For nearly seven years, Kathleen Brickey, the James Carr Professor of Criminal Jurisprudence, has been mining a database compiled by the United States Environmental Protection Agency (EPA). She has been reviewing approximately 350 federal prosecutions for environmental crimes over a 10-year period searching for facts about the nature and characteristics of federal environmental crime prosecutions. Her work has yielded four articles published in academic journals.

The most recent article, “Charging Practices in Hazardous Waste Crime Prosecutions,” was published in a 2001 issue of the Ohio State Law Journal. In it, Brickey examines “how prosecutors have used the Resource Conservation and Recovery Act (RCRA) as a criminal enforcement tool. Drawing on nearly 140 hazardous waste prosecutions, the article analyzes whom the government prosecutes for hazardous waste crimes, what kinds of violations culminate in criminal charges, the business contexts in which the violations occur, and the interplay between RCRA and other criminal statutes.”

The impetus for Brickey to examine these charging practices came from other articles published in academic journals about environmental crime written by environmental law scholars, rather than criminal law scholars like Brickey. The articles tend to be highly critical of criminal enforcement of environmental standards. The authors cite various reasons, including the complexity and obscurity of environmental law, the constantly changing scientific standards, and the difficulty ordinary people have in understanding what is required of them.

“The concern is that because of these factors, the law allows prosecution and conviction of essentially innocent people as environmental felons,” Brickey says. “But what is striking about this part of the academic literature is that none of it is based on empirical claims. Their arguments tend to be based on speculative inferences drawn from their knowledge of environmental law. It was not immediately apparent to me that their claim that something is fundamentally wrong with the environmental criminal enforcement program was sound.”

Like Joe Friday in the television series Dragnet, Brickey began searching the database for “Just the facts, ma’am.” Her goal was to empirically test some of the claims made by critics of the current system. Brickey turned to the EPA database and identified almost 140 summaries of hazardous waste prosecutions in narrative form. To use the data,
Brickey developed her own set of protocols to code each data point and thereby create a more usable database. “It was a lengthy process, and I had a long learning curve. But I have now begun to translate the data into a response to critics of the criminal enforcement program. Because their claims about how the system works are not empirically grounded, my research undercuts the case they make for statutory reform. It also undercuts much of their criticism of reliance on prosecutorial discretion to weed out marginal cases,” she says.

Critics claim that people who are prosecuted for environmental crimes are either low-level employees or persons who have no way of knowing they are violating environmental statutes. And, say these critics, prosecutors are likely to target proprietors of neighborhood businesses like dry-cleaning shops.

Brickey’s research challenges this scenario. In a majority of the cases, industrial activities like manufacturing, waste management, and repair/maintenance operations—including aircraft refurbishing and barge cleaning—led to the violations. Of the cases she examined, only one involved a local dry-cleaning business. This case involved an owner of a dry-cleaning shop in the St. Louis area who had accumulated 23 55-gallon barrels of waste, some containing hazardous chemicals used in the shop. The owner called a friend with a truck who took the barrels, drove to a rural location in the state, and dumped the barrels by the roadside.

Nobody in this day and age would possibly think this would be a legal way to dispose of waste. It is not a case in which someone was totally unaware that his conduct was regulated or that what he did was wrong,” Brickey says.

Environmental law literature also raises concerns about prosecuting violations of permits required for anyone who creates, treats, transports, or disposes of hazardous waste. It is contended that a worker could easily violate the permit, a highly technical document, without realizing it and then be prosecuted.

Again, Brickey’s empirical research contradicts this scenario. By examining the types of charges made by prosecutors, she found only two cases involving permit violations. The rest of the violations involved storing, disposing, or transporting hazardous waste without the required permit.

“This pattern of prosecutions shows that the prosecutors are focusing primarily on those who are operating totally outside the regulatory system. They have simply ignored the permit requirements. There is an economic incentive to do this because it is much cheaper to dump hazardous waste in the woods than it is to properly dispose of it. So prosecuting rogue operators who engage in highly regulated activity without subjecting themselves to the rules of the game is a high priority,” Brickey says.

Another concern raised in the literature is that charges are brought against individuals—for instance, someone who improperly throws away a solvent-laden rag—who inadvertently engage in an isolated act. Brickey’s database also debunked this lone-gunman scenario.

A majority of the cases involved charges against a corporation and two or more individuals. Approximately 65 percent of the individual defendants were owners, officers, or managers of corporations. A high percentage of the cases involved charges that the defendants violated more than one environmental statute, such as RCRA and the Clean Water Act. More than 30 percent of the cases included criminal conspiracy charges, and 70 percent involved allegations that the defendant lied to government officials or falsified records relating to waste management practices and compliance.

“This tells us again that we are not dealing with a lone individual who inadvertently engages in an isolated act, but rather we are talking about multiple parties who have agreed upon a course of conduct that is illegal,” Brickey says.

In her latest article, Brickey counters claims made by critics of environmental criminal enforcement that hazardous waste violations are somehow novel or significantly different from other types of white-collar crime. She has found that these environmental violators essentially are bound by the same motivation as other white-collar criminals: money.

“Business owners and operators have strong financial incentives to disregard costly environmental regulatory requirements. In the context of RCRA violations, the savings can be enormous. In consequence, it seems wholly appropriate for prosecutors to bring hazardous waste crime cases into the mainstream of the government’s criminal enforcement priorities,” according to the article.

Brickey concludes that prosecutorial charging practices are consistent with the United States Department of Justice’s white-collar crime and corporate prosecution policies and that charging practices in RCRA prosecutions are consistent with EPA’s criminal enforcement priorities.

“In practice, prosecutors are highly selective in deciding which cases to pursue,” Brickey writes. “They assign priority to prosecuting rogue operators who make no pretense of complying with regulatory requirements and to prosecuting permit holders who lie to conceal their noncompliance. That should hardly be cause for alarm.”

“Business owners and operators have strong financial incentives to disregard costly environmental regulatory requirements.”
Kathleen Brickey