The Mental Culpability Requirements for Proof of Environmental Crimes in New York

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Introduction

The New York Penal Law has strict requirements for proof of mental culpability, which did not anticipate the multi-phrased environmental criminal statutes we now enforce.[1] This article will attempt to analyze the mental culpability requirements for proof of New York's environmental crimes and what effect federal case law, the doctrine of public welfare status, and the corporate officer doctrine, have on these requirements.

Part I examines the strict provisions in the New York Penal Law as to mental culpability, and their legislative history. It argues that these provisions do not apply to New York's environmental crimes, with the result that developing federal law, which relaxes the requirements for proof of mental culpability, is applicable in New York state courts. These federal developments include the interpretation of environmental statutes, and the status of environmental crimes as public health and welfare statutes. Part II briefly examines the responsible corporate officer doctrine and reviews existing analogous New York case law as a guide to how New York courts may respond to attempts by prosecutors to use this doctrine in environmental cases.

I. Statutory Mental Culpability Requirements in New York

New York's environmental crimes are set out in a single chapter, the Environmental Conservation Law ("ECL"), which took effect on September 1, 1972.[2] The ECL codified New York's environmental law, which had been scattered among several

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1. N.Y. Envtl. Conserv. Law ("ECL") art. 71 (McKinney 1984 and Supp. 1991).
2. 1972 N.Y. Laws ch. 664.

chapters, including the former conservation law, the public health law, and the agriculture and markets law.[3]

There is no uniform method by which environmental crimes are defined in the ECL. Rather, the chapter defines different crimes variously according to a number of criteria including the specified culpable mental state[4] with which the proscribed conduct is carried out,[5] the presence of specified circumstances such as the volume of hazardous waste or substances processed or released,[6] and whether a person is put at risk by a release of a haz-

3. There are many minor offenses in the ECL that have traditionally been prosecuted by way of "environmental appearance tickets" (simplified environmental conservation informations) issued by uniformed environmental officers. Fish and wildlife, wetlands, solid waste and some air violations are typically prosecuted in this way. This paper addresses more serious offenses prosecuted by Information, or an Indictment voted by a grand jury. For a useful summary of environmental offenses in New York, see PIAGGIONE, A GUIDE TO ENVIRONMENTAL CRIMES (1989) (available at the Bureau of Prosecution Services, Division of Criminal Justice Services, Albany, New York).

4. The culpable mental states in New York are:

1. "Intentionally." A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

2. "Knowingly." A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.

3. "Recklessly." A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

4. "Criminal negligence." A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

N.Y. PENAL LAW ("PL") § 15.05 (McKinney 1987).

5. *E.g.*, ECL § 71-2711(1): "A person is guilty of endangering public health, safety or the environment in the fourth degree when with criminal negligence, he engages in conduct which causes a release to the environment of a substance acutely hazardous to public health, safety or the environment." This is an A misdemeanor, punishable by up to a year in jail, ECL § 71-2712(1) provides that the same conduct committed *recklessly* constitutes an E felony punishable by up to four years imprisonment.

6. *E.g.*, ECL § 71-2707: "No person shall: 1) knowingly possess more than one hundred gallons or one thousand pounds, whichever is less, of an aggregate weight or volume of hazardous wastes at a place other than the site of generation." This is an E felony, punishable by up to four years imprisonment, whereas ECL § 71-2709(2) provides that knowing

ardous substance.[7] The chapter also creates many misdemeanors by proscribing breaches of regulatory-type provisions committed with "any" culpable mental state,[8] while other misdemeanors appear to be strict liability crimes,[9] particularly those enforcing provisions relating to fish and wildlife.

The ECL provides that interpretation of its criminal provisions is guided by the principles of construction set forth in the New York Penal Law.[10] The Penal Law ("PL"), in turn, provides that its provisions apply to all offenses defined by other chapters outside the Penal Law, unless there is an express provision or contextual requirement to the contrary.[11]

The PL also addresses how statutes are to be construed with respect to mental culpability requirements. Penal Law section 15.15 provides:

> 1. When the commission of an offense defined in this chapter, or some element of an offense, requires a particular culpable mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms "intentionally," "knowingly," "recklessly," or "criminal negligence," or by use of terms, such as "with intent to defraud" and "knowing it to be false," describing a specific kind of intent or knowledge. When one and only one of such terms appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears.
>
> 2. Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state

possession of more than fifteen hundred gallons or fifteen thousand pounds of hazardous wastes is a D felony, punishable by up to seven years imprisonment.

7. *E.g.*, ECL § 71-2712(1): "A person is guilty of endangering public health, safety or the environment in the third degree when he recklessly engages in conduct which causes the release to the environment of a substance acutely hazardous to public health, safety or the environment." This is an E felony, punishable by up to four years imprisonment, whereas § 71-2713(4) provides that a reckless release of an acutely hazardous substance which causes physical injury to a non-participant in the crime is a D felony, punishable by up to seven years imprisonment.

8. *E.g.*, ECL § 71-1933(1): Any person who, having any of the culpable mental states defined section 15.05 of the penal law, shall violate any of the provisions of titles 1 through 5, 9 through 11 and 19 of article 17, [relating to water pollution] or the rules, regulations, orders or determinations of the commissioner promulgated thereto or to the terms of any permit issued thereunder, shall be guilty of a misdemeanor . . . .

9. In other words, there is no specified culpable mental state in the described offenses.

10. ECL § 71-0101.

11. PL § 5.05(2): "Unless otherwise expressly provided, or unless the context otherwise requires, the provisions of this chapter shall govern the construction of . . . any offense defined outside of this chapter. . . ."

> may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability. This subdivision applies to offenses defined both in and outside this chapter.

This provision raises an immediate question as regards to its application to environmental crimes statutes, which are often multiphrased. The second sentence of subdivision 1 provides that where a defined offense contains a single specified mental state, such mental state will apply to every element of the offense unless a contrary intention is clear. Does this apply to environmental crimes, which are defined outside the Penal Law? This question is of great significance to a prosecutor since evidence of a culpable mental state is often the most difficult part of a case to establish, and the most difficult for a jury to grasp. Yet there is extremely sparse case law to assist a prosecutor in answering it.[12]

12. There is very little appellate decisional law on environmental crimes in New York. As of October 1, 1991, the office of the New York Attorney General had completed 125 environmental prosecutions involving 180 defendants (74 corporations and 106 individuals). The author is aware of 54 other completed prosecutions, by New York District Attorneys, as of December 31, 1989 (34 of them in Suffolk County, which has long had an interest in environmental prosecutions). NEW YORK STATE BAR ASSOC., NEW YORK STATE ENVTL. CRIMES DIGESTS (1983-1989). None of this total of 179 cases has addressed the question posed here. Eight cases have reached the appellate courts, on other matters, People v. Mattiace Industries, Inc., 52 N.Y.2d 739, 417 N.E.2d 563, 436 N.Y.S.2d 269 (1980); People v. Roth, 121 A.D.2d 576 (App. Div. 1986); People v. J.R. Cooperage Co. and Rosenberg, 128 A.D.2d 7, 515 N.Y.S.2d 262 (App. Div. 1987), *modified,* 137 A.D.2d 572, 524 N.Y.S.2d 31, *aff'd,* 72 N.Y.2d 579, 531 N.E.2d 1285, 535 N.Y.S.2d 353 (1988); People v. Harris Corp., 104 A.D.2d 130, 483 N.Y.S.2d 442 (App. Div. 1984); People v. Macellaro, 131 A.D.2d 699, 516 N.Y.S.2d 950 (App. Div. 1987), *appeal denied* 70 N.Y.2d 801, 516 N.E.2d 1232, 522 N.Y.S.2d 119 (1987); People v. Bush and Bush, 134 A.D.2d 603, 521 N.Y.S.2d 603 (App. Div. 1987); People v. Newark Florists Inc. and deWitt, unreported (App. Div. 1989); People v. Mattiace, 77 N.Y.2d 269, 568 N.E.2d 1189, 567 N.Y.S.2d 384 (1990).

In contrast, the federal courts have discussed the relationship between specified mental states and the elements of environmental crimes in at least eight appellate decisions. *See* United States v. Baytank (Houston) Inc., 934 F.2d 599 (5th Cir. 1991); United States v. MacDonald & Watson Waste Oil, Co., 933 F.2d 35 (1st Cir. 1991); United States v. Dee, 912 F.2d 741 (4th Cir. 1990); United States v. Protex Indus., 874 F.2d 748 (10th Cir. 1989); United States v. Greer, 850 F.2d 1447 (11th Cir. 1988); United States v. Hoflin, 880 F.2d 1033, 1036-40 (9th Cir. 1989); United States v. Hayes Int'l and Beasley, 786 F.2d 1499 (11th Cir. 1986); United States v. Johnson and Towers, Inc., 741 F.2d 662, 667-69 (3rd Cir. 1984), *cert. denied sub nom.*, Angel v. United States, 469 U.S. 1208 (1985). *See also,* Webber, *Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?*, 16 B.C. ENVTL. AFF. L. REV. 53 (1988); Harris, Cavanaugh & Zisk, *Criminal*

A. *Does PL Section 15.15 Apply to Environmental Crimes?*

Questions about the applicability of PL section 15.15 to environmental crimes arise because of the wording of its first and last sentences. It begins in subdivision 1 with the statement that it applies "[w]hen the commission of an offense defined in *this chapter*, requires a culpable mental state . . . " (emphasis added), and ends in subdivision 2 with the provision that "[t]his subdivision applies to offenses defined *both in and outside this chapter*." (emphasis added).

Such clear distinction in language suggests that sub-division 1 does not in fact apply to crimes defined outside the Penal Law, while subdivision 2 does. If this is correct, then a specified mental state in a criminal environmental statutory provision is not presumed to apply to every element of the offense but, at the same time, because subdivision 2 does apply to environmental crimes, all such environmental crimes are presumed to require a culpable mental state unless there is a clear legislative intent to impose strict liability.

This interpretation also appears to be in harmony with PL section 5.05(2), which applies Penal Law principles of construction to all offenses defined by other chapters unless there is an express provision or contextual requirement to the contrary.[13] The specific statements in PL section 15.15 that subdivision 1 applies to "this chapter," and subdivision 2 applies "both in and outside this chapter," constitute an express provision, or contextual requirement, that PL section 15.15(1) is not to apply to crimes defined in other chapters. This interpretation of PL section 15.15(1) is further supported by the legislative history of both PL section 5.05(2) and PL section 15.15.[14] Existing case law, which is not consistent with this interpretation, should not be considered authoritative.

Liability for Violations of Federal Hazardous Waste Law: The Knowledge of Corporations and Their Executives, 23 WAKE FOREST L. REV. 203 (1988).

13. *See supra* note 11.

14. 1965 N.Y. Laws, ch. 1030, table 1. The revised Penal Law took effect on September 1, 1967. PL § 500.10.

1. Legislative History

New York is a Model Penal Code ("MPC") state.[15] In drafting the MPC, the only conclusion reached without difficulty was that to be guilty of a crime the accused must at least commit a voluntary act or omit to perform an act of which he is physically capable.[16] The Reporter, Professor Weschler, has written that "[t]he definition of the further elements of culpability was the hardest drafting problem in the framing of the Code . . . The minimal statement is that one may not be convicted of a crime 'unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.' "[17] Section 2.02(4) of the MPC provides that when "the law defining an offense prescribes the kind of culpability that is sufficient," without "distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."[18]

The drafters of the MPC were most concerned with "substantive" criminal law. In 1955, Professor Weschler wrote that the drafters were "attempting to think through the problems of the law that governs the determination of what conduct constitutes a crime — at least within the major areas of criminality . . . ."[19] The revisers of New York's Penal Law were also concerned, however, with the mass of "essentially administrative" provisions of the Penal Law (1909), which perhaps belonged "in a more appropriate body of law dealing with the same or cognate subject matter."[20] The Revision Commission estimated in 1963 that there were already at least 2,000 misdemeanors and 20 felony provisions in other chapters outside it.[21] It proposed that approximately 30% of the administrative provisions then included in the Penal Law

15. *See* Wechsler, *Codification of Criminal Law in the United States: the Model Penal Code*, 68 COLUM. L. REV. 1425, 1428 (1968) ("The revised New York [Penal Law] . . . drew heavily upon the [American Law] Institute's proposals both in general provisions and treatment of specific crimes.").

16. *Id.* at 1436.

17. *Id.* at 1436 (citing § 2.02(1)).

18. *Id.* at 1437.

19. Weschsler, *A Thoughtful Code of Substantive Law*, 45 J.L. CRIMINOLOGY & POLICE SCI. 524, 525 (1955).

20. INTERIM REPORT OF THE STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE 35 (1963) (Legislative Document No. 8).

21. *Id.* at 36.

should be relocated to other bodies of law.[22] The Legislature then commissioned a study bill.[23]

Neither the Revision Commission's reports nor the Commission's staff notes on the study bill commented on the requirements for mental culpability for these "administrative" offenses which the Revision Commission proposed to excise from the Penal Law. For those offenses that remained in the Penal Law in the study bill's proposal — the "substantive" provisions — the Revision Commission broadly adopted the MPC approach with some slight changes of nomenclature.[24]

The Revision Commission's study bill provided in section 5.05(2) that the provisions of "this chapter" would govern the construction of "any offense defined outside this chapter" unless there was an express statement or contextual requirement to the contrary.[25] This section survived unchanged in the law as enacted. The study bill did not, however, draw the distinction between offenses defined in and outside it in its culpability requirements.[26] This distinction was added during the passage of the bill, suggesting a deliberate decision on the part of the Legislature to require more specific culpability requirements for offenses defined within the Penal Law.

Two obvious factors support this view. PL section 15.15 as enacted was part of the complete revision of the title on the principles of criminal liability and the Revision Commission's proposal

22. THIRD INTERIM REPORT OF THE STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE 27-29 (1964) (Legislative Document No. 14). Among the eventually relocated provisions was § 1759 of the 1909 Penal Law (repealed 1965), which surfaced in the Public Health Law and survives today unchanged since its promulgation in 1881, as ECL § 71-3503:

> A person who throws or deposits gas tar, or the refuse of a gas house or gas factory, or offal, refuse, or any other noxious, offensive, or poisonous substance into any public waters, or into any river or stream running or entering into such public waters, is guilty of a misdemeanor.

See also ECL § 71-3501 (McKinney 1984) (formerly PL § 1754 (1909)).

23. Senate Intro. 3918, Assembly Intro. 5376, 1964 Leg. (titled PROPOSED NEW YORK PENAL LAW, drafted and recommended by the TEMPORARY STATE COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE) [hereinafter Proposed Penal Law].

24. STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK PENAL LAW, COMMISSION STAFF NOTES 312-14 (1964).

25. Proposed Penal Law § 5.05(2).

26. *See id.* at § 45.05, which adopted the MPC provision that a specified culpability requirement apply to all the material elements of the offense, unless a contrary purpose was plain.

to remove 30% of the old Penal Law offenses (the "administrative" offenses) was adopted. Such a drastic revision of the chapter, accompanied by new sections drawing distinctions between offenses defined in the Penal Law and offenses defined outside it, strongly suggests that the Legislature focused on and intended these precise distinctions between PL section 15.15(1) and PL section 15.15(2) concerning offenses defined within, and outside, the Penal Law.

2. New York Case Law

There appears to be only one reported case in which a New York court has squarely addressed the provision in PL section 15.15(1) that a specified mental state is presumed to apply to every element of the offense, in a matter involving an offense outside the Penal Law. In *People v. Hager*,[27] the defendant was charged under Vehicle and Traffic Law ("VTL") section 600[28] with leaving the scene of an accident (a felony). His defense was that after the accident (which caused serious injury to a pedestrian), his mind went blank and the next thing he knew, he was driving at some location away from the scene.

VTL section 600(2)(a) provides:

> Any person operating a motor vehicle who, knowing or having cause to know that personal injury has been caused to another person, due to an incident involving the motor vehicle operated by such person shall, before leaving the place where the said personal injury occurred, stop, exhibit his license and insurance identification card for such vehicle . . . and give his name, residence . . . insurance carrier and insurance identification information and license number, to the injured party, if practical, and also to a police officer, or in the event no police officer is in the vicinity of the place of said injury, then, he shall report said incident as soon as physically able to the nearest police station or judicial officer.[29]

The court first held that the statute was not one of strict liability because a culpable mental state was prescribed, namely "knowing or having cause to know that . . . injury has been caused . . . due to

27. 124 Misc.2d 123, 476 N.Y.S.2d 442 (Nassau County Ct. 1984), *aff'd on other grounds*, 123 A.D.2d 329, 506 N.Y.S.2d 223 (App. Div. 1986), *aff'd*, 69 N.Y.2d 141, 505 N.E.2d 237, 512 N.Y.S.2d 794 (1987).

28. N.Y. VEH. & TRAF. LAW ("VTL") § 600 (McKinney Supp. 1991) (New York's "hit and run" statute).

29. *Id.* Violation of this provision is a felony if death or personal injury results from the operator's actions. *Id.* § 600(2)(b).

an incident involving the motor vehicle . . ."[30] The court then referred to PL section 15.15(1) and applied it to the facts of this case, stating that:

> The issue is whether the mental state of mind contained in the statute is presumed to apply to every element of the offense (including whether the accused left the scene knowingly or intentionally) or whether a statutory construction limiting the culpable mental state to mere knowledge by the defendant of causation of a personal injury by an auto accident is the only state of mind the People need prove.[31]

The court concluded that the culpable mental state did apply to the element of leaving the scene.

Nothing in the decision suggests that the court considered the effect of the opening words of PL section 15.15(1) stating that the section applies to "an offense defined in [the Penal Law]."[32] It seems to have been assumed that the section applied to *any* penal statute. In framing the issue, the court cited a leading treatise,[33] but reference to that treatise suggests that its authors would *not* have applied the section to the VTL. The treatise does not touch upon the question in its discussion of PL section 15.15(1), but in discussing PL section 15.15(2), it states that the section provides that a statute defining a crime should be construed as defining a crime of mental culpability, and continues with the observation that:

> This rule of construction applies to areas outside the Penal Law as well as to those offenses defined within the Penal Law. Offenses described in such chapters as the Agriculture and Markets Law, the Vehicle and Traffic Law, the Public Health Law, as well as any other chapters defining offenses, would therefore also fall under this rule.[34]

It is logical to assume, therefore, that authors of the treatise were of the opinion that these other chapters would *not* fall within the rule of PL section 15.15(1) that a specified mental state is presumed to apply to every element of the offense.[35]

30. *Hager*, 124 Misc.2d at 127, 476 N.Y.S.2d at 445 (citing § 600 of the VTL).

31. *Id.*

32. N.Y. PENAL LAW "PL" § 15.15(1) (McKinney 1987).

33. 7 J. ZEIT, NEW YORK CRIMINAL PRACTICE ¶ 61.4 (1990).

34. *Id.*

35. Perhaps it is too obvious, which is why the commentary on PL § 15.15(1) makes no reference to it.

A recent appellate decision disagreed with the holding in *Hager*, but not necessarily with its reliance on PL section 15.15(1). In *People v. Useo*,[36] the appellate division held that the culpable mental state of "knowingly" did not apply to the element of leaving the scene of the accident.[37] The court reached this conclusion because the part of VTL section 600(2)(a) "addressing the defendant's mental state is set off from the language pertaining to the element of leaving the scene of the accident by commas."[38] This, the court held, indicated the Legislature's intention to limit the *scienter* requirement to mere knowledge by a defendant of the injury caused by his driving or by accident.[39] The court did not refer to PL section 15.15(1). It is possible, therefore, that it assumed that the section did apply to the VTL, but that the definition of the offense stated a clear intent to limit the section's application.

B. *Mental Culpability Requirements for Proof of Offenses Defined Outside the Penal Law*

If PL section 15.15(1) does not apply to environmental crimes, the question is what requirements as to mental culpability do apply. There are two conflicting principles involved.

One principle derives from the general rule that penal statutes are to be strictly construed.[40] Yet the Penal Law seems to explicitly reject this principle in PL section 5.00, which provides that "the rule that a penal statute is to be strictly construed does not apply to this chapter but the provisions herein must be construed according to the fair import of their terms to provide justice and effect the objects of the law."[41] For crimes defined outside the Penal Law, however, the general rule of strict construction may still be relevant. In a 1911 case construing then-PL section 21, the predecessor of PL section 5.00, where an offense under what was then Insurance Law section 36 was charged, one court held

36. 156 A.D.2d 739, 549 N.Y.S.2d 490 (mem.) (App. Div. 1989).

37. *Id.* at 740, 549 N.Y.S.2d at 491.

38. *Id.* at 740, 549 N.Y.S.2d at 492.

39. *Id.* at 740-41, 549 N.Y.S.2d at 492.

40. The general rule that penal statutes are to be strictly construed against the State and in favor of the accused is set out in N.Y. STATUTES § 271 (McKinney 1971).

41. PL § 5.00.

that section 21 did not apply and the Insurance Law provision, which was a penal statute, had to be strictly construed.[42]

As against this rule of strict construction is the principle that statutes promoting the public good are to be liberally construed.[43] Within this category are public health statutes.[44] The doctrine of a public welfare offense has developed from the original concept of a regulatory statute with low penalties forbidding specified acts, but without any accompanying mental state,[45] to a broader doctrine that applies to serious crimes with prescribed culpable mental states, but which involve conduct that "a reasonable person should know is subject to stringent regulation and may seriously affect the community's health and safety."[46] This broader doctrine has been held by the Supreme Court to affect the mental culpability requirement for health and safety offenses to which it applies.[47] The Court has declined to insist that the prosecution must prove that the prescribed culpable mental state applies to every factual circumstance that must be proved. Thus in *United States v. Freed*,[48] appellees, who had been indicted for possessing and conspiring to possess unregistered hand grenades, failed to persuade the Court that the prosecution had to show that the appellees were aware that the hand grenades were unregistered. Proof of the appellees' knowledge that they possessed hand grenades, together with proof that the hand grenades were in fact unregistered, was sufficient for a conviction.[49]

In New York, environmental criminal offenses defined in the ECL have been held to be public welfare offenses. In *People v. J. R. Cooperage Co.*,[50] the defendants were charged with unlawful

42. People v. Thomas, 71 Misc. 339, 340-42 (N.Y. Sup. Ct. 1911) (the court in *Thomas* relied upon the statement in § 21 of the Penal Law that its provisions only applied to the chapter comprising the Penal Law itself. This is the interpretation of PL § 15.15(1) argued for here)

43. N.Y. STATUTES § 341 (McKinney 1971).

44. *See* People v. Eisen, 77 Misc. 2d 1044, 1046, 353 N.Y.S.2d 886, 889 (Crim. Ct.), *aff'd on other grounds*, 79 Misc. 2d 829, 362 N.Y.S.2d 340 (Sup. Ct. 1974).

45. Morisette v. United States, 342 U.S. 246, 256 (1952).

46. Liparota v. United States, 471 U.S. 419, 433 (1985) (White, J. dissenting) (quoting United States v. Freed, 401 U.S. 601, 609, *reh'g denied*, 403 U.S. 912 (1971)).

47. *See* United States v. Int'l Minerals & Chemical Corp., 402 U.S. 558 (1971).

48. 401 U.S. 601 (1971).

49. *Id.* at 607.

50. 128 A.D.2d 7, 515 N.Y.S.2d 262 (App. Div. 1987), *modified*, 137 A.D.2d 572, 524 N.Y.S.2d 31, *aff'd*, 72 N.Y.2d 579, 531 N.E.2d 1285, 535 N.Y.S.2d 353 (1988).

dealing in hazardous wastes in the second degree.[51] On the People's appeal from the trial judge's dismissal of the guilty verdict of the jury, the appellate division considered what needed to be shown to prove that the defendant "attempt[ed] to cause" an unauthorized person to dispose of hazardous wastes.[52] Arguing for a broad interpretation of the statute at issue, the court reviewed the legislative history and noted the great potential threat to community health posed by the long-term toxicity of hazardous wastes.[53] The court added: "It is well settled that laws and regulations governing public health should be liberally construed."[54]

The issue at the trial was whether the defendants attempted to cause an unlicensed hauler to remove drums of hazardous waste by placing the drums in a dumpster to be routinely collected by the hauler. The defendants argued that since they had not yet placed their usual telephone call to the hauler requesting the removal of the dumpster when investigators entered the site, they had not done the act proscribed by the statutory language. The Court of Appeals held, in affirming the appellate division, that to construe the phrase "otherwise attempt[ing] to cause" as requiring an actual or attempted communication to the hauler would be a narrow and restrictive construction which "would irreparably undermine the purposes of the subject legislation and create an intolerable loophole in the system of environmental regulation created by the Legislature."[55] The Court continued:

> Moreover, even if a more narrow reading of "otherwise attempts to cause" might be appropriate when interpreting statutes aimed solely at criminal solicitation, it is not appropriate when the phrase is used in a public health statute such as ECL 71-2715(1) intended to criminalize a broader range of conduct.[56]

Given the public welfare status of New York's environmental criminal offenses, in applying a specified mental state to the ele-

51. *Id.* at 7, 515 N.Y.S.2d at 262. The applicable statute was N.Y. ENVTL. CONSERV. LAW ("ECL") § 71-2715(1) (McKinney Supp. 1991) which provides that:

No person shall:

1. With intent that another person possess or dispose of hazardous wastes without authorization, solicit, request, command, importune or otherwise attempt to cause such other person to engage in such conduct.

52. 128 A.D.2d at 8, 515 N.Y.S.2d at 263.

53. *Id.* at 11-12, 515 N.Y.S.2d at 265.

54. *Id.* at 12, 515 N.Y.S.2d at 265.

55. 72 N.Y.2d at 584, 531 N.E.2d at 1287, 535 N.Y.S.2d at 355.

56. *Id.* at 585, 531 N.E.2d at 1288, 535 N.Y.S.2d at 356.

ments included in the definition of such offenses the courts must seek to achieve what the Legislature intended to be achieved and not hold the prosecutor to proof requirements that are more properly applied to "typical" criminal cases. One author has written: "If the statute is a public welfare statute, the court has discretion to apply the culpability requirement to all or just some elements of the offense. In exercising this discretion, the court must be guided by what [the legislature] intended."[57] The application of this doctrine to relax the mental culpability requirements (rather than to aid proof of facts) of environmental crimes has so far taken place only at the federal level. The doctrine, and the emerging federal law on the issue, should also be applied to New York's environmental criminal statutes.

It is indeed appropriate that the New York courts be willing to apply federal decisional law to the interpretation of New York's environmental criminal statutes, rather than imposing stricter requirements based on provisions in the PL. The laws enacted in each state to provide for safe management of hazardous wastes and substances and to combat water and air pollution are part of a single, national scheme of pollution regulation.[58] The federal environmental statutes clearly provide for state involvement in this effort, and the states are allowed to provide stronger penalties for violations but not weaker ones.[59] Thus, state courts which impose stricter mental culpability requirements than federal courts are, arguably, acting against the spirit of the national scheme; in New York this would also be contrary to the stated purpose of the Legislature, which is to match national standards.[60]

C. *What Is an Element of a Crime?*

Even if the New York courts were to hold that PL section 15.15(1) does apply to environmental crimes, a great deal of doubt would remain as to what constitute the elements to which the prescribed culpable mental state in an offense applies. The Penal Law does not define the term "element." Furthermore, it

57. Webber, *supra* note 12, at 86.

58. *See, e.g.*, 33 U.S.C. §§ 1316(c), 1342(b) (1988) (regarding state enforcement of federal new source performance standards and state permit programs under the national pollutant discharge elimination system); 42 U.S.C. § 6926(b) (1988) (authorizing state hazardous waste programs).

59. *See, e.g.*, 42 U.S.C. § 692(6) (1988); ECL § 27-0900 (McKinney 1984).

60. *See* ECL § 27-0900.

refers to both "elements" and "material elements" without making any distinction between them.[61] The Model Penal Code states that to be convicted of a crime a person must have acted with the prescribed culpable mental state "with respect to each material element of the offense."[62] Likewise, the Penal Law states that "[i]f a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of 'mental culpability.' "[63]

Distinguishing between material elements and elements, and even between elements and non-elements, is not always easy. A commentator on the MPC has written that a "material element" means "an attribute of conduct that gives it its offensive quality."[64] According to a well-known treatise, the "elements" of a crime constitute "a specified act or omission, usually a concurring specified mental state, and often specified attendant circumstances and a specified harmful result caused by the conduct."[65] The Penal Law states in section 15.15(1) that the specified mental state is presumed to apply to every "element"[66] of the offense, but this is impossible if one of the elements is an attendant circumstance, or a result, that may be beyond the defendant's knowledge or control. Thus an attendant circumstance, or a result, is either an element to which a culpable mental state cannot apply, or it is simply not a true element.

The New York Court of Appeals has adopted the latter view, that such circumstances are not elements, as illustrated by the decision in *People v. Register*.[67] In that case, the defendant Register was charged with "depraved indifference" murder for firing shots in a crowded bar, killing one man and injuring two others.[68] PL section 125.25(2) states that a person is guilty of murder in the second degree[69] when "under circumstances evincing a depraved

61. *See* N.Y. PENAL LAW ("PL") § 15.15(1), (2) (McKinney 1987).

62. MODEL PENAL CODE ("MPC") § 2.02(1) (1985).

63. PL § 15.10. This section provides that if no culpable mental state is said to apply to a material element, even though one may be applied to another material element, the offense is one of strict liability. *Id.*

64. Weschsler, *supra* note 15, at 1437.

65. W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.8 (1986).

66. The drafters presumably meant "material elements," the term used in the MPC for the equivalent section. MPC § 2.02(1).

67. 60 N.Y.2d 270, 457 N.E.2d 704, 469 N.Y.S.2d 599 (1983).

68. 60 N.Y.2d at 272-73, 457 N.E.2d at 705, 469 N.Y.S.2d at 599-600.

69. There is no first degree murder statute in New York. Murder in the second degree includes intentional killings. *See* PL § 125.25.

indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."[70] Register argued that the trial court should have allowed evidence that he was drunk to negate proof that he was acting in "circumstances evincing a depraved indifference to human life."[71] He maintained that such circumstances amounted to an element of mental culpability upon which his intoxication would bear.[72]

In a 4-3 decision, the Court of Appeals held that the crime included one culpable mental state (recklessly) and one voluntary act (engaging in conduct which creates a grave risk of death to another person), but that the requirement that the conduct had to occur in "circumstances evincing a depraved indifference to human life," referred neither to the culpable mental state nor the voluntary act.[73] Rather, it was a "definition of the factual setting in which the risk-creating conduct must occur — objective circumstances which are not subject to being negatived by evidence of defendant's intoxication."[74]

Thus the issue of what is an element, especially a "material" element, is one on which there is confusion, and on which reasonable people may differ.[75] Partly as a result, it is one thing to prove the facts included in the definition of an offense, but a considerably more difficult thing to isolate all the elements and tie them to the actor's mental state.[76]

II. The Responsible Corporate Officer Doctrine

A further factor in understanding the mental culpability requirements for proving environmental crimes in New York is presented by the responsible corporate officer doctrine. Environmental prosecutors spend a great deal of their time investigating

70. PL § 125.25(2).

71. 60 N.Y.S.2d at 275, 457 N.E.2d at 706, 469 N.Y.S.2d at 601.

72. The defendant could not raise the question of his intoxication to negative the mental state of recklessness attaching to his actions in the bar because "[a] person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto." *See supra* note 4.

73. 60 N.Y.2d at 276, 457 N.E.2d at 706-07, 469 N.Y.S.2d at 601-02.

74. *Id.* at 276, 457 N.E.2d at 707, 469 N.Y.S.2d at 602.

75. *See, e.g.*, People v. Hager, 124 Misc. 2d. 123, 128-29, 476 N.Y.S.2d 442, 445-46 (Nassau County Ct. 1984).

76. *See, e.g.*, United States v. Freed, 401 U.S. 601, 613-14 (1971) (Brennan, J., concurring); Webber, *supra* note 12. *See generally* Robinson & Grall, *Element Analysis in Defining Criminal Liability: the Model Penal Code and Beyond*, 35 Stan. L. Rev. 681 (1983).

incidents that have taken place in a corporate setting.[77] It is almost inevitable that a prosecutor who decides to bring charges after such an investigation will seek to charge both the corporation and one or more individuals within it,[78] even when the individuals were not hands-on actors, and there is no evidence that they played traditional "aider and abettor" roles.[79] Some of the impetus for these prosecutions derives from the pressure on prosecutors to charge individuals in notorious cases of environmental pollution.[80] In response to this pressure, prosecutors — at the federal level, at least — have utilized the "responsible corporate

77. *See supra* note 12.

78. Corporate criminal liability in New York is set out in N.Y. PENAL LAW ("PL") § 20.20 (McKinney 1987):

> 2. A corporation is guilty of an offense when:
>
> (a) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
>
> (b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation; or
>
> (c) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation, and the offense is (i) a misdemeanor or a violation, (ii) one defined by a statute which clearly indicates a legislative intent to impose such criminal liability on a corporation or (iii) any offense set forth in title twenty-seven of article seventy-one of the environmental conservation law.

Title 27 of Article 71 defines crimes concerning hazardous wastes and substances. N.Y. ENVTL. CONSERV. LAW ("ECL") §§ 71.2702-71.2727 (McKinney 1984 and Supp. 1991).

79. New York's aiding and abetting statute is PL § 20.00 (McKinney 1987): "When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."

80. One example of the public "dynamic" involves the Eastman Kodak Co. In April 1990, Eastman Kodak Co. pleaded guilty in Rochester City Court to two rather technical environmental misdemeanors. The plea agreement was reached during an investigation of off-site pollution at Kodak Park brought to the government's attention by the company itself. The City Court Judge, Hon. Herman Weiss, made the following statement when he accepted the plea and the proposed disposition (a total fine of one million dollars):

> I question the reason of accepting a plea of guilty to a criminal offense from a corporation only. While technically a corporation can commit a crime, the acknowledgement of such guilt by the corporation also acknowledges unlawful conduct by individuals who are employed by the corporation, since a corporation can only act through real people. When a corporation pleads guilty in exchange for an agreement not to prosecute members of the corporation, then people who have participated in a criminal act go unpunished. It is this court's view that so-called white collar criminals ought to be punished at least as severely as any other criminal, and because such

officer" doctrine.[81] This doctrine, relying most often on two Supreme Court cases decided under the Food, Drug and Cosmetic Act, *United States v. Dotterweich*[82] and *United States v. Park*,[83] holds that a corporate officer who fails to exercise his responsibility to ensure legal compliance in the corporation's operations may be liable for crimes the corporation commits even though the officer has no personal involvement in these crimes.[84]

If the corporation under investigation is large, the prosecutor's first investigative hurdle is to ascertain how the decision(s) leading to the incident under investigation were made and who made them. This trail can lead to the very highest echelons of corporate management without providing a clear answer to this question. Along the trail there are often individuals — or whole divisions or departments — whose on-paper responsibility is to prevent the very matter under investigation from occurring. However, the prosecutor's dilemma is that there may only be traditionally admissible evidence against one individual in the company: the wage-earning employee who pressed the button or pulled the lever.[85]

In *Dotterweich* and *Park*, the Supreme Court stated that there was a class of penal statutes which dispensed with the conventional requirement for criminal conduct — awareness of wrongdoing —

> criminal conduct frequently results in much more serious consequences to society, perhaps they ought to be punished more severely.
>
> This court has just heard an admission of guilt to two criminal offenses. It is clear then that one or more officers or employees of the company engaged in unlawful conduct in connection with these two crimes. However, violations of the environmental conservation law by anyone, but particularly by agents and employees of large, dominating corporations, can have the gravest consequences for society, today and for generations to come. This court believes that to deter such conduct in the future, officers and employees should also be prosecuted.

Judge Herman J. Weiss, People v. Eastman Kodak Co., Rochester City Court, April 5, 1990 (for a newspaper account of this unpublished opinion, see the noon edition of the Rochester Democrat and Chronicle, Apr. 5, 1990, at 1, col. 4.) The author respectfully suggests that this is not a completely accurate statement of the law. *See* United States v. Bank of New England, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987), which holds that a corporation can have collective knowledge as it is the aggregate of the knowledge of all its employees.

81. *See, e.g.*, United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

82. 320 U.S. 277 (1943).

83. 421 U.S. 658 (1975).

84. *See Dotterweich*, 320 U.S. at 284-85; *Park*, 421 U.S. at 670-73.

85. For an excellent discussion, see Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 Alb. L. Rev. 61, 70-75 (1972).

and that "[i]n the interest of the larger good [such statute] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[86] This class of statutes included those concerned with public health, safety, and matters beyond the self-protection of individuals.

In *Park*, the defendant, who was the chief executive officer of the national retail chain Acme Markets, Inc., had been charged with the misdemeanor of allowing food in a warehouse to become adulterated by rodent infestations.[87] There was evidence that he had been informed of this infestation on a prior occasion by government inspectors.[88] The Supreme Court held that the government establishes a prima facie case "when it introduces evidence sufficient to warrant a finding . . . that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."[89]

The offenses charged in *Dotterweich* and *Park* were strict liability offenses. One federal decision has, apparently, expanded this doctrine to environmental crimes and applied it to proof of a culpable mental state. In *United States v. Johnson & Towers*,[90] the Third Circuit restored charges against two managers of a corporation's waste disposal operations of knowingly disposing of hazardous waste without a permit, holding that the government would have to prove they knew the waste disposer was required to have, but did not have, a permit to accept hazardous wastes.[91] The Court had no factual record before it, although the indictment alleged aider-and-abettor conduct on the part of both individuals. It is not clear whether the Court would have supported a conviction (the case was remanded for trial) absent any evidence of the defendants' involvement in the disposal of wastes. The Court did, however, state that based on the position of the defendants in the company, the jury could be instructed that it could *infer* the defendants' knowledge of the lack of any permit for the disposal of

86. *Park*, 421 U.S. at 668 (quoting *Dotterweich*, 320 U.S. at 281).

87. *Id.* at 660.

88. *Id.* at 661-63.

89. *Id.* at 673-74. For critical comment on the doctrine spawned by *Dotterweich* and *Park*, see Zarky, *The Responsible Corporate Officer Doctrine*, 5 Toxics L. Rev. 983, 986 (BNA) (Jan. 9, 1991).

90. 741 F.2d 662 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

91. *Id.* at 669. *But cf.* United States v. Hoflin, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

hazardous wastes.[92] The Court said that "[s]uch knowledge . . . . may be inferred by the jury as to those individuals who had the requisite responsible positions with the corporate defendant."[93] Thus the Court relied upon the responsible corporate officer doctrine for proof of the culpable mental state element of the offense. However, it is not clear whether it would have relied on the doctrine to support guilt had the evidence shown that the defendants played no part in the prohibited acts, either as principals or as aiders and abettors.[94]

A. *The Doctrine in New York*

No New York court has considered whether the responsible corporate officer doctrine applies to an environmental offense. There are, indeed, very few cases where anything resembling the doctrine has been considered at all.

Two cases concerning food sales have led to convictions of absentee operators of retail businesses for strict liability misdemeanors. In *People v. Lewis*,[95] the defendant was accused of exposing for sale, offering for sale, and selling an adulterated and misbranded article of food (lard) in violation of Agriculture Law

92. *See* United States v. Johnson & Towers, 741 F.2d 662, 670. For comment on this holding, see United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991).

93. *Johnson & Towers*, 741 F.2d at 670. In its criminal penalty section, the Clean Water Act adds "responsible corporate officer" to the definition of "person[s]" who can commit the stated crimes. *See* 33 U.S.C.A. § 1319(c)(6) (West Supp. 1991). The Clean Air Act does likewise. *See* 42 U.S.C.A. § 7413(c)(6) (West Supp. 1991). For different views on the effect of these provisions, compare Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10,065, 10,073 (Mar. 1985) ("Congress undoubtedly intended that criminal penalties be sought against those corporate officers under whose responsibility a violation has taken place and not just employees directly involved in the operation of the violating source.") and McMurry & Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A.L. REV. 1133, 1151-54 (1986) with Zarky, *supra* note 89, at 987-90. *See also* United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991); *cf. MacDonald & Watson*, 933 F.2d 35.

94. Development of the facts would be crucial. If the disposal of wastes had been a single, unusual event, possibly carried out by workers while the defendants were absent, the inference of knowledge on their part of the lack of a permit to dispose of wastes would have been meaningless if they had no reason to know disposal was going on. On the other hand, if disposal of wastes was a routine operation, defendants would be hard pressed to deny their knowledge of such operations. They would then be bound by the inferred knowledge of the permit status and their "acquiescence" of an illegal operation. The indictment alleged that a full tank of wastes from degreasing operations was pumped into a trench over a three day period. *See Johnson & Towers*, 741 F.2d at 663-64.

95. 138 A.D. 673, 122 N.Y.S. 1025 (App. Div. 1910).

sections 164 and 165.[96] His defense was that a clerk in the store had sold the item in his absence.[97] The appellate division held that even if the evidence did not show that the defendant had acted by suffering or permitting the violation by his agent, he had acted by having the adulterated article in the store for the purposes of selling it, and had thus offered or exposed it for sale contrary to the statute.[98]

In *People v. Enders*,[99] the owner/operator of a supermarket was charged, along with his butcher, of selling adulterated and misbranded food (hamburger meat)[100] contrary to Agriculture and Markets Law sections 199-a.[101] His defense was that he was away from the store when his butcher adulterated the meat.[102] The court held, citing *Lewis*, that he was charged with the sufferance of his agent's illegal acts and that he had a duty to inquire into the conditions prevailing in his business.[103] It noted, however, that "[the owner] Schneider was fully aware of what [the butcher] Enders was doing," thus weakening the value of the decision as a precedent for use of the responsible corporate officer doctrine.[104]

In another old case, *People v. Weeks*,[105] the defendant Weeks was found guilty of maintaining a nuisance, a strict liability crime involving business operations.[106] Weeks was a salaried superintendent of a milk and cream business who responded to neighbors' complaints about the noise and bad language of the drivers used by the business by promising to abate these annoyances.[107] Nevertheless, they continued, and Weeks was convicted of maintaining a nuisance under Penal Law section 1532.[108] The conviction was upheld on the grounds that the defendant had control over the business premises; he was employed to "keep things

96. *Id.* at 674, 122 N.Y.S. at 1026.

97. *Id.*

98. *Id.* at 675, 122 N.Y.S. at 1026.

99. 38 Misc. 2d 746, 237 N.Y.S.2d 879 (Crim. Ct. 1963).

100. For a short, entertaining account of the origin of the hamburger, see *id.* at 746-48, 758, 237 N.Y.S.2d at 882-84, 892-93.

101. *Id.* at 750, 237 N.Y.S.2d at 885.

102. *Id.* at 756, 237 N.Y.S.2d at 891.

103. *Id.*

104. *Id.*

105. 172 A.D. 117, 158 N.Y.S. 39 (App. Div. 1916).

106. *Id.*, 158 N.Y.S. at 40.

107. *Id.* at 118-19, 158 N.Y.S. at 40.

108. *Id.* at 119-20, 158 N.Y.S. at 41. N.Y. PENAL LAW ("PL") § 1532 (1909) (repealed) provided: "A person who commits or maintains a public nuisance, the punishment for which is not specially prescribed, is guilty of a misdemeanor."

right," he could hire and fire, and the nuisance had a degree of permanence.[109]

In contrast, in *People v. Brainard*,[110] an appellate court held that the president of a publishing firm who was unaware that his firm had prepared an allegedly obscene book for publication could not be guilty of possession of an obscene book with intent to sell in violation of Penal Law section 1141.[111] The court said the contention [of criminal liability for a subordinate's acts]:

> cannot be sustained unless we are prepared to hold that the manager of a corporation is criminally liable for every criminal act committed by any subordinate officer of the corporation in connection with his duties in behalf of the corporation. I do not understand that any authority has asserted any such broad proposition; and such a proposition of law should only be held upon a statute clearly expressing such intent.[112]

Along the same lines, in *People v. Miller*,[113] the owner of a dog grooming business was acquitted of mistreating a dog under Penal Law section 185[114] because the statute was one requiring the mental state of intent, and the defendant, although the supervisor of the business, took no part in and was unaware of, an employee's actions which led to injuries being caused to a dog.[115]

Finally, in the recent case of *People v. Byrne*,[116] the Court of Appeals refused to impose criminal liability on the absentee owner

109. *Id.*, 158 N.Y.S. at 40-41. *See also* People *ex rel.* Price v. Sheffield Farms. Co., 225 N.Y. 25 (1918), where a conviction of a corporation which owned a milk delivery business for breaking Labor Law § 162 by employing a child under 14 years (for six months) was upheld on the basis that the violation was suffered by the owner who had a duty to inquire into the conditions prevailing in its business. Not to do so was a failure to perform a non-delegable duty; it was not a case of *respondeat superior*. In concurring opinions, however, two justices discussed whether an individual owner or director could have been punished by imprisonment under the same circumstances. One suspended judgment. *Id.* at 34 (Pound, J. concurring). The other opined that an individual could be liable (on a *respondeat superior* theory) for the acts of his agents in which he participated or of which he had knowledge. Such an individual could also be liable for subordinates' acts of which he had no knowledge, and even if carried out against his direct prohibition, if the offense was minor and punishment did not include imprisonment. *Id.* at 34-37 (Crane, J. concurring). These comments were, of course, dicta.

110. 192 A.D. 816, 183 N.Y.S. 452 (App. Div. 1920).

111. *Id.*

112. *Id.* at 818, 183 N.Y.S. at 453.

113. 31 Misc. 2d 1067, 221 N.Y.S.2d 430 (N.Y. Sup. Ct. 1961).

114. PL § 185 (1909) (repealed).

115. 31 Misc. at 1067-69, 221 N.Y.S.2d at 430-33.

116. 77 N.Y.2d 460, 570 N.E.2d 1066, 568 N.Y.S.2d 717 (1991), *rev'g* 128 Misc. 2d 448, 494 N.Y.S.2d 257 (Sup. Ct. 1985).

of a tavern for selling alcohol to a minor in violation of the Alcoholic Beverage Control Act section 65(1), a strict liability offense.[117] This decision followed a tortuous passage of the case through the courts. The complaint against James Byrne was held legally insufficient by the trial court due to the absence of factual allegations that he was present in the tavern at the time of the sale, or that he had notice of it.[118] The appellate term reinstated the complaint,[119] relying on various precedents.[120] The court stated that "[t]he defendant, if adjudged a responsible officer of the corporate licensee, may be held criminally liable notwithstanding his lack of knowledge of, or participation in, the criminal act."[121] Byrne's application to the Court of Appeals for leave to appeal was dismissed.[122]

Byrne was then tried and convicted by a jury and sentenced to a fine.[123] The jury was instructed that it could find the defendant guilty of violating the statute if it determined that the sales had been made, and that the defendant was a responsible officer of the corporate licensee.[124] On appeal his conviction was affirmed.[125] He then obtained leave to appeal to the Court of Appeals which unanimously reversed and dismissed the conviction.[126]

The Court of Appeals stated that on the facts, Byrne could only be convicted if the statute authorized imposition of vicarious liability based solely upon his status as a shareholder and "responsible" officer of the corporate owner.[127] The Court then held that neither the section violated nor the section of the statute criminal-

117. *Id.*

118. 128 Misc. 2d at 448-49, 494 N.Y.S.2d at 257-58.

119. *Id.* at 448, 494 N.Y.S.2d 257.

120. *Id.* at 449, 494 N.Y.S.2d at 258. The precedents were People v. Danchak, 24 A.D. 685, 261 N.Y.S.2d 722 (N.Y. App. Div. 1985) and People v. Leonard, 8 N.Y.2d 60, 201 N.Y.S.2d 509 (1960). It also relied on Hershorn v. People, 108 Col. 43, 113 P.2d 68 (1941) in which the *respondeat superior* doctrine was applied to the operator-manager of a nightclub. *See also* People v. Hawk, 156 Misc. 870, 283 N.Y.S. 531 (Broome County Ct.), *aff'd* 268 N.Y.2d 178, 198 N.E. 555 (1935).

121. 128 Misc. 2d at 449, 494 N.Y.S.2d at 258.

122. 65 N.Y.2d 977, 484 N.E.2d 675 (1985).

123. 77 N.Y.2d 460, 464, 570 N.E.2d 1066, 1067, 568 N.Y.S.2d 717, 718 (1991).

124. *Id.*

125. *Id.*

126. *Id.* at 468, 570 N.E.2d at 1069, 568 N.Y.S.2d at 720.

127. *Id.* at 464, 570 N.E.2d at 1067, 568 N.Y.S.2d at 718.

izing the violation[128] contained any express language extending the statutory duty beyond the "actor who actually engages in the prohibited conduct."[129]

The Court drew a distinction between imputing vicarious liability to a corporation (which has "acted" through the actor) and imputing it to another individual who has had nothing to do with the prohibited act.[130] Nor did it matter that the crime was one of strict liability because even strictly liable conduct involves a prohibited act.[131] Vicarious liability, on the other hand, "eliminates the need to prove that the accused personally committed the forbidden act."[132] The two concepts are distinct and the court stated that a legislative intent to impose criminal liability without any participation in the forbidden act could not be assumed.[133] Finally, the *Byrne* court expressed its extreme reluctance to impose vicarious liability in criminal cases (especially one carrying a possible prison sentence) without express authority to do so in the statute being enforced.[134]

Other indicators in the Court of Appeal's decision in *Byrne* throw doubt on whether it would uphold the responsible corporate officer doctrine as applied in *Dotterweich*[135] and *Park*[136] in a

128. Two statutory provisions were at issue. First, N.Y. ALCO. BEV. CONT. LAW § 65(1) (McKinney 1987) provides that "[n]o person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages" to a minor. Second, ALCO. BEV. CONT. LAW § 130(3) provides: "Any violation by any person of any provision of this chapter for which no punishment or penalty is otherwise provided shall be a misdemeanor . . . ." Such misdemeanor is punishable by up to one year in jail and/or a fine of up to $1000. PL §§ 55.10(2), 70.15(1) (McKinney 1987).

129. 77 N.Y.2d at 465, 570 N.E.2d at 1068, 568 N.Y.S.2d at 719.

130. *Id.* at 465-66, 570 N.E.2d at 1068, 568 N.Y.S.2d at 719.

131. *Id.* at 466, 568, 570 N.E.2d at 1068, N.Y.S.2d at 719.

132. *Id.*

133. *Id.*

134. *Id.* at 466-67, 570 N.E.2d at 1068-69, 568 N.Y.S.2d at 719-20. New York's environmental criminal statutes do not impose vicarious liability. People v. Trapp, 20 N.Y.2d 613, 233 N.E.2d 110, 286 N.Y.S.2d 11 (1967), was concerned, however, with such a statute. The defendant was a corporate officer convicted, with the corporation, of a violation of then-Penal Law § 962-a, as a result of failing to pay welfare benefits and pension fund installments. The statute provided that where "such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor." The *Trapp* court did hold, however, that an officer could not be convicted unless he "stood in such relation to the corporate affairs that it may be presumed that he knew or should have known of and taken some steps to prevent the nonpayment." *Id.* at 618, 233 N.E.2d at 113, 286 N.Y.S.2d at 15. This is akin to the *Johnson & Towers* application of the responsible corporate officer doctrine. *See supra* text accompanying note 92.

135. United States v. Dotterweich, 320 U.S. 277 (1943).

case with a jail penalty. In a footnote, the Court stated that the view of "some courts and commentators" that "the rule of individual accountability should give way in the area of so-called 'regulatory' offenses, where the punishments are usually limited to small fines and the social interest in the injury is 'direct and evident,' "[137] is less persuasive in cases like the one before it in which the punishment for the offense was a maximum of a year in jail. The Court also pointed out that the Penal Law requires that a person commit a voluntary act before criminal liability can attach, even if the act was nothing more than aiding and abetting.[138] It appears, therefore, that in New York, unless a statute expressly provides for the imposition of vicarious liability, the responsible corporate officer doctrine will not substitute for proof of a voluntary act when the offense charged is a crime with any significant penalty.

The *Byrne* court was clearly of the opinion that the defendant's responsibilities to ensure compliance with Alcoholic Beverage Control Law section 65(1) stopped when he left the tavern. In contrast, Dotterweich and Park were held responsible for an ongoing business state of affairs of which they had, or should have had, knowledge, and which they had the power to stop. As applied in these cases, the responsible corporate officer doctrine is not the equivalent of vicarious liability; the doctrine is based on some act, acquiescence, failure to act when action is required, or a failure to fulfill an imposed responsibility. Vicarious liability is based on relationship alone.[139]

The *Byrne* decision may have thrown some doubt on earlier decisions imposing criminal liability on persons with responsibilities to ensure business operations are carried out lawfully but who otherwise have not played any active part in the commission of an offense. It is, however, more than possible that it is a decision on its own facts (the offense was an isolated incident, not an ongoing state of affairs), carefully and narrowly worded so that it does not

136. United States v. Park, 421 U.S. 658 (1975).

137. 77 N.Y.2d at 466-67 n.4, 570 N.E.2d at 1069 n.4, 568 N.Y.S.2d at 720 n.4.

138. *Id.* at 467, 570 N.E.2d at 1069, 568 N.Y.S.2d at 720. An act can, of course, be the failure to perform an act as to which a duty of performance is imposed by law. PL § 15.00(3) (McKinney 1987). This is a stricter requirement than that imposed by the Supreme Court in *Park*.

139. Confusion will reign unless these distinctions are appreciated. *See, e.g.*, Harris, Cavanaugh & Zisk, *supra* note 12, at 236. *See also* W. LAFAVE & A. SCOTT, *supra* note 65, § 3.9 at 352.

upset principles of liability decided in earlier cases. It is clear that an individual who partakes in any way in the prescribed activity, or who sanctions prescribed acts, will not escape liability under *Byrne*. Nor will an individual who attempts to hide his own actions behind a corporate name.[140] On the other hand, a "responsible" officer of a corporation will not be deemed guilty of an offense when he had no part in or knowledge of the prescribed conduct, at least if this case involving a single sale of liquor can be generalized to other settings.

Conclusion

Although environmental crimes in New York usually require proof of a specified culpable mental state unless the contrary is clearly stated, strict mental culpability requirements set out in New York's Penal Law do not apply to these offenses. This "relaxation" of a strict standard allows New York courts to apply emergent federal case law to the proof requirements of New York's environmental crimes. There are two reasons why New York's courts should do this. First, these environmental crimes statutes are public health and welfare statutes which should be interpreted so as to give effect to the Legislature's intent; second, relaxing the mental culpability standards comports with the national schemes to provide for safe management of hazardous wastes and substances, for clean air and water, and for imposing stiff penalties for environmental violations.

One feature of this "relaxed" approach, the corporate officer doctrine, is still a nascent development as applied to environmental crimes, whose validity is unclear as yet in New York. Should the doctrine be accepted, it would enable the courts, when applied in appropriate circumstances, to fulfill the Legislature's intent regarding environmental crimes while having regard for the traditional and just concept that the blameless should not suffer criminal convictions.

140. *See* People v. Sakow, 45 N.Y.2d 131, 379 N.E. 2d 1157, 408 N.Y.S.2d 27 (1978).