined Hanna's claims of remorse at length, but concluded by stating 'his unremorseful actions speak louder than his remorseful words'.¹²⁹ Accordingly, although mens rea was not required great emphasis was placed on his premeditation, and sustained and deliberate flouting of law to establish Hanna's subjective culpability.

Although the bulk of environmental offences are strict liability, they are usually only prosecuted where the subjective culpability of the offender can be established. Subjective culpability also impacts on the sentences imposed on the offender. *Hanna (2014)* goes to great lengths to highlight Hanna's subjective blameworthiness as a basis for justifying the imposition of criminal sanctions.

V CONCLUSION

Hanna (2014) and associated legislative reforms demonstrate the process of the criminalisation of the regulatory offence of illegal dumping in formal and normative terms. Illegal dumping offences conform to the positivist definition of crime – they are legal wrongs that can be followed by criminal proceedings which may result in punishment. However, the positivist definition of crime also highlights the mixed administrative, civil and criminal approaches enshrined in the legislation and expressed in enforcement processes. This mix of approaches is in accordance with best practice models which recommend a mix of persuasion and encouragement of compliance, with prosecution and criminal penalties only as a last resort.

By 2013, Hanna had a long history of illegal dumping offences and had demonstrably failed to respond to council and EPA efforts to persuade him to obey the law. In *EPA v Hanna (2013)*, the EPA request for a custodial sentence could indeed be regarded as a last resort in the face of serial offending. However, the LEC refused to impose a custodial sentence for contempt of court. If severe penalties are used by Parliament to express the perceived seriousness and criminality of offenders, then the slowness of the EPA to apply for custodial sentences, and then the refusal by the LEC to impose incarceration in 2013 suggests that legal actors did not perceive illegal dumping as sufficiently blameworthy to justify incarceration. Accordingly, while regulators may be meeting the requirements of using civil techniques such as persuasion at the bottom of the regulatory pyramid, what was lacking was the inexorable application of serious sanctions for those who refuse to comply. *Hanna (2014)* and

¹²⁵ *Hanna (2014)* at [24].

¹²⁶ *Ibid*, [70].

¹²⁷ *Ibid*, [73].

¹²⁸ *Ibid*, [120].

¹²⁹ *Ibid*, [118].

the creation of the new custodial offence for repeat offenders seems to indicate the patience of the LEC is now exhausted and if Hanna, or another serial offender were to appear before the court, a custodial sentence would be appropriate.

The long, slow process of responding to Hanna's actions as criminal has been a form of education and persuasion. *Hanna (2014)* is an exercise in communicating the criminality of illegal dumping to Hanna, other potential dumpers, the community and legal practitioners. His appearances in the LEC resulted in a great deal of media coverage on the television, radio and newspapers, emphasising his criminality in terms of his serial offending, deliberate breaching of laws and the harmful consequences of his behaviour in monetary and health costs. The softly, softly regulatory approach may not have persuaded Hanna to obey the law, but it has performed a process of criminalisation. Incarceration of Hanna in response to his most recent charges would not be perceived as harsh and unnecessary, but instead as a necessity. This process has accomplished the substantive criminalisation of illegal dumping, such that legal and non-legal actors now perceive this type of behaviour as sufficiently blameworthy as to justify the application of the serious criminal sanction of imprisonment in response to serious offending.