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Prosecutorial Discretion and Environmental Crime

by David M. Uhlmann

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The environmental laws create a complex regulatory system affecting a wide range of economic activity in the United States. The Resource Conservation and Recovery Act (RCRA) establishes a cradle-to-grave regulatory scheme for hazardous wastes; the Clean Water Act (CWA) regulates all discharges of pollutants into waters of the United States; and the Clean Air Act (CAA) imposes limits on all air pollutants that could endanger public health and welfare. As with any complex regulatory scheme, there are significant disparities in the seriousness of environmental violations. Some involve devastating pollution, evacuation of communities, or deliberate efforts to mislead regulators. Others may be de minimis violations or isolated events that occur notwithstanding a robust compliance program.

Given the wide range of potential environmental violations, it might have been preferable for Congress to specify which environmental violations could result in criminal prosecution. Instead, Congress made only limited distinctions between acts that could result in criminal, civil, or administrative enforcement. Even the most technical violation of the environmental laws theoretically could result in criminal prosecution if the defendant acted with the mental state specified by the statute. Mental state is not required for civil or administrative violations, but the additional proof required for criminal prosecution often does little to differentiate between criminal, civil, and administrative violations. In most cases, the government must show only that the defendant acted knowingly. In other words, the government must show defendants know they are engaging in the conduct that is a violation of the law; the government is not required to show that defendants know they are breaking the environmental laws. Indeed, in some cases, the government is required to prove only that the defendant acted negligently; in other cases, the government is not required to show any mental state at all.

If the same violation often could give rise to criminal, civil, or administrative enforcement—and if mental state requirements only preclude criminal enforcement for a small subset of violations—what determines which environmental violations result in criminal prosecution? The answer is the exercise of prosecutorial discretion, which exists in all areas of the criminal law, but assumes a particularly critical role in environmental cases because so much conduct falls within the criminal provisions of the environmental laws. Critics of environmental criminal enforcement argue that Congress gave too much discretion to prosecutors or, even worse from their perspective, to EPA enforcement officials. They note that whether a case is prosecuted criminally may be determined by nothing more substantive than whether the case originates with a criminal investigator or with one of their civil or administrative counterparts within the agency. Even supporters of criminal enforcement acknowledge that prosecutorial discretion is broad under the environmental laws. But they insist that it is no greater than in other areas of economic or regulatory crime and that Congress properly relied on the good sense of prosecutors, the wisdom of judges, and the judgment of juries to determine when violators of the environmental laws should be convicted of criminal activity.

I see no merit in debating whether prosecutorial discretion is broad under the environmental laws—it clearly is—and I concede that it may be disquieting in a nation predicated on the rule of law that we depend so much on individual prosecutors to determine what conduct should be criminally prosecuted. I also acknowledge that the extent of prosecutorial discretion under the environmental laws may raise uncertainty in the regulated community about which environmental violations will result in criminal prosecution. On the other hand, our criminal justice system always relies to some degree upon the exercise of prosecutorial discretion to determine which violations will be prosecuted criminally. To evaluate whether prosecutors have too much discretion—and to address
claims that the environmental laws criminalize too much conduct—we need to know more about the circumstances under which environmental prosecutors exercise their discretion to seek criminal charges for violations.

For environmental crimes, I have written that prosecutors should exercise their discretion to reserve criminal enforcement for cases with one or more of the following aggravating factors: (1) significant environmental harm or public health effects; (2) deceptive or misleading conduct; (3) operating outside the regulatory system; or (4) repetitive violations. Limiting criminal enforcement to cases with one or more of these aggravating factors would preclude prosecution for technical or de minimis violations and provide greater clarity about which environmental violations might result in criminal charges. The presence of one or more of these factors also would delineate an appropriate role for criminal prosecution in the environmental regulatory scheme by limiting criminal prosecution to cases involving substantial harm or risk of harm or to cases in which the conduct involves the type of deliberate misconduct we consider in criminal in other contexts as well.

My views about prosecutorial discretion for environmental crime draw on my experience serving for seventeen years as a federal environmental crimes prosecutor, including seven as Chief of the Environmental Crimes Section when I was responsible for approving all charging decisions in cases brought by my office. The factors track what EPA has identified as significant in its exercise of investigative discretion and draw from the Principles of Federal Prosecution that govern all criminal cases brought by the Justice Department. But my former office does not handle all cases prosecuted under the federal environmental laws—the remainder are prosecuted by United States Attorneys—and the office does not require the presence of any specific aggravating factors to justify criminal charges. As a result, in my prior scholarship, I could not show the extent to which my normative model is descriptive as well.

I therefore created the Environmental Crimes Project to analyze the extent to which the aggravating factors I have identified as normatively desirable were present in recent prosecutions. Over a three-year period, with research assistance from 120 students at the University of Michigan Law School, we reviewed all cases investigated by EPA from 2005–2010. To ensure a representative data set, we focused on defendants charged in federal court with pollution crime or related Title 18 offenses. We conducted our review based on court documents for over 600 cases involving nearly 900 defendants. In addition to analyzing the aggravating factors, we also compiled data regarding the types of defendants charged, the judicial districts and EPA regions involved, the statutes charged, and the outcomes of the cases. In the process, we developed a comprehensive database of information about pollution cases investigated by EPA from 2005–2010 that resulted in federal criminal charges.

Based on our research, I have determined that one or more aggravating factors were present in 96% of environmental criminal prosecutions from 2005–2010. This finding supports at least two significant conclusions. First, in exercising their discretion to bring criminal charges, prosecutors almost always focus on violations that include one or more of the aggravating factors I have identified. Second, violations that do not include one of those aggravating factors are not likely to be prosecuted criminally. I cannot say whether these aggravating factors will trigger criminal prosecution; declined cases are not public, so we do not have a control group of cases where prosecutors decided not to pursue criminal charges. Nor could we create a comparison group of civil matters, because civil cases involve notice pleading and most are resolved by consent decrees that do not identify whether there were aggravating factors. Indeed, I would expect that civil and administrative cases also involve at least significant harm and repetitive violations (deceptive or misleading conduct, in my experience, is likely to result in a referral for criminal enforcement). Nonetheless, my finding that criminal enforcement is reserved for cases involving at least one of the aggravating factors I have identified should provide greater clarity about the role of environmental criminal enforcement and reduce uncertainty in the regulated community about which environmental violations might lead to criminal charges.

This excerpted version of my article has two Parts. Part I focuses on the presence or absence of the individual aggravating factors in each case. Part II analyzes how often multiple aggravating factors are present and assesses defendants with no aggravating factors. Based on the empirical evidence presented here, I conclude that criminal enforcement has been reserved for violations with the aggravating factors I have identified, which suggests that prosecutors have exercised their discretion in ways that should ameliorate concerns about over-criminalization.

I. The Presence of Individual Aggravating Factors in Environmental Criminal Prosecutions

In this Part, I provide the results of our efforts to determine whether the individual aggravating factors I have identified were present in pollution prosecutions initiated from 2005–2010. We determined that 96% of the defendants (828 out of 864 defendants) engaged in conduct involving at least one of the four aggravating factors. The most prevalent aggravating factors were repetitive violations (78% or 679 defendants) and deceptive or misleading conduct (63% or 545 defendants). The third most common factor was operating outside the regulatory scheme (33% or 287 defendants), followed by defendants who caused significant harm (17% or 144 defendants). These findings are shown in Figure 1 below:

These results support two significant conclusions, both of which suggest that criminal enforcement was reserved for culpable conduct under the environmental laws from 2005–2010.

First, one or more aggravating factors are present for nearly all defendants prosecuted under the environmental laws. This is a significant finding in light of over-criminalization claims, since it suggests that criminal enforcement is reserved for conduct involving the aggravating factors that, under my normative model, might warrant criminal prosecution. It also may help address randomness claims about criminal enforcement, since it suggests that prosecutorial discretion may follow a distinctive pattern by focusing on defendants who engage in conduct involving one or more aggravating factors.

Second, it is unlikely that there will be a criminal prosecution if no aggravating factor is present. We identified only a small number of defendants (36) who engaged in conduct that did not involve one of the aggravating factors. This finding suggests that prosecutors are unlikely to pursue criminal charges for violations of the environmental laws that do not involve significant harm, deceptive or misleading conduct, facilities operating outside the regulatory system, or repetitive violations. It also may help mitigate concerns that prosecutors are targeting technical violations and defendants who acted in good faith.

In the Sections that follow, I present data and analysis regarding each of the aggravating factors.²

A. Significant Environmental Harm/Public Health Effects

Cases involving significant environmental harm and public health effects often receive attention from investigators and prosecutors. EPA emphasizes environmental harm and public health effects in its memorandum to investigators regarding the proper exercise of investigative discretion. Prosecutors also focus on these cases for a practical reason—they are more compelling for judges and juries. In white collar cases generally and environmental cases in particular, prosecutors worry that jury nullification may occur if they prove only the elements of the charged offenses without providing juries with a narrative that allows them to view the conduct as morally culpable.

Our study focused on five types of harm: (1) serious bodily injury or death; (2) knowing or negligent endangerment; (3) animal deaths; (4) cleanup costs; and (5) evacuations and emergency responses. At least one of these factors was present for 15% of the defendants in our study (131 of the 864 defendants). Significant environmental harm that did not fit into one of the five factors listed above was present for an additional 13 defendants. Overall, 17% of the defendants included in our study (144 of the 864 defendants) were charged with conduct involving significant environmental harm, a statistically significant percentage but the smallest of the four aggravating factors analyzed.

While our data suggest that significant harm was caused by only one-sixth of the criminal defendants, it merits emphasis that we focused on conduct where harm appeared to be a distinctive “plus” factor in criminal cases. Most pollution crime involves risk of environmental harm or public health effects, since those factors are present whenever pollutants and hazardous wastes are improperly stored, disposed, discharged, or released into the environment. If we had included all potential contamination cases—for example, every CWA discharge case, every RCRA storage and disposal case, and all of the CAA asbestos cases—the harm numbers would have been much higher, involving 73% of all cases (484 out of 664 cases). Stated differently, harm or the potential for harm is present in most environmental cases or they would not be violations at all. Our challenge in examining prosecutorial discretion factors was to identify cases where harm was aggravated and therefore might be a reason the case was criminally prosecuted. It is in this narrower understanding of harm that the number of cases may be limited.

² We obtained the same results when we analyzed at the case level: nearly 96% of all cases (635 out of 664 cases) involved at least one of the aggravating factors. We also achieved nearly identical results when we analyzed the individual aggravating factors at the case level: 17% for significant harm; 59% for deceptive or misleading conduct; 33% for operating outside the regulatory system; and 76% for repetitive violations. We present results here and in Part II based on defendants.
B. Deceptive or Misleading Conduct

Deceptive or misleading conduct undermines the effectiveness of environmental protection in at least three ways. First, deceptive conduct, such as the use of bypass lines or midnight dumping, can allow illegal pollution to go undetected. Second, the environmental laws largely involve an honor system where companies must seek permits or other authorization for pollution activities and then must monitor and self-report their compliance. When companies do not conduct required monitoring or honestly report their pollution activity, they undermine the self-policing required under the environmental laws. Third, misleading conduct deprives regulators of accurate information about overall levels of pollution, which they need to make informed decisions about what pollution to permit.

I have suggested that lying is the most significant factor in making a criminal case out of what otherwise might be a civil or administrative violation. If this premise is true and a high percentage of criminal cases involve deceptive or misleading conduct, it could address concerns that law-abiding individuals are being unfairly targeted with criminal prosecution. I would argue that individuals who misrepresent facts regarding their compliance with legal requirements are not acting in good faith. Moreover, all corporations and individuals are expected to be honest in their statements and submissions to the government. False statements, concealment, and obstruction of justice are therefore criminal under both the environmental laws and Title 18 of the United States Code.

Over 60% of the defendants included in our study committed violations involving deceptive or misleading conduct (63%, or 544 of 864 defendants). This finding is significant because it suggests that the majority of those charged as environmental criminals engage in conduct that is viewed as culpable in other areas of the criminal law as well. To better understand this factor, we analyzed deceptive or misleading conduct based on whether it occurred during (1) the commission of the underlying offense (e.g., by using a bypass line to circumvent pollution control equipment), (2) reporting or recordkeeping (e.g., falsifying documents to conceal pollution control activity), or (3) a cover-up after the violations occurred (e.g., lying to investigators and destroying evidence of a crime).

More than 36% of the defendants in our study (313 of 864 defendants) engaged in deceptive or misleading conduct in the commission of their violations. Nearly 39% of the defendants in our study (336 of 864 defendants) engaged in deceptive or misleading conduct when submitting required reports of pollution activity or in maintaining required compliance records. More than 24% of the defendants (209 of 864 defendants) engaged in some type of after-the-fact effort to conceal violations from regulators.

Perhaps as significantly, nearly one-half of the defendants engaging in deceptive or misleading conduct did so in multiple ways. Of the 544 defendants who engaged in deceptive or misleading conduct, 106 defendants were involved solely in deception during the commission of the offense, 123 defendants were involved in deception solely during reporting or recordkeeping, and 80 defendants were engaged in deceptive conduct solely during cover-up activity. The remaining 236 defendants, or 43%, were engaged in two or more types of deceptive activity.

Deceptive or misleading conduct inculpates both for its own sake—both law and ethics demand that we be truthful—and because of what it reveals about the mental state of the majority of criminal defendants in environmental cases. It has long been argued that the complexity of the environmental laws lays a trap for the uninformed, and that reduced mental state requirements compound the problem by criminalizing conduct that defendants had no idea was unlawful, let alone criminal. Our study’s findings concerning the prevalence of deceptive or misleading conduct do not mean that the environmental laws are not complex or that their criminal provisions are not far reaching. The fact that so many of the defendants charged as environmental criminals engaged in deceptive or misleading conduct, however, may undercuts the argument that the government is prosecuting individuals who make good-faith efforts to comply and do not engage in any culpable behavior.

C. Operating Outside the Regulatory System

The third factor that I have argued may warrant criminal enforcement involves companies that operate outside the regulatory scheme. Like many modern statutory schemes, the environmental laws impose substantial regulatory requirements on facilities across the United States. It is no longer credible for companies to claim ignorance of the fact that their conduct may be regulated. Companies that participate in the regulatory system do so at substantial cost and should not be at a competitive disadvantage when compared to companies that fail to meet their legal obligations. In addition, as noted earlier, the government depends upon complete and accurate information about pollution activity in order to operate an effective permitting system. When companies fail to participate in the regulatory system, the government has no mechanism for taking into account their pollution activity, leading to a lack of information that could undermine environmental protection efforts.

Whether such behavior warrants criminal enforcement, of course, is a separate question from whether the government must take enforcement action to promote compliance efforts. In some instances, criminal enforcement may be appropriate. If a company transports hazardous waste to facilities that are not permitted to receive it, for example, there is a significant potential that the waste will be stored unsafely or disposed of illegally. Likewise, if a company stores or disposes of hazardous waste without a permit, there is a correspondingly significant risk that the public may be exposed to harmful hazardous waste and that toxic pollutants will contaminate the environment. Conversely, civil or administrative enforcement may be more appropriate when the failure to operate within the regulatory system
Involves notification or recordkeeping requirements, or if there is evidence that a defendant failed to comply with permitting requirements because of a good-faith misunderstanding about whether its activities were regulated.

Nearly one-third of the defendants charged with environmental crimes operated outside the regulatory system (33% or 287 out of 864 defendants). Of those 287 defendants, 85% failed to obtain permits required under the environmental laws or transported hazardous wastes to facilities that were not permitted to receive hazardous waste. Slightly less than 15% of defendants who operated outside the regulatory system failed to maintain required records; 5.6% of those defendants failed to monitor for pollution activity, and 30% failed to report pollution.

Significantly, most defendants charged with failure to maintain records, failure to monitor, or failure to report also committed another subcategory of violation. Only one defendant over the six-year period covered by the study was charged solely with recordkeeping violations, and only three defendants were charged solely with failure to monitor violations. The numbers were higher for failure to report pollution activity, including 18 defendants or approximately 2% of all defendants charged with environmental crime. In contrast, there were 184 defendants charged solely with either failure to obtain a permit or permit violations, accounting for 21% of all defendants.

The overwhelming number of defendants charged with permit violations—both alone and in combination with other acts properly characterized as operating outside the regulatory system—suggests that prosecutors have exercised their discretion to focus on the type of actions that most undermine the regulatory system and generally do not prosecute when the violations are more technical.

D. Repetitive Violations

The fourth category of cases that I have asserted might be appropriate for criminal prosecution is repetitive violations. We focused on the duration of the charged misconduct and of any other relevant conduct to identify the extent to which criminal charges were based on repetitive violations. We considered two types of repetitive violations to be potentially aggravating: first, single violations that were egregious enough that they continued for multiple days, weeks, months, or years; and, second, multiple violations that occurred over a period of days, weeks, months, or years.

More than three-quarters of the defendants in our database committed violations that lasted more than a day (79% or 679 out of 864 defendants). We then sorted to determine how many of those defendants committed violations that either lasted more than a week, more than a month, or more than a year or that had harmful effects over a comparable period of time. We found that the largest number of defendants who engaged in repetitive conduct committed violations that lasted more than a year (41% or 351 defendants who engaged in repetitive violations). The results for duration of violations are summarized in Figure 2, above.

These findings admit to competing interpretations about the significance of repetitive violations. On the one hand, as noted above, more than three-quarters of the defendants committed violations that lasted more than one day. Of that group, 84% committed violations that lasted more than one month and 52% committed violations that lasted more than one year. Those findings suggest that duration is often an aggravating factor in environmental criminal prosecutions—and that most defendants commit violations over a period of months or years.

On the other hand, more than a fifth of defendants (21%) committed violations that occurred on a single day. Indeed, just over one-quarter of all defendants (27%) committed violations that did not last more than one week. Those findings suggest that, while environmental criminal cases most often involve violations lasting a month or longer, a significant percentage of cases involve violations of relatively limited duration.

We examined the single-day defendants more closely to determine whether factors were present that might explain why isolated misconduct resulted in criminal charges. We determined that 80% of the defendants engaged in misconduct that involved at least one of the other aggravating factors, with 50% of the defendants engaged in deceptive or misleading conduct. The presence of those aggravating factors might be sufficient to justify criminal prosecution. Moreover, the fact that charges are focused on a single day does not mean that the misconduct was limited to a single day; prosecutors may have agreed to charge a single day of violation as part of a plea agreement. Nonetheless, cases involving isolated misconduct merit caution; an isolated violation should be more egregious to warrant criminal enforcement.3

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3. There were 36 defendants who did not commit repetitive violations who also did not engage in conduct involving any of the other aggravating factors. The charges for these defendants fall outside my normative model. I analyze them in Part II, Section B infra, to determine whether or not they appear to be marginal cases for criminal prosecution.
II. Analysis of the Relationship Between Aggravating Factors and Prosecutorial Discretion

In this Part, I analyze the data regarding the presence of aggravating factors in environmental prosecutions from two perspectives. First, I analyze how often multiple aggravating factors were present in the database and whether there appears to be any relationships among the factors. Second, I examine cases with no aggravating factors to determine whether they reveal marginal cases.

A. Multiple Aggravating Factors and the Relationships Between Aggravating Factors

As Part I explained, aggravating factors were present for 96% of the defendants in our six-year dataset (828 out of 864 defendants). To better understand the role of these aggravating factors, I also analyzed how often multiple factors were present and considered the relationship between factors. Two or more aggravating factors were present for 74% of the defendants (638 out of 864 defendants). The fact that such a high percentage of defendants had multiple aggravating factors suggests a higher level of egregiousness than would be present if most defendants had only a single aggravating factor. Our data regarding the number of aggravating factors is presented in Figure 3:

![Figure 3. Defendants Charged by Number of Aggravating Factors](image-url)

An analysis of these data supports three additional findings regarding the aggravating factors in environmental crimes.

First, one of the first three factors (all factors other than repetitiveness) was present for 88% of the defendants (761 out of 864 defendants). In other words, most defendants were charged for violations that involved harm, deceptive conduct, or operating outside the regulatory system. These findings suggest a further refinement of my overall conclusions from Part I: (1) in most instances, prosecutors have reserved criminal prosecution for defendants with one of the first three aggravating factors; and (2) defendants who engage in conduct that does not involve one of the first three factors are unlikely to face criminal charges.

Second, repetitiveness often is present when criminal charges are brought but rarely is the sole aggravating factor. Repetitiveness was the most prevalent of the four factors, accounting for 79% of the defendants (679 out of 864 defendants). Repetitiveness was the sole aggravating factor, however, for only 10% of the defendants who committed repetitive violations (67 out of 679 defendants), which is the lowest for any aggravating factor. Stated differently, 90% of the defendants who committed repetitive violations (612 out of 679 defendants) also had at least one other aggravating factor. These findings suggest that, while prosecutors may prefer to charge repetitive violations, repetitiveness alone may not be driving charging decisions.

Third, more than 71% of defendants (612 out of 864 defendants) engaged in conduct that involved one of the first three factors (significant harm, deceptive conduct, operating outside the regulatory system) and repetitiveness. Since most environmental crimes involve one of the first three aggravating factors (88% of all defendants) and most environmental crimes involve repetitive violations (79% of all defendants), we would expect to see one of the first three factors present along with repetitiveness in a high percentage of cases. But the relationship was even stronger when we looked at multi-factor defendants. Repetitiveness was present for 96% of the defendants with two or more aggravating factors (612 out of 638 defendants). For defendants with two factors, repetitiveness was present for 94% of the defendants (443 out of 469 defendants). The pairing of repetitiveness with one or more of the other aggravating factors was the most dominant multi-factor relationship when calculated as a percentage of all cases (71% of all defendants). This finding suggests that prosecutors often reserve criminal prosecution for violations that involve both one of the first three factors and repetitiveness and are less likely to bring criminal charges if that relationship is absent.

We found evidence of other relationships among the aggravating factors. Deceptive or misleading conduct occurred least frequently in combination with the factors of significant harm and operating outside the regulatory system. We found 545 defendants who engaged in deceptive or misleading conduct; only 11% of those defendants (58 defendants) engaged in conduct that resulted in significant harm. In

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4. Operating outside the regulatory system also is the sole aggravating factor in only 11% of the cases where it is present (30 out of 281 defendants). In contrast, deceptive or misleading conduct is the sole aggravating factor for 36% of the defendants who engaged in deceptive or misleading conduct (136 out of 547 defendants).

5. Of course, most defendants in our dataset committed repetitive violations, so I would expect to see a significant overlap between repetitive violations and other factors. Still, it is revealing that the other three factors were present so often and that repetitiveness appeared by itself so infrequently.

6. The combination of one of the first three factors and repetitiveness also is the most dominant relationship as a percentage of all cases, accounting for 68% of all cases in the dataset (450 out of 664 cases).
other words, significant harm was present as a percentage of defendants involved in deceptive or misleading conduct less frequently than in our dataset as a whole (17% of all defendants). More of the defendants who engaged in deceptive or misleading conduct were operating outside the regulatory system (21% or 117 defendants) but a relatively modest amount overall and, as with harm, less often than in our dataset as a whole (where it was present for 33% of all defendants).

Deceptive or misleading conduct was present as the sole aggravating factor more often than it was paired with significant harm. Deceptive or misleading conduct was the sole aggravating factor for 14% of the defendants who engaged in deceptive or misleading conduct (78 out of 545 defendants). For defendants who had only one aggravating factor, deceptive or misleading conduct appeared more often than any other aggravating factor both in raw numbers (the next largest category was repetitive violations, which was the sole aggravating factor for 67 defendants) and as a percentage of defendants possessing that factor (the next largest category was significant harm at 11% of all significant harm defendants). As with other aggravating factors, most defendants who engaged in deceptive or misleading conduct also committed repetitive violations (83% or 452 out of 545 defendants), which suggests that deceptive or misleading conduct is charged most often when it occurs more than once. It merits emphasis, though, that deceptive and misleading conduct was charged most often as a standalone factor—and appeared the most often of the first three aggravating factors. As noted previously, in my experience, deceptive or misleading conduct is the most significant factor in the exercise of prosecutorial discretion.

Conversely, we found that there appeared to be at least some positive relationship between significant harm and operating outside the regulatory system. The correlation was not particularly strong: we saw both significant harm and operating outside the regulatory system for 60 defendants (41% of significant harm defendants and 21% of defendants operating outside the regulatory system). Yet both were present slightly more often together than they were present in the dataset as a whole (operating outside the regulatory system was present for 33% of all defendants; significant harm was present for 17% of all defendants). In addition, even a modest correlation between significant harm and operating outside the regulatory system may be noteworthy, since the regulatory system seeks to protect public health and the environment from harm (and the risk of harm).

B. Defendants With No Aggravating Factors Present

For 36 of the defendants in our database, we determined that none of the four aggravating factors was present. We examined each case individually to determine whether, based on the conduct described in the court documents, any involved questionable exercise of prosecutorial discretion. For the 36 defendants with no aggravating factors, 17 defendants committed violations that, while insufficient to code as “operating outside the regulatory system,” nonetheless involved core subcategory violations such as failing to obtain a permit. For example, in nearly all of the RCRA cases in the database, the defendant engaged in conduct that at least involving failing to acquire the requisite permit, which is a subset of culpability under operating outside the regulatory system. But not all of those defendants were coded as operating outside the regulatory system because they might have been partially operating within the regulatory system.

Perhaps there might be circumstances where the failure to obtain a permit reflected good-faith misunderstanding of the permitting requirement or, in the RCRA context, the definition of hazardous waste. In those circumstances, prosecutors might choose to exercise their discretion to decline prosecution in favor of civil or administrative enforcement. By itself, however, there is nothing about prosecution for failure to obtain regulatory permits that signals prosecutorial overreaching. The obligation to acquire and maintain valid permits for pollution activity or to store and dispose of hazardous waste is not an arcane or obscure regulatory requirement.

Only 19 defendants engaged in conduct that was not captured by any category or subcategory. We analyzed each of these cases and found that researchers had noted explanatory “additional aggravating factors” that may have influenced prosecutors for six defendants. For example, one prosecution involved safety violations occurring in schools, which may have prompted the prosecutor to pursue criminal charges. Another prosecution involved conduct that appeared to blatantly disregard the law but was not captured by one of the aggravating factors.

As a result, most prosecutions with no aggravating factors involved either a subcategory of operating outside the regulatory system or an additional aggravating factor. Only 13 defendants engaged in conduct where prosecution could not be justified by a subcategory or additional aggravating factor. Of that number, nine defendants were charged in an indictment or information that merely recited the elements of the offense. It is far easier to identify aggravating factors in so-called speaking indictments, where prosecutors provided additional details about the misconduct, including the type of evidence that fit within the aggravating factor analysis.

Under the Federal Rules of Criminal Procedure, however, only the elements of the offense must be included in an indictment, and pleading practices vary from district to district. In the absence of speaking indictments, we looked to other documents to determine whether aggravating factors were present (e.g., plea agreements, factual basis statements, sentencing memoranda, and judgments) but those documents sometimes did not exist or did not provide additional information beyond the charges. Perhaps some of the nine defendants who were charged in “bare-bones” indictments or informations did not engage in conduct
that involved any aggravating factors. If so, those could be marginal criminal cases; we cannot tell from the court documents. Other than those nine defendants, however, there are only four defendants for whom we could not discern a rationale for the prosecution despite the availability of court documents that provided details about their misconduct. Those four defendants were charged with negligence on a single day, which may involve conduct where civil charges may have been more appropriate. Nonetheless, four defendants is an extremely small percentage of the 864 defendants in our database.

III. Conclusion

More than three decades after EPA hired its first criminal investigators, the prosecution of environmental crime remains the source of persistent claims about over-criminalization and lingering questions about the role of criminal enforcement under the environmental laws. Given the broad discretion that prosecutors have under the environmental laws—and the erosion of bipartisan support for environmental protection—those expressions of concern are not surprising. But they point to the need for a stronger normative framework and a better empirical understanding of criminal enforcement.

I have argued that criminal prosecution would be most appropriate when one or more aggravating factors were present: significant environmental harm or public health effects, deceptive or misleading conduct, operating outside the regulatory system, and repetitive violations. My empirical research now strongly suggests that criminal enforcement has been limited in most instances to violations involving one or more of those aggravating factors. In 96% of the environmental prosecutions from 2005–2010, at least one aggravating factor was present. In more than 88% of those environmental prosecutions, the defendants caused significant harm, engaged in deceptive or misleading conduct, or operated outside the regulatory system that protects the environment and public health. In nearly three-quarters of the cases, two or more aggravating factors were present, with repetitiveness most often the additional aggravating factor. These findings suggest that prosecutors have reserved criminal enforcement for egregious misconduct.

Moreover, the extent to which environmental criminals engage in deceptive and misleading conduct—more than 63% of those prosecuted from 2005–2010—may undermine claims that environmental defendants are well-intentioned individuals inadvertently snared by complex regulations and a criminal enforcement scheme with reduced mental state requirements. The environmental regulatory system depends upon honest self-reporting; those who lie to conceal violations are engaging in culpable behavior that cripples efforts to protect the environment and the public from the risks associated with unlawful pollution. These findings take on added significance because one-third of the defendants in our study were operating entirely outside the regulatory scheme, making no effort to comply with the law. Criminal enforcement is appropriate for defendants who deceive or seek to operate outside the law, particularly when their conduct risks or causes significant harm to the environment and public health.

There were some cautionary notes revealed by our study: 4% of the defendants engaged in conduct that involved no aggravating factors, and a small number of those defendants were charged in what appear to be pure negligence cases. Cases without aggravating factors and those involving pure negligence should receive extra scrutiny from prosecutors to ensure that criminal prosecution is appropriate. In addition, approximately one-fifth of all defendants engaged in conduct that occurred on a single day. Of course, a violation on a single day could be egregious enough to warrant criminal prosecution; in most single-day matters, an aggravating factor other than repetitiveness was present. Nonetheless, the most compelling prosecutions typically involve repeated misconduct, which compounds the wrongdoing and limits any doubt about the defendant’s intent.

Overall, however, my research should reduce uncertainty about which environmental violations may result in criminal prosecution and quiet concerns about over-criminalization. Prosecutors appear to be focusing on conduct that involves the aggravating factors that I have identified; when those factors are absent, criminal prosecution is unlikely to occur. Prosecutors thus have reserved criminal prosecution for culpable conduct and avoided charges based on technical violations or when defendants acted in good faith. Perhaps most importantly, my research provides empirical evidence that prosecutors have properly exercised their broad discretion under the environmental laws and assured an appropriate role for criminal enforcement in our environmental protection system.