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NOTES

IN SEARCH OF EFFECTIVE HAZARDOUS WASTE LEGISLATION: CORPORATE OFFICER CRIMINAL LIABILITY

I. INTRODUCTION

Until recently, protection of the environment was only a slight concern of the American people.¹ The public thought that natural resources were almost limitless in supply, and waste generated from the exploitation of these resources was randomly discarded. The public considered any adverse effects of discarded waste as secondary to the interests of the producer of the waste.² In the 1960s and 1970s, however, public awareness of the natural environment's frailty strengthened.³ In response to this public aware-

1. Public awareness of environmental concerns began to rapidly elevate in the 1960s. Ways, *The Environment, A National Mission for the Seventies*, in ENVIRONMENTAL PROTECTION 1 (1971). However, there have been some noteworthy exceptions, such as John Muir and Teddy Roosevelt, two influential individuals who championed the cause of environmental preservation when few others had such concerns. E. MURPHY, *MAN AND HIS ENVIRONMENT: LAW* 35, 119 (1971).

2. G. COGGINS & C. WILKINSON, *supra* note 1, at 129-31.

3. Ways, *supra* note 1, at 1. In addition, in the 1970s a new brand of criminal activity known as illegal hazardous waste disposal emerged in the United States, especially in the Northeast. D. REBOVICH, *UNDERSTANDING HAZARDOUS WASTE CRIME: A MULTISTATE EXAMINATION OF OFFENSE AND OFFENDER CHARACTERISTICS IN THE NORTHEAST* 5 (1986). *But see* 33 U.S.C. § 407 (1982 & Supp. III 1985) (originally enacted as the Rivers and Harbors Act of 1899, ch. 425, § 13, 30 Stat. 1152). This act prohibited the discharge or deposit of any refuse into navigable waters, except for that refuse which flowed from streets and sewers, as early as 1899.

Due to the increased amount of pollutants in the environment, litigation over environmental injuries has likewise increased. Indeed, some authorities believe that within ten years casualties from exposure to harmful pollutants will keep lawyers busier than products liability cases. Quade, *Pollution Boom*, 69 A.B.A. J. 149 (1983). Furthermore, the United States Department of Justice and the Environmental Protection Agency term the illegal disposal of hazardous waste the "most serious environmental problem of the day." *EPA, Justice Exploring Methods to Reach Illegal Waste Disposers*, 10 Env't Rep. (BNA) 1275 (1979), which quotes United States Department of Justice attorney Barry Trilling at a meeting of the Federal Bar Association on September 28, 1979.

The strong public awareness of environmental concerns in the 1960s and 1970s has not

ness, Congress⁴ and all of the states⁵ have passed legislation that regulates

weakened in the 1980s. A March 1985 Harris poll found that environmental clean-up is more important to Americans than economic growth, by a 63% to 33% margin. Address by Louis Harris, Chairman, Louis Harris & Associates, Inc., Wildlife Management Institute (Mar. 18, 1985).

4. Significant federal environmental legislation includes: the Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1152 (1982 & Supp. III 1985) (now a part of RCRA, *infra*); National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370a (1982 & Supp. III 1985) (this act, which announced a national policy of productive and responsible use of the environment, began the recent proliferation of environmental legislation); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1982 & Supp. III 1985) (provides regulation of hazardous waste aimed primarily at providing funds through license fees to clean-up hazardous waste sites); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1982 & Supp. III 1985) (provides financial and technical resources to dispose solid and hazardous waste in a manner which will result in the least harm to the environment); Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6911 (1976) (replaced by RCRA in 1976); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982 & Supp. III 1985) (provides for increased control of toxic substances); Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. §§ 1251-1376 (West 1986 & Supp. 1987) (provides for increased regulation of water contaminants); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1982 & Supp. III 1985) (aimed at controlling pollution caused by pesticides used in agriculture); Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1802 (1982 & Supp. II 1984) (increases the standards regulating the transportation of hazardous materials); Clean Air Act, 42 U.S.C. §§ 7401-7626 (1982 & Supp. III 1985) (provides air pollution control standards); Ocean Dumping Act, 33 U.S.C. §§ 1401-1445 (1982) (aimed at promoting marine technology research).

5. Every state regulates hazardous waste by statute. ALA. CODE §§ 22-30-1 to -30-24 (1984 & Supp. 1987); ALASKA STAT. §§ 18.60.010-.105 (1987); ARIZ. REV. STAT. ANN. §§ 49-901 to -905, 49-921 to -928, 49-941 to -944 (Supp. 1986); ARK. CODE OF 1987 ANN. §§ 8-7-101 to -518 (1987); CAL. HEALTH & SAFETY CODE §§ 25100-25249, 25280-25299, 25300-25395, 25500-25570, 25600-25611 (West 1984 & Supp. 1988); CAL. WATER CODE §§ 13271, 14080 (West 1984 & Supp. 1988); COLO. REV. STAT. §§ 25-15-101 to -313, 25-16-101 to -201 (1982 & Supp. 1986); CONN. GEN. STAT. ANN. §§ 22a-114 to -1340 (West 1985 & Supp. 1987); DEL. CODE ANN. tit. 7, §§ 6301-6319 (1983 & Supp. 1986); FLA. STAT. ANN. §§ 403.721-.771 (West 1986 & Supp. 1987); GA. CODE ANN. §§ 12-8-60 to -113, 50-9-80 to -84 (1982 & Supp. 1987); HAW. REV. STAT. §§ 340A-1 to -3 (1985); IDAHO CODE §§ 39-4400 to -4432 (1985 & Supp. 1987); ILL. ANN. STAT. ch. 111½, paras. 1001-1051 (Smith-Hurd 1984 & Supp. 1987); IND. CODE ANN. §§ 13-7-8.5-1 to -10, 13-7-8.6-1 to -15, 13-7-8.7-1 to -6, 13-7-13-1 to -4, 13-7-10-1 to -5 (West 1982 & Supp. 1987); IOWA CODE ANN. §§ 455B.411-.490 (West Supp. 1987); KAN. STAT. ANN. §§ 65-3430 to -3490 (1985 & Supp. 1986); KY. REV. STAT. ANN. §§ 224.855-.877 (Baldwin 1987); LA. REV. STAT. ANN. §§ 30:1131-.1150, 32:1501-.1520 (West Supp. 1987); ME. REV. STAT. ANN. tit. 38, §§ 1317-1371, 1401-1404 (1978 & Supp. 1987); MD. ENVTL. CODE ANN. §§ 7-201 to -268 (1987); MASS. GEN. LAWS ANN. ch. 21C, §§ 1-30, ch. 21D, §§ 1-19, ch. 21E, §§ 1-15, ch. 94B, §§ 1-10 (West 1981 & Supp. 1987); MICH. COMP. LAWS ANN. §§ 299.501-.551, 299.601-.611, 299.701-.706 (West 1984 & Supp. 1987); MINN. STAT. ANN. §§ 115A.01-.921, 115B.01-.37, 116.101, 116.11-.12 (West 1987 & Supp. 1988); MISS. CODE ANN. §§ 17-17-1 to -135 (Supp. 1987); MO. ANN. STAT. §§ 260.350-.609 (Vernon Supp. 1988); MONT. CODE ANN. §§ 75-10-401 to -421 (1987); NEB. REV. STAT. §§ 81-1521.01 to .07 (1981); NEV. REV. STAT. ANN. §§ 459.400-.770 (Michie 1986 & Supp. 1987); N.H. REV. STAT. ANN. §§ 147-A:1 to :20, 147-B:1 to :11, 147-C:1 to :7, 147-D:1 to :6 (Supp. 1987); N.J. STAT. ANN. §§ 13:1E-1 to -176, 2C:17-2, 2C:43-3 to -4 (West 1982 & Supp. 1987); N.M. STAT. ANN. §§ 74-4-1 to -13 (1987); N.Y.

disposal of various wastes, including hazardous waste,⁶ and provides civil penalties,⁷ injunctions,⁸ administrative remedies,⁹ and criminal sanctions¹⁰

ENVTL. CONSERV. LAW §§ 27-0101 to -1321, 37-0101 to -0109, 71-2701 to -2727, 71-3703, 72-0401 (McKinney 1984 & Supp. 1988); N.C. GEN. STAT. §§ 130A-290 to -310 (1987); N.D. CENT. CODE §§ 23-20.3-01 to -10, 32-03-41 (Supp. 1987); OHIO REV. CODE ANN. §§ 3734.01 to .99 (Baldwin 1987); OKLA. STAT. ANN. tit. 47, §§ 230.1-.16, tit. 63, §§ 1-2011 to -2021 (West 1984 & Supp. 1988); OR. REV. STAT. §§ 466.005-.995 (1987); PA. STAT. ANN. tit. 35, §§ 6018.101-.1003 (Purdon Supp. 1987); R.I. GEN. LAWS §§ 23-19.1-1 to -36 (1985 & Supp. 1987); S.C. CODE ANN. §§ 44-56-10 to -510 (Law. Co-op. 1985 & Supp. 1987); S.D. CODIFIED LAWS ANN. §§ 34A-11-1 to -23 (1986 & Supp. 1987); TENN. CODE ANN. §§ 68-46-101 to -221 (1987); TEX. REV. CIV. STAT. ANN. art. 4477-7 to -7f (Vernon 1976 & Supp. 1988); UTAH CODE ANN. §§ 26-14-1 to -25, 26-14a-1 to -9, 26-14b-1 to -21 (1984 & Supp. 1987); VT. STAT. ANN. tit. 10, §§ 6601-6618 (1984 & Supp. 1987); V.I. CODE ANN. tit. 19, §§ 1551-1564 (Supp. 1986); VA. CODE ANN. §§ 10-270 to -312 (Supp. 1987); WASH. REV. CODE ANN. §§ 70.105.005-900, 70.105A.010-.905 (Supp. 1987); W. VA. CODE §§ 20-5E-1 to -23 (1985 & Supp. 1986); WIS. STAT. ANN. §§ 144.60-.797 (West Supp. 1987); WYO. STAT. §§ 35-11-101 to 35-12-902 (1987).

6. CERCLA defines a hazardous substance as:

(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901-6987 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

CERCLA, 42 U.S.C. § 9601(14) (1982).

The Congressional Office of Technology Assessment conservatively states that currently one billion tons of hazardous waste are produced each year. U.S. Congress, Office of Technology Assessment, *From Pollution to Prevention: A Progress Report on Waste Reduction — Special Report OTA-ITE-347* 19 (1987). U.S. GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE MANAGEMENT PROGRAMS WILL NOT BE EFFECTIVE: GREATER EFFORTS ARE NEEDED 1 (1979). United States Environmental Protection Agency officials believe that 90% of hazardous waste is disposed of in an environmentally unsound manner. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EVERYBODY'S PROBLEM: HAZARDOUS WASTE 15 (1980).

7. See, e.g., CERCLA, 42 U.S.C. § 9609 (1982); RCRA, 42 U.S.C. § 6928(g) (1982). CERCLA § 9609 provides a penalty up to \$25,000 for various violations, such as failure of a person in charge of a vessel to notify the National Response Center established under the Clean Water Act when a hazardous substance has been released in violation of § 9602; RCRA § 6928(g) provides a penalty up to \$25,000 for each violation of any of the provisions of the hazardous waste management subchapter. See also *infra* notes 43-50 and accompanying text.

8. See, e.g., CERCLA, 42 U.S.C. § 9606 (1982); RCRA, 42 U.S.C. § 6928(a) (1982); Toxic Substances Control Act, 15 U.S.C. § 2618(e) (1982).

9. See, e.g., RCRA, 42 U.S.C. § 6934 (1982); Toxic Substances Control Act, 15 U.S.C. § 2618(e) (1982).

when the regulations are violated. Protection of the environment is the general purpose of this legislation.¹¹

10. See, e.g., CERCLA, 42 U.S.C. § 9603(b) (1982). This section provides for a fine up to \$250,000 for a felony or a misdemeanor resulting in the loss of human life; up to \$25,000 for a misdemeanor; and up to \$1,000 for an infraction. *Id.* See also RCRA, 42 U.S.C. § 6928(d) (1982). Under § 6928(d), a person who knowingly makes a false statement on any required report or permit is subject to a fine up to \$25,000 and imprisonment for up to one year.

11. The main purpose of environmental regulation is to conserve the environment. Specifically, New York states that the purpose of its Environmental Conservation Law is "to conserve, improve and protect its [the state's] natural resources and environment and control water, land and air pollutions in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being." N.Y. ENVTL. CONSERV. LAW § 1-0101 (McKinney 1984 & Supp. 1988). Examples of other purposes include FWPCA, 33 U.S.C.A. §§ 1251-1376 (1982 & Supp. 1987), which is aimed at federal, state, and local cooperation to conserve water and related land resources, and NEPA, 42 U.S.C. §§ 4321-4370a (1982 & Supp. III 1985), which is aimed at productive yet responsible use of the environment.

The purpose of Illinois' Environmental Protection Act is "to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." ILL. ANN. STAT. ch. 111½, para. 1002(b) (Smith-Hurd 1984 & Supp. 1987). Maryland states the purpose of its environmental legislation to be "for the protection of the public health and safety." MD. ENVTL. CODE ANN. § 7-102(a) (1987).

Examples of statutory purposes behind hazardous waste regulation include New Jersey's: [D]isposal and utilization of solid waste [including hazardous waste] is a matter of grave concern to all citizens and is an activity thoroughly affected with the public interest; that the health, safety and welfare of the people of this State require efficient and reasonable solid waste collection and disposal service or efficient utilization of such waste. N.J. STAT. ANN. § 13:1E-2a (West 1982 & Supp. 1987). In addition, Pennsylvania states that: "improper and inadequate solid waste practices create public health hazards, environmental pollution and economic loss, it is the purpose of this act to . . . accomplish . . . an effective solid waste management program." PA. STAT. ANN. tit. 35, § 6018.102 (Purdon Supp. 1987).

In addition, State of New York Executive Chamber Memorandum Filed with Senate Bill Number 4345-B (July 26, 1986) [hereinafter Memorandum in Support of Legislation] (this Memorandum is unpublished and on file with New York Senator Hugh T. Farley), and State of New York Department of Law Memorandum for the Governor (July 9, 1986) (submitted by Robert Abrams, Attorney General of the State of New York, this Memorandum is unpublished and on file with New York Senator Hugh T. Farley) state that criminal sanctions for those who unlawfully dump hazardous waste are seldomly utilized, and that it is the legislative intent to deter future violations by easing the availability of criminal sanctions. See also *supra* note 6.

Thus, while the purpose of environmental regulation is to conserve the environment, criminal punishment of violators is provided to further that purpose. The primary goal of enforcing criminal penalties of environmental regulations is deterrence. M. CLINARD, *ILLEGAL CORPORATE BEHAVIOR* 206, 209 (1979). See also Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALB. L. REV. 61, 63 (1972) (explores the criminal responsibility of corporate officials and the difficulties in prosecuting officers who violate environmental regulations); D. REBOVICH, *supra* note 3, at 17; UNIF. LAW COMMISSIONERS' MODEL SENTENCING AND CORRECTIONS ACT § 3, 10 U.L.A. 47 (1985); Memorandum in Support of Legislation, *supra*; Memorandum for the Governor, *supra* at 3; W. LAFAVE & A.

Many of the environmental statutes provide both civil and criminal penalties;¹² however, courts impose civil penalties more frequently than criminal penalties when both are available.¹³ Unfortunately, the civil penalties have not effectively reduced violations of environmental statutes.¹⁴

SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 1.5, at 36 (1986); F. CULLEN, W. MAAKESTAD & G. CAVENDER, *CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND* (1987) (this book analyzes the movement against white collar crime and the evolution of corporate criminal liability).

12. See CERCLA, 42 U.S.C. § 9609 (1982); RCRA, 42 U.S.C. §§ 6906, 6928 (1982). See also Toxic Substances Control Act, 15 U.S.C. §§ 2613(d), 2615 (1982); FWPCA, 33 U.S.C.A. § 1319 (1986 & Supp. 1987); Clean Air Act, 42 U.S.C. §§ 7413, 7618(e) (1982); Hazardous Materials Transportation Act, 49 U.S.C. § 1809 (1982). See also, e.g., N.Y. ENVTL. CONSERV. LAW §§ 1-0101 to 72-0602 (McKinney 1984 & Supp. 1988) amended by 1986 N.Y. Laws ch. 671 §§ 13-21 [hereinafter ch. 671]; ILL. ANN. STAT. ch. 111½, para. 1002 (Smith-Hurd 1984 & Supp. 1987); MD. ENVTL. CODE ANN. § 7-203 (1987); N.J. STAT. ANN. § 13:1E-50 (West Supp. 1987); PA. STAT. ANN. tit. 35, § 6018.102 (Purdon Supp. 1987).

This note does not address the issue of whether a fine or incarceration is the most effective criminal sanction, if indeed either is more optimal. This note advocates the use of criminal sanctions, fines, and/or imprisonment, rather than the use of civil penalties. For arguments covering the fine/incarceration debate, see Kutcher, *The White-Collar Criminal: Probation Conditions of Community Service and Charitable Contributions*, 45 FED. PROB. 61 (Sep. 1981) (argues for creative probation conditions to ensure effective punishment of white-collar criminals). Kutcher states that: "[f]ines are rarely large enough to deter similar criminal offenses. The individual or the corporation may view a criminal fine as only 'a price of doing business.' Fines are particularly inadequate punishment for corporate criminals." *Id.* See also Posner, *Optimal Sentences for White Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980) (arguing that fines are a better deterrent than incarceration); Braithwaite, *The Limits of Economism in Controlling Harmful Corporate Conduct*, 16 LAW & SOC'Y REV. 481 (1982) (arguing that economic fines are the most effective means of encouraging responsible corporate conduct); Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980) (arguing that incarceration provides the optimal deterrent to potential corporate criminals); BUREAU OF NATIONAL AFFAIRS, *WHITE-COLLAR JUSTICE: A BNA SPECIAL REPORT ON WHITE-COLLAR CRIME* (1976). A federal judge has stated: "[m]y experience at the bar was that one jail sentence was worth 100 consent decrees and that fines are meaningless because the defendant in the end is always reimbursed by the proceeds of his wrongdoing or by his company down the line." *Id.* at 14. Legislation that requires a fine equal to twice the amount of the defendants' gain, and does not allow indemnification of the convicted officer by this corporation addresses the judge's concerns.

13. See *infra* notes 62-69, 174-88 and accompanying text. See also State of New York Governor's Program Bill, Attorney General's Program Bill, 1985-1986 Memorandum 3 [hereinafter Memorandum] (this Memorandum is unpublished and on file with New York Senator Hugh T. Farley); Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40, 50 (1978) (analyzes policy considerations of selecting criminal sanctions for illegal corporate behavior); Memorandum in Support of Legislation, *supra* note 11; Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93, 102 (1985). This lack of criminal convictions has been described as an "enforcement gap" by one commentator. D. REBOVICH, *supra* note 3, at 8. See also Comment, *supra* note 11.

14. D. REBOVICH, *supra* note 3, at 8; Comment, *Is Corporate Criminal Liability Really*

Meanwhile, prominent authorities stress that deterrence is the main purpose of criminal penalties.¹⁵ Thus, in an effort to prevent future violations, legislatures have toughened criminal sanctions.¹⁶ Before prosecutors may concentrate on seeking a criminal sanction, however, they are faced with a procedural concern.

After discovery of a violation of an environmental statute, the prosecutor will have to determine who should be punished. Many violators of environmental statutes are corporations, which may be punished according to the explicit language of most statutes.¹⁷ An obvious question, however, is whether punishment of a corporation, which in many instances is comprised of hundreds or thousands of employees and hundreds or thousands of shareholders, will accomplish the goals of punishment, especially deterrence.¹⁸ Common sense dictates that it will not.¹⁹ Therefore, to punish violations of environmental statutes adequately, responsible corporate officers must be punished.²⁰

Necessary?, 29 Sw. L.J. 908, 924 (1975); Mueller, *Criminal Law and Administration*, 34 N.Y.U. L. REV. 83, 94 (1959); Memorandum in Support of Legislation, *supra* note 11.

15. W. LAFAVE & A. SCOTT, *supra* note 11, § 1.5, at 36. *See also Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1235 (1979) (analyzes recent increased reliance of the federal government on the deterrent effect of criminal punishment to shape corporate activities); UNIF. LAW COMMISSIONERS MODEL SENTENCING AND CORRECTIONS ACT, *supra* note 11.

16. *See* ch. 671, *supra* note 12; *supra* note 11.

17. *See, e.g.*, ch. 671, *supra* note 12; CERCLA, 42 U.S.C. § 9601(21) (1982); ILL. ANN. STAT. ch. 111½, para. 1003(i) (Smith-Hurd 1984 & Supp. 1987).

Corporate environmental crimes cause harm to more than just the environment, including humans: "[w]hite collar crimes violate trust and therefore create distrust; this lowers the social morale and produces social disorganization. Many of the white collar crimes attack the fundamental principles of the American institutions." M. ERMANN & R. LUNDMAN, *CORPORATE AND GOVERNMENTAL DEVIANCE PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY* 174 (2d ed. 1982) (quoting E. SUTHERLAND, *WHITE COLLAR CRIME* 13 (1949)).

18. *See supra* note 15.

19. *See* MODEL PENAL CODE § 2.07 Comment (Tent. Draft No. 4, 148 1955); E. SUTHERLAND, *WHITE COLLAR CRIME* 54 (1983).

20. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 45 (1957) (argues that the best deterrent of corporate crime is direct employee liability). *See also* Comment, *Corporate Criminal Liability for Homicide, Has the Fiction Been Extended Too Far?*, 4 J.L. & COMM. 95 (1984) (argues that the conviction of corporate officers will deter and punish corporate crimes more effectively than punishment of the corporate entity); Comment, *Limits on Individual Accountability for Corporate Crimes*, 67 MARQ. L. REV. 604 (1984) (analyzes the recent trend of imposing greater individual accountability for corporate crimes and argues that individual accountability should be expanded); W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 32 (1972) (stating that criminal jurisprudence requires that guilt involve personal fault); *Commonwealth v. Koczwar*, 397 Pa. 575, 579-80, 155 A.2d 825, 827 (1959), *cert. denied*, 363 U.S. 848 (1960) (upholding the conviction of an employer for acts committed by his employees without personal knowledge, participation, or presence of the employer). In *United States v. Park*, 421 U.S. 658 (1975), the corporate president had received a letter from

the FDA concerning unsanitary conditions at the corporate warehouse, but did not attempt to alleviate the conditions. The Court stated that there is a duty of those who exercise authority and supervision in corporations to seek out and remedy violations and to implement measures to avoid violations, and that breach of this duty can result in criminal liability. *Id. But cf. R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 225, 226 (1976) (Posner argues that if the corporate fine is appropriate, it will cause corporations to police the misconduct of their executives). Posner's argument does not consider the wealth available to many corporations to pay fines, as opposed to the resources of a corporate officer, even if the officer's salary is large. Also, when corporations are fined the fines are small in relation to the corporate assets and the savings which unlawful acts many times provide. *See infra* notes 182-84, 189-92 and accompanying text.

Conviction of corporate officers for environmental violations is rare. M. CLINARD, *supra* note 11, at 207. Indeed, juries have convicted corporations while acquitting the responsible corporate officers. *See United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941) (affirming the conviction of the General Motors Corporation for conspiracy to restrain interstate trade and commerce). This is an absurd result because the corporate officers, and not the corporate entity, made the unlawful decision. *Id.*

See also the following which address the issue of criminal sanctions for corporate violators of environmental statutes: Comment, 20 LAND & WATER L. REV., *supra* note 13 (arguing that federal environmental statutes should include minimum levels of criminal fines and should focus on responsible individuals within corporations); McMurry & Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A.L. REV. 1133 (1986) (examines the recent increase of federal government attention toward the use of criminal sanctions for enforcing environmental laws, and aims at giving corporations, individuals, and counsel an understanding of criminal actions in the environmental area); Allan, *Criminal Sanctions Under Federal and State Environmental Statutes*, 14 ECOLOGY L.Q. 117 (1987) (a guide to, research tool for, and listing of publications covering the burgeoning area of environmental crime); Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379 (1986) (analyzes criminal sanctions under federal environmental statutes); *Environmental Crimes in White-Collar Crime: Third Annual Survey*, 22 AM. CRIM. L. REV. 373 (1984) (reviews and interprets criminal sanctions available under federal environmental statutes); Comment, *supra* note 11; Comment, *Criminal Enforcement of Federal Water Pollution Law in an Era of Deregulation*, 73 J. CRIM. L. & CRIMINOLOGY 642 (1982) (suggests an approach to prevent the degradation of the nation's waterways, which emphasizes stiffer criminal penalties for more effective deterrence); Note, *Federal Enforcement of Individual and Corporate Criminal Liability for Water Pollution*, 10 MEM. ST. U.L. REV. 576 (1980) (analyzes the trend toward increased criminal prosecution of water pollution crimes); Braithwaite, *supra* note 12.

For discussions of criminal liability of corporate officers in general, see Emerson, *The Director as Corporate Legal Monitor: Environmental Legislation and Pandora's Box*, 15 SETON HALL L. REV. 593 (1985) (examines the potential liability of the outside corporate director as a consequence of federal environmental legislation); Irenas & Moskowitz, *Indemnification of Corporation Officers, Agents, and Directors: Statutory Mandates and Policy Limitations*, 7 SETON HALL LEGIS. J. 117 (1984) (examines statutory indemnification of convicted corporate officers by corporations); Comment, *supra* note 14 (arguing that imputing acts of an agent to the corporation would serve to deter the criminal behavior of corporate agents).

Many authors have discussed the civil liability provided in hazardous waste statutes. *See, e.g.,* Note, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 RUTGERS L.J. 117 (1980) (examines the common law and statutory remedies of those damaged by hazardous waste); Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN.

Federal statutes regulating hazardous waste²¹ provide minimum standards and penalties, specifically authorizing the individual states to create stricter regulatory standards and penalties as they see fit.²² In accordance, many states, including New York, Maryland, New Jersey, Pennsylvania, and Illinois,²³ have followed Congress' lead. New York is one state that provides criminal penalties against corporations and corporate officers for prohibited disposal of hazardous waste.²⁴ Recently, New York amended several sections of that legislation.²⁵ This amendment focuses on reinforcing the criminal sanctions which may be imposed on corporate violators.²⁶ The amendment, however, fails to provide a statutory structure likely to accomplish the explicit legislative goal of deterrence, and thus effectively protect the environment.²⁷

This note will focus primarily on the recent New York hazardous waste amendment. The note will begin, in section II, with discussion of the choice between civil and criminal penalties for use on convicted offenders. Section III will examine federal legislation and the response of the federal courts to the legislation. Section IV will then examine the responses of five states, beginning with New York's progressive version. The examination will continue with the responses of Maryland, New Jersey, Pennsylvania, and Illinois to the authority, given to them by Congress, to enact hazardous waste regulations that are stricter than those passed by Congress. These states have embraced the congressional authority and have developed additional hazardous waste regulations. Next, the responses of several of these states' judiciaries to their respective state legislation is analyzed. Section V will then analyze the prosecutorial problems that have hindered the imposi-

L. REV. 575 (1982) (arguing that traditional tort recovery does not adequately compensate toxic waste victims and that therefore a new compensation scheme is needed); Mott, *Liability for Cleanup of Inactive Hazardous Waste Disposal Sites*, 14 NAT. RESOURCES LAW. 379 (1982) (discusses the legal basis for imposing liability on generators of hazardous waste and owners and operators of disposal sites).

21. See *supra* note 4.

22. See, e.g., CERCLA, 42 U.S.C. § 9604 (1982); RCRA, 42 U.S.C. §§ 6941-6949 (1982).

23. See, e.g., ch. 671, *supra* note 12; *infra* notes 75-104 and accompanying text.

24. See *infra* notes 75-104.

25. N.Y. ENVTL. CONSERV. LAW §§ 1-0101 to 72-0602 (McKinney 1984 & Supp. 1988) amended by ch. 671 (1986).

26. Ch. 671, *supra* note 12.

Consumer advocate and general watchdog Ralph Nader claims that corporate crimes cause injuries to people on a larger scale than street crimes and that more people are killed by corporate criminal activities than by individual homicides, stating that "even if death is an indirect result the person still died." M. CLINARD, *supra* note 11, at XVI. Air pollution causes an estimated 140,000 deaths annually. R. CRAMER, *CORPORATE CRIMINALITY IN CORPORATIONS AS CRIMINALS* 20 (1984).

27. Memorandum for the Governor, *supra* note 11, at 3; see also Memorandum in Support of Legislation, *supra* note 11.

tion of criminal sanctions. Finally, section VI proposes a model state statute that incorporates New York's recent chapter 671 amendment and statutory provisions from several states into the New York hazardous waste statutory structure with additional statutory provisions from several other states. This further refinement of the New York hazardous waste amendment would increase the use of criminal sanctions on corporate officers who violate environmental statutes. The refinement would also help fulfill the legislative purpose of environmental protection and would provide a model for other states to follow in their respective battles against hazardous waste pollution.

II. CIVIL OR CRIMINAL PENALTIES: WHICH WILL FULFILL THE PURPOSE OF ENVIRONMENTAL LEGISLATION?

Our society believes that certain acts are morally wrong and require punishment.²⁸ This punishment can be either a civil penalty or a criminal penalty. While environmental legislation provides both civil and criminal penalties for use against regulatory violators,²⁹ civil penalties have been used far more frequently than criminal penalties.³⁰ Several reasons account for the lack of criminal prosecutions,³¹ and this note proposes legislation that would help increase the use of criminal sanctions.³² Criminal punishment satisfies six goals of society: prevention, restraint, rehabilitation, education, retribution, and deterrence.³³ Criminal penalties also carry a community stigma and a criminal record. The main purpose of criminal sanctions, however, is deterrence.³⁴ Civil penalties, on the other hand, are aimed at compensating the victims.³⁵

With conservation of the environment as the main purpose of environmental legislation,³⁶ and civil penalties the main sanction utilized by the courts,³⁷ violations have continued despite the legislation.³⁸ Civil penalties

28. W. LAFAVE & A. SCOTT, *supra* note 11, § 1.5, at 30.

29. *See supra* notes 7, 10 and accompanying text.

30. Memorandum in Support of Legislation, *supra* note 11; *see also supra* note 13; *infra* notes 62-69, 174-88 and accompanying text.

31. *See infra* notes 201-33 and accompanying text.

32. *See text* accompanying notes 234-50.

33. W. LAFAVE & A. SCOTT, *supra* note 11, § 1.5, at 31-36.

34. *Id.* at 36. *See also supra* note 15. Criminal penalties have the potential of instilling more of a feeling of guilt in the violator's mind, due to the stigma attached to criminal convictions. Criminal penalties may also include imprisonment of the violator. Imprisonment carries an obvious deterrent because freedom of movement is considered an important right inherent in our society. Loss of such an important right is considered a significant loss imposed only for serious violations of society's norms and mores.

35. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

36. *See supra* note 11.

37. Memorandum in Support of Legislation, *supra* note 11; *see also infra* notes 62-69, 174-88 and accompanying text.

are obviously not deterring violators of environmental statutes;³⁸ deterrence of violators is needed to reduce future violations. New York has concluded that potential future violators of hazardous waste regulations must be deterred, and thus, criminal sanctions must be utilized more frequently against violators.⁴⁰ Thus, if violations of hazardous waste regulations will be reduced in the future, potential violators must be deterred. Adequate deterrence is not provided by civil penalties, but is provided only from the use of criminal penalties.

III. THE FEDERAL SCHEME

A. *The Federal Acts*

Congress first addressed the problems created by the unregulated disposal of wastes in 1899 with passage of the Rivers and Harbors Act.⁴¹ This Act prohibited the discharge or deposit of any refuse, except refuse from streets or sewers, into any navigable waterway.⁴² The next significant federal act regulating waste disposal was the Resource Conservation and Recovery Act of 1976 (RCRA).⁴³ This Act defined hazardous waste and provided civil and criminal penalties for improper discharge of hazardous

38. Memorandum in Support of Legislation, *supra* note 11; see also *infra* notes 62-69, 174-88 and accompanying text; D. REBOVICH, *supra* note 3, at 8.

39. See W. LAFAVE & A. SCOTT, *supra* note 11, § 1.5, at 33-34. See also *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, *supra* note 15; UNIF. LAW COMMISSIONERS' MODEL SENTENCING AND CORRECTIONS ACT, *supra* note 11; *supra* note 20.

Two authors recently concluded that based on the experiences of enforcement agencies in the last decade, criminal enforcement actions provided by environmental statutes have a greater deterrent effect than civil sanctions. They add that the greater monetary sanctions and negative publicity of criminal sanctions provide powerful deterrence. McMurry & Ramsey, *supra* note 20, at 1157-58. McMurry and Ramsey also argue that if the corporate officer faces a real possibility of criminal prosecution offenders will be prompted to divulge information more readily, in hopes of mitigating penalties, and thus help the enforcement agencies with limited investigatory budgets. *Id.* at 1150. The environmental statutes encourage this aid to enforcement by protecting employees from firing or economic reprimand by the corporation. See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2622 (1982); FWPCA, 33 U.S.C.A. § 1367 (1986); RCRA, 42 U.S.C. § 6971 (1982); CERCLA, 42 U.S.C. § 1609 (1982); Clean Air Act, 42 U.S.C. § 7622 (1982).

The U.S. Department of Justice also believes that enforcement pressure on individuals greatly increases the deterrent effect of environmental statutes. McMurry & Ramsey, *supra* note 20, at 1162.

40. Memorandum for the Governor, *supra* note 11, at 3; see also Memorandum in Support of Legislation, *supra* note 11; ch. 671, *supra* note 12.

41. Rivers and Harbors Act, ch. 425, § 13, 30 Stat. 1152 (1899) (enacted to reduce discharges of materials, which hindered navigation, into the nation's waterways).

42. *Id.*

43. RCRA, 42 U.S.C. §§ 6901-6987 (1982 & Supp. III 1985).

waste.⁴⁴ An important provision of RCRA grants individual states the power to devise a remedial plan with penalties stricter than those provided by RCRA.⁴⁵

Soon after the enactment of RCRA, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act in 1980 (CERCLA).⁴⁶ The focus of this legislation was the clean-up of existing dangerous hazardous waste sites.⁴⁷ To accomplish that end, CERCLA provides criminal fines and/or imprisonment. However, the act limits criminal liability to the falsification of records filed with the Environmental Protection Agency,⁴⁸ and the failure to comply with the acts determined necessary by the Attorney General of the United States to prevent a threatened discharge of wastes.⁴⁹ Thus, CERCLA basically utilizes civil remedies aimed at cleaning up hazardous waste with little concern for the criminal liability of the culpable parties. Congress gave the states the authority to eliminate this deficiency in federal legislation by enacting their own criminal sanctions.⁵⁰

Congress further addressed the problems of hazardous waste management by passing the Toxic Substances Control Act,⁵¹ the Federal Water Pollution Control Act (FWPCA),⁵² the Clean Air Act,⁵³ and other similar acts.⁵⁴ The Toxic Substances Control Act and the Clean Air Act provide criminal penalties for knowing and willful violations, while the FWPCA provides criminal sanctions for negligent, knowing, knowing endangerment, and false statement violations.⁵⁵ An important provision found only in the

44. *Id.* §§ 6921, 6928.

45. *Id.* §§ 6941-6949. Indeed, the primary purpose of RCRA is to provide technical and financial assistance to states in an attempt to encourage them to develop comprehensive solid waste disposal plans.

46. CERCLA, 42 U.S.C. §§ 9601-9675 (1982 & Supp. III 1985).

47. *See Id.*

48. *Id.* § 9603(d)(2).

49. *Id.* § 9606(b).

50. *See supra* note 22.

51. Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982 & Supp. III 1985).

52. FWPCA, 33 U.S.C.A. §§ 1251-1376 (1986 & Supp. 1987).

53. Clean Air Act, 42 U.S.C. §§ 7401-7626 (1982 & Supp. III 1985).

54. *See also* the following related legislation: NEPA, 42 U.S.C. §§ 4321-4370a (1982 & Supp. III 1985); Ocean Dumping Act, 33 U.S.C. 1401-1445 (1982); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 1360-1364 (1982 & Supp. III 1985); Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1802 (1982 & Supp. II 1984).

55. Toxic Substances Control Act, 15 U.S.C. § 2615(a)(1)(b) (1982); Clean Air Act, 42 U.S.C. § 7413(c)(1) (1982); FWPCA, 33 U.S.C.A. § 1319(c) (Supp. 1987). The criminal sanctions may be imposed for violation of permit limitations or conditions under the FWPCA, 33 U.S.C.A. § 1319(c)(1); for violations of emissions standards under the Clean Air Act, 42 U.S.C. § 7413(c)(1); and for refusing inspections, for refusing to establish and allow access to records; and for using prohibited chemicals under the Toxic Substances Control Act, 15 U.S.C. § 2615. In addition, up to six months imprisonment (two years under the FWPCA)

FWPCA is a minimum monetary fine of at least \$2,500 per day of violation.⁵⁶ This minimum fine shows an intent of Congress to ensure the imposition of a more than nominal punishment on those who unlawfully discharge wastes into waterways.⁵⁷ A final provision of the federal statutes that attempts to regulate hazardous waste is application of the criminal sanctions to any "person."⁵⁸ Congress demonstrated with this explicit language that it intended to allow for criminal punishment of corporate officers who could otherwise hide behind the corporate veil.⁵⁹

and a fine of \$10,000 may be levied for falsifying required records and documents and for tampering with monitoring devices under the Clean Air Act, 42 U.S.C. § 7413(c)(2), and the FWPCA, 33 U.S.C.A. § 1319(c)(4).

This is a bright spot in the federal sanctions. A \$25,000 per day fine (maximum available) would undoubtedly be a significant sum to many corporate officers. However, courts tend to impose light sentences. *See infra* notes 62-69, 174-88 and accompanying text. Therefore, these fines should include minimum levels, such as the FWPCA provides. FWPCA, 33 U.S.C.A. § 1319(c)(1) (Supp. 1987). *See also infra* note 57.

56. FWPCA, 33 U.S.C.A. § 1310(c)(1) (Supp. 1987).

57. Inclusion of a minimum fine in the FWPCA increased the likelihood that the convicted offender will be penalized; a \$2,500 fine will carry more of a sting than a \$100 fine. While inclusion of minimal fines will not always guarantee that a penalty is felt, because the minimum fine levied on a corporate officer earning a six figure salary will not amount to much of a penalty, it is a more potent penalty than \$100, regardless of the convicted individual's assets. Congress should have included minimum fines and minimum prison terms in other environmental statutes to increase the penal affect of the sanctions. However, by granting this power to the states, Congress has transferred the responsibility to the states.

State legislation which includes minimum fines and minimum prison terms should also include, to effectively penalize violations and deter future violations, explicit language which orders the judge to consider the assets of the corporate officer before sentencing. Thus, corporate officers with large salaries should be given larger fines.

58. *See, e.g.*, FWPCA, 33 U.S.C.A. § 1319(c)(3) (Supp. 1987); Clean Air Act, 42 U.S.C. § 7413(c)(3) (1982).

59. The doctrine of piercing the corporate veil is a judicial remedy whereby the distinction between the corporate entity and its shareholders is eliminated so that the shareholders, which usually include the corporate officers, may be held individually liable for acts done under the corporate name. The corporate veil may be pierced in occurrences of fraud, disregard of corporate requirements, undercapitalization, and where fairness requires utilization of the doctrine. *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976) (disregard of the corporate requirements). *See also* *Walkovszky v. Carlton*, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (1966) (undercapitalization); *Bartle v. Home Owners Coop., Inc.*, 309 N.Y. 103, 127 N.E.2d 832 (1955) (fraud); *Anderson v. Abbott*, 321 U.S. 349, 365 (1944) (noting that a corporation may not be used to defeat a legislative policy, whether this is the aim or merely the result of the corporate entity); *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981) (the corporate arrangement was disregarded when a shareholder was enabled to circumvent a federal statute, due to his limited liability); *Capital Tel. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) (piercing of the corporate veil "in the interests of public convenience, fairness and equity").

An example of the insulatory belief which many corporate officers function under is provided by a *Harvard Business Review* study which found that four of five executives questioned believed that at least some accepted practices in their industries were unethical. Baumhart, *How Ethical are Businessmen?*, 39 HARV. BUS. REV. 160 (1961). In addition, four of seven

In conclusion, not all federal statutes that regulate hazardous waste attach criminal liability for unlawful disposal of hazardous waste. Those statutes that provide criminal sanctions usually provide no other relief. Only one of the statutes providing criminal sanctions provides minimum fines.⁶⁰ The other statutes would benefit from inclusion of minimum fines and minimum prison terms because of the higher loss they may force convicted violators to suffer. This inclusion would improve the deterrent value of the regulations. While most of the statutes suffer from deficiencies, Congress provided for the elimination of the deficiencies by allowing state legislatures to enact stricter standards and penalties than the federal statutes provide.⁶¹ While Congress has therefore laid a foundation for hazardous waste regulation, it has left the responsibility of building an effective statutory structure upon the individual states.

B. *The Federal Courts' Response to Legislative Acts*

Courts have been reluctant to impose criminal sanctions on corporations and their officers who unlawfully discard hazardous waste.⁶² Few federal cases have resulted in such sanctions. Such scarcity of precedent hinders prosecutors and courts in an attempt to punish corporate officers. However, some precedent for conviction does exist. In *United States v.*

thought that other executives would violate a code of ethics if they knew they would escape detection by authorities. *Id.* at 19.

Both the FWPCA, 33 U.S.C.A. § 1319(c)(3) (Supp. 1987), and the Clean Air Act, 42 U.S.C. § 7413(c)(3) (1982), for example, provide: "[f]or the purposes of this subsection [referring to criminal penalties], the term 'person' shall mean . . . any responsible corporate officer."

By piercing the corporate veil, courts are able to levy the penalty on the responsible individual. This deters other corporate officers because they certainly do not relish the thought of imprisonment or a personal fine. It may be argued that penalizing the corporation will still penalize the responsible officer because his cohorts will chastise him (impose some type of penalty, possibly release him of his duties, or cause loss of respect within the corporation). However, when the corporation is penalized innocent parties suffer, especially shareholders and innocent employees; *see supra* note 19. Furthermore, a penalty levied by the corporation against the responsible officer is not guaranteed. Thus, piercing the corporate veil penalizes the source of the violation, avoids penalizing innocent parties, and provides deterrence in the effort to protect the environment.

60. FWPCA, 33 U.S.C.A. § 1319(c)(1) (Supp. 1987).

61. *See supra* note 22.

62. Punishment of individuals involved in corporate crimes of any type has been very uncommon; for example, the number of criminal antitrust cases filed in all U.S. District Courts between 1960-1981 averaged 24 per year. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL STATISTICS - 1982 at 486 (1983). *See also supra* note 20. *But cf.* *United States v. MacAndrews & Forbes Co.*, 149 F. 823 (C.C.S.D.N.Y. 1906). In *MacAndrews*, the corporate presidents of two corporations were held criminally responsible for their activities in violating the Sherman Act by setting prices for the 85% of the market in licorice pastel (an essential ingredient in plug and smoking tobaccos, as well as cigars and snuff) that the two corporations enjoyed. *Id.* at 825.

Frezza Brothers, Inc.,⁶³ the Third Circuit affirmed the maximum fine of \$50,000, given by the District Court for the Eastern District of Pennsylvania, on the corporation and \$25,000 on each of the two responsible corporate officers, along with mild jail sentences of thirty days.⁶⁴ In *Frezza Brothers*, the defendants had willfully discharged manure from their mushroom farm into a creek on four occasions. Unfortunately, courts have not followed, but have ignored, the Third Circuit's attitude toward corporate pollution. The norm in federal courts is for the corporate defendants to face

63. 602 F.2d 1123 (3d Cir.), *cert. denied*, 444 U.S. 1074 (1979). In another area of public health regulation, the Supreme Court upheld a criminal negligence conviction of a corporate president for allowing unsanitary conditions to exist in a food warehouse. *United States v. Park*, 421 U.S. 658 (1975) (also see the discussion of *Park* at *supra* note 20).

64. 602 F.2d at 1124. A further example is provided by *United States v. Distler*, Crim. No. 77-00108-01-L (W.D. Ky. 1979), *aff'd*, 671 F.2d 945 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981). In *Distler*, Distler, the principal owner of a corporation which dumped toxic chemicals into a sewage system, was sentenced to two years imprisonment and given a \$50,000 fine under the FWPCA. Judgment and Commitment Order, *United States v. Distler*, Crim. No. 77-00108-01-L (W.D. Ky. 1979). However, the United States government spent over \$1.5 million in cleaning up the chemicals, and 161 citizens were treated for exposure to the toxic chemicals. *United States v. Distler*, Crim. No. 77-00108-01-L (W.D. Ky. 1979) (Transcript of Sentencing at 9). Penalties such as Distler's are likely to provide more deterrence to future potential violators than a much lighter sentence.

See also *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987), where the court upheld the District Court for the Western District of Missouri's holding of a supervisor of a chemical manufacturing plant personally liable under RCRA and CERCLA for having arranged for the illegal transportation and disposal of hazardous waste. The court ruled that a company employee who had the authority to handle the disposal of hazardous waste is personally liable for any illegal disposal of the waste. *Id.*

A further bright spot in federal prosecution is seen in *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987). In *Chesapeake Bay*, the court said that the District Court for the Eastern District of Virginia did not abuse its discretion by assessing a penalty of \$1,285,322 for violation of monthly average and daily limits for pollution discharges. The court discarded the argument that this penalty is greater than those assessed for similar violations five or more years earlier. *Id.*

See also *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985), where the EPA tried to criminally prosecute, under RCRA, a truck repair company and two of its employees who were seen illegally dumping toxic chemicals into a trench. The court reversed the District Court for the District of New Jersey and held the employees strictly liable under RCRA's knowing violation standard. The EPA could not convict the employees in this case, however, because the court held that each defendant would have to know that the corporation was required to have a permit, and these employees did not know that their corporation did not possess a permit. *Id.*

See also *Chemical Waste Management, Inc. v. United States Environmental Protection Agency*, 649 F. Supp. 347 (D.D.C. 1986), where a chemical waste processing facility that had violated RCRA regulations for over a year and a half was fined \$40,000. The district court observed that the company could have been fined over \$30 million and that the \$40,000 civil fine was possibly too lenient. *Id.* The D.C. District Court here has shown that it will likely impose stiff sentences in future cases.

meaningless sentences.⁶⁵

The decisions of the majority of the cases will not likely affect the way in which potential violators act. Corporate violators will regard these decisions as only slight hindrances to actions that violate environmental statutes. When criminal sanctions are available, the courts should impose them to a degree which assures a penalty that is more than a slap on the wrist.⁶⁶

Courts should follow the lead provided by *Frezza Brothers*⁶⁷ to accomplish the statutory goals, especially the goal of deterrence.⁶⁸ To punish corporate environmental statute violations, courts must be willing to punish the source of the crime, the corporate officer who makes the decision or has the duty to see that the corporation follows environmental regulations.⁶⁹

65. 602 F.2d at 1130. See *United States v. Blue Lagoon Marine, Inc.*, No. 75-80824 (E.D. Mich. 1975), where a corporate agent deliberately turned on a pump, discharging hundreds of gallons of gas onto a frozen lake. The agent was given the minimum fine allowed under the FWPCA, \$2,500, and the corporation was acquitted. *Id.*

Further, in *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6 (E.D. Ark. 1978), a suspended sentence was given the defendant even though it had knowingly submitted repeatedly false statements on required periodic reports. The district court merely ordered the defendant to bring its sewer system up to statutory standards. *Id.* at 9.

Additionally, in *United States v. Pollution Abatement Services of Oswego, Inc.*, 763 F.2d 133 (2d Cir.), *cert. denied*, 474 U.S. 1037 (1985), the defendant had been discharging refuse into a creek for over a year, and had been storing thousands of drums of highly toxic chemicals on the creek's banks, in violation of criminal provisions of the River and Harbors Act. The court affirmed the District Court for the Northern District of New York's imposition of liability on the president and vice-president of the four-shareholder corporation under civil provisions of the Act, but not its criminal provisions. *Id.* at 134. The court acknowledged the application of criminal sanctions but did not utilize them. *Id.*

If the courts do not utilize criminal sanctions in cases such as these, and impose the lowest fine available for an act as blatant as willfully discharging hundreds of gallons of gas onto a frozen lake, the deterrence of future violators is very low at best. Criminal sanctions which punish statutory violations, and severely punish blatant, willful statutory violations must be imposed to deter as many future violators as possible.

66. A fine of \$1,000 imposed on the president of a large corporation will not serve as a penalty in light of the high salary such an individual earns. The assets of the defendant must be considered to provide appropriate penalties.

67. *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123 (3d Cir.), *cert. denied*, 444 U.S. 1074 (1979).

68. W. LAFAYE & A. SCOTT, *supra* note 11, § 1.5, at 31-36; Comment, *supra* note 14, at 924 (arguing that imputing acts of an agent to the corporation would serve to deter the criminal behavior of corporate agents). Gilbert Geis argues that corporate officers believe that personal liability for corporate crimes is a very effective deterrent. Geis also argues that corporate officers fear jail and feel deep shame when sent there. Geis, *Criminal Penalties for Corporate Criminals*, 8 CRIM. L. BULL. 377, 378-80 (1972). See also Comment, *supra* note 14, at 911.

69. See *United States v. Park*, 421 U.S. 658 (1975).

IV. STATE RESPONSES TO THE AUTHORITY GIVEN THEM BY CONGRESS

A. State Legislation

While hazardous waste is a national concern, it has a strong impact at the local level. For example, areas such as Love Canal have given New Yorkers, and indeed the nation, a vivid example of the repercussions of unregulated disposal of hazardous waste.⁷⁰ In August 1978, the Love Canal area was declared a disaster area when chemical waste, stored thirty years earlier, seeped out of its containers and into the ground water.⁷¹ In response to such occurrences, provisions in federal statutes delegating authority to the individual states,⁷² and heightened public concern,⁷³ many states have enacted legislation attempting to clean-up present hazardous waste sites and to deter dumping in the future.⁷⁴

70. N.Y. Times, Apr. 29, 1979, at 36, col. 3.

71. Hooker Chemical & Plastics Corporation dumped chemical wastes in a landfill in the 1940s. In 1953 Hooker gave the land to a school board, and subsequently a school and homes were built around the burial site. N.Y. Times, Apr. 29, 1979, at 36, col. 3. Leakage of the chemicals up to the surface of the ground in 1978 caused the relocation of over 200 families. *Love Canal Cleanup in Progress; Federal Funding Still Pending, State Says*, 9 Env't Rep. (BNA) 1780 (1978). A further example of the local impact of unregulated hazardous waste dumps include the derailment of a freight train carrying toxic chemicals near Sturgeon, Missouri. Weingarten, *A Tiny Town Cries Foul*, Nat'l L.J., Oct. 22, 1979, at 1, col. 2. Also, the effects of dumping PCB-laced oil-waste chemicals along roads in North Carolina had a strong impact on local residents. *North Carolina Officials Seek Source of Intentional PCBs Highway Spill*, 9 Env't Rep. (BNA) 662 (1978).

72. See, e.g., CERCLA, 42 U.S.C. § 9604 (1982); RCRA, 42 U.S.C. §§ 6944-6949 (1982).

73. See *supra* note 1 and accompanying text.

74. See Staff of § 301(E) Study Group (printed for the use of the Senate Committee on Environmental and Public Works) 97th Cong., 2d Sess., *Injuries and Damages from Hazardous Wastes — Analysis and Improvement of Legal Remedies Part 1*, at 83 (Comm. Print 1982) Part 2, at 131; see also *supra* note 11.

Under the traditional penal model, the principal goal of punishment is rehabilitation, thus many judges believe prison terms provide little benefit, that the disgrace of a conviction itself will rehabilitate the corporate officer. However, the primary purpose of penal sanctions for corporate executives is believed by many to be deterrence. See also *supra* note 15; Mann, Wheeler & Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479 (1980). It is observed that imprisonment is considered too harsh for nonviolent white-collar criminals, a view fostered by many judges who believe that a corporate officer has been sufficiently punished when facing a sentencing hearing, due to loss of reputation and career. Thus, it is argued that greater deterrence will be achieved only through increased prosecution of white-collar criminals. *Id.* at 482-87, 491-92, 496-98.

Other states which highly regulate hazardous waste are: California, CAL. HEALTH & SAFETY CODE §§ 25100-25249, 25280-25299, 25300-25395, 25500-25570, 25600-25611 (West 1984 & Supp. 1988); CAL. WATER CODE §§ 13271, 14080 (West 1984 & Supp. 1988); Colorado, COLO. REV. STAT. §§ 25-15-101 to -313, 25-16-101 to -201 (1982 & Supp. 1986); Indiana, IND. CODE ANN. §§ 13-7-8.5-1 to -10, 13-7-8.6-1 to -15, 13-7-8.7-1 to -6, 13-7-13-1 to -4, 13-7-10-1 to -5 (West 1982 & Supp. 1987); Minnesota, MINN. STAT. ANN. §§ 115A.01-.921, 115B.01-.37, 116.101, 116.11-.12 (West 1987 & Supp. 1988); Nevada, NEV. REV. STAT. ANN.

For example, New York has devised a comprehensive environmental regulatory framework designed to attack environmental abuse.⁷⁵ The framework has grown steadily. The legislature continues to lengthen and amend the Environmental Protection Law.⁷⁶ However, chapter 671, New York's most recent amendment to its Environmental Conservation Law, though incorporating important changes to the Environmental Conservation Law, has not eliminated the need for further acts and amendments to effectively regulate hazardous waste.⁷⁷

1. New York's Statutory Structure

The New York legislature has determined that the criminal prosecution of those corporate officials responsible for discarding hazardous waste into the environment in manners unacceptable to the public has not occurred to the extent desired by the public.⁷⁸ As a result, on July 26, 1986, the New York legislature passed chapter 671.⁷⁹ This legislation amends the criminal sanctions for those who unlawfully discard hazardous waste.⁸⁰

Many times authorities do not criminally prosecute the corporate of-

§§ 459.400-.700 (Michie 1986 & Supp. 1987); and Oregon, OR. REV. STAT. §§ 466.005-.995 (1987).

75. New York enacted its environmental regulatory structure, the Environmental Conservation Law, Chapter 43-48 of the Consolidated Laws of N.Y. (McKinney 1984 & Supp. 1988) in 1972. The purpose of the law is "to conserve, improve and protect its [the state's] natural resources and environment and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being." N.Y. ENVTL. CONSERV. LAW § 1-0101 (McKinney 1984 & Supp. 1988). Several of the major acts within the Environmental Conservation Law are: Air Pollution Control Act, *id.* §§ 19-0101 to -0711 (to safeguard the air resources of the state from pollution); State Acid Deposition Control Act, *id.* §§ 19-0901 to -0923 (to establish an acid deposition control program for emission within the state); Liquefied Natural and Petroleum Gas Act, *id.* §§ 23-1701 to -1727 (siting of liquefied natural and petroleum gas facilities to control the hazards posed by liquefied natural and petroleum gas storage and transportation); Freshwater Wetlands Act, *id.* §§ 24-0101 to -1305 (to preserve, protect and conserve freshwater wetlands and the benefits which they provide); Tidal Wetlands Act, *id.* §§ 25-0101 to -0601 (to preserve and protect tidal wetlands with consideration of the state's reasonable economic and social development as well).

76. Fourteen new articles were added between 1972 and 1984. N.Y. ENVTL. CONSERV. LAW §§ 1-0101 to 72-0602 (McKinney 1984 & Supp. 1988).

77. See *infra* notes 238-52 and accompanying text.

78. Memorandum, *supra* note 13, at 3, states that the New York courts have been unwilling to impose criminal sanctions and that the limited definitions of hazardous waste have kept prosecutors from seeking criminal sanctions.

79. See *supra* note 12. The purpose of this amendment, as stated by Robert Abrams, Attorney General of the State of New York, in Memorandum for the Governor, *supra* note 11, at 1, is to "facilitate and increase statewide prosecutions of environmental polluters by expanding the scope of existing crimes, closing procedural loopholes and increasing penalties."

80. Memorandum in Support of Legislation, *supra* note 11.

ficer who authorizes the unlawful release of hazardous waste.⁸¹ To ease the prosecution of corporate officers section 37-0107 of the Environmental Conservation Law has been amended. This section which previously limited the liability to "industrial or commercial user," now extends the liability to any "person" who unlawfully stores or releases any regulated substances.⁸² This amendment should ease the prosecutor's dilemma of who to name as defendant, and will allow for the implication of many corporate officers instead of corporations.

Further areas amended by chapter 671 are the definitions of criminal classifications and corresponding penalties.⁸³ An extremely important penalty is a fine equal to double the amount of the offender's gain.⁸⁴ This sanction amounts to a penalty because the offender will experience a net financial loss.

Chapter 671 was also enacted to extend the statute of limitations for prosecuting violations.⁸⁵ The legislature increased the statute of limitations for bringing an action against an offender from two to four years after the unlawful act has been discovered.⁸⁶ Thus, the corporate officer may no longer escape liability as easily as he could under the previous statute of limitations. However, a four-year limitation is unsatisfactory because of the length of time required to locate some violators.

The case of *State v. Schnectady Chemicals, Inc.*,⁸⁷ exhibits the problem posed by a four-year statute of limitations. In *Schnectady Chemicals*, the New York county court found that a nuisance action was the only remedy for damage caused by chemical waste dumped unlawfully between fif-

81. See *supra* note 13.

82. Ch. 671, *supra* note 12, § 9 (amended N.Y. ENVTL. CONSERV. LAW §§ 37-0101, -0103, -0105, -0107 (McKinney 1984 & Supp. 1988)). It is easier to indict a responsible corporate officer under the language "person" than "industrial or commercial user." Industrial or commercial user indicates the corporation is the target more than any individual.

83. Ch. 671, *supra* note 12, § 13 (amended N.Y. ENVTL. CONSERV. LAW §§ 71-2707, -2709, -2715, -2717 (McKinney 1984 & Supp. 1988)). Ch. 671 reduces the amounts of released hazardous waste which constitute various reckless misdemeanor and felony violations, as well as increases the penalties for knowing violations and strict liability violations.

There are many changes adopted by ch. 671, *supra* note 12, § 13, with a general increase of the degree of penalty from the previous language.

84. However, if the offender gains a small amount, for example if \$100 is saved by the violation, a fine of double the amount of the offender's gain will not result in much of a penalty.

85. Memorandum, *supra* note 13, at 2.

86. Ch. 671, *supra* note 12, § 25 (amended N.Y. CRIM. PROC. LAW § 30.10 (McKinney 1984 & Supp. 1988)).

87. 117 Misc. 2d 960, 459 N.Y.S.2d 971, *aff'd as modified*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984) (gradual migration of chemical wastes from inactive site into surface and ground water).

teen and thirty years before its discovery.⁸⁸ While the increase of New York's statute of limitations will certainly aid prosecutors, elimination of the statute of limitations would give prosecutors adequate time to pursue violators whose crimes are not discovered for many years. In *Schnectady Chemicals*,⁸⁹ elimination of the statute of limitations would have allowed conviction of the responsible individuals.⁹⁰

The previous narrow definition of hazardous waste was another hindrance to vigorous and effective criminal prosecution of environmental statute violations.⁹¹ Previously, in many instances prosecutors had been unable to categorize very dangerous substances as hazardous waste,⁹² and violators were cited for or subject to civil violations only.⁹³ The New York legislature does not believe that civil penalties are sufficient penalties.⁹⁴ Thus, an important change adopted by chapter 671 is the broadening of the statute's wording from disposal of "wastes" to "substances." This increases the scope of activities that are subject to criminal conviction.⁹⁵ Further, the "disposal" of regulated substances was replaced by the word "release" to facilitate conviction of those who discard unauthorized substances into the environment.⁹⁶ Thus, a corporate defendant will be unable to declare that the discarded material was only a "substance" and not a "waste," even though it is a harmful substance. Also, he or she will not be able to circumvent liability by declaring that the substance was only "released" and not "disposed."

Chapter 671 changes the definition of hazardous waste in another useful manner. The definition provides three newly added technical gradations

88. *Id.* at 964, 459 N.Y.S.2d at 976. A successful nuisance action would not provide the conviction and deterrence desired by the New York legislature. Memorandum for the Governor, *supra* note 11, at 3; *see also* Memorandum in Support of Legislation, *supra* note 11.

89. *State v. Schnectady Chems., Inc.*, 117 Misc. 2d 960, 459 N.Y.S.2d 971, *aff'd as modified*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984).

90. Elimination of the statute of limitations would have allowed conviction, and thus deterrence, which are explicit legislative purposes. *See* Memorandum for the Governor, *supra* note 11, at 3; *see also* Memorandum in Support of Legislation, *supra* note 11.

91. Memorandum, *supra* note 13. The Memorandum states that "[e]nforcement of the ECL [Environmental Conservation Law] . . . has been frustrated by the narrowness of the definition of a hazardous waste." The Memorandum also states that "[t]his bill will expand the scope of existing law to allow prosecution of conduct which causes or contributes to the release to the environment of all hazardous substances" *Id.* at 2.

92. Memorandum, *supra* note 13, at 3.

93. *Id.*

94. *Id.*

95. The legislative intent of ch. 671, *supra* note 12, is provided by Memorandum in Support of Legislation, *supra* note 11, at 1, which states, "[i]n the past, prosecutors have been frustrated in the prosecution of conduct which resulted in a release where the substance released was very dangerous but not, as a technical matter, a hazardous waste."

96. Ch. 671, *supra* note 12, § 9 (amended N.Y. ENVTL. CONSERV. LAW §§ 37-0101, -0103, -0105, -0107 (McKinney 1984 & Supp. 1988)).

of toxicity, making identification of hazardous substances easier for prosecutors and corporate officers.⁹⁷ Furthermore, section 37-0103 now authorizes the Department of Environmental Conservation to promulgate a list of substances that are hazardous or acutely hazardous to public health, safety, or the environment based on new specific guidelines. This list provides added specificity to the definition of hazardous waste.⁹⁸ Despite the more specific definition of hazardous waste, complaints from the business community have still been common.⁹⁹

Before passage, an argument against enactment of chapter 671 was that it failed to define prohibited acts with the specificity necessary to direct business activities.¹⁰⁰ This argument is misguided. Chapter 671 provides new, specific definitions of regulated substances, and also provides extensive guidelines for the Department of Environmental Conservation to utilize in promulgating a list of substances within two years of the chapter's effective date.¹⁰¹ Chapter 671 also lowers the amount of possession of hazardous and

97. N.Y. ENVTL. CONSERV. LAW § 37-0101 (McKinney 1984 & Supp. 1986) read "[S]ubstances hazardous to the environment" shall mean substances which, because of their toxicity, magnification or concentration within biological chains, present a demonstrated threat to biologic life cycles when discharged into the environment." *Id.* Ch. 671, *supra* note 12, § 9, amended § 37-0101 to read as follows:

1. "Oral LD (rat) toxicity" means a calculated dose of a substance which is expected to cause the death of fifty percent of an experimental rat population when administered orally.
2. "Inhalation LC (rat) toxicity" means a calculated concentration of substance in air, exposure to which is expected to cause death of fifty percent of an experimental rat population when inhaled.
3. "Dermal LD (rabbit) toxicity" means a calculated dose of a substance which is expected to cause the death of fifty percent of an experimental rabbit population when applied to the skin.

Ch. 671, *supra* note 12, § 9 (amended N.Y. ENVTL. CONSERV. LAW § 37-0101 (McKinney 1984 & Supp. 1986)).

98. The guidelines include the definitions found *supra* note 97 and the definitions found in the Toxic Substances Control Act, 15 U.S.C. § 2602(2) (1982); the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(a) (1982); CERCLA, 42 U.S.C. § 9631 (1982).

A further change of ch. 671 is prohibition of the "storage or release" of substances hazardous or acutely hazardous to public health, safety, or the environment. The previous language was "storage or discharge" of such substances. Ch. 671, *supra* note 12, § 9 (amended N.Y. ENVTL. CONSERV. LAW § 37-0107 (McKinney 1984 & Supp. 1988)).

99. Letter from Raymond T. Schuler, representing the Business Council of New York State, addressed to the Honorable Evan A. Davis, Counsel to the Governor (July 1, 1986) (this letter opposed enactment of ch. 671 on the grounds of failing to protect businesses with permits, a failure to define "discharge" and "release," incomplete definitions of oral LD (rat) toxicity, inhalation LC (rat) toxicity and dermal LD (rabbit) toxicity, and lack of a need for the bill).

100. *Id.*

101. Ch. 671, *supra* note 12, § 9 (amended N.Y. ENVTL. CONSERV. LAW § 37-0103 (McKinney 1984 & Supp. 1988)).

acutely hazardous waste constituting presumptive evidence of a violation.¹⁰² This lowering also caused concern among the business community.¹⁰³ Chapter 671, however, provides an absolute defense to this presumption to those who possess a valid permit, license, or certificate.¹⁰⁴ Therefore, the New York legislature has addressed the problems that businesses previously encountered when they attempted to determine whether disposal or release of their waste would be lawful.

2. The Potential Success of Chapter 671

By enacting chapter 671 the New York legislature intended to facilitate criminal prosecution of those corporations, corporate officers, and other individuals who discharge hazardous waste in an unlawful manner.¹⁰⁵ The amendment provides a specific definition of hazardous waste and specific criminal sanctions. The definition and sanctions are intended to aid prosecutors and the courts in convicting the type of offender who has traditionally been given mild civil penalties.¹⁰⁶ Yet, the amendment does not contain the provisions needed to fulfill the legislative intent.¹⁰⁷

Examination of case law exhibits the dearth of criminal convictions of corporations and corporate officers responsible for unlawfully discarding hazardous waste.¹⁰⁸ Applying chapter 671 to cases decided before its enactment tests its effectiveness. This application attempts to see whether the cases would result in different outcomes today, in light of the intent behind the amendment.

For example, a limiting problem that courts encountered with the previous statutory provisions was the lack of proper notice as to what constitutes a hazardous waste. In *People v. Attco Metals Industries, Inc.*,¹⁰⁹ the New York county court held that the definition of hazardous waste provided in the Environmental Conservation Law would not let corporate of-

102. Ch. 671, *supra* note 12, § 16 (amended N.Y. ENVTL. CONSERV. LAW § 71-2719 (McKinney 1984 & Supp. 1988)). This will facilitate prosecution of responsible corporate officers when the corporation continually discards waste and leaves little evidence of a violation on the corporate premises.

103. *See supra* note 99.

104. Ch. 671, *supra* note 12, § 17 (amended N.Y. ENVTL. CONSERV. LAW §§ 71-2720(1),(2) (McKinney 1984 & Supp. 1988)). A corporation and corporate officer operating under a valid permit issued by a New York state agency, the federal government, or an order from the Commissioner of the Federal Environmental Protection Agency cannot be convicted.

105. Memorandum in Support of Legislation, *supra* note 11.

106. *Id.*

107. *Id.*

108. *See supra* notes 62-69 and accompanying text; *see infra* notes 174-88 and accompanying text.

109. 122 Misc. 2d 689, 471 N.Y.S.2d 498 (N.Y. Co. Ct. 1984).

ficers decide whether their activity would violate the regulations.¹¹⁰ This vague definition would present an obvious obstacle to the prosecution of corporate officers. If the definition of hazardous waste is vague, a corporate officer can only make a good faith judgment. If legislatures regulate hazardous waste, they have a duty to give an adequate definition of hazardous waste; chapter 671 does provide a specific definition.¹¹¹ Also, chapter 671 provides specific guidelines for the Department of Environmental Conservation to utilize in promulgating a new list of hazardous waste in addition to incorporating definitions provided in the federal acts.¹¹² The definition and list should provide clear definitions and examples of hazardous waste which will help prosecutors determine whether a violator released an unlawful material.

Chapter 671 provides further that criminal liability involving reckless, knowing, or strictly liable releases of hazardous waste constitutes a felony.¹¹³ In *Haz-O-Waste Corp. v. R.M. Williams*,¹¹⁴ a New York Appellate Division court confirmed substantial evidence of the illegal storage, on two separate occasions, of cyanide waste by the defendant after the New York Department of Environmental Conservation specifically informed the defendant not to store the waste illegally. With proof that the corporation's president had knowledge of the violations, the appellate court merely approved a \$10,000 civil penalty levied on the corporation by the Department of Environmental Conservation.¹¹⁵ Chapter 671 provides the mechanism for imposing a criminal sentence on the president of Haz-O-Waste Corporation. Section 15 of chapter 671 provides a class C felony conviction when any person intentionally releases a substance he or she knows will create a substantial risk of physical injury to others.¹¹⁶ Illegal storage of cyanide creates a substantial risk of physical injury to another person.¹¹⁷ Thus, a class C felony could have been imposed on Haz-O-Waste's president.

Van de Mark Chemical Co., Inc. v. Williams,¹¹⁸ provides a further example of the potential success of chapter 671. In *Van de Mark*, a New York Appellate Division court confirmed the New York Department of En-

110. *Id.* at 693, 471 N.Y.S.2d at 501.

111. *See supra* note 84.

112. Ch. 671, *supra* note 12, § 9 (amended N.Y. ENVTL. CONSERV. LAW § 37-0105 (McKinney 1984 & Supp. 1988)).

113. Ch. 671, *supra* note 12, §§ 13, 15 (amended N.Y. ENVTL. CONSERV. LAW §§ 71-2707, -2709, -2711 to -2714, -2715, -2717 (McKinney 1984 & Supp. 1988)).

114. 103 A.D.2d 1001, 478 N.Y.S.2d 198 (1984).

115. *Id.* at 1001, 478 N.Y.S.2d at 199.

116. Ch. 671, *supra* note 12, § 15 (adds a new § 71-2714 to N.Y. ENVTL. CONSERV. LAW §§ 1-0101 to 72-0602 (McKinney 1984 & Supp. 1988)).

117. Cyanide is defined as an "extremely poisonous . . . solid." THE OXFORD ENGLISH DICTIONARY 1297 (vol. II 1970).

118. 107 A.D.2d 1046, 486 N.Y.S.2d 580 (1985).

vironmental Conservation's finding of a violation of section 19-0107(3) of the Environmental Conservation Law, and other violations, but only affirmed a \$2,500 civil penalty.¹¹⁹ Here several sections of chapter 671's criminal sanctions could have been utilized, had they been available.¹²⁰ In addition, in *D.V.C. Industries, Inc., v. Flacke*,¹²¹ where D.V.C. violated its discharge permit on at least eighteen separate instances by releasing hazardous waste into ground water, the Appellate Division court confirmed the Department of Environmental Conservation's imposition of an \$18,000 civil penalty,¹²² or less than \$1,000 per violation. Under chapter 671, the corporation and the corporate officer would have been subject to a class D felony for knowing release of a hazardous substance into a primary water supply.¹²³

Chapter 671 provides the specific definition of hazardous waste and stiffer criminal sanctions that should ease the prosecutor's burden of proof when attempting to convict those corporate officers or individuals who violate regulation of hazardous waste releases. More importantly, the New York legislature has given the message to prosecutors, judges and juries that they have not prosecuted corporate polluters at an acceptable level. Other states should follow this lead and thereby increase their laws' deterrent effects. However, the provisions of chapter 671 do not provide prosecutors and the courts with the arsenal needed to convict the unlawful corporate officer effectively.¹²⁴ Other states provide this weaponry through statutory structures that can be borrowed in order to punish violators effectively and deter potential future violations.

3. Other State Legislative Responses

The statutory structures addressing hazardous waste crime in such heavily populated and industrialized states as Maryland, New Jersey, Pennsylvania, and Illinois offer further examples of legislative attempts to curtail

119. *Id.* at 1047, 486 N.Y.S.2d at 581.

120. Ch. 671, *supra* note 12, §§ 9, 13-16 (amended N.Y. ENVTL. CONSERV. LAW §§ 37-0101, -0103, -0105, -0107, 71-2707, -2709, -2715, -2717, -2719 (McKinney 1984 & Supp. 1988), and added new §§ 71-2710 to -2714 to N.Y. ENVTL. CONSERV. LAW §§ 1-0101 to 72-0602 (McKinney 1984 & Supp. 1988)).

121. 86 A.D.2d 892, 447 N.Y.S.2d 523 (1982).

122. *Id.*

123. Generally, ch. 671 should facilitate conviction of corporate officers who unlawfully discharge hazardous waste because the quantities of discharged waste which constitute the various levels of liability have been lowered, and the amount of hazardous waste which constitutes presumptive evidence of knowledge of violation has been lowered. Ch. 671, *supra* note 12, §§ 13-16 (amended N.Y. ENVTL. CONSERV. LAW §§ 71-2707, -2709, -2715, -2717, -2719 (McKinney 1984 & Supp. 1988), and added new §§ 71-2710 to -2714 to N.Y. ENVTL. CONSERV. LAW §§ 1-0101 to 72-0602 (McKinney 1984 & Supp. 1988)).

124. *See infra* notes 238-52 and accompanying text.

unlawful releases of hazardous waste by imposing criminal sanctions. These states have chosen to provide extensive regulation of hazardous waste and offer some of the nation's most progressive regulation of hazardous waste.¹²⁵ While each state has provisions to add to an effective statutory scheme, each state has its deficiencies.¹²⁶

Maryland's Hazardous Materials and Hazardous Substances Act is a state statute that provides some interesting provisions.¹²⁷ This Act, which defines hazardous waste broadly,¹²⁸ includes several unusual features.¹²⁹ For example, Maryland provides fines up to \$100,000 and imprisonment up to five years for violation of the Act. Moreover, since 1982, the legislature has removed the statute of limitations for felonious storage, disposal, and transportation of hazardous substances.¹³⁰ The removal of the statute of limitations aids prosecution greatly because in many cases the evidence of illegal action is discovered many years after the illegal activity occurred.¹³¹ Elimination of any statute of limitations would allow prosecutors to bring criminal suits against the violator whose concealed waste was not discovered for a number of years,¹³² or in cases where discovering the violator requires years of searching. Thus, an effective statutory scheme would not include a statute of limitations, thus allowing for prosecution both of violations discovered years after the fact and of violators found years after the violation.

Despite its favorable provisions, Maryland's statutory structure has deficiencies which contribute to the state's "enforcement gap."¹³³ For example, Maryland does not contain a specific hazardous waste definition,¹³⁴ minimum fines and prison terms, a penalty of double the amount of the offender's gain, or mandatory criminal sanctions. Also, Maryland does not include the following: (1) forbiddance of indemnification of convicted corporate officers by their corporations; (2) the deprivation of corporate management positions for the convicted officer for at least two years; (3) the language which encourages piercing the subsidiary corporate veil; (4) the

125. D. REBOVICH, *supra* note 3, at 13-17 (all states but Illinois are discussed). *See also* states cited *supra* note 74.

126. D. REBOVICH, *supra* note 3, at 8 (all states but Illinois are discussed).

127. MD. ENVTL. CODE ANN. § 7 (1987) (known by popular name as Controlled Hazardous Substance Act). D. REBOVICH, *supra* note 3, at 14.

128. MD. ENVTL. CODE ANN. § 7-201(m) (1987).

129. While not directly related to criminality, the Act requires transporters of hazardous waste to give a bond or security for abatement of any pollution resulting from improper transport of a hazardous substance. Also, three certificates, a hauler, a vehicle, and a driver certificate are required of transporters, along with documents and labels concerning the hazardous substance being transported. *Id.* § 7-249.

130. *Id.*

131. D. REBOVICH, *supra* note 3, at 15.

132. *Id.*

133. *Id.* at 8.

134. *See infra* note 236 and accompanying text.

restitution of injured parties; and (5) the pre-emption of local sewer regulations.¹³⁶ These measures would increase Maryland's ability to close its "enforcement gap," which would deter future potential violators,¹³⁶ and thus fulfill the legislative purpose of protecting the environment.¹³⁷

Unlike other states, New Jersey's regulations threaten corporations with the forfeiture of business practices in the state. New Jersey's hazardous waste criminal statutory structure¹³⁸ provides for fines up to \$100,000 and imprisonment up to ten years for individuals, and fines up to \$300,000 for corporations.¹³⁹ Also, several sentencing alternatives in New Jersey include: fines equal to twice the monetary gain to the offender or twice the monetary damage caused by the offense;¹⁴⁰ restitution by the offender in the amount of damage resulting from the crime;¹⁴¹ corporation dissolution;¹⁴² charter forfeiture;¹⁴³ and prohibition of future business interests in New Jersey.¹⁴⁴ These alternatives are very useful deterrents¹⁴⁵ which show a legislative concern for the corporate polluter problem.

Restitution by the offender in the amount of damage is a provision which a successful criminal legislative scheme should include.¹⁴⁶ This would

135. See *infra* notes 238-50 and accompanying text.

136. See *supra* note 15.

137. See *supra* note 11.

138. N.J. STAT. ANN. §§ 2C:17-2, 2C:43-3 to -4, 13:1E-9 (West 1982 & Supp. 1987).

New Jersey's statutory structure was not fully developed until 1979. Prior to 1979, actual harm or damage from a discharge was required for criminal liability. This requirement was abandoned in 1979, along with the change of the crime of nuisance to the concept of illegal release or abandonment. *Id.* § 2C:17-2.

139. *Id.*

140. *Id.* § 2C:43-3(e) (this provision would guarantee the imposition of a penalty because future potential violators will not consider a violation beneficial if conviction would result in a loss of twice the gain).

141. *Id.* § 2C:43-3(f) (restitution not only requires that the offender would lose any gain from the offense, and thus be penalized, but it serves to compensate the victim as well).

142. *Id.* § 2C:43-4(b). Any dedicated corporate officer would be deterred by the possibility of corporate dissolution because this would eliminate his source of income; many corporate officers have some pride in their corporation, which would be lost. Telephone interview with Chris L. Warning, Financial Analyst with Commonwealth Edison Co., Chicago, Ill. (Mar. 7, 1987).

143. N.J. STAT. ANN. § 2C:43-4(b) (West 1982 & Supp. 1987). A corporate charter is a constitution of a corporation which gives it the legal right to exist and function. BLACK'S LAW DICTIONARY 306 (5th ed. 1979). Thus, without a charter the corporation is dissolved and the corporate officer has lost his job.

144. N.J. STAT. ANN. § 2C:43-4(b) (West 1982 & Supp. 1987). This provision provides more deterrence than corporate dissolution and charter forfeiture because unlike these two penalties, prohibition of future business activity in the state will not let the corporate officer, who has just lost his job due to dissolution of his corporation, quickly charter the identical corporation under a new name.

145. See *supra* notes 140-44.

146. See *supra* note 141 and accompanying text.

require the corporate officer him/herself to compensate the injured party, which would obviously deter future offenders more than if restitution is not required, or if the corporation provides the funds.¹⁴⁷ It would also eliminate the harm created by the unlawful conduct.

New Jersey's statutory scheme, while providing some useful ideas towards effective legislation, does not include key provisions for effective regulation of hazardous waste. For example, the statute should give a specific definition of hazardous waste.¹⁴⁸ The legislation, however, should contain further provisions.¹⁴⁹ These measures would increase the likelihood that New Jersey will close its "enforcement gap" in the future,¹⁵⁰ deter potential future violators,¹⁵¹ and thus fulfill the purpose of the state's environmental legislation, protection of the environment.¹⁵²

Another state with extensive hazardous waste regulation is Pennsylvania. Pennsylvania has a comprehensive Solid Waste Management Act which includes a broad definition of hazardous waste.¹⁵³ The penalties in the Pennsylvania act provide for minimum as well as maximum levels for fines and imprisonment terms.¹⁵⁴ These minimum levels provide the courts with penalties that are likely to be significant and thus will have a greater deterrent effect on others. Finally, Pennsylvania has a twenty-year statute of limitations that does not begin to run until the offense is discovered.¹⁵⁵ This recently enacted statute of limitations will undoubtedly help prosecutors greatly.¹⁵⁶ In many cases, illegal dumpings escape discovery for years and require extensive investigation after discovery and before prosecutors

147. Restitution by the convicted corporate officer to the injured party, which should include the state and the public costs (thus, clean up of hazardous waste would be included) in the amount of the damage, would most importantly attempt to alleviate the harm which brought about the need for a penalty. If no person (including the public) or thing (the environment) were harmed, there would be no reason for a penalty. Additionally, restitution will require a substantial cash flow from the convicted individual, and this would result in a penalty because the offender would rather not part with the required cash. However, whether restitution amounts to a penalty would rest on the facts of each case (depending especially on the assets of the convicted corporate officer).

148. See *infra* note 236 and accompanying text.

149. See *infra* notes 238-50 and accompanying text.

150. D. REBOVICH, *supra* note 3, at 8.

151. See *supra* note 15.

152. See *supra* note 11.

153. PA. STAT. ANN. tit. 35, §§ 6018.101-.1003 (Purdon Supp. 1987) (the hazardous waste definition is given at § 6018.103).

154. *Id.* § 6018.606(g). For example, the highest penalty, first degree felony, carries a fine of at least \$10,000 but not more than \$500,000 per day of violation, and imprisonment for between 2 and 20 years. *Id.*

155. *Id.* § 6018.617.

156. However, to prove entirely effective at convicting responsible parties who are difficult to locate when the crime has been discovered, the statute of limitations should be eliminated.

may seek criminal prosecution.¹⁵⁷ Effective environmental legislation should not have a statute of limitations because violators whose crime has been concealed for many years should be subject to prosecution.¹⁵⁸ Further, inclusion of minimum fines and prison terms in a statutory scheme would not guarantee that every corporate officer would consider all imposed criminal sanctions punishment, but the legislation would increase the likelihood that the violator will indeed suffer a penalty.¹⁵⁹

Pennsylvania provides several provisions which facilitate conviction of the corporate officer who has violated environmental regulations. However, several provisions which would facilitate conviction are missing.¹⁶⁰ Inclusion of these provisions would help close Pennsylvania's enforcement gap,¹⁶¹ deter potential violators,¹⁶² and thus fulfill the legislative intent of protecting the environment.¹⁶³

Illinois also provides extensive hazardous waste regulation. The Illinois Environmental Protection Act¹⁶⁴ provides for varying degrees of felony offenses according to the offender's state of mind and the supposed severity of the offender's action. Illinois does not use quantities of waste to determine the degree of culpability.¹⁶⁵ Furthermore, the Illinois incarceration provisions provide not only maximum sentences, but minimum sentences as well.¹⁶⁶ However, Illinois' criminal fines, which vary according to the of-

157. D. REBOVICH, *supra* note 3, at 15.

158. *Id.* at 17.

159. A wealthy corporate officer convicted of an unlawful disposal of hazardous waste which does not carry a minimum fine or a minimum incarceration period may receive a prison term of five days and/or a \$100 fine. However, if the same offense carried a minimum one year prison term and minimum \$2,500 fine, the likelihood that the corporate officer considers the sanction as punishment will be greater.

160. See *infra* notes 238-50 and accompanying text.

161. D. REBOVICH, *supra* note 3, at 8.

162. See *supra* note 15.

163. See *supra* note 11.

164. ILL. ANN. STAT. ch. 111½, paras. 1003 to 1052 (Smith-Hurd 1984 & Supp. 1987).

165. *Id.* ch. 111½, para. 1044. This avoids what at times seems unjust: unlawful release of 4,999 gallons of a waste is treated as a lighter offense than the unlawful release of one gallon of waste mixed with 4,999 gallons of water; or, the unlawful release of 4,999 gallons of waste is treated as a lighter offense than the unlawful release of one more gallon (5,000 gallons) of that waste. On the other hand, the absence of quantitative categories avoids the specificity which corporations find very important to decision-making. See *supra* note 99.

166. ILL. ANN. STAT. ch. 38, para. 1005-8-1 (Smith-Hurd 1984 & Supp. 1987) provides:

(4) for a Class 1 felony, the sentence shall be not less than 4 years and not more than 15 years;

(5) for a Class 2 felony, the sentence shall be not less than 3 years and not more than 7 years;

(6) for a Class 3 felony, the sentence shall be not less than 2 years and not more than 5 years;

(7) for a Class 4 felony, the sentence shall be not less than 1 year and not more than

fense, do not provide minimum dollar levels.¹⁶⁷ Finally, Illinois provides a lengthy definition of hazardous waste, but it is somewhat vague.¹⁶⁸ This vagueness hinders the corporate officers' ability to determine what the legislature considers hazardous waste. An effective statutory scheme should incorporate minimum prison terms for each class of felony similar to the Illinois provision.¹⁶⁹ Illinois, however, does not offer any further provisions for model legislation which will effectively result in imposition of criminal sanctions on corporate officers.

While Illinois provides minimum prison terms that facilitate deterrence of potential future violators,¹⁷⁰ its Environmental Protection Act should include additional provisions.¹⁷¹ These measures would facilitate conviction of corporate officers, which would deter future potential violators¹⁷² and thus fulfill the legislative intent of protecting the environment.¹⁷³

As demonstrated by examination of various state approaches, varying standards and penalties from state to state govern the imposition of criminal sanctions for unlawful release of hazardous waste. The examined states are heavily industrialized and attempt to provide specific definitions of hazardous waste and specific penalties for various levels of culpability which are aimed at facilitating the conviction of offenders. New York, a state which has experienced heavy industry over a longer period of time than

3 years.

167. Inclusion of a minimum term of years deters future potential violators because they know that if convicted they face the possibility of at least one year in prison, opposed to 30 days or some other small period if the minimum levels did not exist. The language used by the Illinois General Assembly is "subject to a fine not to exceed." See, e.g., ILL. ANN. STAT. ch. 111½, paras. 1042-1044(b)(2) (Smith-Hurd 1984 & Supp. 1987).

168. See ILL. ANN. STAT. ch. 111½, para. 1003.15 (Smith-Hurd Supp. 1987) and *supra* notes 97-98. Although lengthy, the definition retains an amount of ambiguity.

"Hazardous waste" means a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed, and which has been identified, by characteristics or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976, P.L. 94-580, or pursuant to Board regulations.

ILL. ANN. STAT. ch. 111½, para. 1003.15 (Smith-Hurd Supp. 1987). The words "increase in mortality" are ambiguous because it is difficult to determine an increase in mortality. The main problem with this definition is lack of any concrete technical measurements that New York now provides. See *supra* note 97. This was a problem New York had before ch. 671; the definition was not specific enough for corporate officers to decide whether a regulation would be violated.

169. See *supra* note 166.

170. *Id.*

171. See *infra* notes 238-50 and accompanying text.

172. See *supra* note 15.

173. See *supra* note 11.

states such as Illinois, has addressed hazardous waste crime with a stronger voice than Illinois. The current New York Environmental Conservation Law provides a good lead toward furthering adequate regulation of hazardous waste, but does not provide a framework which will successfully reach this goal.

B. State Courts' Responses to the Legislation

State courts, showing the same unwillingness to utilize the criminal provisions of environmental statutes as federal courts,¹⁷⁴ have sparsely imposed the increased criminal provisions of state environmental statutes. For example, in *D.V.C. Industries, Inc. v. Flacke*,¹⁷⁵ a New York Appellate Division court found that D.V.C. violated its discharge permit on eighteen separate occasions, including the failure to take action to correct eight violations after given ample time to do so. These violations resulted in a paltry \$18,000 civil penalty.¹⁷⁶ This case provided an excellent opportunity for the imposition of criminal sanctions against the responsible corporate officer. These repeated violations show that the violator possessed the knowledge required for imposition of a class D felony under chapter 671.¹⁷⁷ Hence, a criminal penalty, unlike a civil fine, in this situation would have provided deterrence to officers of other corporations.¹⁷⁸

The decision in *Haz-O-Waste Corp. v. Williams*, is another instance of the New York courts' reluctance to impose criminal sanctions.¹⁷⁹ In *Haz-O-Waste*, a New York Appellate Division court found that the New York Department of Environmental Conservation told the corporation on April 20, 1979, not to "accept, store, transport or dispose of any wastes significantly contaminated with cyanides or cyanide compounds."¹⁸⁰ However, on June 4, 1979, and again on September 23, 1979, cyanide waste was found stored on the premises. The Haz-O-Waste Corporation received only a \$10,000 civil penalty. To highlight the lack of fear which many violators have towards prosecution, during each inspection the corporate president pointed out numerous barrels of cyanide to the inspector.¹⁸¹

Wasteland, Inc. v. Pollution Control Board,¹⁸² provides an example of

174. See *supra* notes 62-69 and accompanying text.

175. 86 A.D.2d 892, 447 N.Y.S.2d 523 (1982).

176. *Id.* at 892, 447 N.Y.S.2d at 523.

177. Ch. 671, *supra* note 12, § 15 (adds a new § 71-2713 to N.Y. ENVTL. CONSERV. LAW §§ 1-0101 to 72-0602 (McKinney 1984 & Supp. 1988)).

178. See Memorandum for the Governor, *supra* note 11, at 3; see also Memorandum in Support of Legislation, *supra* note 11.

179. 103 A.D.2d 1001, 478 N.Y.S.2d 198 (1984).

180. *Id.* at 1001, 478 N.Y.S.2d at 199.

181. *Id.*

182. 118 Ill. App. 3d 1041, 456 N.E.2d 964 (1983).

judicial reluctance to impose criminal sanctions in the Illinois courts. In *Wasteland*, the corporation violated, on nine separate occasions within one year, a statutory provision that provides for criminal sanctions. The Illinois appellate court affirmed the Illinois Pollution Control Board's finding that the corporation committed the violations in bad faith and affirmed a \$75,000 civil penalty. This fine equalled only the amount that the corporation saved by utilizing unlawful, instead of lawful, practices.¹⁸³ This penalty fails to constitute a true penalty; the violator must experience a net loss of something — money, freedom of movement, honor, status, etc. — for a sentence to equal a penalty.¹⁸⁴ Further, imposition of criminal, as opposed to civil, penalties would provide a stronger deterrent because of the stigma attached to conviction and the problems created by a criminal record.¹⁸⁵

City of Moline v. Pollution Control Board,¹⁸⁶ provides another example of the judicial reluctance in Illinois to impose criminal sanctions on violators of hazardous waste regulations. In *City of Moline*, the city violated a provision of the Illinois Environmental Protection Act, the city's permits, and various administrative standards. The Illinois appellate court reversed the Illinois Pollution Control Board's imposition of a penalty on the city and stated that the Act's punitive measures are secondary considerations.¹⁸⁷ This judicial interpretation is surely contrary to the legislative intent, given the explicit inclusion of criminal penalties in the state's environmental statutes.¹⁸⁸

183. *Id.*

184. Penalty involves the idea of punishment. BLACK'S LAW DICTIONARY 1020 (5th ed. 1979). Punishment is "[a] deprivation of property or some right." *Id.* at 1110.

A fine which takes into account the offender's assets would constitute a financial penalty; a prison term for a minimum of six months would provide a loss of freedom of movement. *See supra* note 159 and accompanying text.

185. *See supra* note 15.

186. 133 Ill. App. 3d 431, 478 N.E.2d 906 (1985).

187. *Id.* at 433, 478 N.E.2d at 908. *See also* Chicago Magnesium Casting Co. v. Pollution Control Bd., 22 Ill. App. 3d 489, 317 N.E.2d 689 (1974), where a magnesium foundry continued to violate sulfur dioxide emissions after investigation by a Pollution Control Board investigator, but was not fined because emissions had discontinued by the time the complaint was filed.

188. Illinois' criminal sanctions are similar to those provided in New York. *See supra* note 83 (New York), and *supra* notes 165-67 (Illinois). The Illinois courts have not embraced that state's environmental criminal sanctions. *See supra* notes 182-87 and accompanying text; *see infra* notes 189-92 and accompanying text. Likewise, the New York courts have not embraced New York's environmental criminal sanctions. *See supra* notes 174-81 and accompanying text. The New York legislature has recently declared that criminal sanctions have not been used at an acceptable rate. Memorandum in Support of Legislation, *supra* note 11. With the similarities in the Illinois and New York criminal sanctions and judicial reluctance, the New York legislature's recent statement that the criminal sanctions should be used more frequently, and are thus not secondary considerations, surely applies to Illinois as well.

Standard Scrap Metal Co. v. Pollution Control Board,¹⁸⁹ provides a final example of the judicial reluctance to impose criminal sanctions for hazardous waste violations in Illinois. In *Standard Scrap Metal*, a scrap metal company was found to have knowingly operated a furnace and incinerator for nine years without a permit, and having failed to install an afterburner to reduce furnace emissions to allowable rates.¹⁹⁰ The Illinois appellate court affirmed the Illinois Pollution Control Board's \$30,000 civil penalty when the company's wrongdoings saved it over \$100,000.¹⁹¹ Here, the court should have imposed criminal sanctions on the responsible corporate officer. A penalty which at least equals the amount saved by utilizing unlawful measures, or at least a prison term for the responsible individual would provide a result more in tune with the notions of justice and deterrence.¹⁹²

Finally, a recent study of hazardous waste offense and offender characteristics in Maine, Maryland, New Jersey, and Pennsylvania describes many of the criminal penalties imposed against corporations and corporate agents in these states between January 1, 1977, and December 31, 1984.¹⁹³ The vast number of cases resulted in small fines and suspended prison terms for individuals, and varied, usually small fines for corporations.¹⁹⁴ Obviously, the courts in these states are reluctant to impose criminal sanctions.

The failure of the state courts to impose criminal sanctions when confronted with such blatant statutory violations as the offenders committed in these cases exhibits the reluctance to impose criminal sanctions which permeates the judiciary.¹⁹⁵ The purpose of the statutes that regulate disposal of hazardous waste is to protect the environment.¹⁹⁶ If the courts do not impose criminal sanctions, illegal discarding of hazardous waste will not be deterred,¹⁹⁷ clean-up funds¹⁹⁸ will be grossly insufficient to handle the many

189. 142 Ill. App. 3d 655, 491 N.E.2d 1251 (1986).

190. *Id.* at 658, 491 N.E.2d at 1253.

191. *Id.* at 660-61, 491 N.E.2d at 1255.

192. In this case the company saved \$100,000 and none of its officers suffered a penalty. If the responsible officers were fined or penalized, the source of the evil would be penalized. Also, a penalty would be felt; when the corporation is fined an amount which is less than it saved by violating the regulations, it and other corporations might find this to be a wise business practice because they came out ahead. Allowing a net gain to be realized when a penalty is imposed is contrary to the purpose of penalties, which is that the recipient should suffer a loss.

193. D. REBOVICH, *supra* note 3, at 1.

194. *Id.* at 59-63.

195. *See supra* notes 174-88 and accompanying text.

196. *See supra* note 11.

197. Memorandum for the Governor, *supra* note 11, at 3; *see also* Memorandum in Support of Legislation, *supra* note 11.

198. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 71-2723 (McKinney 1984 & Supp. 1988). *See also* CERCLA, 42 U.S.C. § 9621 (1982).

unauthorized waste sites,¹⁹⁹ and the environment will undoubtedly suffer from avoidable contamination. This absence of criminal sanctions will frustrate the purpose of protecting the environment.²⁰⁰ While judicial reluctance results in few criminal sanctions, judicial reluctance is not the only reason why criminal sanctions are seldomly imposed.

V. THE PROSECUTION PROBLEM

While the scarcity of criminal sanctions levied against corporate officers who violate environmental statutes results in part from judicial reluctance, prosecutorial problems also contribute to the scarcity of convictions. First, the prosecutor must seek criminal sanctions before the courts can impose them. Second, traditional public perceptions can hinder prosecutorial and judicial efforts. Third, the corporate officer can attempt to insulate himself within the corporate structure. Fourth, the corporate officer can attempt to use the subsidiary corporation to escape liability. Finally, various other special obstacles may hinder the successful prosecution of corporate officers. Prosecutors and judges must attempt to avoid these obstacles when possible.

A. Determination of Sanctions

After the prosecutor discovers a violation of an environmental statute, he or she must determine whether to seek criminal sanctions. The determination of whether to pursue criminal penalties or civil monetary penalties is left to the discretion of the officer or agency charged with enforcement.²⁰¹

199. See U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 6, at 14.

200. See *supra* note 11.

201. U.S. v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975). In *Phelps Dodge*, where defendant's motion to dismiss criminal charges for polluting navigable waters was denied, the court, in applying the FWPCA, concluded that the EPA Administrator must act on any violation but that he has the choice of pursuing civil or criminal sanctions. *Id.*

In 1977, the statutory compliance deadlines for the Clean Air Act and the FWPCA arrived, creating thousands of major source violations of statutory regulations. McMurry & Ramsey, *supra* note 20, at 1135. (The FWPCA contained a July 1, 1977 deadline for attaining emission levels to meet the best practicable technology (BPT) standards for industrial discharges. FWPCA, 33 U.S.C.A. § 1311 (1986). The Clean Air Act had similar deadlines for air pollutants. Clean Air Act, 42 U.S.C. § 7420 (1982)). Also, an activist administration appointed a new leadership in the EPA, the primary agency responsible for implementing most federal environmental statutes. McMurry & Ramsey, *supra* note 20, at 1135. In addition, congressional hearings on the reauthorization of the Clean Air Act and the FWPCA in 1976 and 1977 showed an impatience with the EPA's passive enforcement efforts. *Id.* In response, the EPA adopted its Major Source Enforcement Effort (MSSEE) to bring all major source violators into compliance with the new Clean Air Act and FWPCA standards. *Id.* at 1136. The aim was to bring as many enforcement actions as possible, which meant civil enforcement actions because civil enforcement efforts are less costly than criminal enforcement efforts. *Id.*

Thus the EPA, in the late 1970s, focused on civil enforcement actions of environmental

However, utilization of civil sanctions has not always fulfilled the purpose of environmental regulations.²⁰² Therefore, prosecutors should be more willing to seek criminal sanctions when they are available.²⁰³ But once prosecutors seek criminal sanctions, they must face judicial reluctance.²⁰⁴

B. Traditional Public Perceptions

The continued reluctance of the courts to impose criminal sanctions on corporate officers for unlawful disposal of hazardous waste stems in part from traditional views on this type of punishment.²⁰⁵ In the nineteenth and continuing into the twentieth century, regulatory violations were considered economic crimes. Accordingly, judges did not feel that economic crimes, with the public as the victim, deserved criminal punishment.²⁰⁶ Secondly, because the public perception of regulatory violations traditionally has been a perception that regulatory violations were not morally delinquent acts,²⁰⁷ violations have not been punished as criminal acts.²⁰⁸ In light of the recent

statutory violations. Moreover, the federal agencies directly responsible for criminal enforcement of the environmental statutes, the Criminal Division of the Justice Department, the United States Attorney, and the Federal Bureau of Investigation, were not primarily concerned with criminal enforcement actions. Thus, an organized federal criminal enforcement program did not exist in the late 1970s. *Id.* at 1136-37.

The use of criminal enforcement has increased amongst some federal agencies in the 1980s. A new Environmental Enforcement Section of the Land and Natural Resources Division of the Department of Justice was created in 1980 and listed criminal enforcement as its top priority. J. TOMPKINS, JR., OFFICE OF POLICY & MGMT. ANALYSIS, CRIMINAL DIVISION, U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL: NATIONAL PRIORITIES FOR THE INVESTIGATION AND PROSECUTION OF WHITE COLLAR CRIME (1980). Moreover, at the EPA a new Office of Criminal Enforcement was created in 1981. McMurry & Ramsey, *supra* note 20, at 1140 (citing Office of Criminal Enforcement, Env'tl. Protection Agency, Criminal Enforcement Strategy 8 (Draft 1985)). In 1982 the EPA hired its first criminal investigators. *Id.* These organizations, however, focused only on the most serious regulatory violators. McMurry & Ramsey, *supra* note 20, at 1141 (citing B. Blum, Creation of the Office of Criminal Enforcement 2-3 (unpublished EPA internal memorandum) (Jan. 5, 1981)). Nonetheless, EPA claims that deterrence through criminal prosecution has become an important policy goal of its enforcement activities. McMurry & Ramsey, *supra* note 20, at 1143. The EPA, state EPAs, other prosecutors, and the judiciary will have to embrace this policy to fulfill statutory policies of deterrence and thus compliance with statutory regulations. See ch. 671, *supra* note 12; *supra* note 11.

Legislation that provides for mandatory criminal sanctions would eliminate the situation in which criminal sanctions are available but are not sought. See *supra* note 11.

202. See *supra* note 11.

203. See *supra* notes 28-40 and accompanying text.

204. See *supra* notes 62-69, 174-88 and accompanying text. See also Memorandum in Support of Legislation, *supra* note 11; Comment, 20 LAND & WATER L. REV., *supra* note 13, at 102.

205. Comment, 20 LAND & WATER L. REV., *supra* note 13, at 95.

206. *Id.*

207. 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 2.08, at 2-555 to -564 (1987).

208. *Id.*

changes in public perception of environmental regulatory violations,²⁰⁹ these past obstacles should not permeate current judicial thought.

C. *The Corporate Structure*

Punishment of the individual functioning within the corporation for involvement in corporate crime has been rare.²¹⁰ In a recent study, it was found that in 1975 and 1976 only 1.5 percent of enforcement efforts against corporate officers produced convictions.²¹¹ Furthermore, prison terms that are levied rarely exceed thirty days, and fines are at a level generally considered inconsequential.²¹² The corporate polluter thus faces only a slight

209. See *supra* notes 1, 3 and accompanying text.

210. See, e.g., U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *supra* note 62, at 526.

The corporate form of organization used in business has two advantages over other forms of organization from the point of view of violations of law: 1) anonymity of persons which impedes the location of responsibility; and 2) an increased rationality of the behavior conducted under the corporate form. M. ERMANN & R. LUNDMAN, *supra* note 17, at 59.

211. M. CLINARD, *supra* note 11, at 206. M. Clinard sheds light on the amounts and types of penalties which are actually served. In the study, of 56 federally convicted corporate executives, 62.5% received probation, 21.4% had their sentences suspended and 28.6% were incarcerated. The average prison sentence for all those convicted, whether or not they went to prison and regardless of the offense, averaged 2.8 days; this was a total of 16 officers of 582 corporations sentenced to 597 days imprisonment. Finally, the average incarceration period for the imprisoned corporate executive was 37.1 days. *Id.* at XXII. These figures certainly do not amount to penalties, and their deterrent value is extremely low. A corporate officer aware of the leniency which these figures represent will not be deterred.

212. M. ERMANN & R. LUNDMAN, *supra* note 17, at 233.

The minimal effect which criminal fines have on corporate defendants is illustrated by the following. In 1976, 23 corporations were convicted of fixing and raising the prices of folding cartons over a 30-year period. The corporations were initially fined \$50,000 each, but some fines were later reduced; nonetheless, \$50,000 to these corporations was the equivalent of between \$0.24 and \$1.80 for persons earning \$15,000 a year. *Id.* at 234. While jail sentences may seem harsh for a corporate officer who unlawfully displaces hazardous waste, it is obvious that corporations will continue to violate regulations if the penalties which are levied do not affect corporate profits and result in protests from shareholders. Substantial fines and jail sentences brought upon corporate officers will cause the nation's corporate officers to comply with statutory regulations. Fines levied on corporate entities will many times be diluted amongst shareholders and consumers, and thus any punitive and deterrent value will be nonexistent. See *supra* note 19.

The case of Allied Chemical is a good illustration of the point that even if the imposed fines appear very extensive, they may not amount to what could be considered a penalty. Allied Chemical, with over \$2.6 billion in annual sales, organized a subsidiary corporation for production of an insecticide which it knew was dangerous. Shortly after production began, 10 of the employees became ill, as did people living near the plant. Soon, 100 miles of the James River were closed to fishing for a period of time which resulted in a loss of between \$4 million and \$24 million to the fishing industry. The EPA spent \$3.5 million in clean up of the river. However, not one individual of Allied was fined or faced a jail term, but the top two officers of the subsidiary corporation were each fined \$25,000 and placed on five years probation. Also, the subsidiary corporation was fined \$3.8 million, but was defunct so not one dollar of this fine

chance of conviction, and if convicted a strong likelihood of a lenient sentence.

The business judgment rule²¹³ gives corporate officers' decisions deference to insure the risk-taking which stimulates economic vitality.²¹⁴ While providing corporate officers the needed security to make business decisions, the business judgment rule does allow judicial review of business decisions which are grossly negligent.²¹⁵ Thus, a strong corporate veil protects the officers of corporations.²¹⁶ However, the environmental statutes provide regulations which do not allow the corporate violator to hide behind the corporate veil.²¹⁷ Indeed, the doctrine of piercing the corporate veil is available to prosecutors and courts when the corporation is used merely to isolate corporate agents from their wrongdoing, and allows conviction of corporate agents despite the existence of the corporation.²¹⁸ Prosecutors and courts

was ever paid. In addition, Allied Chemical was criminally fined \$13.24 million. The final cash outflow from Allied Chemical amounted to \$9.5 million, which is \$0.33 per share spread over the 28,500,000 shares of Allied Chemical stock. M. ERMANN & R. LUNDMAN, *supra* note 17, at 280-89. Allied stock averaged \$45 per share that year. ALLIED CHEMICAL CO., 1982 ANNUAL REPORT (1983).

213. The business judgment rule states that corporate directors' decisions do not subject the directors to personal liability for possible illegal results from their acts if they: 1) acted within the corporation's power and the directors' authority; 2) acted in accordance with a reasonable basis for their decision; 3) acted in good faith and; 4) honestly believed that the action was in the best interest of the corporation. The rule applies as well to corporate officers. H. HENN, *LAW OF CORPORATIONS* 508-09 (2d ed. 1986). In *Smith v. Van Gorkom*, 488 A.2d 858, *reh'g denied*, 488 A.2d 898 (Del. 1985), the board of directors of a corporation agreed to conduct a leveraged buy-out of another corporation controlled by a member of the board, after a very short presentation and without virtually any investigation of the deal; the court found that this was a violation of the business judgment rule.

214. H. HENN, *supra* note 213, at 508. See also Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1368, 1378 (1948) (arguing that industrial corporations should have broader liability); Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 617-19 (1975) (discusses problems posed by bankruptcy of subsidiary and affiliated corporations); Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262 (1967) (discussing limited liability under two theories of corporate functions, the large corporation and the small corporation); Comment, *Inadequate Capitalization as a Basis for Shareholder Liability: The California Approach and a Recommendation*, 45 S. CAL. L. REV. 823, 830, 833-34 (1972) (arguing for less leniency on undercapitalized corporations).

215. See *supra* note 213.

216. See *infra* note 218.

217. See, e.g., CERCLA, 42 U.S.C. § 9606(b) (1982). See also *supra* note 82 and accompanying text.

218. See also *supra* note 59. *Dewitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976) (the court pierced the corporate veil and held the corporation's president personally liable for the debts of a corporation which completely disregarded corporate formalities, functioned only for the financial advantage of its president, and was undercapitalized). On the other hand, corporate officers may utilize the *ultra vires* doctrine. This doctrine states that any illegal act of a corporate employee which was done outside the scope of employment does not impute liability to the employee's superiors for the wrongful conduct

should fully embrace this doctrine to punish violators of criminal statutes.

D. Parent/Subsidiary Problem

A further obstacle to successful conviction of those responsible for the illegal release of hazardous waste is the wholly-owned subsidiary of a parent company.²¹⁹ This problem arises when the subsidiary functions primarily as the discarder of waste and insulates the responsible individuals in the parent corporation.²²⁰ The environmental statutes have failed to address this possible obstacle to prosecution of responsible individuals.²²¹ The failure of environmental statutes to address the situation where a subsidiary

of the employee. Comment, *supra* note 11, at 65.

219. A parent company is defined as owning "more than 50 percent of the existing shares of" another corporation. BLACK'S LAW DICTIONARY 1004 (5th ed. 1979).

See Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986) (discussing the failure of CERCLA to consider the situation where the parent corporation has formed an insolvent subsidiary corporation which carries out the wishes of the parent corporation while isolating the parent from liability for wrongful actions directed by the parent). See also M. ERMANN & R. LUNDMAN, *supra* note 17, at 281. Here, the bureaucratic and physical distance between the Allied Chemical officers and the subsidiary shielded them, but not the subsidiary corporation, from liability. This problem needs to be addressed in the environmental statutes. *But cf.* United States v. Johns-Manville Corp., 231 F. Supp. 690, 698 (E.D. Pa. 1964) where the district court held a corporation liable for the activities of an employee of the corporation's subsidiary. *Id.*

220. Note, *supra* note 219. An example of this problem is *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982). The court said that the Pennsylvania Solid Waste Management Act, which defines unlawful disposal of hazardous waste, requires that the person who generated hazardous waste must dispose of it to be liable for unlawful disposal. *Id.* at 1148-49. Therefore, a generator of hazardous waste may contract with a third party, which may be its subsidiary, for disposal of the waste and not be liable for the disposal. When a party contracts with another party to perform an unlawful act, both parties should be liable. The court should have found the party which contracts for the unlawful disposal of its hazardous waste liable. This would deter unlawful generators of hazardous waste from concealing the true identity of their waste from unsuspecting disposers (such as those unlicensed to accept hazardous waste, and thus unaware of the material's characterization as hazardous waste, who would then bear the brunt of liability).

221. Note, *supra* note 219, at 987. *But see* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987) (the court held that a person who owns an interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste; see the discussion of this case at *supra* note 64). Further, courts have been willing to pierce the corporate veil when there is evidence of a deliberate attempt to cut off liability by incorporating subsidiaries. See, e.g., United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110, 119 (D. Vt. 1973), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974) (affirmed the granting of equitable relief, for oil spills, from the principal owners of vessels engaged in transporting oil for unreasonable interference with the public's rights). However, the doctrine has not been utilized against subsidiary corporations under environmental statutes. Note, *supra* note 219, at 1001. Courts should not be so reluctant. Piercing the corporate veil of both the subsidiary and parent corporations and convicting the responsible officers within the parent corporations would put the penalty at its source. See also the Allied Chemical case, *supra* note 212.

insulates individuals within the parent corporation who made illegal decisions is a major deletion; it provides an excellent loophole for many corporations, and thus responsible corporate officers.²²² An easy solution would be explicit statutory language which calls for piercing of the subsidiary's corporate veil to identify the responsible individual(s) within the parent corporation. The statute should read that the prosecutor could seek to pierce the subsidiary's corporate veil whenever he or she has evidence that the subsidiary corporation has functioned solely or primarily to insulate the parent corporation from any liability for statutory violations.

E. Special Obstacles

In addition to the problems mentioned above, additional obstacles to the prosecution of hazardous waste offenders exist. A recent study of hazardous waste crime in four northeastern states has revealed seven special obstacles.²²³ First, there are strong business community pressures to abandon prosecutions against corporations for unlawful releases of hazardous waste.²²⁴ A second obstacle is the difficulty of adequately describing and verifying dangerous levels of disposed hazardous waste to judges and jurors.²²⁵ In addition, prosecutors are many times limited in the amount of technical assistance at trial compared to the assistance corporate defendants utilize.²²⁶ Also, many liberal local sewer disposal regulations conflict with more stringent state regulations.²²⁷ Furthermore, there are deficiencies in tracking offenders which allow exploitation by offenders.²²⁸ Sixth, environmental inspectors do not always collect evidence in a manner which enables it to be used in a criminal prosecution.²²⁹ Another obstacle is the push for expediency in the criminal prosecution of cases and pressure put on prosecutors by public and special interest groups.²³⁰

Two final obstacles prevent the successful prosecution of corporate officers. First, judges frequently accept *nolo contendere* pleas.²³¹ This judicial

222. The responsible corporate officer can organize a subsidiary, utilize unsuspecting lower-level employees as corporate officers, and arrange for the subsidiary without suspicion or without concern, to unlawfully discard hazardous waste.

223. D. REBOVICH, *supra* note 3, at 4.

224. *Id.* Increased public awareness may erode this factor. Ch. 671's new definition of hazardous waste will help eliminate this problem. *See supra* note 97.

225. D. REBOVICH, *supra* note 3, at 4.

226. *Id.* This factor can be hard to overcome when corporate coffers are very large.

227. *Id.* States should pre-empt local sewer regulations.

228. Elimination of any statute of limitations would prove helpful in tracking offenders.

See infra notes 241-42 and accompanying text.

229. Education of inspectors would increase admissible evidence.

230. Education of the public would alert them to the intricacies involved, and time required, for successful prosecutions.

231. Radin, *Corporate Criminal Liability for Employee-Endangering Activities*, 21

acceptance virtually relieves the corporate officer from punishment because a nolo contendere plea relieves the officer from subsequent civil liability, which is imposed frequently.²³² Judicial acceptance of nolo contendere pleas will not deter corporate officers because it gives them a sense that they have done no wrong; that because their corporation indemnified them, the law must not be right, or that the corporate officers' violation is somehow justified. Second, the corporation usually indemnifies its convicted corporate officer.²³³ Thus, judges should avoid nolo contendere pleas and indemnification to effectively deter future potential violators.

While courts may be reluctant to impose criminal sanctions when sanctions are available, judicial reluctance does not fully explain the sparse use of criminal sanctions against corporate officers who are responsible for unlawfully disposing hazardous waste. The problems mentioned above can hinder the prosecutor's attempt to seek criminal sanctions before the judge's role begins.

VI. A PROPOSAL TO ENSURE CORPORATE OFFICER CRIMINAL LIABILITY

None of the examined state statutes regulating hazardous waste singularly accomplishes the intended protection of the environment from unlawful disposal of hazardous waste.²³⁴ With the New York statutory structure as the framework, the addition of chapter 671, several provisions from other states, and further provisions, would provide a statutory framework which would provide the best deterrent to unlawful disposal of hazardous waste

COLUM. J.L. & SOC. PROBS. 39, 57 (1983) (analyzes corporate liability for injuries in the workplace).

232. *Id.* If judges do not impose criminal sanctions that penalize, they should be more reluctant in granting nolo contendere pleas.

233. *Id.* at 58; M. CLINARD, *supra* note 11, at 221.

All United States jurisdictions allow corporate indemnification of agents under certain circumstances, by statute. Some of these include situations where an adverse judgment is levied against the agent, and some are even mandatory. Irenas & Moskowitz, *supra* note 20, at 117-18. The argument in favor of indemnification is that it encourages recruitment of capable management. Wisener v. Air Express Int'l Corp., 583 F.2d 579, 583 (2d Cir. 1978) (former officer and director of a corporation was entitled to indemnification from corporation for legal fees and expenses incurred in defending himself in securities actions after an aborted merger). Also, it is argued that indemnification gives corporate officers discretion, void of any hindering fear, in seeking profits. Johnston, *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 BUS. LAW. 1993, 1994 (1978) (analyzes indemnification and insuring of directors and officers by their corporations for claims most likely to be encountered). However, protection of the nation's resources should not be inferior to the seeking of profits. Businesses need the resources to provide the products from which they seek to create profit. Depletion of resources will deplete profits. Also, if corporate management is capable, it will be able to make successful business decisions within the letter of the law. Legislators have not regulated the use of resources to the point that profits may only be realized by unlawful practices.

234. See *supra* notes 75-104, 125-73 and accompanying text.

and thus effectively protect the environment.

To further the deterrence of violations and protection of the environment, New York recently amended its environmental legislation, with the enactment of chapter 671, in an attempt to facilitate conviction of violators of hazardous waste statutes. Courts had been unwilling to embrace the criminal sanctions found in New York's Environmental Protection Law before enactment of chapter 671,²³⁵ and it is doubtful that chapter 671 will change this reluctance. The amendment provides important provisions to increase the likelihood of criminal convictions and meaningful penalties, but they stop short of their fullest potential impact.

Chapter 671 provides specific definitions of hazardous waste which will let corporate officers determine whether discharge of waste will be unlawful and will ease the prosecutor's burden of determining whether the waste was hazardous.²³⁶ The amendment also provides an affirmative defense to the corporate officer who has made a decision in accordance with the provisions of a valid permit.²³⁷ If a valid permit authorizes the discharge, the corporate officer has not violated any regulations. These provisions will possibly reduce the frequency of violations and will undoubtedly ease the prosecutor's burden when attempting to convict violators. Unfortunately, the amendment does not include provisions which would result in the convictions of as many violators, and deter as many future violators, as possible.

Several additional provisions are needed beyond those in New York's new Environmental Conservation Law if a statutory scheme is to effectively convict corporate officers who are responsible for the unlawful release of hazardous waste, and thus deter future violators. First, the amendment should contain minimum fines, as given in twelve state statutes,²³⁸ and minimum periods of incarceration, as six states provide.²³⁹ While these mini-

235. See *supra* notes 174-81 and accompanying text. See also Memorandum, *supra* note 13; Comment, 20 LAND & WATER L. REV., *supra* note 13, at 102.

236. Ch. 671, *supra* note 12, § 12 (amended N.Y. ENVTL. CONSERV. LAW § 71-2702 (McKinney 1984 & Supp. 1988)).

237. Ch. 671, *supra* note 12, § 17 (adds a new § 71-2720 to N.Y. ENVTL. CONSERV. LAW §§ 1-0101 to 72-0602 (McKinney 1984 & Supp. 1988)).

238. CAL. HEALTH & SAFETY CODE §§ 25189.5(b)-(d), 25191(a),(d) (West Supp. 1988); DEL. CODE ANN. tit. 7, §§ 6309(f),(g) (1983 & Supp. 1986); ILL. ANN. STAT. ch. 38, para. 1005-8-1 (Smith-Hurd 1984 & Supp. 1987); IND. CODE ANN. § 13-7-13-3(a) (West Supp. 1987); KY. REV. STAT. ANN. § 224.994(4) (Baldwin 1987); MO. ANN. STAT. § 260.425(3) (Vernon Supp. 1988); OHIO REV. CODE ANN. § 3734.99 (Baldwin 1987); OKLA. STAT. ANN. tit. 63, § 1-2011 (West Supp. 1988); PA. STAT. ANN. tit. 35, § 6018.606 (Purdon Supp. 1987); TENN. CODE ANN. § 68-46-114(a)(1) (1987); TEX. REV. CIV. STAT. ANN. art. 4477-7, §§ 8(b)(1)(A)-(E) (Vernon Supp. 1988); WASH. REV. CODE ANN. § 70.105.090 (Supp. 1987).

239. ALA. CODE § 22-30-19(c) (Supp. 1987); GA. CODE ANN. §§ 12-8-82(a)(1)-(5),(b) (Supp. 1987); KY. REV. STAT. ANN. § 224.994(6) (Baldwin 1987); OHIO REV. CODE ANN. § 3734.99 (Baldwin 1987); PA. STAT. ANN. tit. 35, § 6018.606 (Purdon Supp. 1987); W. VA.

imum sanctions would not guarantee that every fine and prison term are considered a penalty by the convicted corporate officer, this provision would increase the likelihood that the corporate officer would consider the sanction a penalty. In addition, statutes should order the sentencing judge to consider the corporate officer's assets before imposing a fine. This order to consider an officer's assets would increase the likelihood that each offender will feel the sting of a penalty.

Third, as Maryland has done, legislation should eliminate the statute of limitations.²⁴⁰ Discarders of hazardous waste often conceal the waste carefully; thus, it is not discovered for many years.²⁴¹ The lapse of time should not erase liability for hazardous waste crimes. Indeed, in many instances the lapse of time brings the liability to its fruition, as when hazardous waste finally corrodes through its container, seeps into ground water, and is finally discovered. Also, identification of the violator may consume many years past the discovery date of the violation. Legislation should thus also exclude after-the-fact statutes of limitations. Fourth, after a prosecutor convicts a corporate officer for violating legislative criminal regulations, imposition of the sanctions should be mandatory, pre-empting any civil penalties. Mandatory imposition of criminal sanctions would deter future violators more effectively, an important purpose of criminal sanctions.²⁴²

Effective legislation should include five additional provisions. First, legislation should forbid indemnification of the convicted corporate officer by his or her corporation.²⁴³ Indemnification is admittedly difficult to patrol; however, examination of the officer's and corporation's financial records should reveal any indemnification. Second, legislation should deprive the convicted corporate officer of any corporate management position in any corporation for a period of at least two years.²⁴⁴ Deprivation of any corporate management position for a convicted corporate officer is necessary because many of these individuals merely jump from the courtroom to another corporate management position.²⁴⁵ This jump to another management position does not deter or prevent the environmental criminal from continued criminal conduct. Legislation must eliminate the criminal's forum for a period of time during which he or she may consider the repercussions of any future violations. Third, legislation needs explicit language which states that courts should apply the doctrine of piercing the corporate veil of the

CODE §§ 20-5E-15(a),(c),(d) (1985).

240. MD. ENVTL. CODE ANN. § 7-265 (1987).

241. D. REBOVICH, *supra* note 3, at 15.

242. *See supra* notes 95, 201.

243. *See supra* note 233.

244. *See* M. CLINARD, *supra* note 11, at 221 (argument made for corporate crimes in general).

245. *See* M. CLINARD, *supra* note 11, at 221.

subsidiary corporation and its parent when sufficient evidence for application of the doctrine exists.²⁴⁶ Piercing these corporate veils would let the courts punish the responsible corporate officer.²⁴⁷ Legislation should also require that corporate officers responsible for the unlawful release of hazardous waste that damages others provide restitution to such parties, as New Jersey has done.²⁴⁸ Restitution by violators guarantees some financial loss by the violator, elimination of the harm caused, and possibly instills shame in the violator's conscience. Finally, state legislation should pre-empt local sewer regulations. These sewer regulations are frequently much more lenient than state regulations, and allow the release of dangerous substances that can reach water used for human use and consumption.²⁴⁹

In summary, the favored provisions of New York, supplemented with additional provisions, including some from Maryland, New Jersey, Pennsylvania, and Illinois, would create legislation which would successfully achieve the purpose emphasized by the heavily industrialized state of New York. This legislation would further the conviction of environmental criminals and deter environmental abuse in an effort to conserve limited environmental resources,²⁵⁰ and achieve the general legislative purpose of protecting the environment.²⁵¹

VII. CONCLUSION

Congress and the states have provided, to varying degrees, extensive criminal sanctions against individuals and corporations that unlawfully discard hazardous waste. Federal and state courts, however, have been reluctant to utilize these sanctions. The criminal fines and incarceration provided by legislatures are either not imposed by the courts or are imposed at such minimal levels that they do not constitute punishment. When a sanction does not punish, the important deterrent value is lost. Conservation is the main goal of environmental legislation, which is aimed at protecting the environment, and deterrence is the vehicle for realizing that purpose.

The New York legislature has recently amended its Environmental Protection Act in an attempt to facilitate the conviction of individual and corporate hazardous waste offenders. The amendment wisely provides a more specific definition of hazardous waste that allows for more informed

246. See *supra* notes 59, 218, 221 and accompanying text. Sufficient evidence must show that the sole or primary reason for the existence of the subsidiary is to insulate individuals within the parent corporation from liability for unlawful releases of hazardous waste.

247. *Id.*

248. N.J. STAT. ANN. § 2C:43-3(f) (West 1982 & Supp. 1987).

249. D. REBOVICH, *supra* note 3, at 4.

250. Memorandum for the Governor, *supra* note 11, at 3; see also Memorandum in Support of Legislation, *supra* note 11.

251. See *supra* note 11.

corporate decision-making and that provides an absolute defense to those operating under the provisions of a valid permit. Furthermore, New York has specifically delineated various offense classifications which will aid prosecutors and the courts in determining appropriate sanctions to be imposed. The amendment also provides a penalty of double the amount of the offender's gain.

New York, however, has not incorporated the provisions needed to effectively punish violators. Effective legislation, based on New York's statutory framework, would include seven provisions in addition to the three favorable ones recently offered by New York's chapter 671. First, legislation should include minimum levels of fines and incarceration, as Illinois and Maryland provide. In addition, the sentencing judge should be ordered to consider the corporate officer's assets before imposing a fine. Third, as in Maryland, the statute of limitations for hazardous waste crime should be eliminated. Fourth, criminal sanctions should be mandatory after the conviction of a corporate officer. Legislation should also not allow indemnification by a corporation of its corporate officer who has been convicted of a hazardous waste regulatory violation. Sixth, legislation should not let a convicted corporate officer return to any corporate management position with any corporation for at least two years. Statutory language should, in addition, encourage piercing of the corporate veil of subsidiary corporations and their parents to allow for the imposition of criminal sanctions on the responsible officer(s) within the parent corporation. Finally, legislation should require that the responsible corporate officer provide restitution to any parties damaged by the unlawful release of hazardous waste.

With the recent amendments to its Environmental Protection Law, the New York legislature has told the New York prosecutors and courts to increase conviction of corporate officers who engage in hazardous waste criminal activity. The current New York Environmental Protection Law provides a good start towards deterring corporate officers who violate hazardous waste regulations. However, the adequate legislative regulation of hazardous waste requires additional features. The proposed statutory scheme will satisfy the goals of punishment and provide for wiser use of our limited environmental resources. If states amend their hazardous waste statutes in accordance with this proposal, they will become leaders in protecting our environment and maintaining adequate resources for the continued physical and economic well-being of this nation.

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