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Polluters as Perpetrators of Person Crimes: Charging Homicide, Assault, and Reckless Endangerment in the Face of Environmental Crime

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By May 21, 1991, Mary Cinquegrana's two daughters had inhaled too many toxic fumes to sleep in their own bedroom any more. The fumes came from two barrels filled with black sludge that their neighbor kept between his mobile home and the Cinquegranas' unit. These barrels emitted an awful smell that made the family sick to their stomachs, spewed black muck when it rained, and prevented anything from growing in the land around them. The smell leached into the bedroom of the two younger Cinquegranas and caused them to suffer headaches, dizziness, nausea, and diarrhea, and prevented them from sleeping in their beds for fear of getting sicker. The fumes and sludge affected other nearby residents as well, but by the time they alerted the fire department on May 21, 1991, it was almost too late; neighbor Floyd Shaffer had inhaled fumes that left him unconscious by the time the authorities arrived. The state Department of Environmental Regulation removed the barrels and tested the black sludge inside; the investigators found several toxic substances known to cause the symptoms Floyd Shaffer and the Cinquegranas were suffering. Fact patterns such as this, from the Florida case of *State v. Delgrasso*,[1] illustrate the intersection of environmental and criminal law, where humans may be injured or killed by acts of pollution.

Environmental and criminal law overlap in a variety of ways, most notably where legislatures criminalize environmentally harmful conduct. This particular intersection occurs in federal environmental pollution control statutes, many of which authorize imprisonment, a traditional characteristic of criminal laws.[2] Another intersection occurs when a polluting activity causes serious bodily injury or death. Environmental pollution control statutes are designed to curtail

1 653 So. 2d 459 (Fla. Dist. Ct. App. 1995).

2 *See, e.g.*, Clean Air Act (CAA), 42 U.S.C. § 7413(c)(1) (2006) (authorizing a term of imprisonment up to five years for knowingly violating substantive CAA requirements).

polluting activity, protect the environment, and protect human health,[3] but the statutes also authorize punishment for regulatory violations.[4] This makes for an incomplete penalty: the acts of polluting and regulatory violations are punished, but not any harm to humans that results from that pollution. The incompleteness of this penalty scheme gives prosecutors an unexplored opportunity—when victims of environmental pollution sustain serious bodily injury or death, prosecutors should charge a traditional person crime in addition to, or instead of, the environmental crime. This is not to say that any time a person is injured or killed by an act of pollution prosecutors should only focus on the human injury. Instead, traditional criminal statutes are another useful but underused weapon in the legal arsenal against environmental crime.

This Article presents the theory that when victims of environmental crimes sustain serious bodily injury or death, state-level prosecutors may often charge the perpetrator with a traditional person crime alongside, or instead of, violations of environmental statutes. In order to show the efficacy of such a course of action, it is necessary to look at fact patterns of pollution that may cause serious bodily injury or death, and determine how state environmental and person crime statutes can deal with defendants in such situations. Assuming prosecutors are able to charge polluters with person crimes under their state laws, there are also some practical and jurisprudential issues to consider when deciding how to charge the crime. Part I of the Article suggests that certain serious bodily injuries or death can be caused by chronic, catastrophic, or unregulated polluting actions. Part II discusses the act and mental state elements of the various environmental crimes in New York, Oregon, and Florida that can deal with these serious cases of pollution, and Part III does the same for traditional person crimes.[5] Part IV presents the issues of statutory

3 While this is true of all major pollution control statutes, it is especially true of the CAA. *See id.* § 7413(c)(5)(A) (criminalizing knowingly releasing a hazardous air pollutant or substance that the defendant knew placed another person in danger).

4 These regulatory violations can include failures to submit required reports, engaging in certain activities without the proper permits, and failure to cooperate in investigations, among other acts. *See, e.g., id.* § 7413(c)(1)–(3) (criminalizing knowing violations of requirements or prohibitions of state implementation plans, permit requirements, and failure to pay fees).

5 As of the publication date of this Article, only three reported cases reflect fact situations in which prosecutors charged an environmental crime such as unlawful possession of hazardous waste *and* a person crime such as manslaughter when a polluter caused serious bodily injury or death. *See* State v. Delgrasso, 653 So. 2d 459 (Fla. Dist. Ct.

analysis and discretion involved when a prosecutor determines whether to charge a polluter whose actions cause serious bodily injury or death with an environmental crime, a person crime, or both.

I
CERTAIN POLLUTING ACTIVITIES CAN CAUSE SERIOUS BODILY INJURY OR DEATH

At this point in modern human history, it is widely understood that pollution can negatively affect human health.

> [T]here are now clearly established links between many common environmental contaminants and human mortality. Fine particulates in the ambient air kill tens of thousands of people every year in the United States alone. Widely used chemicals such as vinyl chloride pose risks of lethal cancer and other diseases. Greenhouse gases contributing to climate change will cause increased incidence of human disease, in addition to many other health-related effects. And so on. The basic idea is that pollution kills people and makes them sick, and, in many cases, we can expect death as a consequence of pollution.[6]

Dangerous air pollution has been a topic of much concern in the last several decades, spawning protective legislation such as new sections of the Clean Air Act adopted from portions of the Montreal Protocol to phase out chlorofluorocarbons and other ozone-depleting substances.[7] In addition to those in the air, water pollutants are also potentially extremely dangerous to human health. Pollutants enter ground and drinking water from such common sources as farms, power plants, and even swimming pools, and can cause health effects including cancer, reproductive problems, and nervous system damage.[8]

App. 1995); People v. Roth, 604 N.E.2d 92, 93 (N.Y. 1992); People v. Polvino, 580 N.Y.S.2d 616 (Onondaga Cnty. Ct. 1991). Accordingly, this Article examines the statutes in the states of New York and Florida where those cases were brought. The Article also analyzes relevant statutes in Oregon to determine if there is a statutory difficulty against bringing such cases in that state, or if there may be another reason no polluters have been charged with person crimes to date in Oregon.

6 Lisa Heinzerling, *Knowing Killing and Environmental Law*, 14 N.Y.U. ENVTL. L.J. 521, 522 (2006) (internal citations omitted).

7 *See, e.g.*, CAA Amendments of 1990, Pub. L. No. 101-549, tit. VI, secs. 601–618, §§ 7671–7671q, 104 Stat. 2399, 2648–72 (1990) (implementing the "Montreal Protocol"); 42 U.S.C. § 7671c(h) (2006) (requiring EPA to "promulgate rules for reductions in, and terminate the production, importation, and consumption of, methyl bromide under a schedule that is in accordance with, but not more stringent than, the phaseout schedule of the Montreal Protocol Treaty as in effect on October 21, 1998.").

8 *See* NATURAL RES. DEF. COUNCIL, WHAT'S COMING OUT OF THE TAP? 1 (2007), *available at* http://www.nrdc.org/water/files/fdrinkingwater.pdf.

Harmful pollution is often accidental, such as when older houses have lead pipes that leach lead into the drinking water, or even permitted, such as the naturally occurring *E. coli* bacteria found in human feces and therefore in treated sewage.[9] Just as often, a person or corporation releases harmful pollutants into the air or water and may or may not be aware of the results of such actions. These polluters can harm humans in one of three ways: through unregulated infractions, chronic pollution, or a sudden and catastrophic release. Existing cases demonstrate each of these scenarios.

A. Unregulated Infractions

Federal and state governments regulate pollution through control and environmental contamination statutes that have three components: (1) environmental goals, (2) implementation devices, and (3) enforcement mechanisms.[10] This scheme allows the administering agency to keep an eye on potential polluters and force them to comply with the regulation standards under threat of administrative, civil, or criminal sanctions.

Because many of these standards are drafted to be inclusive rather than exclusive, they do not encompass every possible form of pollution that exists, and sometimes polluters manage to slip through the regulatory cracks and discharge a pollutant in a manner not defined by statute. For example, the Clean Water Act (CWA) indicates that "the discharge of any pollutant [into waters of the United States] by any person shall be unlawful" unless in compliance with other sections of the CWA,[11] including those addressing requirements for obtaining permits to discharge from point sources.[12] The CWA does not authorize permits to discharge from non-point sources because discharge constitutes only "addition of any pollutant to navigable waters from any point source."[13] If a person added pollutants to water from a nonpoint source, it would not constitute a discharge under the terms of the statute.

9 *Id.*

10 SUSAN F. MANDIBERG & SUSAN L. SMITH, CRIMES AGAINST THE ENVIRONMENT 10, 11 (1997).

11 Federal Water Pollution Control Act, 33 U.S.C. § 1311(a) (2006).

12 *Id.* § 1341(a)(1), § 1362(14).

13 *Id.* § 1362(12).

An example of unregulated non-point source pollution is addressed in *United States v. Plaza Health Laboratories, Inc.*[14] Defendant Geronimo Villegas was a co-owner and vice president of Plaza, a blood testing laboratory in New York.[15] On at least two occasions, Villegas personally disposed of vials of human blood from Plaza, some containing blood infected with Hepatitis B, into the Hudson River from his residence.[16] Federal prosecutors for the District of New York charged Villegas with knowing violations of CWA provisions and knowing endangerment,[17] and the jury found Villegas guilty.[18] On appeal, Villegas argued that he was not subject to regulation under the CWA, because as an individual polluter he was not a point source.[19] The CWA defines point source as "any discernible, confined and discrete conveyance,"[20] and the court noted that "[h]uman beings are not among the enumerated items that may be a 'point source.'"[21] Although the language is ambiguous because it does not specifically *exclude* human beings as point sources, the court applied the rule of lenity[22] and found that a human being cannot be a point source, stating: "this statute was never designed to address the random, individual polluter like Villegas."[23]

If a human cannot be a point source, pollution coming directly from a single person, such as dropping hazardous materials from his hand into water, is outside the regulatory scheme of the CWA and constitutes an unregulated infraction.[24] Fortunately, no one was infected or harmed by the blood Villegas released into the Hudson River, but there could be another case in which the pollutant *did* seriously injure or kill a human being. For instance, the vials of blood could have broken and infected someone who found them. Such a scenario would show that an unregulated infraction may cause serious

14 3 F.3d 643 (2d Cir. 1993).

15 *Id.* at 643.

16 *Id.* at 643–44.

17 *Id.* at 644. *See also* 33 U.S.C. § 1319(c)(2)–(3).

18 *Plaza Health Labs.*, 3 F.3d at 644.

19 *Id.*

20 33 U.S.C. § 1362(14).

21 *Plaza Health Labs.*, 3 F.3d at 646.

22 *Id.* at 649 (stating that textual ambiguity is decided in favor of the defendant).

23 *Id.* at 646.

24 A single person could pollute from a point source and be subject to CWA regulations if, for example, he owned a small workshop and discharged a pollutant into water through a pipe. Memorandum from Susan Mandiberg to Sarah Gibson (April 22, 2009) (on file with author).

bodily injury or death. In such a case, the defendant would be outside the purview of sanctions authorized by the CWA, but could be subject to charges of traditional person crimes.

B. Chronic Pollution

When people think of pollution making humans sick, they often conjure up the bad corporation image that is familiar from the true stories recounted in *Erin Brockovich*[25] and *A Civil Action*.[26] These scenarios involve corporations that have a toxic byproduct from some aspect of their industry that pollutes the groundwater or air for months or years at a time, leading to serious illnesses and death in neighboring communities.

Another true, but less dramatized version of this fact situation appears in *O'Connor v. Boeing North American, Inc*.[27] In this case, a variety of current and former residents of Southern California brought a class action suit alleging that during a period of fifty years Boeing released "radioactive contaminants and hazardous nonradioactive contaminants into the environment, the air, the soil, and the groundwater."[28] The plaintiffs stated that due to the hazardous contaminants, they were diagnosed with a variety of illnesses, including "cancers of the thyroid, brain, cervix, breast, lung, ovaries, bladder, prostate, pancreas, and stomach; leukemia; lymphoma; hypothyroidism; infertility; and multiple chemical sensitivity sensory neuropathy," and that some of these illnesses resulted in death.[29] The plaintiffs brought a civil case alleging personal injury and wrongful death,[30] a common legal response to combat chronic pollution.

Chronic polluters are not always corporations. *State v. Delgrasso* is one of the few state cases that exists in which prosecutors charged a polluter with both violations of environmental statutes and person

25 ERIN BROCKOVICH (Jersey Films 2000) (depicting the efforts of a single mother to document and litigate the industrial pollution of a town's water supply by an energy company).

26 A CIVIL ACTION (Touchstone Pictures 1998) (depicting a personal injury lawyer's pursuit of a class action case against a pair of large corporations for contaminating local groundwater).

27 92 F.Supp.2d 1026 (C.D. Cal. Mar. 28, 2000), *modified on reconsideration*, 114 F.Supp.2d 949 (C.D. Cal. 2000), *aff'd in part and rev'd in part*, 311 F.3d 1139 (9th Cir. 2002).

28 *Id.* at 1030.

29 O'Connor v. Boeing N. Am., Inc., 311 F.3d 1139, 1144 (9th Cir. 2002).

30 *O'Connor*, 92 F.Supp.2d at 1027.

crimes.[31] The defendant in the case kept several barrels behind his property that the Department of Environmental Regulation (DER) eventually determined contained toxic or flammable materials: "[O]ne drum contained a petroleum product and one a ketone based solvent with a flashpoint that made it more ignitable than gasoline. . . . [One barrel DER tested contained hazardous waste] consisting of such products as ethylbenzene, toluene and xylene."[32] One of these barrels had a hole in it, and when it rained, black muck would ooze out of the barrel onto the surrounding ground.[33] The odor from the barrels made residents sick, and one family had to close off bedrooms in their home that were near the barrels because people could not sleep in the rooms without experiencing headaches and nausea.[34]

The resident manager testified that he had repeatedly alerted Delgrasso that the odor from the barrels was making residents ill and asked Delgrasso to remove the barrels.[35] Delgrasso did nothing about it, despite the fact that the manager found Delgrasso a local team qualified to remove toxic waste.[36] The fire department was finally alerted, and when they arrived they determined that a complete evacuation of the area was necessary.[37] Firefighters transported several residents to a nearby hospital where they were treated for such ailments as headaches, sick stomachs, dizziness, diarrhea, and loss of consciousness.[38] Neither side disputed that the contents and odor of the barrels were what made the other residents ill.[39]

31 653 So. 2d 459 (Fla. Dist. Ct. App. 1995). *See infra* Part II (discussing environmental crime charges), Part III (discussing person crime charges).

32 *Delgrasso*, 653 So. 2d at 461. Exposure to petroleum products such as benzene, toluene, and xylene affects the central nervous system; permanent damage can occur with long-term exposure. Inhaling toluene for more than several hours can cause fatigue, headache, nausea, and drowsiness, and death can result from exposure to large concentrations of toluene. Benzene has been shown to cause leukemia in humans. Exposure to other petroleum products can affect the blood, immune system, liver, spleen, kidneys, lungs, and developing fetal tissue. *See, e.g.*, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP'T OF HEALTH AND HUMAN SAFETY, PUBLIC HEALTH STATEMENT FOR TOTAL PETROLEUM HYDROCARBONS 4–5, (1999), *available at* http://www.atsdr.cdc.gov/toxprofiles/tp123-c1.pdf.

33 *Delgrasso*, 653 So. 2d at 461.

34 *Id.* at 462.

35 *Id.* at 461.

36 *Id.*

37 *Id.* at 463.

38 *Id.* at 461–62.

39 *Id.*

Cases such as *O'Connor* and *Delgrasso* demonstrate that chronic pollution can cause serious bodily injury or death to humans. On a case-by-case basis, prosecutors should weigh the facts to decide whether they can charge chronic polluters with both violations of environmental protection statutes and person crimes.

C. Catastrophic Pollution

The final method through which pollution can cause serious bodily injury or death to humans is via a catastrophic event. These types of polluting activities are often irreversible and have a catastrophic effect, such as the Exxon Valdez and the BP gulf oil spills.[40] Two state cases in which prosecutors charged both violations of environmental protection statutes and person crimes demonstrate the effects of catastrophic pollution.

In *People v. Roth*, an employee at a company that transported petroleum products died in a workplace explosion.[41] While cleaning a tank filled with petroleum vapors with a high-pressure washer, a stream of water hit a trouble light, which sparked and ignited the vapors, killing the employee.[42] "Witnesses also identified a number of other unsafe conditions at the site, several of which had the potential to trigger an explosion in the vapor-laden atmosphere."[43] This is an example of explosive, catastrophic pollution that resulted in the death of a human.

Another case that shows the results of catastrophic pollution is *People v. Polvino*.[44] The facts are somewhat similar to those in *Delgrasso*: a defendant in possession of hazardous chemicals was told to remove the chemicals from an unauthorized area, but the defendant failed to do so.[45] Serious injury resulted, and in the case of *Polvino*, an employee died due to a more sinister incident.

Polvino hired an environmental engineering firm to conduct an environmental audit of a building he was planning to purchase, and

40 *See, e.g.*, EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, 2009 STATUS REPORT, *available at* http://www.evostc.state.ak.us/Universal/Documents/Publications/20th%20Anniversary%20Report/2009%20Status%20Report%20(Low-Res).pdf (describing catastrophic effects of the oil spill, including animal carcass counts, reduced species growth rates, and detrimental economic and social effects on local communities).

41 604 N.E.2d 92, 93 (N.Y. 1992).

42 *Id.*

43 *Id.* at 93.

44 580 N.Y.S.2d 616 (Onondaga Cnty. Ct. 1991).

45 *Id.* at 617–19.

during the course of the audit the engineer observed several barrels marked sodium sulfide and sodium hydroxide.[46] The engineer informed Polvino that the materials in the barrels were hazardous and would have to be specifically identified, and that Polvino could be liable for them.[47] Polvino asked the engineer to prepare a quote for identifying and disposing of the materials, and the engineer did so within a few weeks, but Polvino never responded to the engineer.[48]

Polvino then asked a former employee if he knew how to dispose of the barrels, and the employee testified that he told Polvino he did not know how to do so, and that he would need an Environmental Protection Agency permit to move or dispose of barrels containing hazardous waste.[49] At that point, Polvino apparently asked another employee, Carl Witheral, to dispose of the barrels.[50] Witheral rented a U-Haul truck, told a friend that he was "getting paid well [to move] contaminated waste," and turned up dead three days later. [51] Experts determined that Witheral spilled barrels containing sodium sulfide and sodium hydroxide, or lye, chemically burning himself and causing the two materials to combine and produce a lethal gas, hydrogen sulfide.[52] The "exposure to such high levels of hydrogen sulfide gas produced by the [sodium hydroxide] and sodium sulfide turned the decedent's lungs into a leathery type consistency which resulted in his death."[53]

We can see from the cases of *Roth* and *Polvino* that catastrophic pollution can result in serious bodily injury or death to humans, and in these cases it may be possible for prosecutors to charge catastrophic polluters with both violations of environmental statutes and person crimes.

46 *Id.* at 618.

47 *Id.* at 617–18.

48 *Id.* at 618.

49 *Id.*

50 *Id.* at 618–19.

51 *Id.* at 619.

52 *Id.*; *see also* AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP'T OF HEALTH AND HUMAN SAFETY, CAS # 7783-06-4, HYDROGEN SULFIDE 1 (2006), *available at* http://www.atsdr.cdc.gov/tfacts114.pdf. (explaining the harmful effects of exposure to hydrogen sulfide).

53 *Polvino*, 580 N.Y.S.2d at 619.

II
STATE ENVIRONMENTAL CRIMES CAN DEAL WITH SOME OF THESE FACT PATTERNS

Unregulated, chronic, and catastrophic pollution can all result in serious bodily injury or death. When this occurs, prosecutors have an opportunity to charge polluters with violations of environmental protection statutes, but not all violations can be charged at the state level.

The Environmental Protection Agency (EPA) oversees regulation of the five core pollution control statutes: the Clean Air Act (CAA),[54] the Clean Water Act (CWA),[55] the Resource Conservation and Recovery Act (RCRA),[56] the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[57] and the Safe Drinking Water Act of 1974 (SDWA).[58] Federal and state governments share regulatory and enforcement authority, and states can "assume authority over some programs and enforcement if they meet certain minimum requirements"[59] such as establishing permit programs, implementation plans, and enforcement schemes.[60] In order to achieve this status, a state must prove to the Administrator of the EPA that it has "adequate legal authority at the state level to carry out the program," but the EPA can always bring a concurrent enforcement action regardless of state involvement.[61] If a state wants to enforce a federal regulation, the legislature can draft their own statutes that criminalize environmentally harmful conduct, as long as the statutes are equally as or more restrictive than federal requirements.[62] On the other hand, if the state is not seeking to

54 42 U.S.C. §§ 7401–7671q (2006).

55 33 U.S.C. §§ 1251–1387 (2006).

56 42 U.S.C. §§ 6901–6992K.

57 42 U.S.C. §§ 9601–75.

58 42 U.S.C. §§ 300f–300j.

59 MANDIBERG & SMITH, *supra* note 10, at 23 (citations omitted).

60 *Id.* (citing CAA state implementation plans, 42 U.S.C. §§ 7410, 7661a, RCRA program permits, 42 U.S.C. § 6926, and SDWA enforcement mechanisms, 42 U.S.C. § 300g-2).

61 *Id.* at 24 (citations omitted).

62 Many states have implemented the federal regulations as codified state regulations, and assume enforcement authority. *See, e.g.*, ARIZ. REV. STAT. § 49-255.01 (LexisNexis 2010) (implementing the Clean Water Act); ALA. CODE §22-22A-4(n) (LexisNexis 2010) (appointing the Alabama Department of Environmental Management as the state enforcement agency for the CAA, the CWA, the SDWA, and the Solid Waste Disposal Act). On the other hand, some states have promulgated their own environmental laws, but left enforcement of the federal statutes to the EPA. *See, e.g.*, ALASKA STAT. §

enforce the federal statute, its environmental crime statutes can be worded however the legislature chooses and be less restrictive or have no relation to the federal requirements at all.[63]

Regardless of whether a state environmental protection statute comes from a federal regulation or the state takes an independent course in drafting the law, when pollution causes serious bodily injury or death, prosecutors must focus on statutes that criminalize injury of humans in addition to the act of pollution. Because the three federal statutes that criminalize pollution—the CAA, the CWA, and RCRA—do not penalize actual harm to humans, prosecutors have to rely on any existing state-derived versions of those statutes that punish actual human harm. Environmental protection statutes exist to protect the environment and human health, so specific portions of the laws protect humans who live near and are affected by a polluted environment. These laws authorize imprisonment as a sanction for harming humans, and in cases of death or serious bodily injury prosecutors should treat the laws as criminal statutes in the same manner as a homicide or assault statute. Accordingly, it is necessary to examine these statutes under a criminal framework and analyze the act and mental state elements of the laws in order to determine whether a prosecutor can use them as a tool against a polluter whose actions cause serious bodily injury or death.[64]

A. The Act Element: Defining the Crime

Criminal laws exist to punish conduct that causes a social harm, and it is the act element of a criminal statute that defines exactly what that wrongful conduct is. There are three possible components of an act element: conduct, the specific actions a defendant must take; result, the outcome of the defendant's actions; and attendant circumstances, any conditions that exist at the time of the crime. For

46.03.020(12) (2010) (stating that Alaska's Department of Environmental Conservation may "take all actions necessary to receive authorization from the [EPA] to administer and enforce a National Pollutant Discharge Elimination System program in accordance with [the CWA]").

63 In this situation the state statute must still, of course, comport with constitutional provisions. Interview with Susan Mandiberg, Professor of Law, Lewis & Clark Law School, in Portland, Or. (May 6, 2009) [hereinafter Mandiberg Interview].

64 While prosecutors must consider whether they can prove both the act element *and* the mental state element of each crime, this Part discusses each type of element separately and assumes that the prosecution can prove the element not currently under examination (i.e., assumes that when discussing the act element prosecutors can prove mental state and vice versa).

example, a statute might provide: "It is an offense to discharge hazardous waste into state waters and thereby harm or injure human health." In this hypothetical statute:

- "to discharge" is the conduct,
- "hazardous" is an attendant circumstance,
- "waste" is an attendant circumstance,
- "state waters" is an attendant circumstance, and
- "thereby harm or injure human health" is the result.

In order to prove that a defendant is guilty under this statute, a prosecutor must prove all five elements beyond a reasonable doubt: that the defendant discharged hazardous waste, that the discharge occurred in state waters, and that the discharge harmed or injured human health. Proving the act and result requirements can be relatively straightforward, depending on the fact situation: the prosecutor needs to show that the defendant effected a discharge, as defined by statute,[65] and that a human's health was harmed. Proving the attendant circumstances is usually similarly straightforward, but proving that the defendant had the required mental state in relation to those circumstances can be more difficult.[66] For example, the terms *hazardous* and *waste* should be defined in the statutory scheme, especially if it is derivative of one of the federal pollution control statutes. Based on case law or the legislative history of the statute, the prosecutor will need to prove beyond a reasonable doubt either that (1) the defendant knew the discharged substance met the statutory definition of hazardous waste, or (2) the defendant was factually aware that the discharged substance was hazardous waste.

Not all criminal statutes have all three components of the act element—some do not specify attendant circumstances,[67] and some do not contain a result element.[68] When pollution causes serious bodily injury or death, prosecutors must rely on environmental

65 *See, e.g.*, 33 U.S.C. § 1362(12) (2006).

66 *See infra* Parts II.B, pp. 525–30 & III.B, pp. 541–43 (discussing mental states).

67 *See, e.g.*, FLA. STAT. ANN. § 373.430(1)(a) (LexisNexis 2010) (criminalizing "caus[ing] pollution . . . so as to harm or injure human health or welfare"). This statute contains no attendant circumstance element, only conduct (causing pollution) and result (harming or injuring human health).

68 *See, e.g.*, FLA. STAT. ANN. § 403.413(6)(b) (LexisNexis 2010) (criminalizing "dump[ing] litter . . . in an amount exceeding 15 pounds in weight . . . but not exceeding 500 pounds in weight . . . and not for commercial purposes"). This statute contains no result element, only conduct (dumping more than 15 but less than 500 pounds of litter), and attendant circumstances ("not for commercial purposes").

protection statutes with a result element reflecting injury or death to humans. If prosecutors use statutes that criminalize the act rather than the harm of pollution, the defendant is not punished for the harm he caused.

For example, in *State v. Delgrasso*, prosecutors charged the defendant with unlawfully disposing of hazardous waste.[69] Such a crime has no result element at all, much less one reflecting harm to humans. The statute authorizes punishment of up to five years in prison and a fine of up to $50,000 for "[a]ny person who . . . [d]isposes of, treats, or stores hazardous waste . . . [a]t any place but a hazardous waste facility which has a current and valid permit . . . ."[70] On the other hand, prosecutors could have charged Delgrasso with an environmental crime with a result element reflecting the harm he caused. The statute does not require the prosecutor to prove that the defendant knew such a result would occur: "it shall be prohibited for any person . . . [t]o cause pollution . . . so as to harm or injure human health or welfare."[71] This statute authorizes the same punishment as unlawfully disposing of hazardous waste if prosecutors can prove the defendant willfully violated the statute.[72]

There are, however, very few environmental crime statutes in Florida, New York, and Oregon that have result elements referencing human injury or death. Both New York and Florida have charged polluters with both environmental and person crimes stemming from the same act of pollution, though New York lacks these statutes.[73] In Oregon, such laws are more common: five statutes include a human harm result element, and four address it in and/or form. For example:

> (1) A person commits the crime of unlawful disposal, storage or treatment of hazardous waste in the first degree if the person . . . knowingly disposes of, stores or treats hazardous waste *and*:
>
> > (a) As a result, recklessly causes substantial harm to human health or the environment; *or*

69 653 So. 2d 459, 462 (Fla. Dist. Ct. App. 1995).

70 FLA. STAT. ANN. § 403.727(3)(b)(2)(a). The statute has only a conduct element ("[d]isposes of, treats, or stores hazardous waste") and attendant circumstances ("any place but a hazardous waste facility which has a current and valid permit"), but no result element.

71 FLA. STAT. ANN. § 373.430(1)(a).

72 *Id.* at § 373.430(4).

73 *See* State v. Delgrasso, 653 So. 2d 459 (Fla. Dist. Ct. App. 1995); People v. Roth, 604 N.E.2d 92, 93 (N.Y. 1992); People v. Polvino, 580 N.Y.S.2d 616 (Cnty. Ct. 1991).

> (b) Knowingly disregards the law in committing the violation.[74]

Given the use of and/or in these statutes, prosecutors may still charge polluters who injure humans even if they did not "knowingly disregard the law."[75] The Oregon statute criminalizing environmental endangerment requires a result of serious physical injury or imminent danger of death and criminalizes environmental endangerment when any person knowingly commits any of the four other environmental crimes mentioned above.[76]

When prosecutors decide which charges to bring against a polluter who causes serious bodily injury or death, they should consider statutes that contain a human harm result element before relying on those that criminalize pollution without harm.[77]

B. Mental State with Regard to Result

Depending on how a state chooses to draft and codify crimes, a prosecutor will need to use one of two frameworks to analyze a defendant's mental state: principles of common law or the Model Penal Code (MPC). Some states have adopted all of the MPC, some have adopted only particular sections, and some have adopted none of it. If a state has not adopted the MPC in its entirety, the statutes that do not fall under the MPC require a common law analysis. Florida uses the common law approach, but both Oregon and New York employ modified versions of the MPC.[78]

The mental state specified in a crime refers to the defendant's attitude towards the act element at the time he engaged in the prohibited conduct. Although prosecutors must prove all elements of a crime beyond a reasonable doubt, they should pay particular attention to the *mental state related to the result* of the crime when

74 OR. REV. STAT. § 468.926 (2009) (emphasis added) (citations omitted); *see also id.* § 468.931 (defining unlawful transport of hazardous waste in the first degree); *id.* § 468.939 (defining unlawful air pollution in the first degree); *id.* § 468.946(1)(b) (defining unlawful water pollution in the first degree).

75 *E.g.*, *id.* § 468.939.

76 *Id.* § 468.951.

77 Prosecutors can also charge regulatory crimes in addition to crimes reflecting human harm—the result crimes require a causation element that may be more difficult to meet depending on the fact situation. Memorandum from Susan Mandiberg, *supra* note 24; *see infra* Part IV.A, p. 544 (discussing causation).

78 *Compare* FLA. STAT. ANN. § 775.01 (LexisNexis 2010) (defining culpable mental states) *with* OR. REV. STAT. § 161.085(6)–(10) (2009) *and* N.Y. PENAL LAW § 15.05 (Consol. 2010) (defining culpable mental states).

determining whether to charge the crime. The result component is the only portion of the act element that matters when charging a defendant whose act of pollution caused serious bodily injury or death.

1. Model Penal Code Mental States

There are four mental states used to define a defendant's attitude toward the result of an action in the MPC; these four states are arranged in a hierarchy of mental involvement: purposely, knowingly, recklessly, and negligently.[79] These words, used in conjunction with act elements, set out what a prosecutor needs to prove to show the defendant committed the crime at issue. In order to prove that a defendant acted:

1. *Purposely* with respect to the result, a prosecutor must show that the defendant had the "conscious object . . . to cause such a result;"[80]
2. *Knowingly* with respect to the result, a prosecutor must show that the defendant was "aware that it [was] practically certain that his conduct [would] cause such a result[;]"[81]
3. *Recklessly* with respect to the result, a prosecutor must show that the defendant "consciously disregard[ed] a substantial and unjustifiable risk that the [consequence would] result from his conduct[;]"[82]
4. *Negligently* with respect to the result, a prosecutor must show that the defendant "should [have been] aware of a substantial and unjustifiable risk" of the result.[83]

In order to apply these definitions to the mental state of a defendant toward the result of his actions at the time of the crime, the prosecutor needs to: (1) establish which mental state word applies to the result

79 MODEL PENAL CODE (MPC) § 2.02(1)–(2) (2001). Some states that have adopted this provision of the MPC, such as Oregon and New York, substitute *intentionally* for *purposely*. *See, e.g.*, OR. REV. STAT. § 161.085(7); N.Y. PENAL LAW §15.05(1).

80 MPC § 2.02(2)(a)(i). In Oregon and New York, the definition of *intentionally* is functionally identical to that of *purposely* in the MPC: "a person acts with a *conscious objective to cause the result* or to engage in the conduct so described." OR. REV. STAT. § 161.085(7) (emphasis added); *accord* N.Y. PENAL LAW § 15.05(1).

81 MPC § 2.02(2)(b)(ii).

82 *Id.* § 2.02(2)(c).

83 *Id.* § 2.02(2)(d). The definitions given here are only in reference to mental state regarding result. The MPC also has definitions for mental state regarding attendant circumstances, but they are not relevant to this discussion because it focuses solely on prosecutors charging crimes based on a defendant's mental state with respect to the result of a crime.

element of the crime,[84] (2) use the MPC to determine the required mental state for the result, and (3) insert the specifics of the result into the appropriate mental state definition.[85]

2. Common Law Mental States

Unlike the straightforward approach of the MPC, the breakdown of common law mental states in criminal statutes requires several layers of analysis. First, statutes subject to common law analysis use many more words than the MPC to identify a defendant's mental state towards the result of his actions—words such as *intentionally*, *maliciously*, *willfully*, and others appear in statutes. These words can be divided into two categories of mental states that a prosecutor must prove as defined by the crime: mental states of general intent and those of specific intent.

A mental state of general intent requires only that the defendant intended to commit the act or cause the result that he did. The defendant can act with "*any* mental state, whether express or implied, in the definition of the offense that relates *solely* to the acts that constitute the criminal offense."[86] If a common law statute lacks a mental state word specifying the intent necessary to be guilty of a crime, it is usually a general intent crime.[87] For example, Florida's litter law is a general intent crime because it does not contain a mental state word: "it is unlawful for any person to dump litter in any manner or amount . . . [i]n or on any public highway, road, street, alley, or thoroughfare."[88] With regard to the mental state of a defendant who committed this crime, the prosecutor must only prove that the defendant intended to dump litter. If the prosecutor can prove beyond a reasonable doubt that the defendant dumped litter as defined by statute on a public highway, road, street, alley, or thoroughfare, there is a rebuttable presumption[89] that he has also proved the defendant's

84 If no mental state word is given in the statute the default is *recklessly*. *Id.* § 2.02(3).

85 *See infra* Part II.B.3, pp. 529–30.

86 JOSHUA DRESSLER, CASES AND MATERIAL ON CRIMINAL LAW 157 (4th ed. 2007).

87 *Id.* at 156 (stating that sometimes a court "may denominate an offense as 'general intent' when no particular mental state is set out in the definition of the crime"). The exception to this rule is the word *maliciously*—it is still a general intent crime even if this word appears in reference to any portion of the act element.

88 FLA. STAT. ANN. § 403.413(4) (LexisNexis 2010).

89 The presumption is rebuttable because the defendant can raise a mistake of fact defense claiming, for instance, that he thought he threw the litter in a trash can or thought the road was private, and the prosecutor would have to prove beyond a reasonable doubt that such a mistake was unreasonable.

general intent to do so based on the rational inference that people intend the logical consequences of their actions.[90]

Crimes of specific intent require a special mental state above and beyond the general intent.[91] There are three types of specific intent: intent to commit a future act, special motive for acting, and actual awareness of the circumstances.[92] A defendant having any one of these three kinds of specific intent means to do more than just act—the defendant means to act with an additional goal. For example, in Florida, aggravated assault is defined as "an assault . . . [w]ith an intent to commit a felony."[93] A defendant committing this crime has more than just the general intent to assault someone; he has the further specific intent of committing a felony in addition to the assault.

Once the prosecutor determines what type of intent he must prove, there are two kinds of inquiries necessary to prove that intent to the jury: subjective and objective. In an attempt to negate the mental state element of a specific intent crime, the defendant can raise a defense claiming that he made an honest mistake of fact and did not have the requisite mental state essential to the crime charged. In order to disprove this claim the prosecutor must then collect evidence to prove to the jury beyond a reasonable doubt that the defendant's mistake was not *honest*; he must show what the defendant was subjectively, or *actually*, thinking about at the time of the crime. This inquiry requires circumstantial evidence to prove, as there is no way of showing for certain what is in a defendant's mind.[94]

If a defendant uses a mistake of fact defense for a general intent crime, on the other hand, the prosecutor must show that the mistake was neither *honest nor reasonable*. To prove this beyond a reasonable doubt, the prosecutor needs evidence to show what the defendant was objectively, or *should have been*, thinking at the time of the crime, based on what a reasonable person would have thought under the same circumstances.[95] Proving this is somewhat similar to proving negligence under the MPC.

90 DRESSLER, *supra* note 86, at 154.

91 *Id.* at 157 (quoting State v. Bridgeforth, 750 P.2d 3, 5 (Ariz. 1988)).

92 *Id.*

93 FLA. STAT. ANN. § 784.021(1)(b) (LexisNexis 2010).

94 *See, e.g.*, Davis v. State, 355 N.E.2d 836, 839–40 (Ind. 1976).

95 *See, e.g.*, *id.* at 839.

3. Proving Mental State

Prosecutors look at the defendant's conduct, surrounding circumstances, and other circumstantial evidence to prove his mental state with respect to the result at the time of the crime.[96] For example, if the facts from *State v. Delgrasso*[97] occurred in Oregon, prosecutors might consider charging the defendant with first-degree unlawful disposal, storage, or treatment of hazardous waste. As discussed above, this statute provides that "[a] person commits the crime of unlawful disposal, storage or treatment of hazardous waste in the first degree if the person . . . knowingly disposes of, stores or treats hazardous waste *and* . . . [a]s a result, recklessly causes substantial harm to human health or the environment."[98] The statute requires that to be culpable for the crime, the defendant knowingly dispose of or store hazardous waste and recklessly cause harm to human health. Disposing of, storing, or treating hazardous waste is the *conduct* component of the act element. Prosecutors in this situation would also have to prove beyond a reasonable doubt that the defendant engaged in the prohibited conduct when determining if they can prove the mental state elements—the defendant *knowingly* engaged in the conduct and *recklessly* caused the result.[99]

In order to show that the defendant knowingly disposed of, stored, or treated hazardous waste, prosecutors first must determine how to prove the defendant acted knowingly based on Oregon's definition of culpable mental states. The issue is whether *knowingly* applies to the defendant's conduct. In Oregon, "'[k]nowingly' . . . when used with respect to conduct . . . described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described."[100] The prosecutor must prove only that the defendant knowingly disposed of waste that happened to be hazardous, and not that he knowingly disregarded the law by disposing of hazardous waste as defined under the Oregon regulatory

96 Commonwealth v. O'Searo, 352 A.2d 30, 37 (Pa. 1976) ("Because a state of mind by its very nature is subjective, absent a declaration by the actor himself [prosecutors] can only look to the conduct and the circumstances surrounding it to determine the mental state which occasioned it.").

97 653 So. 2d 459, 461 (Fla. Dist. Ct. App. 1995).

98 OR. REV. STAT. § 468.926 (2009) (emphasis added) (citations omitted).

99 Ultimately, of course, prosecutors would also have to prove beyond a reasonable doubt that the defendant engaged in the prohibited conduct, but we will assume for purposes of the mental state discussion that they can.

100 OR. REV. STAT. § 161.085(8) (2009).

definition.[101] Since knowing disregard of the law is a separate provision from recklessly causing substantial harm in the first-degree under the unlawful disposal, storage, or treatment of hazardous waste statute, the prosecutor does not need to prove that the defendant knowingly disregarded the law *if* he can prove that the defendant recklessly caused harm.[102] The prosecutor only needs to show that the defendant disposed of waste that he knew to be hazardous.[103]

Combining the mental state from the statute and the proof required in Oregon's definition of culpable mental states, to prove that the defendant recklessly caused substantial harm to human health the prosecutor would need to obtain evidence that the defendant "consciously disregard[ed] a substantial and unjustifiable risk that" human harm would result from his conduct.[104] This definition is the same as in the MPC,[105] and the prosecutor can use an MPC analysis. Continuing to use the facts from *Delgrasso*, such evidence could come from the testimony that the resident manager had asked the defendant to remove the barrels several times because the odor was making people sick,[106] therefore the defendant must have consciously disregarded a substantial risk to human health.

The fact situation from *Delgrasso* fits neatly within the Oregon environmental crime of first-degree unlawful disposal, storage, or treatment of hazardous waste. The conduct and circumstances as described in the case reveal that it is possible for a prosecutor to prove the defendant's mental state toward the result of the defendant's crime. Looking at the mental state required to prove a crime and analyzing facts such as these demonstrate that some environmental crime statutes can be used to charge defendants in situations when their polluting acts cause serious bodily injury or death.

C. Authorized Maximum Penalty

In addition to act and mental state elements, prosecutors should also consider the authorized maximum penalty of each statute when deciding which crime to charge. If the prosecutor can prove all

101 OR. REV. STAT. § 466.005(7) (2009).

102 State v. Maxwell, 984 P.2d 361, 365 n.5 (Or. Ct. App. 1999).

103 *Id.* at 365 (finding that to prove "defendant 'knowingly disregarded the law [as set out in Or. Rev. Stat. § 468.926(1)(b)],' the state was required to prove that defendant acted with an awareness that his conduct was in disregard of the law").

104 OR. REV. STAT. § 161.085(9).

105 MPC § 2.02(2)(c) (2001).

106 653 So. 2d 459, 461 (Fla. Dist. Ct. App. 1995).

elements of both crimes beyond a reasonable doubt, he may be able to ask the court to apply both sentences to run consecutively, resulting in a longer prison term and greater penalty for the defendant.

In the Oregon and Florida statutes discussed above, the authorized maximum penalty for both criminal and civil crimes depends on the mental state the prosecutor can prove the defendant had at the time of the crime. In Florida, for example, a defendant who *willfully* commits an act of pollution that harms or injures human health or welfare is subject to a five-year prison sentence and up to $50,000 in fines.[107] On the other hand, if the same defendant committed the polluting act with "*reckless indifference* or gross careless disregard" for human health and welfare, he is only subject to a sentence of sixty days in jail and up to $5000 in fines.[108]

In Oregon, a defendant found guilty of first-degree unlawful transport of hazardous waste,[109] first-degree unlawful air pollution,[110] or first-degree unlawful water pollution[111] is subject to up to ten years in prison[112] and a fine of up to $250,000.[113] A defendant who knowingly commits one of the three preceding crimes and thereby puts someone in imminent danger of death or causes serious physical injury is subject to a possible fifteen-year prison sentence and a fine of up to $1,000,000.[114]

As we can see, in both Oregon and Florida statutes, as the defendant's mental awareness of the crime increases, the punishment authorized by law also increases. This comports with general punishment schemes found throughout criminal law. When deciding to charge a polluter with one of these violations, a prosecutor should examine the penalties authorized by statute and compare them to those authorized for a person crime.

107 FLA. STAT. ANN. § 373.430(3) (LexisNexis 2010).

108 *Id.* § 373.430(4) (emphasis added).

109 OR. REV. STAT. § 468.931 (2009).

110 *Id.* § 468.939.

111 *Id.* § 468.946.

112 OR. REV. STAT. § 161.605(2) (2009).

113 *Id.* § 161.625(1)(c).

114 OR. REV. STAT. § 468.951.

III
STATE TRADITIONAL "PERSON" CRIMES MIGHT ALSO DEAL WITH THESE FACT PATTERNS

Since nearly the beginning of American government, managing person crimes has been the jurisdiction of the states rather than the federal government.[115] There are very few federal statutes criminalizing serious bodily injury or death, so state prosecutors are often the enforcer of person crimes against a defendant. Some state person crimes may be used to address environmental pollution that results in serious bodily injury or death, similar to the environmental crimes described above. As with state environmental crimes, prosecutors must prove both the act or result element *and* the mental state element of each crime beyond a reasonable doubt.[116]

A. Defining the Crime by Its Result

When deciding to charge environmental crimes or person crimes in the case of death or serious bodily injury, prosecutors need to examine person crime statutes that have a result element reflecting harm to humans. Person crimes naturally involve human harm, and prosecutors should distill the range of available statutes down to those that criminalize infliction of serious bodily injury or death by means that can include acts of pollution—namely, homicide, assault, and battery.

1. Homicide

Homicide crimes encompass both murder and manslaughter, and all homicide statutes criminalize conduct that results in the death of a human. Statutory differences come from the intent of the defendant with regards to the conduct and circumstances of the crime, and the mental state of the defendant with regard to the result.[117] Because all homicide statutes contain a result element reflecting human death, prosecutors may consider them all in cases in which pollution results in human death.

For instance, prosecutors in *People v. Polvino* charged the defendant with second-degree manslaughter under the New York

115 U.S. CONST. amend. X (specifying that any powers not granted to the federal government, including police power to regulate violent crime, are reserved to the states).

116 As above, this Part examines the two types of elements separately under the presumption that when discussing one the other can be proved.

117 *See infra* Part III.B, 541–43.

Penal Code.[118] New York's second-degree manslaughter statute is relatively broad, and contains a result element reflecting human death: "[a] person is guilty of manslaughter in the second degree when . . . [h]e recklessly causes the death of another person."[119] The statute requires that a defendant have a particular mental state when causing the death of another person; it does not specify any particular physical act necessary to produce that result. The same is true of New York's criminally negligent homicide statute: "[a] person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."[120] Determining whether the defendant's actions actually *caused* the death of another person directly or indirectly is a necessary step in deciding whether to charge a defendant with a homicide crime.[121]

As the New York homicide statutes increase in degree of punishment, they require the defendant to have a more culpable mental state. First-degree manslaughter and both first- and second-degree murder statutes maintain the general result element—causing the death of another person—but require that the defendant have "intent to cause serious physical injury to another person."[122] Due to the elevated mental state specified, this statute is probably difficult for prosecutors to use for environmental crimes. It is far more common for a defendant to intentionally cause physical injury or death to another with guns, knives, or other typical weapons instead of hazardous waste. However, it is possible to imagine a situation similar to that in *Polvino* where the defendant *intended* for the acid to spill, or even dumped it himself, in order to cause extensive chemical burns that resulted in the death of the employee. In this manner, hazardous waste could be used as a murder weapon, and a prosecutor could bring a charge of murder or first-degree manslaughter against the defendant.

Homicide statutes in Oregon, on the other hand, may make it more difficult for prosecutors to charge polluters with murder or manslaughter. Murder, as defined in Oregon, occurs when criminal homicide is committed intentionally,[123] or if someone is killed during

118 580 N.Y.S.2d 616, 621 (Onondaga Cnty. Ct. 1991).

119 N.Y. PENAL LAW § 125.15 (Consol. 2010).

120 *Id.* § 125.10.

121 *See infra* Part IV.A.

122 N.Y. PENAL LAW § 125.20(1).

123 OR. REV. STAT. § 163.115(1)(a) (2009).

the commission of another intentional crime such as arson, robbery, or a felony sexual offense.[124] Although it is uncommon for environmental hazards to be used as the threat of force to commit a sexual offense or robbery—such as "Give me all your money or I'll throw you in this hazardous waste dump!"—it is possible that an offender could commit arson by igniting hazardous wastes to burn down a building.[125] If someone is killed in the process, the offender could be charged with murder under this statute.[126] Given the string of requirements that would be necessary for an environmental offender to meet the definition of murder, it would not be surprising if prosecutors did not charge environmental offenders with murder in Oregon, should a situation arise in which an act of pollution causes a human death.

Oregon also has two degrees of manslaughter, and "[c]riminal homicide constitutes manslaughter in the first degree when . . . [i]t is committed recklessly under circumstances manifesting extreme indifference to the value of human life."[127] The definition of second-degree manslaughter is essentially the same as first-degree manslaughter, except that it does not include the circumstantial element of manifesting extreme indifference to the value of human life: "[c]riminal homicide constitutes manslaughter in the second degree when . . . [i]t is committed recklessly."[128]

In contrast to New York and Oregon, prosecutors in Florida must face a semantic labyrinth in order to determine if second-degree murder is the appropriate charge for a crime based on the defendant's intent. The statute seems reasonably straightforward: "[t]he unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a *depraved mind* regardless of human life, although *without any premeditated design to effect the*

124 *Id.* § 163.115(1)(b)(A), (G)–(H). The same is true of first-degree murder in Florida. FLA. STAT. ANN. § 782.04(1)(a)(1)–(2) (Consol. 2010).

125 In this circumstance prosecutors would have to prove first-degree arson, which requires an intent to damage property. *See, e.g.*, OR. REV. STAT. § 164.325 (2009).

126 This provision might also apply in a situation in which the hazardous waste was still not the threat of force, but was the ultimate cause of death. For example, consider a situation in which a defendant robs his victim at gunpoint in a hazardous waste dump and the victim later dies from exposure to the pollutants. In this case, the gun would be the threat of force but the hazardous waste would be the ultimate cause of death, and the defendant could be charged with criminal homicide since the death occurred as the result of his commission of felony robbery. Mandiberg Interview, *supra* note 63.

127 OR. REV. STAT. § 163.118(1)(a) (2009).

128 *Id.* § 163.125(1)(a).

death of a particular individual, is murder in the second degree."[129] A problem arises, however, in trying to determine what constitutes a depraved Floridian mind with respect to the result of the defendant's actions. Under Florida's definition, an act evinces a depraved mind if "a person of ordinary judgment would know [it] is reasonably certain to kill or do serious bodily injury to another, *and* . . . is done from ill will, hatred, spite, or an *evil intent*."[130] Immediately after requiring that the act come from an evil intent, the statute indicates that prosecutors *do not* need to prove that the defendant had the intent to cause death.[131] Detractors of Florida's definition point out that "[l]ogic dictates that a crime that specifically excludes 'premeditated design' to kill [as set out in the statute], excludes 'evil intent.'"[132] Moreover, the Florida legislature has never asked prosecutors to prove that a defendant acted with "'ill will, hatred, spite or evil intent' to be guilty of second-degree murder,"[133] demonstrating that the "intent" required by the definition of the depraved mind mental state should not necessarily be taken as the intent to kill required for second-degree murder in New York and Oregon.

Due to this balance of statutory interpretation and consideration of legislative intent, it is necessary for Florida prosecutors to carefully examine the defendant's mental state with regards to intent when determining whether second-degree murder is an appropriate charge.[134] On the other hand, manslaughter in Florida requires no intent of any kind, and is defined as "the killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification."[135] While there is no specified "intent" in this

129 FLA. STAT. ANN. § 782.04(2) (Consol. 2010) (emphasis added).

130 FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.4 (2008) (emphasis added), *available at* http://www.Floridasupremecourt.org/jury_instructions/chapters/chapter7/p2c7s7.4.rtf.

131 *Id.*

132 COMM. ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, IN THE MATTER OF STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, REPORT NO. 2007-10 app. B-2 at 8 (Fla. 2007), http://www.floridasupremecourt.org/decisions/probin/sc07-2324_Appendix%20BpartII.pdf, *amended and authorized for publication by In re* Standard Jury Instructions in Criminal Cases Report No. 2007-10, 997 So. 2d 403 (Fla. 2008) (per curiam) (rejecting the Committee's proposed changes to Standard Jury Instructions in Criminal Cases, except for instruction 7.7 as amended by the Court).

133 *Id.* at 3.

134 *See infra* notes 150–52 and accompanying text (discussing common law intent to kill); *see supra* Part II.B.2 (discussing common law mental state).

135 FLA. STAT. ANN. § 782.07(1) (Consol. 2010); *see infra* Part III.B (discussing culpable negligence as a mental state).

statute, it is still dependent on the defendant's mental state—culpable negligence—and cannot be charged until the prosecutor determines if he can prove the defendant's mental state at the time of the crime.

In looking at the homicide statutes in New York, Florida, and Oregon it becomes clear that whether prosecutors can charge a polluter whose actions result in death is entirely dependent on the wording of the statute. Some broadly worded laws, such as New York's manslaughter statutes, easily encompass fact situations such as that in *Polvino*. Other statutes, such as those in New York that require intent to cause death, may prove more difficult to apply to cases where pollution results in human death.

2. Assault

Criminal assault is generally defined as causing physical injury to another person, and often involves the intent to cause harm or disfigurement.[136] As with homicide statutes, the result element in these statutes remains consistent and always encompasses harm or injury to a human being. A problem with charging injuries arising from environmental crimes under assault statutes is that the statute often requires the use of a deadly weapon or dangerous instrument.[137] It is currently unclear whether courts would consider hazardous waste to be either.[138] An option for New York prosecutors is to charge assault with a weapon or dangerous instrument and prove the polluting material meets that criminal definition. For example, two provisions of second-degree assault require use of a dangerous instrument.[139] New York courts have found that any item can rise to this level if it is capable of causing death or serious bodily injury under the circumstances in which it is used.[140] Under this definition, it is possible that a container of hazardous waste or other toxic material might be considered a dangerous instrument if used in a way that

136 *See, e.g.*, N.Y. PENAL LAW § 120.10 (Consol. 2010).

137 *See, e.g.*, *id.* §§ 120.05(1), (4), 120.10(1).

138 Some chemicals can be deadly weapons depending on the circumstances. *See, e.g.*, Commonwealth v. Raybuck, 915 A.2d 125, 126 (Pa. Sup. Ct. 2006) (finding that mouse poison qualified as a deadly weapon when put on food served to the victim, but that unknown household chemicals did not when mixed together in an attempt to create a toxic gas).

139 N.Y. PENAL LAW § 120.05(2), (4).

140 People v. Rumaner, 357 N.Y.S.2d 735, 737 (App. Div. 1974); *see also* People v. Still, 810 N.Y.S.2d 271, 272 (App. Div. 2006) (finding that belts, hardcover books, and shoes can be dangerous instruments); People v. Bouldin, 338 N.Y.S.2d 686, 686 (App. Div. 1972) (finding that a spatula can be a dangerous instrument).

causes death or serious physical injury. Assault in the second degree requires the prosecutor to prove that the defendant "*recklessly* causes serious physical injury to another person by means of a . . . dangerous instrument."[141] If the defendant in *Polvino* tipped over the barrels of known hazardous wastes and caused the victim's chemical burns, the prosecutor could show (1) that the defendant knew the contents of the barrel were hazardous and could result in injury if spilled, and so "consciously disregard[ed] a substantial and unjustifiable risk" that serious injury would result[142] from tipping over the barrels, and (2) that the hazardous waste caused the serious injury. With both of these elements proven, it would be clear that the defendant had the requisite reckless state of mind to cause the injury and used a dangerous instrument to effect it.

There are only a few provisions of New York assault statutes that could fall within the category between not using a weapon and a lack of intent to cause injury. Assault in the first degree could be charged under two circumstances: (1) the defendant intends to disfigure the victim or disable a portion of the victim's body, and causes such an injury,[143] or (2) "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person."[144] This second circumstance is an unlikely option for prosecutors, since it would be difficult to show that a polluter exhibited "a depraved indifference to human life." New York courts have found depraved indifference only in situations that reveal some level of brutality, callousness, or extreme danger.[145] These descriptors do not fit the situation in *Polvino* because even though the defendant was aware that the chemicals in

141 N.Y. PENAL LAW § 120.05(4) (emphasis added).

142 N.Y. PENAL LAW § 15.05 (Consol. 2010).

143 N.Y. PENAL LAW § 120.10(2).

144 N.Y. PENAL LAW § 120.10(3).

145 *See, e.g.*, People v. Perkins, 772 N.Y.S.2d 750, 753 (App. Div. 2004) (finding that defendant exhibited depraved indifference to human life when he used a brick to inflict a skull fracture on his victim); People v. Cofield, 602 N.Y.S.2d 619, 619 (App. Div. 1993) (finding that defendant evinced depraved indifference to human life in pushing victim onto subway tracks); People v. Hines, 551 N.Y.S.2d 123, 124 (App. Div. 1990) (finding that a defendant who drove a car directly towards a large crowd of people in the street, despite being aware of their presence, exhibited depraved indifference to human life). *But see* People v. Coon, 823 N.Y.S.2d 566, 567 (App. Div. 2006) (finding that depraved indifference did not exist when a defendant high on cocaine used a butcher knife to cut his victim's neck two times).

the barrels were dangerous, he did not know that the combination of chemicals could be lethal. Asking someone to move barrels of dangerous chemicals does not amount to callousness or brutality without some other factors present, such as knowledge that the barrels would leak and the damage the chemicals could cause. It is difficult to imagine a situation in which an act of pollution could achieve this level of brutality and total disregard for human safety.

In addition, prosecutors can charge second-degree assault if a defendant causes physical injury to another person during the commission of a felony.[146] Usually this provision is used when a defendant injures someone in the course of kidnapping, arson, or other person or property crimes, but it also has a potential use in conjunction with commission of environmental crimes. For example, in New York, a defendant is guilty of endangering public health in the second degree if he "knowingly engages in conduct which causes the release of a substance hazardous to public health [or] safety . . . and such release causes physical injury to any person who is not a participant in the crime."[147] Commission of this crime is a class D felony, which authorizes a prison sentence of up to seven years.[148]

The defendant in *United States v. Plaza Health Laboratories, Inc.*[149] could have been guilty of second-degree assault for injuring someone while committing second-degree endangerment of public health. His actions could constitute second-degree endangerment of public health if, (1) by intentionally throwing the vials of blood he knew to be infected into the Hudson, he knowingly engaged in conduct that caused the release of a hazardous substance, and (2) someone on the beach or downriver became infected by the blood from a broken vial. In this scenario, the defendant could be charged with the felony of second-degree endangerment of public health, and because he injured someone in the commission of that crime he would also be subject to a charge of second-degree assault.

In contrast to the numerous assault charge options in New York, Florida has a single assault statute that looks much more similar to the common law tort[150] than the person crime codified in New York.

146 N.Y. PENAL LAW § 120.05(6).

147 N.Y. ENVTL. CONSERV. LAW § 71-2713 (Consol. 2010).

148 *Id.*; N.Y. PENAL LAW § 70.00(2)(d) (Consol. 2010).

149 3 F.3d 643 (2d Cir. 1993).

150 The common law tort of assault is acting "intending to cause a harmful or offensive contact [to another], or an imminent apprehension of such a contact, and . . . the other is thereby put in such imminent apprehension." RESTATEMENT (SECOND) OF TORTS §

Whereas assault in New York requires actual infliction of injury, whether intentional or not, Florida requires only "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent."[151] Due to the threat requirement, Florida's statute is difficult to apply to environmental crimes. For example, consider a case in which a factory in Tampa has manufactured an item that creates a gaseous cyanide byproduct, and the gas is spewed into the air through an exhaust vent. Exposure to cyanide can be toxic to humans,[152] and people who live in the vicinity of the factory have been complaining of vomiting, difficulty breathing, and heart pains for several months. In order to charge the managers of the factory with assault,[153] a prosecutor would need to show that the managers somehow verbally threatened or acted to harm the neighbors.[154] The factory is potentially committing an environmental crime by causing air pollution, but assault by environmental pollution is not a likely claim because of the required verbal or behavioral threat.[155]

21(1)(a)–(b) (1965). For example, a man who raises his hand as though to slap his wife, causing her to flinch and cringe away for fear he will hit her, may be liable for the common law tort of assault. In contrast, the *crime* of assault at common law "was an attempt to commit a battery." Rollin M. Perkins, *An Analysis of Assault and Attempts to Assault*, 47 MINN. L. REV. 71, 71 (1962–63). Battery is the harmful or offensive contact feared in the common law tort of assault. *See* BLACK'S LAW DICTIONARY 162 (8th ed. 2004).

151 FLA. STAT. ANN. § 784.011(1) (LexisNexis 2010).

152 AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP'T OF HEALTH AND HUMAN SAFETY, CAS # 74-90-8, CYANIDE 1 (2006) [hereinafter CYANIDE], *available at* http://www.atsdr.cdc.gov/tfacts8.pdf. ("Exposure to high levels of cyanide harms the brain and heart, and may cause coma and death. Exposure to lower levels may result in breathing difficulties, heart pains, vomiting, blood changes, headaches, and enlargement of the thyroid gland.").

153 This Article does not discuss methods of charging individual defendants and corporate entities with crimes committed by the corporation. For a discussion of these methods, see generally Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 NEB. L. REV. 197, 199–220 (2008).

154 Since the Florida assault statute does not require actual infliction of injury, the prosecutor does not need to show that the cyanide actually caused the symptoms.

155 *See, e.g.*, FLA. STAT. ANN. § 373.430(1)(a) (LexisNexis 2010) (criminalizing "caus[ing] pollution . . . so as to harm or injure human health or welfare"). It is difficult to imagine a situation in which factory managers would threaten to cause their neighbors' illnesses; it is not likely that the factory president would threaten a neighbor complaining of the chemical odor produced at the factory: "If you don't stop complaining, I will approve a manufacturing process that will cause gaseous cyanide to enter the air and make

Therefore, assault is not a crime in Florida that can readily be applied to situations in which someone violated environmental statutes.

Although it may take a well-crafted argument, such as proving that hazardous waste is a dangerous instrument, prosecutors—at least in New York—can charge a polluter whose actions result in injury to another human with some level of assault.

3. Reckless Endangerment and Culpable Negligence

Reckless endangerment and infliction of injury through culpable negligence are person crimes solely dependent on the mental state of the defendant and the result of his conduct. The prosecution is not required to prove any particular conduct, and the result elements of the various statutes make some of them available to prosecutors when charging polluters whose actions result in serious bodily injury or death.

In *People v. Roth*, New York prosecutors charged the defendant with, among other crimes, reckless endangerment[156]—a crime that punishes actions that create a risk of injury or death.[157] Even though the result element of this statute only refers to the creation of a *risk* of injury or death, a charge of reckless endangerment is a viable option in situations in which pollution results in serious bodily injury or death. The prosecutor can use the fact that actual harm resulted from the defendant's actions to show that the defendant risked injury or death, so much so that his actions caused it to occur.[158]

Florida, on the other hand, has a culpable negligence statute that requires an infliction of actual injury upon another person,[159] making it much more similar to an assault crime than reckless endangerment. The facts in *State v. Delgrasso*[160] exemplify an environmental violation that results in this person crime—barrels of hazardous waste on the defendant's property caused nearby residents to become sick

you vomit." Even if the president did make such a threat, the complaining neighbor is unlikely to be afraid that "such violence is imminent." FLA. STAT. ANN. § 784.011(1).

156 604 N.E.2d 92, 93 (N.Y. 1992).

157 N.Y. PENAL LAW §§ 120.20, 120.25 (Consol. 2010).

158 Oregon's reckless endangerment statute also only refers to the risk of harm, and so the same rationale applies in that state. OR. REV. STAT. § 163.195 (2009); *see infra* Part IV.A (discussing causation).

159 FLA. STAT. ANN. § 784.05(2). Another provision of the statute requires only "expos[ure] . . . to personal injury." *Id.* § 784.05(1). Because the result element does not reflect serious bodily injury or death, it is not relevant to this discussion.

160 653 So. 2d 459, 461–62 (Fla. Dist. Ct. App. 1995).

and require hospitalization. Because the act that resulted in actual injury falls exactly within the purview of the culpable negligence statute, the prosecutors in *Delgrasso* missed the opportunity to charge the defendant with a person crime.

B. Mental State with Respect to Result

Among the previously discussed person crime statutes in which the result element is serious bodily injury or death, most require the same mental states of acting purposefully, knowingly, recklessly, or negligently toward the result as the applicable environmental statutes. In the case of these criminal statutes, the analysis is the same as for environmental statutes: in jurisdictions that have adopted the MPC approach to mental states, a prosecutor proves the defendant's mental state by applying the statutory definition.

For example, New York prosecutors charged the defendant in *People v. Polvino* with second-degree manslaughter,[161] a statute that criminalizes "recklessly caus[ing] the death of another person."[162] The result element of the statute is "the death of another person," and the required mental state is recklessness. To prove that the defendant acted recklessly, prosecutors need evidence that he "consciously disregard[ed] a substantial and unjustifiable risk" that the result set out in the statute will occur.[163] To prove second-degree murder, the prosecutor needs to show that the defendant knew of and disregarded a risk that the death of another person would occur. In the case of *Polvino*, there is no such evidence: no one told the defendant of a risk, and there is no evidence that he knew that the hazardous substances in the barrels could cause death when combined.[164]

On the other hand, jurisdictions such as Florida that have not adopted the MPC approach to mental state require a common law culpability analysis focusing on more mental states than just purpose,

161 580 N.Y.S.2d 616, 621 (Onondaga Cnty. Ct. 1991).

162 N.Y. PENAL LAW § 125.15 (Consol. 2010).

163 N.Y. PENAL LAW § 15.05 (Consol. 2010).

164 There is evidence that the defendant knew of a risk that he could be acting without an appropriate permit. Environmental experts told the defendant that a permit would be required to remove the barrels due to the hazardous nature of the substances inside—however, that is not the risk that is set out in the second-degree murder statute. The defendant did not know of a risk that his actions would cause the death of another human, and therefore the prosecutor cannot prove that the defendant is guilty of second-degree murder. *Polvino*, 580 N.Y.S.2d at 618.

knowledge, recklessness, and negligence.[165] For example, Florida's second-degree murder statute states: "The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree."[166] This statute requires that the defendant acted with a depraved mind, a mental state that *implies* intent to kill at common law.[167]

Acting with a depraved mind implies that the defendant had the intent to kill, but it is necessary to determine if the defendant acted with an intent to kill before determining if second-degree murder is the appropriate charge. In Florida, a depraved mind exists if three elements are present:

> 1. [A] person of ordinary judgment would know [the act] is reasonably certain to kill or do serious bodily injury to another, *and*
>
> 2. is done from ill will, hatred, spite or an evil intent, *and*
>
> 3. is of such a nature that the act itself indicates an indifference to human life.[168]

If the *Polvino* case had happened in Florida rather than New York, prosecutors probably could not have charged the defendant with second-degree murder because they had little evidence to prove that the defendant acted with a depraved mind under this definition. The lack of evidence that anyone knew or told Polvino the combination of hazardous substances in the barrel could be lethal when combined prevents the prosecutors from proving all three prongs of a depraved mind: (1) a person of ordinary judgment would not know that moving the barrels could cause the chemicals to combine lethally, (2) the defendant showed no particular ill will toward the employee, and (3)

165 *See supra* Part II.B.2.

166 FLA. STAT. ANN. § 782.04(2) (LexisNexis 2010). Intent to kill should not be confused with premeditation, which is not required for second-degree murder in the Florida statute or at common law. *See* Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1711 n.100 (2004–2005) (stating that "not all intentional killers . . . premeditate").

167 DRESSLER, *supra* note 86, at 296 (quoting DeBettencourt v. State, 428 A.2d 479, 484 (Md. Ct. Spec. App. 1981)). Common law intent to kill is known as malice aforethought, and can be express or implied. *Id.* at 231. A defendant manifests express intent to kill if he consciously wanted to cause the death, and he has implied intent to kill if he intended to cause serious bodily harm or if he acted with extreme recklessness toward the risk of death. *Id.*

168 Duckett v. State, 686 So. 2d 662, 663 (Fla. Dist. Ct. App. 1996) (emphasis added). (citations omitted).

the act of asking someone to move barrels of hazardous waste does not by itself indicate an indifference to human life. Since prosecutors would not be able to prove that Polvino acted with the common law mental state of "a depraved mind regardless of human life," they could not prove he was guilty of second-degree murder.[169]

As long as person crimes have a result element that reflects serious bodily injury or death, prosecutors can charge polluters who cause harm with person crimes *if* they can prove the defendant's mental state towards the result.

C. Authorized Maximum Penalty

Prosecutors need to consider the maximum penalties authorized by person crimes where environmental pollution results in serious bodily injury or death. Comparing the authorized punishments for person crimes to those for environmental crimes can help prosecutors determine which statutes are most appropriate for charging.

As with environmental crimes, the authorized maximum penalties for person crimes depend on the mental state or intent the prosecutor can prove the defendant had at the time of the crime. In New York, a defendant who *intends* to cause serious bodily injury to another and causes the death of that person is guilty of first-degree manslaughter, a class B felony[170] authorizing up to twenty-five years in prison.[171] If, on the other hand, the same defendant *recklessly* causes the death of another, he is guilty of a class C felony[172] subject to a prison sentence of up to fifteen years.[173]

Although some person crimes authorize prison sentences greater than those authorized by environmental crimes, the reverse may also be true. In a situation in which pollution results in serious bodily injury or death, the prosecutor should first determine whether the act and mental state elements are provable beyond a reasonable doubt. Next, the prosecutor should consider the maximum penalty authorized by the person crime statutes versus the environmental crime statutes when deciding which crime to charge.

169 *See* FLA. STAT. ANN. § 782.04(2).

170 N.Y. PENAL LAW § 125.20 (Consol. 2010).

171 N.Y. PENAL LAW § 70.00(2)(b).

172 N.Y. PENAL LAW § 125.15.

173 N.Y. PENAL LAW § 70.00(2)(C).

IV
DIFFICULTY OF PROVING CAUSATION

Ultimately, the act and mental state elements of any crime must be causally related to the criminalized result in order for prosecutors to successfully charge a defendant. The direct link between the defendant's actions and the result is causation, and without this link the prosecutor can only show that the defendant acted and that someone was injured or killed, but not that the defendant's actions caused that harm.

As with mental states, the MPC provides guidance for analyzing causation, but is only relevant in states that have adopted that portion of the MPC. For states that have not adopted the MPC approach to causation, a common law analysis of both cause-in-fact and proximate cause is necessary. Neither New York, Florida, nor Oregon have adopted the MPC approach to causation, so it is only necessary to analyze their statutes using common law causation for the purposes of this Article.[174] At common law, prosecutors must prove beyond a reasonable doubt that (1) the defendant's conduct was the cause-in-fact of the result, and (2) that the defendant's conduct was the proximate cause of the result.[175]

A. Cause-in-Fact

Determining whether the defendant was the cause-in-fact of the serious bodily injury or death is necessary to the prosecution's case because it reveals whether the defendant is in the causal chain. If the defendant did not cause the result he cannot be found guilty of the crime. There are three tests the prosecutor may use to show that the defendant's actions directly caused the result: (1) the but-for test, (2) the substantial factor test, and (3) the acceleration test. The but-for test is essentially the same used under the MPC—the defendant's

174 States that have adopted the MPC approach to causation use a but-for test: "Conduct is the cause of a result when . . . it is an antecedent but for which the result in question would not have occurred . . . ." MODEL PENAL CODE § 2.03(1)(a) (2001). If a victim would not have died but for the defendant's conduct, the defendant's actions are the cause of the death. For a more thorough discussion of the but-for test in states adopting the MPC approach to causation, see David J. Karp, Note, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249 (1978).

175 *See, e.g.*, Velazquez v. State, 561 So. 2d 347, 351 (Fla. Dist. Ct. App. 1990) ("Even where a defendant's conduct is a cause-in-fact of a prohibited result . . . Florida and other courts throughout the country have for good reason declined to impose criminal liability . . . where the prohibited result of the defendant's conduct is beyond the scope of any fair assessment of the danger created by the defendant's conduct . . . .").

actions are the cause of the result if the result would not have occurred but for the defendant's conduct.[176] Prosecutors use the substantial factor test when two independent defendants act separately and the actions of either one alone were sufficient to cause the result.[177] The acceleration test also deals with two independent actors, but is concerned with an inevitable result and focuses on when the result occurred.[178] If the defendant's actions made the result occur sooner, his actions are the cause-in-fact of the result, but if they merely contribute to an injury without accelerating the result, his conduct is not considered the cause-in-fact.[179]

Cases in which two independent actors pollute and cause serious bodily injury or death are likely to be rare—especially in situations in which a person rather than a corporation is the defendant—so the substantial factor and acceleration tests may not be useful to prosecutors in these situations. Therefore, the but-for test is crucial to prosecutors determining whether to charge a polluting defendant whose actions result in serious bodily injury or death with an environmental crime or a person crime. The prosecutor always needs to examine how difficult it would be to prove causation based on the facts under each statute.

B. Proximate Cause

The second causation element at common law is proximate cause—whether there were any intervening or superseding causes of the result after the defendant's actions took place. If so, the prosecutor must determine if those causes were independent of or dependent upon the defendant's actions.[180] If the causes were independent of the defendant's actions, the defendant is determined not to be the cause of the result and is not liable for the crime *unless* the independent cause was foreseeable at the time the defendant acted. However, if the causes were dependent on the defendant's actions, the defendant is the cause of the result, *unless* the intermediate cause broke the chain of causation and was *not* foreseeable at the time of the defendant's actions.[181]

176 *E.g.*, *id.* at 350.

177 *E.g.*, *id.* at 351.

178 *See, e.g.*, Oxendine v. State, 528 A.2d 870, 872 (Del. 1987).

179 *Id.*

180 *See, e.g.*, Kibbe v. Henderson, 534 F.2d 493, 498–99 (2d Cir. 1976), *rev'd on other grounds*, 431 U.S. 145 (1977).

181 *Id.* at 498 n.6.

For example, the defendant in *People v. Polvino*[182] could have argued that the prosecutor could not prove causation due to an unforeseeable independent intervening cause: between the defendant's conduct of asking his employee to move the barrels and the employee's death, the employee spilled the contents of the barrels and caused the chemicals to combine.[183] The defendant might have argued (1) that the cause was intervening because it occurred between his action and the result, (2) that the cause was independent because he did not ask the employee to move the barrels, despite evidence to the contrary, and (3) that the cause was not foreseeable because he did not know at the time that the employee would move the barrels. If the prosecutor lacked evidence to overcome this argument, such as evidence that the defendant knew of the lethal properties of the chemicals and specifically asked the employee to move the barrels, the chain of causation would be broken and the defendant's actions could not be considered the cause of the result.

C. Common Law Causation Analysis

For example, take this case: Vic, an employee, is cleaning a tank filled with sludge, which Dee, his employer, knows to be laced with cyanide.[184] Despite Vic's complaints of a sore nose, throat, and repeated requests for safety equipment, Dee does not provide safety equipment for cleaning the tank but tells Vic to keep cleaning.[185] After returning to cleaning the tank, Vic collapses and is rushed to a hospital where he is diagnosed with and treated for cyanide poisoning.[186] Dee denies any knowledge of cyanide in the sludge tank to medical and law enforcement professionals.[187] Assuming this case occurred in Oregon, prosecutors could consider charging Dee with at least two crimes with result elements reflecting human injury, first-degree air pollution and fourth-degree assault. Deciding which charges to bring requires the prosecutor to determine if he can prove causation between Dee's actions and Vic's injury.

182 580 N.Y.S.2d 616 (Onondaga Cnty. Ct. 1991).

183 *Id.* at 619.

184 *See* United States v. Elias, 269 F.3d 1003, 1007 (9th Cir. 2001).

185 *See id.*

186 *See id.* Cyanide can be both a solid and a gas, and can contaminate air in its gaseous form. *See* CYANIDE, *supra* note 152.

187 *See Elias*, 239 F.3d at 1008.

First-degree air pollution in Oregon prohibits the activity of a person who "knowingly . . . allows to be discharged or emitted any air contaminant . . . and . . . [a]s a result, recklessly causes substantial harm to human health."[188] In order to bring this charge against Dee the prosecutor needs to prove that: (1) Dee knowingly allowed an air contaminant to be discharged or emitted, (2) Dee was reckless about whether Vic would be poisoned, (3) but for Dee's allowance of the emission Vic would not have been poisoned *or* that such action was not a substantial factor in the result,[189] and (4) if Dee's actions are a substantial factor in the poisoning, whether there is an independent and unforeseeable intervening cause.

(1) The prosecutor should look for evidence that Dee allowed an air contaminant to be discharged or emitted. This is evident from the fact that Dee was aware that there was cyanide in the sludge in the tank—she knew of a contaminant—but allowed the contaminant to be emitted.[190]

(2) The prosecutor should look at the statute to determine what would need to be proved regarding Dee's mental state toward the result of Vic's injury.[191] In order to prove that Dee acted recklessly with respect to the result, the prosecutor must show that the defendant was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that the result [would] occur."[192] The fact that Dee knew there was cyanide in the tank but refused to provide Vic safety equipment for going inside the tank is evidence of Dee's reckless mental state towards Vic's poisoning.

(3) The prosecutor should then determine whether to prove causation with the but-for test or substantial factor test by establishing if there is only one potential cause, or if there could be more. In this case, one potential cause of the poisoning was that Dee told Vic to continue cleaning the tank without safety equipment, causing Vic to be exposed to cyanide. A second potential cause is that Vic chose to go

188 OR. REV. STAT. § 468.939 (2009).

189 Oregon uses the but-for approach to causation when there is only one potential cause, and the substantial factor test when there is more than one. *See* Magnuson v. Toth Corp., 190 P.3d 423, 425 (Or. Ct. App. 2008) (citing Joshi v. Providence Health Sys., 149 P.3d 1164, 1168–69 (Or. 2006)).

190 *Elias*, 269 F.3d at 1007.

191 Because mental state towards conduct is not relevant to determining causation, it is not discussed here. See *supra* Parts II.A and III.A for a discussion of reasons why the result element is the crucial consideration when determining whether to charge environmental or person crimes.

192 OR. REV. STAT. § 161.085(9) (2009).

back in the tank without safety equipment and was exposed to cyanide though his own actions. Since there are at least two potential causes of the poisoning, the prosecutor should apply the substantial factor test.

(4) To determine if Dee's actions were a substantial factor in the result, the prosecutor should examine the facts to see if Dee's actions materially contributed to Vic's injury. Dee refused Vic's request for safety equipment and told him to go back in the tank anyway. If Vic was wearing safety equipment he would not have been poisoned, and he likewise would have avoided poisoning if he had not gone back in the tank unprotected. Since Vic would not have been poisoned without either of Dee's actions—her refusal of safety equipment and her insistence that Vic go back in the tank—those actions materially contributed to Vic's poisoning.

Since Dee's actions were a substantial factor, it is not necessary for the prosecutor to look for possible proximate independent and unforeseeable causes of the poisoning, but a prudent prosecutor should consider claims Dee might raise. In this case, Dee might claim that Vic went back into the tank of his own free will and that his choice to enter the tank and breathe in the cyanide was the independent proximate cause, breaking the chain of causation from Dee to the result. The prosecutor can counter this claim by arguing that though Vic willfully went back into the tank, his action was dependent because Vic had no choice but to reenter the tank under the scope of his employment. Furthermore, Dee could have foreseen that Vic would continue cleaning the tank because she should know that an employee would likely do what he is told rather than risk losing his job. If this argument holds, it would mean that the causation chain between Dee's action and the result is intact—Dee is the cause of the harm despite Vic's intervening act.

In the common law causation analysis, the prosecutor can charge Dee with first-degree air pollution because he can prove causation between Dee's actions and Vic's poisoning. The prosecutor can potentially charge Dee with a person crime, and should run the same analysis to determine if it is easier or more difficult to prove causation for that crime. Oregon's fourth-degree assault statute states that "[a] person commits the crime of assault in the fourth degree if the person . . . [i]ntentionally, knowingly, or recklessly causes physical injury to another."[193] In order to charge Dee with this crime the prosecutor needs to determine if he can prove that: (1) Dee intended, knew, or

193 OR. REV. STAT. § 163.160.

was reckless about whether Vic could be poisoned, (2) but for Dee's actions Vic would not have been poisoned, and (3) there was no proximate cause of Vic's poisoning.[194]

(1) The prosecutor should look at the statute to determine what he needs to prove regarding Dee's mental state toward the result of Vic's poisoning. The statute provides for three possible mental states, and the prosecutor may look at all three. However, the level of punishment for the crime does not change based on the mental state, so it is most efficient to use recklessness, as it is the least difficult mental state to prove. In order to prove that Dee acted recklessly with respect to the result, the prosecutor must show that the defendant was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that the result [would] occur."[195] The fact that Dee knew there was cyanide in the tank and refused to provide Vic safety equipment when going inside the tank is evidence of Dee's reckless mental state towards Vic's poisoning.

(2) The prosecutor should run the but-for test to determine if the defendant's action was the cause-in-fact of the result: Vic would not have been poisoned but-for Dee's refusal to provide safety equipment for cleaning a tank that she knew contained cyanide.

(3) In case the but-for test does not hold up in court, the prosecutor should determine if there was a proximate cause by looking for any intervening factors. If any intervening factors exist, the prosecutor should establish whether they were independent of—or dependent upon—Dee's actions, whether Dee should have foreseen the intervening causes at the time she acted, and whether the causes were a substantial factor in the result. As with the causation analysis of the environmental crime, the prosecutor should consider any claims Dee might make regarding a proximate cause of Vic's injury, such as Vic's choice to reenter the tank. Again, the prosecutor should be able to make the argument that there was no proximate cause of Vic's injury—Vic returned to clean the tank due to the scope of his employment.

As with first-degree air pollution, the prosecutor can easily prove causation between Dee's actions and Vic's poisoning, and can also charge her with fourth-degree assault. Since the prosecutor can prove causation for both crimes, he can bring both charges against Dee.

194 The statute does not specify that a particular conduct must cause the result, so the prosecutor does not need to prove such. *See id.*

195 OR. REV. STAT. § 161.085(9).

The final step is to determine if it is effective for the prosecutor to bring both charges, depending on the authorized maximum penalty for each.[196] First-degree air pollution is a class B felony,[197] which authorizes a fine of up to $250,000[198] and a prison term not to exceed ten years.[199] Fourth-degree assault is a class A misdemeanor,[200] which authorizes a prison sentence of up to one year[201] and a fine of not more than $6,250.[202] In this case, the environmental crime authorizes the greater penalty, but the prosecutor still may wish to charge the person crime as well. The prosecutor could ask the court to set the sentences to run consecutively so that if Dee received the maximum penalties for both crimes she would effectively receive an eleven-year prison term.

Fact patterns, act elements, mental states, and authorized maximum penalties are important to prosecutors when deciding what crime, if any, with which to charge a polluter whose actions result in serious bodily injury or death.

D. Justice

In addition to the practical concerns prosecutors must consider when determining whether a person crime or an environmental crime is the more appropriate charge, there are theoretical and jurisprudential concerns as well. Is it just to use traditional crimes in the environmental context? Are the goals of punishment better served by one type of charge?

"[J]urisprudence can have but one or the other of two objects: 1. To ascertain what the *law* is [or] 2. To ascertain what it ought to be."[203] Prosecutors should be especially concerned with the second object, as they have an ethical responsibility to act as "a minister of justice and not simply [as] an advocate."[204] Prosecutors are required to consider

196 *See supra* Parts II.C and III.C.

197 OR. REV. STAT. § 468.939 (2009).

198 OR. REV. STAT. § 161.625(1)(c).

199 OR. REV. STAT. § 161.605(2).

200 OR. REV. STAT. § 163.160(2).

201 OR. REV. STAT. § 161.615(1).

202 OR. REV. STAT. § 161.635(1)(a).

203 Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 357 n.34 (1995–1996) (quoting JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ch. XVII, § 2 (Leslie B. Adams, Jr. spec. ed. 1986) (1780)).

204 MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (1983).

what is most just for all parties involved when determining what crime or crimes to charge.

This ethical issue can arise when choosing whether to charge a person crime or an environmental crime. If the prosecutor chooses to charge the person crime only, it may be unjust toward the state because there is little reason to have environmental protection statutes if they are often subjugated in favor of person crime statutes. In addition, this choice may be unjust for the first-time offender who acts negligently or recklessly, or who intended to pollute but not to cause human injury or death. The stigma of being convicted of a person crime is difficult to overcome, and it may be unfair to subject a defendant who genuinely did not intend to cause harm to humans to such a conviction. Ultimately, if the defendant kills another person he will be charged with homicide, and intent will serve to determine which degree of the crime is appropriate.

The legal system functions by charging people with crimes and punishing those who have committed an act that society deems to be morally or socially wrong. There are varying purposes of punishment, including retribution against the offender, rehabilitation of the offender, and deterrence of future offenders. There may be policy or practical reasons for prosecutors to charge certain types of offenders with person crimes instead of environmental crimes. As long as prosecutors maintain the discretion to determine which crime will be the most effective punishment in each situation, those purposes can be effectively upheld.

Charging an environmental offender with a person crime serves the purposes of punishment differently than charging an environmental crime. The prosecutor should consider the individual defendant when deciding which type of crime to charge, but greater social needs may play a role as well. Personal and social reactions to the respective crimes are significantly different. Although defending the environment has become a popular and necessary crusade in the last few decades, it is unlikely that the majority of people think the social harm of pollution is more grave than that of murder.[205] There is not

205 *Compare* Joe Sexton, *One Precinct Takes Aim at Environmental Crime*, N.Y. TIMES, July 19, 1995, at B3, *available at* http://www.nytimes.com/1995/07/19/nyregion/one-precinct-takes-aim-at-environmental-crime.html (describing how a Brooklyn precinct police force was only able to start responding to reports of environmental crimes once person crime statistics were down by more than thirty percent, illustrating the comparatively low priority of environmental crimes), *with* Paul Zielbauer, *Murder in Greenwich: Reaction; Some Relief, But No Joy, As "Guilty" Rings Out*, N.Y. TIMES, June

only the social stigma of a person crime conviction, but the personal stigma may be greater as well. Defendants are often likely to feel more personal guilt in committing a crime against a human than against the environment.[206]

When thinking about the broader goals of punishment, the prosecutor should consider deterrence, retribution, and rehabilitation. How likely is it that charging the defendant with an environmental crime for serious bodily injury or death will deter future offenders? It is possible that potential environmental offenders will change their minds about polluting when they discover that they can be charged with murder if they kill someone in the course of polluting, but it is unlikely. Retribution may not be as overwhelming for an environmental conviction as with a person crime because the potential prison terms tend to be lower and the social stigma less intense.[207] Fines, however, serve a retributive purpose, and civil fines are often greater than those imposed with criminal convictions. Rehabilitation may be less likely to be accomplished by charging an environmental crime for serious bodily injury or death, since the social stigma and personal guilt associated with being convicted of pollution is lower than that of a person crime, and less likely to make offenders change their ways. However, charging typical environmental offenders with environmental crimes is more likely to deter other potential permit or pollution offenders because they could reasonably expect to be charged with such a crime. It is more difficult for environmental offenders to anticipate being charged with a person crime, so it makes sense to charge environmental offenders with environmental crimes in an attempt to deter future defendants from committing the same offense. Since the two types of crimes intersect, prosecutors do not always have to choose whether the environmental or person crime charge is more appropriate. In cases such as *Polvino*, the most effective answer is to charge both.

8, 2002, at B5, *available at* http://www.nytimes.com/2002/06/08/nyregion/murder-in-greenwich-reaction-some-relief-but-no-joy-as-guilty-rings-out.html (describing public's reaction to a guilty verdict for a murder defendant as relieved and satisfied).

206 *See, e.g.*, Zielbauer, *supra* note 205, at B5 (describing the defendant's life as "hell. . . . It's clear that the consciousness of guilt has followed him wherever he went.").

207 *See* discussion *supra* Part II.C (providing examples of authorized prison terms for some environmental crimes); *see supra* note 205 (comparing public reaction to environmental crimes with public reaction to commission of murder).

E. Anticipated Jury Reaction

Ultimately, all lawyers want to win their cases, and the jury is a major factor in determining which side is victorious. Prosecutors should always try to anticipate what a jury will decide when looking at given facts, and fit those facts into the definitions of a person crime or an environmental crime. There is no truly accurate way to predict the reaction of a given jury, but it is helpful to research the outcomes of previous environmental and person crime cases within the jurisdiction when determining what type of crime to charge. For example, during Florida's 2007–08 fiscal year, juries convicted on seventy percent of the 408 noncapital murder charges tried before them.[208] In the same time span, juries in Florida convicted defendants on only thirty-seven percent of the 391 criminal charges of pollution harming human health or welfare, littering, and unlawful storing of hazardous waste tried before them.[209] Based on this information, Florida juries are nearly twice as likely to convict on murder charges than on environmental crime charges, and a Florida prosecutor might decide to charge a defendant whose polluting act killed another human with second-degree murder rather than with pollution that harms or injures human health.[210]

In addition, knowledge of human nature and the facts of a given case can help a prosecutor anticipate a jury's reaction. Even though our population has embraced protecting environmental resources, most people are more likely to feel empathy, compassion, and outrage when confronted with the death of another human being than with the reckless endangerment of the environment.[211]

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208 *Trial Court Statistics*, FLA. ST. CT., http://trialstats.flcourts.org/ (last visited Oct. 26, 2010) (query Step 1: Circuit Criminal Counts; Step 2: State total; Step 3: Beginning Year 2007, Beginning Month 7, Ending Year 2008, Ending Month 6).

209 FLA. OFFICE OF STATE COURTS ADM'R, OFFENDER BASED TRANSACTION SYSTEM: COURT ACTION ON INFORMATION/INDICTMENT CHARGES FILED FOR SELECT FLORIDA STATUTES JULY 2007 THROUGH JUNE 2008 (on file with author).

210 Assuming the prosecutor can prove all elements of both crimes beyond a reasonable doubt.

211 *See, e.g.*, Joseph A. Slobodzian, *A Tough Case: Defending Child-Neglect Suspects*, PHILA. INQUIRER, Aug. 22, 2008, at B01 (discussing public outrage and charges of reckless endangerment in the case where two social workers failed to prevent parents from starving their fourteen-year-old daughter with cerebral palsy to death: "[i]ndefensible"); *Pennsylvania Mining Supplier Charged with Reckless Endangerment*, ENV'T NEWS SERVICE (Nov. 2, 2005), http://www.ens-newswire.com/ens/nov2005/2005-11-02-09.asp#anchor6 (not mentioning any public reaction to environmental reckless endangerment).

F. Procedural Barriers

Procedural obstacles can sometimes prevent a prosecutor from charging a particular crime. There is a provision under the Oregon Environmental Crimes Act, for example, that requires three steps with respect to prosecuting environmental crimes. First, the attorney general and local prosecutors must "develop legally prescribed guidelines for prosecution."[212] Second, prosecutors wishing to charge felony environmental crimes need to obtain the "personal approval of the district attorney of the county or the Attorney General."[213] Third, a prosecutor charging a felony environmental crime must certify to the court that he followed the guidelines.[214] This provision was enacted to control prosecutorial discretion, and may have done its job too well[215]: it can discourage prosecutors from bringing charges against polluters even when there is probable cause to charge the crime. Prosecutors are forced to "account[] for factors outside the elements of a crime" such as the polluter's lack of bad intentions and the lack of substantial harm.[216] Since under the statute prosecutors who have probable cause to charge a felony must certify that they comported with the established charging guidelines *and* get attorney general or county district attorney approval for bringing the charge, the likelihood that felony environmental crime charges in Oregon will make it through this procedural barrier is slim. In fact, as of the time of this Article, only three felony environmental crime prosecutions have been brought against polluters in Oregon since the statute was adopted in 1993.[217]

212 Gregory A. Zafiris, Comment, *Limiting Prosecutorial Discretion Under the Oregon Environmental Crimes Act: A New Solution to an Old Problem*, 24 ENVTL. L. 1673, 1674–75 (1994) (citing OR. REV. STAT. § 468.961(1)–(3) (1993)).

213 OR. REV. STAT. § 468.961(1) (2009).

214 *Id.* § 468.961(4).

215 Zafiris, *supra* note 212, at 1684–85.

216 *Id.* at 1685. Probable cause is the objective basis for believing that "more likely than not an offense has been committed and a person to be arrested [or charged] has committed it." OR. REV. STAT. § 131.005(11) (2009).

217 State v. Lebeck, 17 P.3d 504 (Or. Ct. App. 2000) (upholding trial court's modification of defendant's sentences for four counts of class B felony first-degree unlawful storage of hazardous waste), *superseded by statute per* State v. French, 145 P.3d 305, 307 (Or. Ct. App. 2006); State v. Stevens Equip. Co., 998 P.2d 1278 (Or. Ct. App. 2000) (upholding a conviction of class B felony first-degree unlawful storage of hazardous waste); State v. Maxwell, 984 P.2d 361 (Or. Ct. App. 1999) (upholding a conviction of class B felony first-degree unlawful storage of hazardous waste).

Although the specific requirements of the statute can be difficult to overcome, perhaps the more far-reaching barriers are psychological. By codifying a statute's requirements the legislature is curtailing prosecutorial discretion. This psychological barrier can manifest itself in several ways—most notably politically and economically. For instance, if the polluter at issue is the biggest employer in a small county, the prosecutor may face serious political concerns with charging the company with a felony. While it may not be a problem for the attorney general to charge the company at a state level, the local district attorney has to be directly involved with the company and its employees, and may have concerns about losing a large number of votes or other detrimental political outcomes if the company is charged with a crime.[218] While under normal circumstances the district attorney would approve a prosecutor's choice to charge a felony, this potential political barrier may lead the district attorney to refuse to allow the prosecutor to charge the crime.

Moreover, the economic climate in a given county might prevent prosecutors from charging felonies under this statute. In Oregon, district attorneys receive their budgets from their counties, rather than from the state.[219] In counties with less revenue, budgets tend to be relatively small and inflexible, and the local district attorney is faced with managing a very tight budget. If a prosecutor wants to charge a local company with an environmental felony, the district attorney may need to carefully consider the monetary requirements of approving such a charge. Environmental crime cases are extremely technical, require expert witnesses from both sides, can drag on for months or years, and cost a great deal of money. Large companies can have seemingly endless resources compared to the district attorney's finite budget, and it may not be in the best interest of the county to approve a potentially expensive environmental felony charge.

G. Nature and Quality of Investigation

Often prosecutors are faced with a political decision when determining if they will charge the crime the state agency, EPA, or police requested, or to charge a different crime altogether.

218 Mandiberg Interview, *supra* note 63.

219 *See, e.g.*, WASHINGTON COUNTY, OREGON ADOPTED BUDGET, ORGANIZATION UNIT: DISTRICT ATTORNEY 100-4510, BUDGET DETAIL 2 (2008), http://washtech.co.washington.or.us/budgetsummary/pdf09/66_Bud100-4510.pdf (detailing County Administrator's analysis of the Washington County District Attorney's requested budget).

We can see this quandary in action when prosecutors at the Department of Justice review an investigation undertaken by the EPA and determine not only what crimes to charge against an offender, but whether to pursue prosecution at all.[220] Prosecutorial discretion is a fundamental issue, and is by no means limited to federal environmental regulations. States, and even some major cities such as New York City, have agencies tasked with protecting and managing the state's natural resources, as well as with enforcing its environmental laws.[221] In the context of enforcing environmental laws, these agencies function similar to police departments: they handle investigation of potential violations of state statutes and refer cases to prosecutors for charging review. Depending on the case, the environmental agency may be the only investigating body if the violation is purely environmental, or they may be forced to work in conjunction with the local police department if the case also involves a potential violation of a state criminal statute as well.

When reviewing cases referred by the police, prosecutors must carefully consider whether to charge the crime the police referred. Prosecutors run the risk of a political offense if they choose to ignore the police recommendation, although sometimes that decision is a necessary one. For instance, police officers may want to crack down on a repeat offender, and recommend to the prosecutor that the offender be charged with a particular crime even if the facts and law do not entirely support that charge. A prosecutor who cannot prove the charge against the repeat offender should decline to issue the charge. The prosecutor is forced to make a just decision, but may upset the reporting police officers in the process. These political considerations are less significant when environmental agencies such as the EPA refer cases to prosecutors.[222]

If a case is referred by both the police *and* the environmental agency, as was the case in *State v. Delgrasso*,[223] prosecutors must

220 Charles J. Babbitt, Dennis C. Cory & Beth L. Kruchek, *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENVTL. L. & POL'Y F. 1, 3 (2004).

221 *See, e.g.*, *About Department of Environmental Protection*, FLA. DEP'T ENVTL. PROT., http://www.dep.state.fl.us/mainpage/about/about_dep.htm (last visited October 26, 2010).

222 *See, e.g.*, ALEXANDER VOLOKH & ROGER MARZULLA, POLICY STUDY NO. 210, ENVIRONMENTAL ENFORCEMENT: IN SEARCH OF BOTH EFFECTIVENESS AND FAIRNESS 9 (1996), http://www.reason.org/files/8c014ffde14ebd7a3ad267ae5bb85ba8.pdf (describing how agencies leave the method of enforcement to prosecutors).

223 653 So. 2d 459, 461–62 (Fla. Dist. Ct. App. 1995).

weigh whether the traditional or environmental crime is more appropriate. Often both are appropriate, as in *People v. Polvino*, where prosecutors charged both manslaughter and reckless endangerment.[224] The prosecutor must determine which agency investigation was more complete, thorough, and accurate. For instance, if the prosecutors in *Delgrasso* had received reports from both the Florida Police Department and the Florida Department of Environmental Regulation (DER), but the DER report contained more facts, witness interviews, or data than the police report, the prosecutors might have decided only to charge Delgrasso with unlawfully disposing of or storing hazardous waste as the DER recommended, setting aside the police's recommendation of charging him with inflicting personal injury through culpable negligence. Although the prosecutor's job is ultimately to apply the facts of a given case to the state law and determine which charge, if any, is appropriate, that prosecutor cannot do so without relying on the agency reports. The prosecutor must always weigh the relative merits of the reports before making a final charging decision.

V
CONCLUSION

Environmental crimes need to be of global concern because they cause significant harm to our natural resources and endanger the lives and safety of human beings. Polluters may cause serious bodily injury or death by acts of pollution. Our criminal justice system would not let such crimes go unpunished when committed with a gun or a knife, and environmental crimes should receive similar strict treatment. Prosecutors must be the first line of defense, and they must exercise careful discretion when deciding whether to charge polluters with environmental crimes or with traditional person crimes when a death or serious bodily injury results.

For the most part, state prosecutors have not taken the opportunity to charge polluters whose actions result in serious bodily injury or death with a traditional person crime in addition to, or instead of, the environmental crime. Many states have written statutes allowing this prosecutorial discretion, but charging a person crime is not always an easy decision. Prosecutors must consider first and foremost whether they can *prove* the crime. They should also consider maximum

224 580 N.Y.S.2d 616, 621–22 (Onondaga Cnty. Ct. 1991).

authorized sentences, the outcomes of any previous similar cases, the potential reaction of the jury and public, and principles of fundamental fairness. When tasked with charging a person crime or environmental crime, these are necessary considerations for prosecutors to take into account in order to meet the goals of the justice system and adequately enforce protection of both human and environmental resources.