2015 WL 4123605 (N.Y.) (Appellate Brief)
Court of Appeals of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v.
Curtis BASILE, Defendant-Appellant.

No. APL 2014-00038.
April 23, 2015.

Queens Criminal Index No. 2007QN068755

Brief for Amici Curiae National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers

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*x QUESTION PRESENTED

Did the trial court commit reversible error by refusing to instruct the jury that conviction under New York's animal cruelty statute, Agriculture and Markets Law § 353, requires proof of *mens real*

SUMMARY OF THE ARGUMENT

A.M.L. § 353 is a criminal statute. As such, under N.Y. Penal Law § 15.15(2), it is presumed to include a *mens rea* element unless there is clear legislative intent to the contrary. Here, no such intent exists. Section 353, which originated in New York's Penal Law, was moved to the A.M.L. in 1965 as part of a major reorganization of the criminal law in New York. There are no indications, clear or otherwise, that the state legislature intended to strip § 353 of its *mens rea* requirement when it relocated the statute to the A.M.L.

To the contrary, there are several indications that the legislature understood (and continues to understand) that § 353 requires a culpable mental state. First, § 353 is surrounded in the A.M.L. by more recently enacted animal-cruelty statutes. Each of those statutes contains explicit culpability language - even the ones that ***5** criminalize conduct less serious than that prohibited by § 353. Second, current legislative initiatives that seek to codify the common-law understanding of New York's animal-cruelty statutes and restore them to the Penal Law apply a "know or reasonably should know" standard, not strict liability.

Section 353 is not a public welfare and regulatory law, and thus the Appellate Term's reliance on A.M.L. § 43 was mistaken. Section 43, which was enacted in 1909, imposes strict liability on conduct that involves dangerous devices or hazardous materials, the types of instrumentalities that underpin the public welfare and regulatory laws. A dog is not an inherently dangerous device, and there is nothing about caring for a dog that would pose an obvious and inherent threat to public health and safety.

Remarkably, the People now concede - no less than 10 times in their opposition brief - the critical point that § 353 "does in fact require … an implied mental state" and requires "knowledge that the actor is engaging in the wrongdoing that the statute makes criminal." *See* Brief for Respondent ("Opp.") at 6, 48. That concession torpedoes their entire argument, because the jury was never instructed that it needed to find knowledge as an element of the crime, and in fact the People presented *no* evidence at trial demonstrating that Mr. Basile knowingly deprived ***6** his dog of necessary sustenance. The failure to instruct the jury cannot be deemed harmless error. As a result, the conviction must be reversed.

*IX STATEMENT PURSUANT TO RULE 500.1(F)

The proposed *Amici Curiae*, the National Association of Criminal Defense Lawyers and the New York State Association of Criminal Defense Lawyers, have no parents, subsidiaries, or affiliates.

*1 STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation founded in 1958, has a nationwide membership of approximately 10,000 direct members and 90 affiliate organizations totaling more than 40,000 attorneys. The NACDL's members include private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges. Among the NACDL's objectives are to promote the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with due process of law.

The New York State Association of Criminal Defense Lawyers is a not-for-profit corporation with a subscribed membership of more than 750 attorneys, including private practitioners, public defenders, and law professors, and is the largest private criminal bar in the State of New York. It is a recognized state affiliate of the NACDL which, like that organization, works on behalf of the criminal defense bar to ensure justice and due process for those accused of crimes.

The NACDL and NYSACDL regularly file *amicus curiae* briefs in this Court, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal ***2** justice system as a whole. [1] The issue of *mens rea* in the criminal law is one the NACDL has recently addressed in a comprehensive joint study and report with The Heritage Foundation. *See* Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (2010), *available* at www.nacdl.org/withoutintent. The same serious threat represented by the steady erosion of the *mens rea* requirement - an issue of concern that crosses the broad ideological spectrum - is implicated by the Appellate Term's decision. As representatives of the defense bar, the NACDL and NYSACDL stand between the government and the accused, who should not face criminal conviction unless they act with a guilty mind.

This case presents the Court with an opportunity to clarify an important issue of criminal law in this state: whether a conviction under Agriculture and Markets Law (A.M.L.) § 353 requires the People to prove that the defendant acted with a culpable mental state. Here, the Appellate Term incorrectly held that there is no mental-state requirement under § 353. Relying on A.M.L. § 43, a provision that imposes strict liability on public welfare and regulatory crimes, the court ***3** stripped the *mens rea* requirement from the animal-cruelty statute absent any evidence of clear legislative intent to make § 353 a strict-liability offense.

The Appellate Term's decision stands in stark contrast to § 353's origin in the Penal Law and the codification of the presumption in favor of *mens rea* embodied in NY. Penal Law § 15.15(2). The court's decision is also contrary to longstanding decisions of New York trial courts that construe § 353 to include a *mens rea* requirement. And it conflicts with legislation proposed in 2012 and 2015 that would relocate New York's animal cruelty statutes from the A.M.L. to the Penal Law and include express *mens rea* language to remove any doubt that § 353 requires proof of a culpable mental state.

Finally, the court's decision is contrary to the fundamental precept of the American criminal justice system that no person should be subject to public condemnation, stigma, and deprivation of liberty unless he acts with a guilty mind. *See* Herbert L. Packer, *The Limits of the Criminal Sanction* 131 (1968). It is axiomatic in our system of law that not every wrongful act is a crime. Rather, the union of a wrongful act and a guilty mind is the moral foundation of criminal law and the first line of defense for the protection of the innocent. *See, e.g.*, John S. Baker, Jr., *Mens Rea and State Crimes: 50 Years Post-Promulgation of the Model Penal Code*, 92 Crim. L. Rep. (BNA) 248 (Nov. 28, 2012). The court below's ***4** decision is an extraordinary departure from this key construct of American criminal law, and it should be reversed.

STATEMENT OF POSITION

The NACDL and NYSACDL file this *amid curiae* brief in support of Defendant-Appellant Curtis Basile, urging reversal of his conviction under Agriculture and Markets Law § 353.

ARGUMENT

I. CONVICTION UNDER § 353 REQUIRES PROOF BEYOND A REASONABLE DOUBT THAT THE DEFENDANT ACTED WITH A CULPABLE STATE OF MIND.

A. Section 353 Must Be Construed To Require Mental Culpability.

Section 353 provides that "[a] person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink … is guilty of a class A misdemeanor." A.M.L. § 353. The statute defines "torture" and "cruelty" as "every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted." *Id.* at § 350 (emphasis added). The statute does not otherwise define these terms.

While this Court has not interpreted the statutory language of § 353, the statutory interpretations of early trial courts may be instructive. For instance, in *People ex rel. Freel v. Downs*, the trial court interpreted the terms "cruelty" and "torture" in the statutory predecessors to § 353, N.Y. Penal Law §§ 185 & 189 ***7** (1909), as containing a *mens rea* element. 136 N.Y.S. 440, 443 (Magis. Ct. 1911). The court stated:

> I attach considerable importance to the use of the word "unjustifiable" in connection with the legislative definition of torture or cruelty. It clearly indicates legislative intent and shows that the Legislature had in mind that while in certain cases there may be physical pain and suffering, even to the extent of causing death, no criminal proceeding can be sustained unless the pain or cruelty was unnecessary, unjustifiable, and willful.

Id. at 444 (emphasis added). The term "cruelty," the court added, requires the "*willful* infliction of unavoidable pain" or evidence that the defendant "*criminally intended* to visit pain" upon the animal. *Id.* at 446 (emphasis added). This case illustrates that courts have interpreted § 353 to require mental culpability from the inception of animal-cruelty laws in the State.

Because § 353 does not include an express *mens rea* requirement, it is governed by N.Y. Penal Law § 15.15(2). Section 15.15(2) is consistent with what has been described as New York's "strong record of inferring culpability requirements" into criminal statutes. *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 Duke L.J. 285, 319-21 (Nov. 2012). Under that section, "[a] statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability." N.Y. Penal Law § 15.15(2). That section applies to crimes ***8** "both in and outside this chapter," *see id.*, and therefore extends to A.M.L. § 353. [2] As this Court has repeatedly noted in analogous contexts, "[i]n the absence of a clear legislative intent to impose strict criminal liability, such construction should not be adopted." *People v. Coe*, 71 N.Y.2d 852, 855 (1988) (finding that conviction under a Public Health Law statute prohibiting willful **elder abuse**, which did not contain an express *mens rea* requirement, required the prosecution to prove that the defendant acted "knowingly"); [3] *People v. Williams*, 81 N.Y.2d 303, 316 (1993) (finding that statutes prohibiting rape that did not include express *mens rea* language required the prosecution to prove that the defendant acted intentionally, citing § 15.15(2)).

1. There Is No Indication Of Clear Legislative Intent To Make § 353 A Strict-Liability Offense.

a. The Statutory History Of § 353 Demonstrates That It Was Intended To Be A Traditional Criminal Law Offense.

***9** Section 353 originated in the New York Penal Code. The statute was enacted to promote "the more effectual prevention of cruelty to animals." N.Y. Rev. Stat. ch. 375, § 1 (1867). In 1965, it was moved to the A.M.L. as part of a major reorganization and modernization of the criminal law in New York State. *See* Governor's Memo approving L. 1965, cc. 1030, 1031, reprinted in 1965 N.Y. Legis Ann. 530. Section 353's transfer to the A.M.L., however, did not alter its fundamental nature. As New York courts have repeatedly recognized, "notwithstanding its inclusion in the Agriculture and Markets Law rather than the Penal Law, [§ 353] *is* a criminal statute." *Hammer v. Am. Kennel Club*, 304 A.D.2d 74, 79 (1st Dep't), *aff'd*, 1 N.Y.3d 294 (2003) (emphasis in the original) (addressing plaintiff's standing to pursue civil remedies under § 353); *People v. Minton*, 170 Misc. 2d 272, 274-76 (Crim. Ct. Bronx County 1996) (chronicling the history of § 353 back to its genesis in the Penal Law to determine whether the legislature intended to classify animal cruelty as a continuing criminal offense).

As this Court observed in *Coe*, "when [the legislature] intends to impose strict criminal liability, it does so clearly." 71 N.Y.2d at 855. The mere fact that § 353 was swept into the A.M.L. as part of an omnibus legislative package is not an indication of clear legislative intent to make it a strict liability offense.

***10 b. Section 353 Must Be Construed In A Manner Consistent With The Other Animal-Cruelty Statutes In The A.M.L.**

Legislative intent to maintain § 353 as a traditional criminal law offense with the attendant *mens rea* requirement is also evidenced by the fact that other animal-cruelty statutes in the A.M.L., enacted later, contain *mens rea* elements. There are four other animal-cruelty statutes in the A.M.L.: § 353-a, addressing aggravated cruelty to animals; § 353-b, dealing with appropriate shelter for dogs left outdoors; § 353-c, prohibiting the electrocution of fur-bearing animals; and § 353-d, outlawing the confinement of companion animals in vehicles. Each of these statutes, which the New York legislature enacted between 1999 and 2008, includes explicit mental culpability language from N.Y. Penal Law § 15.05.[4] These statutes ***11** make it a crime to "intentionally" or "knowingly" engage in certain conduct against animals. That is so even for the statutes that prohibit conduct plainly less serious than the conduct attributed to Mr. Basile. *See, e.g.*, A.M.L. § 353-b(2)(a) ("Any person who owns or has custody or control of a dog that is left outdoors shall provide it with shelter appropriate to its breed, physical condition and the climate. Any person who *knowingly* violates the provisions of this section shall be guilty of a violation.") (emphasis added).

The grouping of § 353 with animal-cruelty statutes that contain explicit *mens rea* requirements demonstrates that the legislature intended § 353 to be construed in the same manner. *See Albany Law Sch. v. N. Y. State Office of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106, 121 (2012) ("Statutes that relate to the same subject are *in pari materia* and should 'be construed together unless a contrary intent is clearly expressed by the Legislature."'); *People ex rel. Doscher v. Sisson*, 222 N.Y. 387, 393 (1918) ("When two or more statutes, whenever passed relate to the same thing or the same class of things or to the same general subject- ***12** matter, they are *in pari materia*, and are to be construed as forming an unitary system ...."). The People's position that the legislature's failure to add explicit *mens rea* language to § 353 when it added the other animal-cruelty statutes to the A.M.L. is contrary to the *in pari materia* doctrine, and this Court has rejected similar "arguments from silence" in other contexts. *See Clark v. Cuomo*, 66 N.Y.2d 185, 190-91 (1985) (stating that "[l]egislative inaction, because of its inherent ambiguity, 'affords the most dubious foundation for drawing positive inferences"'). Moreover, as New York courts have noted, the fact that § 353 does not contain an express *mens rea* element is not dispositive because the statutory language is indefinite and dated. *See People v. Bunt*, 118 Misc. 2d 904, 910 (Rhinebeck Justice Ct. Dutchess County 1983) (addressing the constitutionality of § 353 and describing it as "not well drafted"). The imprecision of the statutory language, initially drafted in the 19th century and largely unchanged to present day, should not be exploited to undermine all other indicia of legislative intent to include a *mens rea* element in § 353.

2. Current Legislative Initiatives Reflect A Consensus That § 353 Has A *Mens Rea* Requirement.

There has been a concerted legislative effort to clarify the *mens rea* requirements under New York's animal-cruelty statutes since at least 2012. *See* ***13** 2011 N.Y. A.B. 9917 (NS); 2011 N.Y. S.B. 6730 (NS) (introduced in 2012). Most recently, in 2015, Assemblywoman Linda Rosenthal (D-Manhattan) and Senator Andrew Lanza (R-Staten Island) introduced a bill known as the Consolidated Animal Crimes Bill (the "CACB"). 2015 N.Y. A.B. 352 ("A.B. 352"); 2015 N.Y. S.B. 3201 ("S.B. 3201"). The purpose of the CACB is to facilitate the enforcement of the animal-cruelty statues by (1) returning certain sections of the A.M.L. to the Penal Law, and (2) clarifying the elements of the animal-cruelty statues by adding express *mens rea* language to certain sections. A.B. 352 at 2, 7; S.B. 3201, at 2, 7. The CACB seeks to "codif[y] prevailing case law interpretations of statutory terminology into the statute itself in an effort to obviate confusion among law enforcement, attorneys and judges and enhance the pace of the legal process." N.Y.C. Bar, *Rep. on Legislation by Animal Law Comm.: A.775-B & S.6653*, 2 (Feb. 2014) ("N.Y. City Bar Report"). The CACB would repeal A.M.L. § 353 and create a new Penal Law § 280.20 in its place.

The new Penal Law § 280.20 would make it a crime for an individual to deprive an animal in one's "ownership, possession, care, control, charge or custody" of "nutrition, hydration, veterinary care, or shelter adequate to maintain the animal's health and comfort" if "he or she *knows or reasonably should know* that such animal is not receiving adequate nutrition, hydration, veterinary care or ***14** shelter." A.B. 352 at 19; S.B. 3201, at 19 (emphasis added). The statutory scheme would require an even higher degree of mental culpability (*e.g.*, intentional conduct) for more serious animal-cruelty offenses like animal cruelty in the first degree. [5] N.Y. City Bar Report, *supra* at 2.

The CACB, in addition to attracting bipartisan sponsors, has broad support from animal rights groups and civic organizations. These organizations have emphasized the importance of clarifying the current animal-cruelty statutes, citing the use of archaic and vague terms like "overloads," "overdrives," and "sustenance," and the failure of the current statutory regime to explicitly list applicable mental states. N.Y. City Bar Report, *supra* at 3. It is supported by the New York State Humane Association and by the Humane Society of the United States. [6]

***15** Section 353's origin in the Penal Law, its grouping in the A.M.L. with other animal cruelty statutes that require *mens rea*, and current legislative initiatives categorically demonstrate that there was and is no clear legislative intent to make § 353 a strict liability offense.

B. The Appellate Term's Reliance On A.M.L. § 43 Is Misplaced Because § 353 Is Not A Public Welfare And Regulatory Law.

***16** Section 43, enacted in 1909, provides that "[t]he intent of any person doing or omitting to do [anything prohibited by this chapter] is immaterial in any prosecution for a violation of the provisions of this chapter." A.M.L. § 43. At the time § 43 was enacted, the provisions it modified were intended to be strict-liability statutes to protect the public welfare. *See, e.g.*, A.M.L. § 81 (regulating the slaughter and sale of animals with tuberculosis). It was intended to regulate the risk posed to the public health and safety by potentially hazardous and widely distributed animal and agricultural products.

"A public welfare statute is currently one in which 'Congress has rendered criminal a type of conduct that [1] a reasonable person should know is subject to stringent public regulation and [2] may seriously threaten the community's health or safety."' *People v. M&H Used Auto Parts & Cars, Inc.*, 22 A.D.3d 135, 144 (2d Dep't 2005) (quoting Rebecca S. Webber, *Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know it?*, 16 B.C. Envtl. Aff. L. Rev. 53, 85 (1988)). Public-welfare statutes typically implicate dangerous devices or activities that may threaten public health or safety. *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82, 90 (2d Cir. 2000) (holding under 18 U.S.C. § 42(c) that the government failed to meet its burden of proving that the defendant knowingly caused the transportation to the United States of a shipment ***17** of wild animals under inhumane or unhealthful conditions) (citing *Staples v. United States*, 511 U.S. 600, 607 (1994)). "[T]he underlying rationale for imposing strict liability for public welfare offenses is that the element of mental culpability may be eliminated only because the objects that are the subject of the legislation are so obviously and inherently dangerous that anyone

who possesses them should bear the burden of determining, at their own peril, whether they are prohibited by law." *People v. Wood*, 58 A.D.3d 242, 251 (1st Dep't 2008) (citing *People v. Small*, 157 Misc. 2d 673, 679-80 (Sup. Ct. N.Y. County 1993)).

Section § 353 protects animals from unjustifiable **abuse** or injury; it does not implicate the types of dangerous materials, devices, or activities mentioned above. A domestic animal, like a dog, is not "readily ascertainable as inherently dangerous," *see Wood*, 58 A.D.3d at 251, and there is nothing about caring for a dog within the meaning of § 353 that would place "a defendant in responsible relation to a public danger." *Bronx Reptiles, Inc.*, 217 F.3d at 90. As such, "the predicate for strict liability is absent." *Wood*, 58 A.D.3d at 252.

Prior to the decision below, no court had applied § 43 to § 353, and, as noted in *People v. Torres*, the decision below applying the public welfare and regulatory crimes exception to § 353 is an outlier. *See People v. Torres*, 46 Misc. 3d 1222(A), 2015 N.Y. Misc. LEXIS 593, at *4 (Albany City Ct. 2015). In *Torres*, ***18** the government charged the defendant with violating § 353 for neglecting to provide his dog with medical care for an open wound on its rear leg and failing to provide his dog with proper food and drink. *Id.* at *1. The defendant moved to dismiss the information, arguing that it was facially defective because there was insufficient evidence to show that he failed to provide proper food and drink to his dog. *Id.* at *l-2. Addressing the statute's culpability requirement, the court cited several courts that had determined that § 353 requires some level of a culpable mental state in the absence of clear legislative intent to create a strict-liability offense. *Id.* at *8 (citing *Arcidicono*, 75 Misc. 2d at 296, and *People v. Fritze*, 28 Misc. 3d 1220(A), 2010 N.Y. Misc. LEXIS 3741, at *15 (Dist. Ct. Nassau County 2010)). The court cited the decision in the instant case as an outlier, noting that the court below relied on § 43 to construe § 353 as a strict-liability statute. Thus, there is no support, historically or in recent judicial decisions, for the Appellate Term's application of the public welfare and regulatory exception to the *mens rea* requirement to § 353.

II. THE TRIAL COURT'S FAILURE TO PROVIDE A PROPER JURY INSTRUCTION WAS NOT HARMLESS ERROR AND WARRANTS REVERSAL OF MR. BASILE'S CONVICTION.

The trial court's failure to instruct the jury that § 353 required proof of a culpable mental state was not harmless error. "An error is harmless only when ***19** there is 'overwhelming proof of the defendant's guilt' and no significant probability that the jury would have acquitted the defendant were it not for the error." *People v. Robinson*, 17 N.Y.3d 868, 870 (2011) (quoting *People v. Crimmins*, 36 N.Y.2d 230, 242 (1975)); *see also People v. Arafet*, 13 N.Y.3d 460, 467 (2009). As demonstrated above, the People were required to prove that Mr. Basile acted with a culpable mental state in order to obtain a conviction under § 353. The People no longer contest [7] this point, expressly conceding that "the statute does in fact require both culpable, blameworthy acts and, at the very least, an implied mental state before liability can be imposed." Opp. at 6. [8] We agree.

***20** At trial, the People presented *no* culpable mental state evidence and the court determined that it was not required to instruct the jury that conviction under § 353 required *any* proof of *mens rea*. A207-09. [9] Presented with what appeared to be a strict liability offense, the jury convicted Mr. Basile of violating § 353 and he was sentenced to three years of probation and forty-five days of community service. A267, A296. The People's attempt to deflect their failure to prove an element of the offense and the court's instruction error by now arguing that "it is difficult to conceive how a jury could find that such an act occurred without determining that the defendant's actions were either intentional or knowing" utterly fails to minimize the prejudice suffered by Mr. Basile. Opp. at 6-7.

Under the facts presented at trial, there is a significant probability that, with the proper instruction, the jury would have acquitted Mr. Basile. As Mr. Basile's defense team established at trial, he is a man who had fallen on hard times. A185. Only nineteen years old, he was out of work and had recently been involved in a serious accident. A183, A185. He had trouble feeding himself, let alone his dog Danger. A185-186. Still, every time that Mr. Basile ate, he made sure that Danger ate too. A186. He fed Danger rice, chicken, meatloaf, and steak, whatever he could get his hands on. A121, A193. Recognizing his dire financial situation, Mr. ***21** Basile sought to find Danger a better home. A187. He contacted his cousin and his ex-girlfriend, but was turned away by both. *Id.* He was afraid to take Danger to an animal shelter because he feared a shelter would put the dog to sleep. A190.

An ASPCA veterinarian determined that Danger had an emaciated body condition. A137. But, as even the veterinarian expert testified, Danger did not appear physically distressed, had maintained "reasonable strength," and his condition may not have been apparent to a layperson because of the dog's long coat. A119, A151, A161, A175.

At trial, the only evidence presented on the People's case was that Mr. Basile did not feed Danger enough food. The People presented *no* evidence to establish beyond a reasonable doubt that Mr. Basile acted with any mental culpability. In light of the complete lack of proof of Mr. Basile's guilt for the crime charged under § 353, the trial court's failure to instruct the jury that § 353 required the People to prove that Mr. Basile acted with a culpable mental state cannot be deemed harmless error. To the contrary, the facts of this case and the evidence presented at trial strongly suggest that Mr. Basile would not have been convicted if the trial court had given the proper instruction. Therefore, his conviction must be reversed.

*22 CONCLUSION

For the foregoing reasons, the Court should hold that a criminal conviction under § 353 requires the People to prove that the defendant acted with a culpable mental state and reverse Mr. Basile's conviction.

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Footnotes

1 *See, e.g.*, Brief of *Amici Curiae* NACDL *et al.* in Support of Defendant-Respondent in *People v. Baret*, 23 N.Y.3d 777 (2014), *cert, denied*, 135 S. Ct. 961 (U.S. 2015); Brief of *Amici Curiae* NACDL *et al.* in Support of Defendant-Appellant in *People v. Johnson*, 22 N.Y.3d 1162 (2014); Brief of *Amid Curiae* NACDL *et al.* in Support of Plaintiffs-Appellants in *Hurrell-Harring v. State*, 15 N.Y.3d 8 (2010); Brief of *Amid Curiae* NACDL *et al.* in Support of Petitioners-Appellants in *Walton v. N.Y. State Dep't of Corr. Servs.*, 13 NY.3d 475 (2009).

2 The only published decision addressing the application of § 15.15(2) to § 353 is *People v. Arcidicono*, 75 Misc. 2d 294, 296 (Dist. Ct. Suffolk County 1973), in which the trial court concluded that § 353 should be read to include a mental state requirement, citing § 15.15(2). The Appellate Term upheld the judgment on different grounds, finding that the evidence was sufficient to establish a culpable state of mind, but finding it unnecessary to reach the issue of whether A.M.L. § 353 is a strict liability offense or one of mental culpability. 79 Misc. 2d 242 (App. Term 2d Dep't 1974).

3 The term "wilful" or "wilfully" in the Public Health Law, similar to the term "unjustifiable" in the animal-cruelty statute, may be instructive as to the degree of mental culpability required by a statute, but is not itself a *mens rea* requirement as set forth in N.Y. Penal Law § 15.05. *Coe*, 71 N.Y.2d at 855 (noting that using the term "wilfully" in Pub. Health Law § 12-b, intended a culpable mental state generally equivalent to that required by the term "knowingly").

4 Section 15.05 includes the following definitions:

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

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

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

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

N.Y. Penal Law § 15.05.

5 For example, the CACB would establish a new Penal Law § 280.25, defining animal cruelty in the first degree. The law would require a more culpable mental state than Penal Law § 280.20 - it would require the government to prove the intent to cause death or serious physical injury, the intent to torture, or knowing instigation of aggravated animal **abuse**. Similarly, the bill would create a new Penal Law § 280.35 making it illegal to endanger the welfare of animals. This statute would require the government to establish either the intent to cause injury or the reckless creation of a risk of injury to an animal. In the same way, Penal Law §§ 280.60 and 280.65, which would require appropriate shelter for dogs left outdoors and prohibit confining certain animals in vehicles in extreme temperatures, would both require a criminal defendant to act knowingly.

6 *See* N.Y. State Humane Ass'n, *NYSHA Supports Moving New York's Anti-cruelty Laws from Agriculture and Markets Laws to Penal and Criminal Procedure Laws*, http://www.nyshumane.org/wp-content/uploads/2015/03/A352S3201.pdf (last visited Apr. 8, 2015). Humane Soc'y of U.S., *Humane Alert: Support the Consolidated Animal Crimes Bill for New York*, http:// www.humanesociety.org/about/state/new_york/?credit=web_id424367309 (last visited Apr. 8, 2015). This standard is consistent with the interpretation of § 353 set forth in a public statement by the American Society for the Prevention of Cruelty to Animals (“ASPCA”). Analyzing the current statute's required mental state, the ASPCA has taken the position that, to sustain a conviction under § 353, the government must prove the defendant knowingly committed an act of cruelty. The organization has stated:

An important aspect of the misdemeanor cruelty provision relates to the mental state of the perpetrator. Section 353 does not expressly require proof of a particular mental state. That is, the statute does not require that a defendant intentionally recklessly or negligently committed any of the proscribed acts. However, where criminal sanctions are imposed, there is a presumption against laws that impose strict liability that is, liability without proof of a guilty state of mind. Unless there is an express legislative intent to impose strict liability, the provision will be construed to have a mental culpability requirement. Penal Law sec. 15.15(2); *People v. Arcidicono*, 75 Misc. 2d 294, 296 (Dist. Ct. Suffolk Co. 1973); *aff'd*, 79 Misc. 2d 242. As with all elements of a criminal offense, the prosecution bears the burden of establishing the mental state or *mens rea* beyond a reasonable doubt.

Because section 353 does not expressly require proof of a specific mental state, and because there is no legislative intent to make cruelty a strict liability offense, the prosecution will have to prove the least onerous *mens rea* that the defendant knowingly committed an act of cruelty.

Stacy Wolf, Am. Soc'y for Prevention of Cruelty to Animals, *Animal Cruelty: The Law in New York* 18 (Aug. 2003), http:// www.potsdamhumanesociety.org/files/cruelty/ ASPCA_NYlaws.pdf

7 The People's confusing position on appeal does nothing to obscure the position staked below and adopted by both the trial court and the Appellate Term that “the trial court was not compelled, as a matter of elemental fairness … to add a *mens rea* element to the statute. As a result, the court correctly rejected defendant's request to include a *mens rea* element in its jury charge when none was required.” Opp. at 51.

8 The People's retraction of their initial position is jarring. The People concede that § 353 requires proof of a culpable mental state at least 10 times. *See* Opp. at 4. (“The court was not required to insert *additional mens rea* language.”) (emphasis added); *id.* at 6 (the statute “does in fact require … an implied mental state”); *id.* at 6-7 (questioning how a jury could find that the defendant deprived an animal of food “without determining that the defendant's actions were either intentional or knowing”); *id.* at 47-48 (the statute requires “at the very least an implied mental state”); *id.* at 48 (“[I]t is difficult to conceive of how a jury could find that such an act occurred without determining that the defendant's actions were either intentional or knowing.”); *id.* (“Inherent in the ordinary meaning of the words that describe the prohibited acts or omissions is the knowledge that the actor is engaging in the wrongdoing that the statute makes criminal.”); *id.* at 49 (“mental culpability [is] implicit” in the terms of the statute); *id.* (“[T]he plain meaning of the words ‘injuring, maiming, mutilating, or killing’ … implies the knowledge of an intent to inflict” injury.); *id.* (“[T]he act of depriving … an animal necessary sustenance demonstrates … mental culpability.”); *id.* (Section 353 “embod[ies] an identifiable mental state”).

9 The citations formatted “A” refer to the trial transcript attached to Defendant-Appellant's opening brief.

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