

ENVIRONMENTAL JUSTICE SINCE HAMMURABI: FROM ASSIGNING RISK “EYE FOR AN EYE” TO MODERN-DAY APPLICATION OF THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

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INTRODUCTION

Most legal scholars credit the genesis of the public welfare statutes and the responsible corporate officer doctrine to two Supreme Court cases, *United States v. Dotterweich*¹ and *United States v. Park*,² where the Supreme Court upheld the use of strict liability for misdemeanor violations of the Federal Food, Drug, and Cosmetics Act (“FDCA”).³ But the doctrine may be older still. Hammurabi’s Code of Laws⁴ made a residential home builder criminally liable “[i]f a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death.”⁵ If the

* Law Clerk, Court of Appeals of Virginia. I would like to thank Barry Breen of EPA for his inspiration as a teacher and support in writing this Article.

¹ 320 U.S. 277 (1943).

² 421 U.S. 658 (1975).

³ 21 U.S.C. §§ 301-399 (1994).

⁴ HAMMURABI’S CODE OF LAWS § 229 (c. 1780 B.C.E.) (L.W. King trans.), available at <http://www.fordham.edu/halsall/ancient/hamcode.html> (last visited Feb. 6, 2005). Hammurabi ruled Babylon, the world’s first metropolis, from circa 1795 to 1750 B.C.E. *Id.*

⁵ *Id.* Similarly, “[i]f [the building collapse] kill the son of the owner the son of that builder shall be put to death.” *Id.* § 230. The Code addresses other unacceptable risks from faulty buildings and liability for shipbuilding. “If it kill a slave of the owner, then he shall pay slave for slave to the owner of the house.” § 231. “If it ruin goods, he shall make compensation for all that has been ruined, and inasmuch as he did not construct properly this house which he built and it fell, he shall re-erect the house from his own means.” § 232. “If a builder build a house for some one, even though he has not yet completed it; if then the walls seem toppling, the builder must make the walls solid from his own means.” § 233. “If a shipbuilder build a boat for some one, and do not make it tight, if during that same year that boat is sent away and suffers injury, the shipbuilder

builder were liable for the construction faults of his officers, this would make Hammurabi's Code the very first public welfare statute involving the responsible corporate officer ("RCO") doctrine.⁶ What the Code recognized, as did the Court in *Dotterweich*, is that those who have a duty to prevent serious harm to a helpless public should be held liable.⁷

The flurry of criticism over the addition of the RCO provision to the Clean Air Act ("CAA")⁸ has focused on its application of strict liability and the mens rea requirement. *Dotterweich* and *Park* both applied what appeared to be strict liability for violations of FDCA.⁹ The fear was that if "the building fell," non-culpable corporate officers would be held strictly liable and, like the builders in Hammurabi's time, would face the most severe penalties.¹⁰

This fear was unfounded. The "liability net" which many believed would be cast far and wide caught no fish. No corporate officer was held strictly liable; public welfare offenses evolved as the courts conscientiously applied the "knowing" requirement to environmental statutes and the RCO provision.¹¹

However, traditional criminal law theory and case law support another use of the RCO provision, one in which the statute is the source of a duty for a corporate officer who is responsible in relation to a public danger. The duty is to actively seek to prevent and remedy violations. This Article explores the value of defining the RCO provision as the actus reus of a crime—the omission or breach of a statutory duty. This theory can further the environmental regulatory program by deterring would-be violators and by increasing compliance, despite the fact that the RCO

shall take the boat apart and put it together tight at his own expense. The tight boat he shall give to the boat owner." § 235.

⁶ Whether Hammurabi's Code recognized any defenses to liability is unknown.

⁷ *Dotterweich*, 320 U.S. at 278.

⁸ 42 U.S.C. §§ 7601-7671 (2000).

⁹ See *Park*, 421 U.S. at 658; *Dotterweich*, 320 U.S. at 277; 21 U.S.C. §§ 301-399 (2000).

¹⁰ See *infra* note 90 and accompanying text.

¹¹ See, e.g., *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991) (holding instruction that jury could infer knowledge based on defendant's status as a corporate officer reversible error).

provision is now rarely used to prosecute corporate officers. Part I traces the evolution of criminal provisions and the addition of the responsible corporate officer clause in environmental statutes. Part II follows the case law that has slowly evolved from 1943 to the present. Part III discusses why the RCO provision is not used more often, and how it nevertheless serves an important function in environmental law. Finally, this Article concludes with suggested improvements to how and when the RCO doctrine should apply.

I. THE RESPONSIBLE CORPORATE OFFICER IN ENVIRONMENTAL STATUTES

A. *Development of Criminal Provisions in Environmental Statutes*

During the 1970s and 1980s, when the major federal environmental statutes were first enacted, rigorous enforcement of their criminal provisions was the exception rather than the rule.¹² Limited enforcement during the implementation phase was seen simply as fair, as regulatory agencies focused on educating industry on how to comply with the vast and comprehensive regulatory scheme, which demanded dynamic and evolutionary changes in behavior.¹³ Compliance, implementation, and education were the main goals.¹⁴ Also, lack of criminal enforcement was due to the fact that the first criminal provisions were misdemeanors, and frequently involved only minimal penalties—there was thus

¹² ENVIRONMENTAL LAW INSTITUTE, LAW OF ENVIRONMENTAL PROTECTION § 9:30 (Sheldon M. Novick et al. eds., 2002).

¹³ See generally *Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?: Hearing Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong. (2002), available at <http://judiciary.senate.gov/hearing.cfm?id=336> (last visited April 5, 2005) (testimony of Michael J. Penders) (discussing the growth of the EPA's Office of Criminal Enforcement) [hereinafter *Hearing*]; Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 494-95 (1996) (discussing incremental nature of change in environmental law and the shape that the EPA's earliest enforcement efforts took) [hereinafter Brickey, *Crossroads*].

¹⁴ See Brickey, *Crossroads*, *supra* note 13, at 494.

little justification for the added burden and expense of a criminal prosecution;¹⁵ most of the Environmental Protection Agency's ("EPA") and the Department of Justice's ("DOJ") legal resources were devoted to defending the newly enacted laws from various challenges.¹⁶

B. Stiffer Criminal Penalties—Public Perception and Public Outrage

Once the regulatory program was largely in place, criminal provisions with felony provisions were added to environmental statutes.¹⁷ Although criminal provisions were for the most part added gradually, public outrage at environmental disasters led to quick congressional response that included the addition of criminal provisions to environmental statutes.¹⁸ Two such disasters, the 1984 release of cyanide gas in Bhopal, India, and the 1989 *Exxon Valdez* oil spill in the Prince William Sound, impacted how the public viewed environmental violations: that violations of environmental laws were serious crimes deserving of serious penalties.

1. 1984: Union Carbide, Bhopal, India

In December 1984, a tank at a Union Carbide pesticide manufacturing facility in Bhopal, India, containing methyl

¹⁵ *See id.*

¹⁶ *Id.*

¹⁷ *See infra* note 31 and accompanying text.

¹⁸ For example, the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701-2761 (1994), was enacted largely as a result of public outrage to the *Exxon Valdez* spill. OPA provides enhanced capabilities for oil spill response and natural resource damage assessment. *Id.* Some commentators argue that the "moral outrage" reaction in enacting environmental laws may have hindered effective cost-benefit compliance schemes. *See, e.g.,* Christopher H. Schroeder, *Cool Analysis Versus Moral Outrage in the Development of Federal Environmental Criminal Law*, 35 WM. & MARY L. REV. 251 (1993) (stating that "moral outrage" against environmental violations has blurred attempts to effectively enforce a cost-benefit based compliance scheme).

isocyanate, an extremely toxic cyanide compound, leaked.¹⁹ A dense cloud of the toxic gas formed and then spread out over an area of forty square kilometers.²⁰ Approximately 3800 people died as a result of inhaling the methyl isocyanate.²¹ Most of the victims were impoverished squatters who lived next to the factory in huts; they died as a result of pulmonary edemas and respiratory infections, while 170,000 more victims suffered other injuries.²² Survivors continue to suffer from an increased number of stillbirths and spontaneous abortions.²³ Faulty valves that had not been adequately maintained caused the leak; there was also a lack of preventive and containment measures in the building where the tank was housed.²⁴ Union Carbide's behavior subsequent to the accident did little to add to a growing public perception of corporate indifference—victims were each compensated an average of \$451.50.²⁵

2. 1989: Prince William Sound and the *Exxon Valdez*

On March 24, 1989, the *Exxon Valdez* oil tanker grounded on Bligh Reef, spilling nearly 11 million gallons of oil into the biologically rich waters of the Prince William Sound.²⁶ Although the accident itself did not result in a loss of human life, it did cause severe damage to a pristine ecosystem and cause incalculable

¹⁹ *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 844 (S.D.N.Y. 1986).

²⁰ *Toxics: Justice for Bhopal*, Greenpeace, at <http://www.greenpeaceusa.org/bhopal> (last visited April 2, 2005).

²¹ *Technology Transfer Network Air Toxics Website: Methyl Isocyanate*, U.S. Environmental Protection Agency, at <http://www.epa.gov/ttn/atw/hlthef/methylis.html> (last visited April 2, 2005).

²² *See id.* These included secondary respiratory infections, lung disabilities, and eye damage. *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Toxics: Justice for Bhopal*, *supra* note 20.

²⁶ *In re* the Exxon Valdez, 296 F. Supp. 2d 1071, 1077 (D. Alaska 2004); *see also* *Details about the Accident*, Exxon Valdez Oil Spill Trustee Council, at <http://www.evostc.state.ak.us/facts/details.html> (last visited April 2, 2005).

damage to the local economy and area residents.²⁷ An investigation revealed that Exxon failed to provide sufficient crew for the vessel and that the ship lacked adequate navigation equipment.²⁸ Exxon was also aware that the ship's captain suffered from alcoholism prior to the incident.²⁹

C. Overview of the 1990 Amendments to CAA

Whether the result of accidents like these, or a growing concern about the environment, by the 1990s the public overwhelmingly favored broadening criminal liability for violations of environmental laws. A survey conducted in 1990 found that seventy-two percent of the public was in favor of incarceration of deliberate environmental violators.³⁰ In 1986, the public rated environmental crime seventh in importance among national priorities.³¹

Between 1988 and 1990, Congress added significantly more stringent environmental standards and tougher criminal provisions.³² The CAA Amendments of 1990 followed this trend

²⁷ See *Exxon Valdez*, 296 F. Supp. 2d at 1078.

²⁸ *Id.* at 1077.

²⁹ *Id.*

³⁰ ENVIRONMENT OPINION STUDY, INC., A SURVEY OF AMERICAN VOTERS: ATTITUDES TOWARD THE ENVIRONMENT 14 (1990).

³¹ Robert Deeb, *Environmental Criminal Liability*, 2 S.C. ENVTL. L.J. 159, 160-61 (1993) (reporting the results of a 1986 Department of Justice poll of public attitudes toward crime).

³² Congress added criminal penalties to a variety of environmental statutes. See Comprehensive Environmental Response, Compensation, and Liability Act § 103(b) (codified in pertinent part at 42 U.S.C. § 9603(b) (2000)) (adding criminal sanctions for failure to notify or submitting false and misleading information); Safe Drinking Water Act § 3009-1(a) (codified in pertinent part at 42 U.S.C. § 300h-2(c)(2) (2000)) (adding criminal penalties for willful violations); Toxic Substances Control Act § 16(b) (codified in pertinent part at 15 U.S.C. § 2615(b) (2000)) (same); and Endangered Species Act § 11(b) (codified in pertinent part at 16 U.S.C. § 1540(b)(1) (2000)) (criminalizing "knowing" violations of the Act). Congress also added more criminal penalty sections to the Clean Water Act ("CWA") in the 1990 Amendments. See 33 U.S.C. § 1319(c) (1994); S. REP. NO. 101-94, at 4 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 745.

and generally strengthened environmental protections by adding provisions for ozone and carbon monoxide in non-attainment areas, adding provisions limiting emissions from motor vehicles and increasing the types of regulated pollutants.³³ The 1990 Amendments likewise increased the severity of criminal sanctions; almost all “knowing” violations were upgraded to felonies.³⁴ Penalties were increased from two years to five years for most violations, and from six months to two years for knowingly making false statements, with doubled penalties for the second violation.³⁵ In addition, Congress added a “knowing endangerment” provision which imposes a maximum fine of \$1 million and up to fifteen years in prison.³⁶

Section 206(b) affirms recent court decisions to explicitly provide that violations of the prohibition on discharge of oil and hazardous substances are subject to the criminal penalties established under § 309 of the Act. These penalties are \$2,500-\$25,000/1 year for negligent violations, \$5,000-\$50,000/3 years for knowing violations, and up to \$250,000 and 15 years for knowing endangerment. This amendment is intended to resolve any ambiguity concerning the intent of Congress on this question.

Id.

³³ Pub. L. No. 101-549, §§ 103-109, 104 Stat. 2399 (1990) (codified as amended in scattered sections of 42 U.S.C.). The criteria pollutants are sulfur dioxide, PM₁₀, carbon monoxide, ozone, NO_x and lead. *Id.* One of the requirements of the 1990 Amendments is the evaluation of the oxides of nitrogen and effect of volatile organic carbons as precursors of ozone. *Id.*

³⁴ CAA imposes criminal liability on “any person” who “knowingly” makes a false material statement, fails to pay fees, or fails to notify or report as required in the Act. 42 U.S.C. § 7413(c)(2) (2000). Paragraph (c)(4) has a lower mens rea of “negligence” for releases of hazardous air pollutants listed under section 7412 that places a person in “imminent danger of death or serious bodily injury,” with a maximum sentence of one year, and a five year penalty if the release is done “knowingly.” *Id.*

³⁵ *Id.* § 7413(c)(2)(C). Additionally, violators are subject to the sometimes harsh effects of the Federal Sentencing Guidelines. See Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and Sentencing Guidelines: The Time Has Come . . . And It is Hard Time*, 20 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,096 (1990) (providing an analysis of the impacts and mechanics of the Guidelines).

³⁶ 42 U.S.C. § 7413(c)(5) (2000). See generally John Gibson, *The Crime of “Knowing Endangerment” Under the Clean Air Act Amendments of 1990: Is It*

1. Shifting Responsibility

An important theme in the 1990 Amendments is one of congressional intent to shift responsibility from employees “merely doing their jobs” to senior management—corporate officers and agents who are in the best position to ensure compliance with environmental laws and those in the best position to prevent violations.³⁷ This shift is apparent in a number of ways. For example, Congress expanded the definition of “person” to include “an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.”³⁸ Under 42 U.S.C. § 7143(h), “operator[s],” defined as senior management personnel or corporate officers, are subject to liability.³⁹ This paragraph specifically excludes any “employee who is carrying out his normal activities and who is acting under orders from the employer,” although such employees can be held criminally liable under both provisions if they act knowingly or willfully.⁴⁰ Similarly, supervisors can be held criminally liable when they exercise “substantial control” over the workplace and the procedures employed.⁴¹

More “Bark Than Bite” as a Watchdog to Help Safeguard a Workplace Free From Life-Threatening Hazardous Air Pollutant Releases?, 6 FORDHAM ENVTL. L.J. 197 (1995) (discussing how the “knowing endangerment” provisions in CAA have limited usefulness in protecting worker safety due to the addition of ambiguous legal terms such as “willful” and “into the ambient air” raising the burden of proof on prosecutors).

³⁷ See, e.g., *United States v. Shurelds*, No. 97-6265, 173 F.3d 430 (Table), 1999 WL 137636, at *2-3 (6th Cir. (Ky.) Mar. 2, 1999) (discussing “normal activities” of employees under section 113(h)). The Sixth Circuit rejected a void for vagueness challenge to section 113(h). *Shurelds* contended that CAA had conflicting mens rea requirements; 42 U.S.C. § 7413(c)(1) (1994), requires “knowingly,” while (h) required “knowing and willfully.” The court found that exceptions contained in criminal provisions are normally construed as affirmative defenses.

³⁸ 42 U.S.C. § 7602(e) (1994).

³⁹ 42 U.S.C. § 7413(h) (1994).

⁴⁰ *Id.*

⁴¹ See *United States v. Pearson*, 274 F.3d 1225 (9th Cir. 2001). *Pearson* was

2. The Responsible Corporate Officer Provision

The 1990 Amendments also added the “responsible corporate officer” provision to the definition of “person” in subsection (c)(6).⁴² This provision mirrors an identical one that appeared in the Clean Water Act (“CWA”) in the 1977 Amendments.⁴³ What was true of both provisions is that neither in the 1977 enactment nor in 1990 in the CAA Amendments did Congress explain why.⁴⁴ The solitary comment when RCO was added to CAA was “[t]he committee intends that criminal penalties be sought against those corporate officers under whose responsibility a violation has taken place, and not just those employees directly involved in the operation of the violating source.”⁴⁵ However, courts have used two canons of

charged with knowingly causing removal of asbestos containing material without complying with applicable work practice standards in violation of 42 U.S.C. § 7413(c)(1) (2000). Pearson had instructed employees to use less than appropriate amounts of water on the asbestos (in order to prevent the accumulation of particulate matter), and had performed the work using clogged ventilation machines. The court held that a person could be both an employee and a supervisor under CAA. The standard for liability as a supervisor is higher than that of an RCO—the supervisor must have exercised “substantial control” in the workplace and over workplace procedures. *Id.* at 1231 (citing *United States v. Walsh*, 8 F.3d 659, 662-63 (9th Cir. 1993)).

Under the CAA, a defendant need not possess ultimate, maximal, or preeminent control over the actual asbestos abatement work practices. Significant and substantial control means having the ability to direct the manner in which work is performed and the authority to correct problems. On any given asbestos abatement project there could be one or more supervisors. The term “supervisor” is not limited to the individual with the highest authority.

Id. at 1231 (citation omitted); *see also* *United States v. Itzkowitz*, No. 96-CR-786, 1998 WL 812573 (E.D.N.Y. May 13, 1998) (applying the “substantial control” standard in finding defendant to be an operator under CAA, 42 U.S.C. § 7413(h) (1994)).

⁴² 42 U.S.C. § 7413(c)(6) (1994).

⁴³ *See* Clean Water Act, 33 U.S.C.A. § 1319 (West 2004).

⁴⁴ *See* *United States v. Brittain*, 931 F.2d 1413, 1414 (10th Cir. 1991) (noting Congress’s near silence on the subject).

⁴⁵ COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, CLEAN AIR AMENDMENTS OF 1977, S. REP. NO. 95-127, at 51 (1977).

statutory construction to interpret RCO. The first is that the legislature intended to give effect to every word in the statute.⁴⁶ Second, when the legislature “borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase.”⁴⁷ Hammurabi’s Code notwithstanding, the courts looked to the genesis of the RCO doctrine in the early Supreme Court decisions of *United States v. Dotterweich*⁴⁸ and *United States v. Park*⁴⁹ to give meaning to the RCO provision.⁵⁰

II. THE RESPONSIBLE CORPORATE OFFICER CASE LAW

A. *United States v. Dotterweich*⁵¹

Dotterweich was the President and General Manager of Buffalo Pharmaceutical, Inc., a company that purchased drugs from manufacturers, repackaged them, and then distributed them under its own label.⁵² Despite the fact that Dotterweich argued that he had no personal knowledge of the shipments, and therefore could not be found liable, he was convicted of misbranding and shipping adulterated drugs,⁵³ a misdemeanor under FDCA.⁵⁴

⁴⁶ See, e.g., *United States v. George*, 266 F.3d 52, 62-63 (2d Cir. 2001).

⁴⁷ *Fusco v. Perini N. River Assocs.*, 601 F.2d 659 (9th Cir. 1979), *vacated on other grounds by* 444 U.S. 1028 (1980); see also *Bragdon v. Abbott*, 524 U.S. 624, 627 (1998) (“Congress[s] repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing . . . interpretations.”).

⁴⁸ 320 U.S. 277 (1943).

⁴⁹ 421 U.S. 658 (1975).

⁵⁰ Note that the basis of the responsible corporate officer doctrine, the public welfare offenses, is older still. See *United States v. Balint*, 258 U.S. 250, 252 (1922) (“[T]he emphasis of . . . [public welfare statutes] is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se.”) (citations omitted).

⁵¹ 320 U.S. 277 (1943).

⁵² *Dotterweich*, 320 U.S. at 278.

⁵³ *Id.*

⁵⁴ See 21 U.S.C. § 331(a), (k) (1994).

In upholding the conviction, the Supreme Court found that FDCA's misdemeanor penalties served as an important and necessary means of regulation by acting as an incentive, to keep adulterated drugs from the public.⁵⁵ The Court noted that *Dotterweich*, viewed in a historical context, came at the beginning of an era of modern industrialism, where a helpless public was "largely beyond self-protection."⁵⁶ The Court also upheld the conviction although the statute applied strict liability, noting that Congress did not intend FDCA to have a mens rea requirement,⁵⁷ and the misdemeanor sanctions were justified, despite the absence of culpable conduct, because of the corporate officer's responsibility toward the public.⁵⁸ "Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."⁵⁹ In somewhat circular logic, the Court here established the two bases underlying the responsible corporate officer doctrine. First, in certain cases, a conviction would be upheld without culpable conduct. Second, that strict liability could be imposed when the corporate official has failed in his or her duty, that is, when the officer is in "responsible relation" to a public danger.⁶⁰

*B. United States v. Park*⁶¹

The Court expanded the concept of what constitutes a "relation to a public danger"⁶² in *Park*. Like *Dotterweich*, *Park* was the president of a large commercial distribution chain, a retail food company called Acme Markets, Inc.⁶³ Acme employed 36,000 people

⁵⁵ *Dotterweich*, 320 U.S. at 280-81.

⁵⁶ *Id.* at 280.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 281.

⁶⁰ *Id.*

⁶¹ 421 U.S. 658 (1975).

⁶² *Dotterweich*, 320 U.S. at 281.

⁶³ *Park*, 421 U.S. at 660.

and had sixteen warehouses throughout the United States.⁶⁴ In 1970, the Food and Drug Administration ("FDA") advised Park personally of an appalling rodent infestation in two of Acme's warehouses, one in Philadelphia and a second in Baltimore.⁶⁵ As late as March 1972, FDA inspections revealed that conditions had improved but that there was still evidence that mice and rat excrement had contaminated food containers.⁶⁶ In a letter written to Acme, the FDA inspector noted that the "reprehensible conditions obviously existed for a prolonged period of time without any detection, or were completely ignored."⁶⁷ Park testified that he was ultimately responsible for the operations of the company and that he had been given the responsibility to oversee the sanitary conditions of the warehouses.⁶⁸ In his defense, Park argued that as head of a large corporation, he could not manage the day-to-day operation of a large corporation, therefore, he had to put his faith in "dependable subordinates," which he had done, and therefore could not be found criminally liable.⁶⁹

As in *Dotterweich*, the Court upheld the conviction by recognizing that a corporate officer's "act, default, or omission" could be the basis for criminal liability.⁷⁰ The Court cited to a number of lower court cases that recognized a vested duty in corporate officers to oversee and manage and to "devise whatever measures are necessary to ensure compliance with the Act," and that the law imposed not only a duty to seek out and remedy violations, but to actively prevent them from occurring.⁷¹

The Court presciently noted that *Park's* holding, in isolation, could support a finding of guilt "predicated solely on [the defendant's] corporate position," implicitly acknowledging that status-based offenses are per se unconstitutional and anticipating mens rea challenges that were to come in future public welfare

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 662.

⁶⁷ *Id.* at n.6.

⁶⁸ *Id.* at 664.

⁶⁹ *Park*, 421 U.S. at 664.

⁷⁰ *Id.* at 670.

⁷¹ *Id.* at 672.

statutes.⁷² However, the Court focused on Park's duty with regard to the corporation and the public at large, noting the prosecution's closing:

Mr. Park was responsible for seeing that sanitation was taken care of, and he had a system set up that was supposed to do that. This system didn't work. It didn't work three times. At some point in time, Mr. Park has to be held responsible for the fact that his system isn't working⁷³

The Court went on to state that:

the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.⁷⁴

Park strongly establishes that the responsible corporate officer provision is based on a duty created by the statute, and that knowledge of ongoing violations, and the failure to act on that knowledge, is strongly indicative of culpability. Also important in future cases was that the Court implicitly recognized "powerless[ness] to prevent" the violation as an affirmative defense.⁷⁵

⁷² *Id.* at 674.

⁷³ *Id.* at 675 n.16.

⁷⁴ *Id.* at 673-74.

⁷⁵ *Park*, 421 U.S. at 673 (citation omitted).

C. *Two Uses of the Responsible Corporate Officer Doctrine*

Dotterweich and *Park* support two possible uses of the RCO doctrine. The first of these is that the RCO doctrine creates an affirmative duty for the corporate officer to act, with the statute as the source of the duty.⁷⁶ The breach or omission to fulfill that duty flowing from a statutory obligation acts as a basis for either tort or criminal liability—a proposition firmly established in state and federal law.⁷⁷ RCOs who are “responsible” under the statute have a duty to seek out and prevent those violations over which they have responsibility.⁷⁸

A variation of the statute as the source of the duty is that the duty is imposed *because* of the officer’s status as an RCO.⁷⁹ However, this approach is far less defensible because the Supreme Court has rejected the idea of status-based crimes.⁸⁰ The second approach is that the RCO doctrine imposes either strict liability on the RCO, or that it lowers the government’s evidentiary burden by presuming *mens rea*.⁸¹

⁷⁶ SUSAN F. MANDIBERG & SUSAN L. SMITH, CRIMES AGAINST THE ENVIRONMENT, § 8-2(b)(3)(i) (Michie 1997).

⁷⁷ *See id.* § 3-3(a) n.25 (citing *United States v. Washington Power Co.*, 793 F.2d 1079, 1082 (9th Cir. 1985)); *Carolene Products Co. v. United States*, 140 F.2d 61, 66 (4th Cir. 1944).

There is ample authority in support of the principle that the directing heads of a corporation which is engaged in an unlawful business may be held criminally liable for the acts of subordinates done in the normal course of business, regardless of whether or not these directing heads personally supervised the particular acts done or were personally present at the time and place of the commission of these acts.

Id.

⁷⁸ *Carolene Products*, 140 F.2d at 66.

⁷⁹ MANDIBERG & SMITH, *supra* note 76, § 3-3(a) n.28 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (holding statute incriminating “vagrancy” was unconstitutionally vague) and *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (reversing conviction for status as “drug addict”)).

⁸⁰ *Id.*

⁸¹ *Id.*

D. Environmental Statutes as Public Welfare Statutes

CAA, CWA, and other environmental statutes contain a mens rea requirement of “knowingly” in most instances, unlike FDCA.⁸² Also, unlike the misdemeanor provisions contained in FDCA, environmental statutes contain felony provisions.⁸³ An early question in interpreting the RCO provision is whether such statutes could be construed as public welfare statutes. With the notable exception of the Fifth Circuit,⁸⁴ the courts offered an early clarification that, in fact, they were.⁸⁵ This classification has added

⁸² See generally 42 U.S.C. § 7413(c)(2) (2000).

Any person who knowingly (A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State); (B) fails to notify or report as required under this chapter; or (C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter

Id.

⁸³ See, e.g., 42 U.S.C. § 7413(c)(1) (2000) (providing for felony penalties for knowing violations).

⁸⁴ *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996). This decision “is widely considered aberrational.” Thomas Richard Uiselt, *What a Criminal Needs to Know Under Section 309(c)(2) of the Clean Water Act: How Far Does “Knowingly” Travel?*, 8 ENVTL. LAW 303, 331 (2002).

⁸⁵ *United States v. Weintraub* held that the government satisfies the knowledge element for purposes of a conviction under the Clean Air Act if it proves that “the defendant knew that the substance involved in the alleged violations was asbestos.” 273 F.3d 139, 151 (2d Cir. 2001). Accord *United States v. Hunter*, 193 F.R.D. 62 (N.D.N.Y. 2000); *United States v. Weitzenhoff*, 35 F.3d 1275, 1279 (9th Cir. 1993) (“[P]ublic welfare offenses are not to be construed to require proof that the defendant knew he was violating the law in the absence of clear evidence of contrary congressional intent.”). *Staples v. United States* is instructive as the Supreme Court explains the analysis of what constitutes a public welfare offense—knowledge that a reasonable person would know that the substance or product is the subject of regulation. 511 U.S. 600, 618 (1994). Except for the Fifth Circuit in *Ahmad*, courts have generally agreed that violations of CAA and

importance as courts have used it to uniformly reject a specific intent requirement in various environmental laws' criminal provisions.⁸⁶ That is, the government is not required to prove that the violator knew that his conduct violated the law, for example, that a permit was required, or the violator knew the exact conditions of the permit were violated.⁸⁷ The rationale for not requiring specific intent is the set forth in *United States v. International Minerals & Chemical Corp.*, and is based on a high likelihood that the violator knows that the material with which he or she is dealing is regulated.⁸⁸ The general intent construction fills an important regulatory function by lowering the government's burden in prosecuting criminal cases. The courts have upheld related challenges to environmental statutes against void for vagueness challenges under the Rule of Lenity.⁸⁹

other environmental statutes are public welfare statutes and therefore not specific intent crimes. In other words, no showing is necessary that the violator was aware that he or she was breaking the law, supported by the maxim that ignorance of the law is not a defense. Courts have generally followed *Weitzenhoff*. See, e.g., *United States v. Phillips*, Nos. 02-30035 & 02-30046, 2004 WL 193258 (9th Cir. (Mont.) Jan. 30, 2004); *United States v. Fiorillo*, 186 F.3d 1136, 1155-56 (9th Cir. 1999); *United States v. Hopkins*, 53 F.3d 533, 540 (2d Cir. 1995). *Phillips*, as earlier cases, rejected what it construed as a due process argument that CWA required a mental state of willfulness to be a violation. Interestingly, the court noted that no finding of aquatic harm was necessary to find a criminal violation—such matters were properly left to sentencing considerations. *Phillips*, at *2; see also *United States v. Goldsmith*, 978 F.2d 643, 645 (11th Cir. 1992) (holding that the government need only prove the defendant had knowledge of the general hazardous character of the materials in order to be found liable).

⁸⁶ See generally *supra* note 85 and accompanying text (explaining courts' construing of so-called public welfare offenses).

⁸⁷ See *United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 439 n.3 (6th Cir. 1998).

⁸⁸ 402 U.S. 558, 565 (1971) ("Where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

⁸⁹ See *Kelley*, 157 F.3d at 439 n.3.

Defendants contend that RCRA is "gravely ambiguous" and requires application of the rule of lenity and an interpretation

E. Early Fears: The Responsible Corporate Officer Doctrine Imposes Strict Liability

The addition of the RCO provision in CAA led to panic that with the upgrade of criminal penalties to felonies coupled with increasingly aggressive enforcement of environmental violations by EPA and DOJ,⁹⁰ environmental violators would be facing strict

of the statute that requires proof of knowledge of illegality. Under the rule of lenity “an ambiguous criminal statute is to be construed in favor of the accused. . . . This maxim of construction, however, is not lightly applied. It is inapplicable unless there is a “grievous ambiguity or uncertainty” in the statute. There is no such grievous ambiguity in RCRA, as demonstrated by the analysis Accordingly, we reject Defendants’ argument for application of the rule of lenity.

Id. (citations omitted).

⁹⁰ Prosecutions for environmental crimes rise every year, with increasingly longer prison sentences and higher monetary penalties.

In fact, since the beginning of 1983 until December 13, 1995, the Department of Justice . . . has recorded environmental criminal indictments against 1,674 corporate and individual defendants and 1,176 guilty pleas and convictions. Recorded as of September 29, 1995, nearly \$309 million in criminal penalties were assessed (this number includes federal and state restitutions and known costs for remediation) and 517 years of imprisonment imposed (374 of which account for actual confinement).

Sean J. Bellew & Daniel T. Surtz, *Criminal Enforcement Of Environmental Laws: A Corporate Guide To Avoiding Liability*, 8 VILL. ENVTL. L.J. 205, 207 n.12 (1997). Some believed that other agencies would follow EPA in its increasingly aggressive policy of enforcing criminal provisions. See, e.g., John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/ Crime Distinction in American Law*, 71 B.U. L. REV. 193, 217-18 (1991).

The Environmental Crimes Section (“ECS”) of DOJ in 2003 did not reveal its enforcement policies, and would not answer questions about why the responsible corporate officer provision is not used more often. The refusal may also have been because the ECS was sharply criticized in the 1990s for mismanagement and incompetence.

Despite its apparent numerical success, the Justice Department’s criminal-enforcement record is plagued by political controversy. Spearheaded by Representative John

liability for their crimes.⁹¹

Dingell, whose Subcommittee on Investigations and Oversight of the House Energy and Commerce Committee held extensive hearings in 1992 and 1993, critics challenged the rigor of the criminal-enforcement program by questioning the Department's judgment in declining to prosecute seemingly strong cases (sometimes over strenuous objections from line prosecutors); its apparently deferential treatment of powerful corporations and their executives; its holding of closed-door meetings with defense lawyers without informing EPA officials or the United States Attorney's office; and its "ready agreement to trivial financial penalties in cases involving serious and long-standing environmental violations.

Brickey, *Crossroads*, *supra* note 13, at 496 (quoting Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 874 (1994) (footnotes omitted).

⁹¹ See, e.g., Peter M. Gillon & Steven L. Humphreys, *Corporate Officer Liability Under Clean Air Act May Create Disincentives*, 6 NO. 5 INSIDE LITIG. 6 (1992); Bellew & Surtz, *supra* note 90, at 218.

The [RCO] doctrine is a useful tool in EPA's campaign against corporate violators. The doctrine circumvents the knowledge requirement of environmental statutes by imposing vicarious criminal liability upon CEOs for the environmental violations of their subordinates. Although this approach seems to be a violation of the constitutional right to due process, the apparent need to remedy environmental pollution appears to outweigh the constitutional rights of corporations and their officers.

Id.; see also Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L.J. 169, 170 (1994) ("Such a sweeping application of the RCO doctrine could result in felony-level criminal liability being imposed against a corporate officer for the environmental crime of a subordinate even when the officer had no knowledge of the illegal activity, thus making the officer a 'designated felon.'"); Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders*, 45 SW. L.J. 1199, 1200 (1991) ("The labyrinth of regulation in this area, the persistent legal standard of strict liability in many laws, the vast array of reporting requirements, and the lack of privilege with regard to most environmental information, all combine to make the defense of a criminal environmental charge a difficult endeavor."); Michael S. Elder, *The Criminal Provisions of the Clean Air Act Amendments of 1990: A Continuation of the Trend Toward Criminalization of Environmental Violations*, 3 FORDHAM

An alternate concern was the perception that innocent nonculpable corporate officials would be jailed for the vicarious liability of their employees, or be held strictly liable based solely on their status as corporate officers.⁹² One commentator stated plainly that the RCO doctrine was simply applying strict liability.⁹³

In fact, the Justice Department attempted to do just that, and used reasoning in *Dotterweich* and *Park* to reduce or eliminate mens rea in prosecuting environmental crimes. Keith Onsdorff, a former Director in the Office of Criminal Enforcement at EPA, co-authored an early influential article⁹⁴ in which he accused DOJ of attempting to circumvent RCRA's "slender" knowledge requirement by using the RCO doctrine to hold corporate officers vicariously, or strictly liable for the actions of their employees.⁹⁵ Onsdorff's and others' fears proved to be unfounded—despite DOJ's attempts, the courts roundly rejected the application of either strict liability or a lowered mens rea requirement in early interpretations of the RCO provision.⁹⁶

F. Early Cases: From Frezzo Brothers to Brittain

1. *United States v. Frezzo Brothers, Inc.*⁹⁷

The RCO doctrine was used in a prosecution under CWA in *Frezzo Brothers*.⁹⁸ Although frequently cited as supporting the

ENVTL. L. REP. 141, 162 n.3 (1992). "Recent court decisions have 'reduced or eliminated the role of mens rea' in environmental cases by applying the responsible corporate official doctrine. . . . The practical effect of these decisions . . . is that 'the traditional public welfare offense has now been coupled with felony level penalties.'" *Id.*

⁹² Bellew & Surtz, *supra* note 90, at 217-18.

⁹³ *Id.*

⁹⁴ Keith A. Onsdorff & James M. Mesnard, *The Responsible Corporate Officer Doctrine in RCRA Criminal Enforcement: What You Don't Know Can Hurt You*, 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,099, 10,102 (1992).

⁹⁵ *Id.*

⁹⁶ See *infra* Part II.F.3-5 for a discussion of *MacDonald & Watson*, *White*, and *Baytank*.

⁹⁷ 602 F.2d 1123 (3d Cir. 1979).

⁹⁸ *Id.* at 1130 n.11.

removal of the mens rea requirement, *Frezza Brothers* has more historical value, and is in fact uninformative on the application of the RCO doctrine. The Frezzos, Guido and James, were convicted of negligently or willfully discharging manure and compost from a holding tank into waterways of the United States in violation of CWA.⁹⁹ They appealed in part, arguing that they could not be prosecuted as individuals because the indictment charged them as corporate officers, and the jury instructions failed to mention this fact.¹⁰⁰ The court made short shrift of the RCO doctrine, noting briefly in a footnote and in dicta that the brothers could be found guilty as individuals when the indictment charged them with acting as corporate officers.¹⁰¹ What was true was that there was considerable evidence that the Frezzos had actual knowledge of their illegal acts.

2. *United States v. Johnson & Towers, Inc.*¹⁰²

Johnson & Towers is also valuable as a historical reference. What is notable about the case is that the RCO doctrine was mentioned in a RCRA violation, and RCRA, unlike CAA and CWA, does not contain an RCO provision. The court held that knowledge, including knowledge of the offense, “may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant.”¹⁰³ Another, more recent, case, *United States v. Self*, was also decided on similar grounds. The *Self*

⁹⁹ 33 U.S.C. § 1311 (2000).

¹⁰⁰ *Frezza Brothers*, 602 F.2d at 1130 n.11.

¹⁰¹ The extent of the court’s discussion was:

Defendants contend that the trial judge improperly instructed the jury that they could be found guilty as individuals when the indictment charged them with acting as corporate officers. The Government argued the case on the “responsible corporate officer doctrine” recognized by the United States Supreme Court in *United States v. Park* and *United States v. Dotterweich*. We have examined the judge’s charge and we perceive no error in the instruction to the jury on this theory.

Id. at n.11 (citations omitted).

¹⁰² 741 F.2d 662 (3d Cir. 1984).

¹⁰³ *Id.* at 670.

court stated in part: “Thus, while knowledge of prior illegal activity is not conclusive as to whether a defendant possessed the requisite knowledge of later illegal activity, it most certainly provides circumstantial evidence of the defendant’s later knowledge from which the jury may draw the necessary inference.”¹⁰⁴

Johnson & Towers recognized a concept that involved mens rea, but not strict liability or a lowered mens rea requirement—that a corporate officer’s position could be used as circumstantial evidence of knowledge of a violation.

3. *United States v. MacDonald & Watson Waste Oil Co.*¹⁰⁵

Another early case regarding the imposition of strict liability on corporate officers was *MacDonald & Watson*.¹⁰⁶ One of the defendants, Eugene D’Allesandro, was charged with “knowingly” accepting hazardous waste containing toluene and soil contaminated with toluene without a permit in violation of RCRA¹⁰⁷ on two separate occasions in 1986. At trial, the prosecution presented evidence that D’Allesandro was not simply the president but a “hands-on’ manager” of a small corporation, with detailed knowledge of the day-to-day activities in the plant.¹⁰⁸ D’Allesandro acknowledged that he had, on other occasions, accepted such shipments of contaminated waste that were outside the scope of his permit.¹⁰⁹ However, during the prosecution’s closing arguments, the prosecution conceded that the government had “no direct evidence Eugene D’Allesandro . . . actually knew that [those exact] shipments were coming in.”¹¹⁰ To prove intent, the court, at the prosecution’s request, instructed the jury that

¹⁰⁴ *United States v. Self*, 2 F.3d 1071, 1088 (10th Cir. 1993).

¹⁰⁵ 933 F.2d 35 (1st Cir. 1991).

¹⁰⁶ *Id.*

¹⁰⁷ See 42 U.S.C. § 6928(d)(1) (2000) (penalizing “[a]ny person who (1) *knowingly* transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit . . .”) (emphasis added).

¹⁰⁸ *MacDonald & Watson*, 933 F.2d at 50.

¹⁰⁹ *Id.* at 51.

¹¹⁰ *Id.* at 51 n.13 (omission in original).

they could find that the government satisfied the “knowing” requirement based on D’Allesandro’s position as an RCO, if the following were met: that he was a corporate officer, not merely an employee, that he had direct responsibility for the illegal activities, that the government proved that he had a responsibility to supervise the activities in question, and that he had “known or believed that the illegal activity of the type alleged occurred.”¹¹¹

At the district court, the prosecution tried to establish the knowledge requirement based solely on D’Allesandro’s status as a corporate officer. However, the First Circuit Court of Appeals reversed the convictions, finding the instructions to be an error of law.¹¹² *Park* and *Dotterweich* were distinguishable, the court found, because RCRA, unlike FDCA, explicitly required a mental state of “knowingly;” this intent requirement could not therefore be met *solely* through a showing that D’Allesandro was a corporate officer—there was no demonstration of actual awareness, which was what the statute required.¹¹³ The scienter requirement assumed added importance, the First Circuit found, not simply because congressional intent was clear, but also because the violation involved meaningful time in prison, from five years for the first offense, to ten years for the second.¹¹⁴ Although some courts have supported the idea that the misdemeanor/felony distinction would have no bearing on their decision about a mens rea requirement,¹¹⁵ *MacDonald & Watson* clearly establishes that it does.

4. *United States v. White*¹¹⁶

In *United States v. White*, the district court rejected a theory of *respondeat superior*, which would have expanded the RCO

¹¹¹ *Id.* at 51.

¹¹² *Id.*

¹¹³ *Id.* at 51-52.

¹¹⁴ *MacDonald & Watson*, 933 F.3d at 51-52.

¹¹⁵ See, e.g., *United States v. Cattle King Packing Co.*, 793 F.2d 232, 240 (10th Cir. 1986) (stating that “[t]here is nothing in the *Park* decision limiting its scope to misdemeanors”).

¹¹⁶ 766 F. Supp. 873 (E.D. Wash. 1991).

doctrine beyond strict liability.¹¹⁷ In *White*, the United States charged one of the defendants, Steven Steed, in a Bill of Particulars as an RCO.¹¹⁸ According to the government's theory, Steed was charged with constructive knowledge of his employees' actions—as the corporate officer in charge of environmental safety he therefore either had knowledge of the violations, or *should have known* the violations had occurred.¹¹⁹ The government tried to extend the doctrine of respondeat superior to include finding vicarious criminal liability through the actions of Steed's employees.

But again, as in *MacDonald & Watson*,¹²⁰ the court refused to accept that the RCO doctrine could allow conviction without the requisite intent required by RCRA. Congressional intent was clear: the “knowing” must be proven—it was not equal to the fact that the defendant “should have known.”¹²¹

5. *United States v. Baytank, Inc.*¹²²

Onsdorff and Mesnard claim that in *Baytank*, the First Circuit Court of Appeals implicitly applied what *MacDonald & Watson* found to be impermissible: that the knowledge of a RCRA violation could be inferred from the defendant's position as a corporate officer alone.¹²³ Similarly, however, the evidence in *Baytank* was quite powerful beyond the defendants' position that they possessed *actual knowledge* of the violations, and that their positions as RCOs were simply additional circumstantial proof. Two of the defendants were high-ranking officers. Johnsen, as Operations Manager, “had direct responsibility for most of the facility's day-to-day operations, including the filing of environmental compliance forms.”¹²⁴ Nordberg, the Executive Vice President, submitted

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 894.

¹¹⁹ *Id.* at 895.

¹²⁰ 933 F.2d 35 (1st Cir. 1991).

¹²¹ *White*, 766 F.Supp. At 895.

¹²² 934 F.2d 599 (5th Cir. 1991).

¹²³ Onsdorff & Mesnard, *supra* note 94, at 10,103-04.

¹²⁴ *Id.* at 616-17.

permit applications to EPA. Testimony revealed that both had intimate knowledge of the facility and regularly dealt with thousands of gallons of illegally stored hazardous wastes.¹²⁵

6. *United States v. Brittain*¹²⁶

MacDonald & Watson, White, and Baytank made clear that the courts would not impute knowledge to a corporate officer based solely on status. All courts have rejected such an approach—currently there is no strict liability attached to the environmental statutes, nor will there likely be.¹²⁷ A later case, *United States v. Brittain*, is occasionally cited as authority to the contrary, but does not support the courts' adoption of an altered mens rea for RCOs, except in dicta, and where the facts of the case clearly indicate actual knowledge and actual liability.¹²⁸

Brittain was convicted of eighteen counts of falsely reporting material facts to a government agency, and two misdemeanor counts of discharging pollutants into the waters of the United States in violation of CWA.¹²⁹ Brittain had argued that his conviction must be reversed based on insufficient evidence because the government failed to link the discharges to his willful or negligent conduct, claiming that the only evidence linking his knowledge of the discharges was based on his position in the company as an RCO.¹³⁰ The court commented that “a ‘responsible corporate officer,’ to be held criminally liable, would not have to ‘willfully or negligently’ cause a permit violation. Instead, the willfulness or negligence of the actor would be *imputed to him by virtue of his position of responsibility.*”¹³¹

Brittain seems to strongly support the application of either a theory of respondeat superior or strict liability. Again, however, it

¹²⁵ *Id.*

¹²⁶ 931 F.2d 1413 (10th Cir. 1991).

¹²⁷ See generally *supra* Part II.F.2-3, 5 (discussing *MacDonald & Watson, Johnson & Towers, and Baytank*).

¹²⁸ *Brittain*, 931 F.2d at 1414.

¹²⁹ *Id.* at 1414; see 33 U.S.C. §§ 1311(a) & (c)(1) (2000).

¹³⁰ *Brittain*, 931 F.2d at 1420.

¹³¹ *Id.* at 1419 (emphasis added).

is important to note that *Brittain's* consideration of the RCO doctrine was in *obiter dictum*—there was considerable evidence linking Brittain to the willful discharges, and the conviction was based on actual knowledge, not on his position as a corporate officer.¹³² Brittain was aware that the plant had discharged sewage, he had personally observed the discharges, and he told the plant supervisor to not report these to EPA.¹³³

Brittain does add to the RCO doctrine in one respect. In considering the construction of the provision (noting that CWA did not define the term, and that the “legislative history is silent regarding Congress’s intention”)¹³⁴ the court found that the addition of RCOs was intended to *expand* criminal liability, not, as Brittain had argued, limit it to permit holders.¹³⁵

Brittain demonstrates that critics were wrong with two predictions. The RCO doctrine has not “been refined to its current state as” as Onsdorff and Mesnard claimed.¹³⁶ It had not then nor has it now. Second, the fear that the doctrine would be widely used to convict non-culpable parties, that it would impose either strict liability or a modified and lessened mens rea requirement, has not come to pass. The courts’ rejection of a lowered mens rea under the RCO doctrine has been so complete, that one scholar argued that RCO is a myth, simply finding its basis in dicta in a few opinions.¹³⁷ This answers partly the question why the provision is not used more frequently.

G. Statute as the Source of Duty: Iverson, Ming Hong and the Evolution of the RCO Doctrine

Despite the rejection of the use of the RCO doctrine to modify or eliminate the mens rea requirement, courts have accepted the

¹³² *Id.* at 1420.

¹³³ *Id.*

¹³⁴ *Id.* at 1419.

¹³⁵ *Id.* at 1418.

¹³⁶ Onsdorff & Mesnard, *supra* note 94, at 10,101.

¹³⁷ Richard G. Singer, *The Myth of the Doctrine of the Responsible Corporate Officer*, 6 *Toxics L. Rep.* (BNA) 1378 (Apr. 8, 1992).

RCO provision as one where the statute creates a duty when a corporate officer stands in a responsible relation to a public danger. This theory is strongly supported in traditional criminal law and in *Dotterweich* and *Park*. What follows is a consideration of some of these cases, and how they have refined how the doctrine is used.

1. *United States v. Iverson*¹³⁸

Iverson was the president and chairman of the board of CH2O, a company that blended chemicals to form various products such as acid cleaners and heavy-duty alkaline-based products. The blending process involved mixing in drums. The drums collected a waste residue that required cleaning; the cleaning produced wastewater with a high toxic metal content. The city sewer authority informed Iverson that the metal content was too high to accept under their permit, and legal disposal of the wastewater was expensive—or at least more expensive than dumping it illegally.¹³⁹ Beginning around 1985, Iverson personally ordered employees of CH2O to discharge the wastewater in three places, on the plant's property, through a sewer drain at an apartment complex that defendant owned, and through a sewer drain at defendant's home.¹⁴⁰ The original plant did not have sewer access. Later, though, in 1992, CH2O purchased another facility that did have sewer access, which Iverson also employed to dispose of the wastewater.¹⁴¹ Testimony revealed that Iverson was present during at least some of the discharges, where he could both see the discharges and smell the chemical odor.¹⁴²

The district court instructed the jury that it could find Iverson guilty if he had knowledge that employees were discharging the wastewater, that he had the authority and the capacity to prevent

¹³⁸ 162 F.3d 1015 (9th Cir. 1998).

¹³⁹ *Id.* at 1018.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1019.

the discharges, *and* that he failed to prevent the on-going discharges of pollutants to the sewer system.¹⁴³

Iverson had argued that he could be held liable only if he actually exercised control of the activity, or if had the express corporate duty to do so.¹⁴⁴ On appeal, the Ninth Circuit Court of Appeals rejected Iverson's narrow interpretation of RCO doctrine, holding that

under the CWA, a person is a "responsible corporate officer" if the person has *authority to exercise control* over the corporation's activity that is causing the discharges. There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity.¹⁴⁵

Iverson was a direct application of *Park* as a violation of a statutory duty to prevent violations, although in this case it seemed hardly necessary, as the testimony established that Iverson had actually ordered the discharges. However, *Iverson* is indicative of how the RCO would have the responsibility to report violations, especially when the knowledge is firsthand.

2. *United States v. Ming Hong*¹⁴⁶

Ming Hong adds an important detail that would otherwise limit application of the RCO doctrine. The case held that an officer need not be officially designated as one to be held liable. In *Ming Hong*, employees of the Avion Corporation discharged untreated wastewater into the Richmond, Virginia sewer system in violation of its CWA permit. Ming Hong had personally bought one filter designed as the final step in a longer treatment system, though not

¹⁴³ *Id.* at 1022.

¹⁴⁴ *Iverson*, 162 F.3d at 1022.

¹⁴⁵ *Id.* at 1025 (emphasis added).

¹⁴⁶ 242 F.3d 528, 531 (4th Cir. 2001) (holding no formal designation required to establish as individual as an RCO).

as a complete filter system. He knew this and was also in charge of the company's finances. He had explicitly refused to authorize payment for filters, he knew that the filtration Avion had was inadequate under their permit conditions, and was regularly at the site when illegal discharges occurred.¹⁴⁷ Despite the fact that Ming Hong went to "great lengths" to shield his connection with Avion in an obvious attempt to avoid culpability,¹⁴⁸ the Fourth Circuit Court of Appeals found that he was the de facto owner, that he exercised substantial control over the discharges and was therefore criminally liable.¹⁴⁹

Ming argued that the government was required to prove that he was an RCO because the information charged him as such, and that even if no proof was required, the United States "failed to prove that he exerted sufficient control over the operations of [the corporation] to be held responsible for the improper discharges"¹⁵⁰ or that he had "authority to prevent the illegal discharges" that were the basis of the charges.¹⁵¹ The court found that "[t]he gravamen of liability as a[n] RCO"¹⁵² was not a formal designation as such, but, relying on the principles articulated in *Park*, whether the defendant "bore such a [responsible] relationship" to the violations¹⁵³ where it was "appropriate to hold him criminally liable."¹⁵⁴

Ming Hong is perhaps the clearest application of the statute creating a duty. Ming was very clearly aware of the regulations requiring the permit, and he had the means and the authority to comply with its terms.

¹⁴⁷ *Id.* at 530.

¹⁴⁸ *Id.* at 532.

¹⁴⁹ *Id.* at 531 n.2.

¹⁵⁰ *Id.* at 531.

¹⁵¹ *Id.* at 532.

¹⁵² *Ming Hong*, 242 F.3d. at 531.

¹⁵³ *United States v. Park*, 421 U.S. 658, 672 (1975).

¹⁵⁴ *Ming Hong*, 242 F.3d at 531.

*H. Responsible Corporate Officers: Circumstantial Proof of Mens Rea: United States v. Self*¹⁵⁵

Although rejecting the lowered mens rea requirement, the responsible corporate officer doctrine can be used as circumstantial or supplemental evidence to establish guilty knowledge. Self argued that he was convicted based on his status as an RCO, like the defendant in *MacDonald & Watson*.¹⁵⁶ The Tenth Circuit Court of Appeals upheld the conviction, finding an important distinction: the error in *MacDonald & Watson* was erroneous jury instructions, in which the court held that it was impermissible to infer knowledge based on status as an RCO alone.¹⁵⁷ *Self*, in comparison, dealt with sufficiency of the evidence.¹⁵⁸ *MacDonald & Watson* acknowledged what is common in criminal cases, that mens rea may be inferred from circumstantial evidence—hereby using the RCO doctrine.¹⁵⁹ Still, at no time did the court believe that the mens rea was lessened simply by virtue of Self's position. The court held that the evidence was sufficient; the defendant had knowledge of prior illegal storage, he had solicited shipments, and the facility's vice-president and an employee testified that the defendant directed storage of hazardous waste in violation of RCRA.¹⁶⁰ The RCO doctrine cemented that this knowledge was not coincidental.

*I. Willful Blindness: United States v. Hopkins*¹⁶¹

Hopkins gives some indication of how the RCO doctrine might be used in a conscious avoidance or "willful blindness" instruction.

¹⁵⁵ 2 F.3d 1071 (10th Cir. 1993).

¹⁵⁶ *Id.* at 1087.

¹⁵⁷ *Id.* at 1087-88.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1088; *see also* *United States v. Kelly*, 167 F.3d 1176 (7th Cir. 1999) (holding that the jury could infer knowledge of potentially hazardous properties of waste and incur criminal liability through his responsibility for waste handling, his frequent visits to facility, and familiarity with age, location, and contents of storage drums).

¹⁶⁰ *Self*, 2 F.3d at 1087.

¹⁶¹ 53 F.3d 533 (2d Cir. 1995).

“A conscious-avoidance charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt ‘that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.’”¹⁶² The *Hopkins* court stressed that willful blindness instructions were an appropriate means by which to argue in the alternative—that the defendant had actual knowledge, or “if the defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain.”¹⁶³ In this case, Hopkins was the vice president of Spirol, a company that manufactured zinc-plated products. The plating process produced large amounts of toxic wastewater, and Hopkins was responsible for monitoring the wastewater and filing monthly discharge reports with the state’s Department of Environmental Protection. Hopkins would wait until his subordinates presented him with reports that contained acceptable levels. In what one can only imagine was Hopkins’ best Sergeant Schultz imitation from the 1965 to 1971 television series “Hogan’s Heroes,” Hopkins would respond, “I know nothing, I hear nothing.”¹⁶⁴ Although the RCO doctrine was not used explicitly, Hopkins’ position as vice-president, and his explicit duty to monitor and file the reports might have been more of a factor had the evidence of his guilt been less compelling.¹⁶⁵

III. THE DORMANT PROVISION

DOJ has achieved a ninety-five percent conviction rate in the prosecution of environmental crimes.¹⁶⁶ About eighty percent of

¹⁶² *Id.* at 542 (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993)).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ For a discussion of the willful blindness doctrine in environmental crimes, see Karen M. Hansen, “*Knowing*” *Environmental Crimes*, 16 WM. MITCHELL L. REV. 987, 990-92 (1990).

¹⁶⁶ Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer Doctrine: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L.J. 169 (1994).

convictions for environmental crimes involved corporate officers.¹⁶⁷ Several states have adopted similar RCO provisions in their environmental statutes, with identical language as in CAA and CWA,¹⁶⁸ yet despite the addition there is a notable absence of criminal convictions in state cases, although many states use the RCO doctrine as a duty-creating provision in the civil context, following *Park* and *Dotterweich*.¹⁶⁹ States have reached the same results as in federal courts in rejecting strict liability.

There are no reported cases to date using the RCO provision in a state criminal environmental case. The RCO provision seldom plays a role in environmental criminal prosecutions involving both state and federal law. In exploring the reasons for this, one obvious cause may be the courts' rejection of the RCO doctrine as reducing or modifying the mens rea requirement. Related to this may be that the Environmental Crimes Section, which prosecutes

¹⁶⁷ *Id.* at 169.

¹⁶⁸ *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-44(c) (West 2003) ("Person" includes "any responsible corporate officer.").

¹⁶⁹ *See People ex rel. Madigan v. Tang*, 805 N.E.2d 243, 255 (Ill. App. 2004) ("Regardless, the responsible corporate officer doctrine requires specific allegations of corporate responsibility with regard to the wrongful acts, rather than just general allegations of corporate responsibility."); *State v. Standard Tank Cleaning Corp.*, 665 A.2d 753, 764 (N.J. Super. 1995).

Since the WPCA was designed to establish a state system for enforcement of the provisions of the Federal Clean Water Act, it is reasonable to construe the term "responsible corporate official" . . . in conformity with the concept of "responsible corporate officer" developed in *Dotterweich* and *Park* and applied in *Brittain*. Under this view, an individual may not be held liable for a corporation's violation of the WPCA simply because he or she occupies the position of corporate officer or director. Instead, there must be a showing that a corporate officer had actual responsibility for the condition resulting in the violation or was in a position to prevent the occurrence of the violation but failed to do so. Stated another way, we construe the WPCA to impose liability only upon corporate officers who are in control of the events that result in the violation. Absent such a showing, a corporate officer cannot be said to be "responsible" for the violation.

Id. (citations omitted).

environmental crimes at DOJ, has too few resources to cover the entire country to argue a theory perceived to be vague and that has received mixed treatment in the courts.

Yet another reason may lie in the fact that the government can prosecute environmental crimes under a conspiracy theory and by applying *Pinkerton* liability.¹⁷⁰ Once the underlying violation is established, a criminal co-conspirator is liable for all the substantive crimes committed during the course of and in the furtherance of the conspiracy that are reasonably foreseeable.¹⁷¹ Additionally, the government can charge an individual under any of the appellations listed in section 302(e), which include corporate officers, agents, and employees.¹⁷²

Other reasons and an area of concern in the criminal enforcement program are that prosecutors tend to react to violations rather than actively seek them out, relying on whistleblowers to find and investigate cases. While whistleblowers can be a valuable resource, such reliance is not an effective way to find and prosecute the most serious violations.¹⁷³ Related to the procedure of how DOJ learns of criminal violations are the mechanics of enforcement, by ratcheting up violations from

¹⁷⁰ *Pinkerton v. United States*, 328 U.S. 640 (1946).

¹⁷¹ *United States v. Self*, 2 F.3d 1071, 1088 (10th Cir. 1993) (discussing *Pinkerton* and stating that “[a] criminal conspirator is criminally responsible for substantive crimes of coconspirators committed during the course of and in furtherance of the conspiracy which are reasonably foreseeable”). The Tenth Circuit Court of Appeals found this as an alternative to liability. *Id.* at 1088-89 (noting that aiding and abettor liability is a further means to establish a link up the corporate chain).

¹⁷² “Section 302(e)” refers to CAA’s definitions of “individuals” at 42 U.S.C. § 7602(e). “The term ‘person’ includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.” *Id.*

¹⁷³ *Hearing, supra* note 13, at 112 (testimony of Ronald A. Sarachan). Mr. Sarachan was a former Chief of the Environmental Crimes Section at DOJ.

administrative penalties, to civil penalties, and then finally criminal prosecutions,¹⁷⁴ which perhaps give RCOs the opportunity to escape liability.

There are reasons particular to the CAA of why the RCO doctrine is not used more often, and why there are few prosecutions under CAA generally: proving violations is notoriously difficult, simply by the nature of the “gone with the wind” evidence.¹⁷⁵ Another reason for few prosecutions is that CAA allows for an exemption for “accidents,” emission violations that are not “reasonably foreseeable,”¹⁷⁶ even though, as one commentator noted, these accidents frequently occur in the same factories again and again.¹⁷⁷ Even when evidence of these unlawful emissions is available, the violations under CAA are measured in days, not in amounts or levels or toxicity, which significantly lower the dollar amount.¹⁷⁸ This lack of benefit relative to cost may adversely influence the decision to prosecute. The cumulative effect of all these make violators difficult to target.

A. *The Dormant Provision: Is the RCO Doctrine A Benefit?*

What effect does having the dormant RCO provision in the statute have on industry? If it is unused, should it remain in the statute, or does the RCO provision further the goals of environmental regulation? If so, how could the legislature amend the RCO provision to improve this function?

¹⁷⁴ There is no requirement in environmental statutes that the government pursue civil actions prior to the initiation of criminal proceedings. *See* *United States v. Frezzo Bros.*, 602 F.2d 1123, 1124 (3d Cir. 1979).

¹⁷⁵ *Hearing, supra* note 13 (testimony of Ronald A. Sarachan). There have been a number of convictions for violations of work practice standards of asbestos removal under CAA. *See, e.g.*, *United States v. Tomlinson*, 189 F.3d 476 (Table), 1999 WL 511496 (9th Cir. (Wash.) July 16, 1999); *United States v. Itzkowitz*, No. 96-CR-786, 1998 WL 812573 (E.D.N.Y. May 13, 1998).

¹⁷⁶ *Hearing, supra* note 13.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

*B. Should the RCO Doctrine Be Used in Criminal Prosecutions?
Blurring the Line Between Tort and Criminal Law*

One of the criticisms of applying the RCO doctrine in environmental criminal law is a general one—environmental criminal statutes, as applied, do not comport with traditional criminal law norms.¹⁷⁹ The foundation of this criticism is that environmental statutes such as CAA and CWA (and of course other environmental statutes) overlay their criminal and civil provisions; a violation of any one is either civil or criminal, with the mental state of “knowingly” dividing the two.¹⁸⁰ Some provisions have “negligent” as a mental state.¹⁸¹ While the dividing line between tort and criminal law is usually well defined in traditional law, the argument runs that environmental law has distinctive characteristics: an aspirational quality, a high degree of complexity, and indeterminacy.¹⁸² These distinctive qualities blur the line between tortious and criminal conduct in environmental statutes.

C. Environmental Law's Distinctive Features

Richard Lazarus, a professor at Georgetown University, describes how three of these distinctive features of environmental law need to be taken into consideration when making criminal

¹⁷⁹ See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2440-41 (1995); Coffee, Jr., *supra* note 90, at 213-17; David A. Barker, Note, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1390-91 (2002).

¹⁸⁰ See generally *supra* note 149.

¹⁸¹ U.S.C. § 7413(c)(4) (2000).

Any person who negligently releases into the ambient air any hazardous air pollutant . . . or any extremely hazardous substance . . . and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under title 18 or by imprisonment for not more than 1 year, or both.

Id.

¹⁸² Lazarus, *supra* note 179, at 2444-45.

environmental policy.¹⁸³ The first of these is that environmental law is aspirational: environmental law seeks goals that it knows are not immediately obtainable. For example, CAA sought attainment of national ambient air quality standards by 1975—goals that have yet to be achieved even today in 2005. Similarly, CWA had a goal of swimmable waters by 1983, and zero discharges of pollutants into the nation’s waterways by 1985.¹⁸⁴ Environmental law also lends itself to indeterminacy—it is evolutionary and dynamic in nature, constantly responding to advancements in science and technology, and evolving to our understanding of the environment itself.¹⁸⁵ The law constantly adapts to reflect these changes.

These constantly changing standards, and the change in conduct they require, make the duty a corporate officer must fulfill too indeterminate to apply criminal law, because it provides no set guidelines by which to judge criminal behavior.¹⁸⁶ And of course, added to this indeterminacy is environmental law’s inherent complexity.¹⁸⁷ It is therefore easy to engage in conduct that is criminal without culpability.

Traditional criminal law, in comparison, is based on a fixed set of societal norms based on a common and largely static understanding of moral values. Rape, murder, theft, are morally wrong, and of course have been so considered since time immemorial. Criminal law requires readily identifiable codes of conduct to justify the harsh sanctions of incarceration and large monetary penalties, whereas environmental law is anything but that, with its dynamic, changing character, highly technical standards, and incomprehensible complexity. “[C]riminal law is [therefore] more appropriate for redressing violations of absolute duties, whereas tort law is better suited for redressing violations of relative duties.”¹⁸⁸ The RCO doctrine of course plays into this—at least, its perception, in that responsible corporate officers

¹⁸³ *Id.*

¹⁸⁴ See 33 U.S.C. § 1251(a)(1) (2000) (describing CWA standards for today).

¹⁸⁵ Lazarus, *supra* note 179, at 2419.

¹⁸⁶ *Id.* at 2431.

¹⁸⁷ *Id.* at 2443.

¹⁸⁸ *Id.* at 2444.

have a duty, but what that duty is may not always be clear. When there is no clear duty for the responsible corporate officer to fill, and when the conduct is not clearly identifiable as criminal, criminal enforcement, with the full "moral force" of the law behind it, is inappropriate.¹⁸⁹ Further, policy makers and the legislature have not considered these important differences in enacting criminal provisions.¹⁹⁰ The result is that "this blurring of the border between tort and crime predictably will result in injustice, and ultimately will weaken the efficacy of the criminal law as an instrument of social control,"¹⁹¹ evidenced by the application of a negligence standard in some statutes.¹⁹²

D. Enforcement Policy of the Department of Justice

Lazarus and others argue further that the blurred line gives prosecutors too broad a discretion in enforcement decisions,¹⁹³ and

¹⁸⁹ *Id.* at 2486; see also Coffee, Jr., *supra* note 90.

¹⁹⁰ Lazarus, *supra* note 179, at 2454.

¹⁹¹ Coffee, Jr., *supra* note 90, at 193. ("[T]he dominant development in substantive federal criminal law over the last decade has been the disappearance of any clearly definable line between civil and criminal law.")

¹⁹² *Id.*

¹⁹³ See Kevin A. Gaynor et al., *Environmental Criminal Prosecutions: Simple Fixes for a Flawed System*, 3 VILL. ENVTL. L.J. 1, 11 (1992).

Exacerbating the lack of centralized review of environmental criminal cases is the minimum level of culpability required for a case to become a criminal case. . . . Further, some of these statutes require the government to show only negligence to establish criminal liability. Because the threshold standard is so low, whether a violation is treated criminally, civilly or administratively is not necessarily made through the principled and predictable application of the statutory scheme, but rather, can be made on the whim of an Assistant U.S. Attorney. As a consequence, virtually any environmental violation can be prosecuted criminally, if an Assistant U.S. Attorney so chooses.

Id. But see Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 4 IOWA L. REV. 115, 130-31 (1998). Brickey details how the scrutiny in the decision to prosecute environmental crimes is very rigorous, involving many layers of review of prosecutors, and in fact, there is no whim of any one prosecutor, as Gaynor and others insist.

that such “ad hoc” prosecutorial decisions are subjective and impressionistic, and cannot be relied on to promote consistency and fairness.¹⁹⁴

DOJ has guidelines describing how and when they will prosecute as environmental crimes,¹⁹⁵ guidelines designed to further the regulatory program by encouraging voluntary compliance, cooperation, and adequate training. The Department’s stated policy is to seek the “highest culpable party in the corporate organization to target for criminal violations.”¹⁹⁶ While these rules offer guidelines on how DOJ bases its decisions to prosecute (considering factors such as the level of risk to the public, public health impacts, whether the violation is “technical,” deliberate and blatant failures to obtain permits, false statements, and the level of cooperation, etc.)¹⁹⁷ this does little to define what kinds of conduct or acts form the line between civil and criminal violations, adding to a perception of arbitrariness and unfairness. While guidelines clarify enforcement policy, as one commentator points out, it still begs the question of where the dividing line lies—and whether we trust prosecutors to honor these lines.¹⁹⁸

¹⁹⁴ Lazarus, *supra* note 179, at 2412, 2419, 2488.

¹⁹⁵ See EPA, Memorandum, *Exercise of Investigative Discretion* (Jan. 12, 1994), available at <http://www.epa.gov/compliance/resources/policies/criminal/exercise.pdf> [hereinafter *Exercise of Investigative Discretion*]; F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,478, 10,480 (1987) (“It has been, and will continue to be, Justice Department policy to conduct environmental criminal investigations with an eye toward identifying, prosecuting, and convicting the highest ranking, truly responsible corporate officials.”).

¹⁹⁶ Habicht II, *supra* note 195 (quoting Deputy Attorney General, Aug. 8, 1998).

¹⁹⁷ *Exercise of Investigative Discretion*, *supra* note 195; see also U.S. DOJ, Memorandum, *Factors In Decisions On Criminal Prosecutions For Environmental Violations In the Context of Significant Voluntary Compliance Or Disclosure Efforts By The Violator* (July 1, 1991), available at <http://www.usdoj.gov/enrd/factors.htm>.

¹⁹⁸ See DONALD A. CARR, ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS 115 (BNA 1995).

E. Brickey's Response—The Intersection of Criminal and Environmental Law

If the criticisms of Lazarus and others are valid, then the RCO doctrine should not be used in the enforcement of criminal law. If a corporate officer's duties are not clearly defined, then criminal enforcement of a violation based on an unclear duty is inappropriate and unfair.

However, not all critics agree with this assessment. Kathleen Brickey has found a much closer "fit" in her evaluation of the intersection between environmental criminal theory and traditional criminal law. She argues that environmental criminal provisions do create clear, straightforward duties, and that there is no unfairness in judging those knowing failures to fulfill one's duties as criminal.¹⁹⁹ If Brickey is correct, then using the RCO doctrine could be an important tool for ensuring corporate compliance, as link in chain that could ensure corporate responsibility for environmental violations.²⁰⁰

F. Administrative and Substantive Environmental Crimes

Brickey's argument centers on what she believes is a mistaken perception of environmental law is a "monolithic," uniform body.²⁰¹ She analyses how environmental criminal enforcement is actually applied, finding that they are an appropriate application of traditional criminal law.²⁰²

¹⁹⁹ See Brickey, *Crossroads*, *supra* note 13, at 518-19.

²⁰⁰ The RCO doctrine could of course be extended, and in all probability should be, to civil enforcements. The arguments against it are certainly not as strong as imposition of criminal liability—where mens rea requirements are proportionately higher. See, e.g., Noel Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Enforcement Cases*, 21 STAN. ENVTL. L.J. 283, 321-22 (2002). Wise discusses how the RCO's application to environmental statutes as public welfare offenses creates a duty for which the officer should be held personally liable in tort.

²⁰¹ Brickey, *Crossroads*, *supra* note 13, at 492.

²⁰² *Id.*

The crux of Brickey's analysis is that she divides environmental violations crimes into two groups—substantive and administrative. Substantive environmental crimes are those that involve direct harm or risk of harm to the environment. They usually involve illegal discharges or emissions, or they risk illegal storage in violation of RCRA.²⁰³

Administrative crimes are those that interfere with the information exchange between the government and industry—monitoring and reporting requirements. These would include failures to properly monitor, false reporting of emissions, failures to notify when emissions or discharges exceed legally established limits. Permit violations are a hybrid, and can involve both substantive and administrative violations. Failure to obtain a permit when one would ordinarily be issued as a matter of course would be an administrative violation, whereas the failure to obtain a permit when one would not be granted, under any circumstances, is a substantive violation.

When environmental law is broken down into these categories, and evaluated in a traditional criminal law context, there is a much closer fit between environmental and criminal law theory. One of the most persuasive examples she offers is found in the identical provisions in CAA and CWA which criminalize “knowingly making a false material statement” in a reporting document.²⁰⁴ Requiring a corporate officer to make accurate statements is not influence by environmental law's “aspirational qualities.”²⁰⁵ Rather, this provision, and others like it involve an unchanging, “elementary standards of conduct.”²⁰⁶ This area of law is not dynamic and evolutionary, but, as she states, is static, and unchanging, as old as the basic tenet, “[t]hou shalt not lie.”²⁰⁷

The statute thus establishes the duty is very clearly not subject to environmental law's distinctive characteristics. She finds that similarly, criminal violations of substantive environmental

²⁰³ *Id.* at 512.

²⁰⁴ *Id.* at 513.

²⁰⁵ *Id.* at 498.

²⁰⁶ *Id.* at 515.

²⁰⁷ Brickey, *Crossroads*, *supra* note 13, at 515.

law are not inherently unfair—the application of a mens rea requirement leads to predictable outcomes, not ones that are unfair or that unwittingly put the innocent in jail. She identifies the permitting process as a classic example, which creates equally-identifiable standards of conduct and which operates as a covenant between the government and the polluter to define the scope of what pollution will be allowed. It cannot be seen as unfair to prosecute those who have full notice of the agreed-upon standard.²⁰⁸

*United States v. Weintraub*²⁰⁹ illustrates Brickey's point well. Weintraub was a Connecticut real estate developer who purchased office building in New Haven, which he planned to renovate into apartment buildings. The city provided Weintraub with a report describing considerable amounts of asbestos in the building. The work procedures for asbestos removal fill hundreds if not thousands of pages of the Federal Register, and contain detailed work practice standards for removal in demolition and construction, elaborate descriptions of when asbestos becomes "friable," that is, when it turns to dust that poses a threat to the public.²¹⁰ Friability determinations are made using complex applications of "Polarized Light Microscopy."²¹¹ While the underlying science and policy were complex, indeterminate, and aspirational, Weintraub was aware of asbestos in the building and that asbestos removal required specialized, licensed removers.²¹² At one point, during the demolition, EPA even warned Weintraub that his company was under investigation, but the illegal disposals continued.²¹³ The standard of conduct was clear, but Weintraub chose to violate it.

²⁰⁸ See *Hearing, supra* note 13, at 115 ("I used to instruct new prosecutors . . . when I was Chief of the Environmental Crimes Section, the conduct for which we prosecuted people in environmental crimes cases was conduct that my then-five-year-old daughter would have known was wrong."); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1109 (W.D. Wis. 2001).

²⁰⁹ 273 F.3d 139 (2d Cir. 2001).

²¹⁰ See, e.g., National Emission Standards for Hazardous Air Pollutants; Asbestos NESHAP Revision, 55 Fed. Reg. 48,406 (Nov. 20, 1990).

²¹¹ *Weintraub*, 273 F.3d at 145.

²¹² *Id.* at 142.

²¹³ *Id.*

Another sample of how identifiable the standards of conduct are in environmental regulation is found in *Murphy Oil*,²¹⁴ which describes a process in which the a responsible corporate officer is required to ensure the accuracy of monitoring reports.

Under the Clean Water Act, each permittee must establish and maintain records, install and use monitoring equipment, sample its effluent according to a prescribed schedule and report the results to the permitting agency. The effluent reports, which are submitted on standard EPA prescribed forms, are known as Discharge Monitoring Reports. A permittee's Discharge Monitoring Reports must be signed by a "responsible corporate officer" or duly authorized representative, who certifies that the reported information was prepared by qualified personnel under his or her direction or supervision, and that the information is true, accurate and complete. Accuracy is further encouraged by the availability of criminal penalties for false statements.²¹⁵

G. Links to Traditional Criminal Law: Deterrence

Failure to fulfill a duty created by statute is the basis for criminal and tort liability, and has longstanding and wide acceptance by the courts.²¹⁶ The effect of the RCO doctrine can and should be to codify a corporate officer's duty in order to ensure greater compliance, accuracy in monitoring and reporting, and to deter violations by ensuring corporate accountability.²¹⁷ If Brickey's analysis is valid, then these duties are not abstract, but

²¹⁴ 143 F. Supp. 2d 1054 (W.D. Wis. 2001).

²¹⁵ *Id.* at 1109 (citations omitted).

²¹⁶ MANDIBERG & SMITH, *supra* note 76, § 3-3(a).

²¹⁷ James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916 (1991) ("Environmental crime does not pay! This is the message of the United States Environmental Protection Agency (EPA) for the 1990s.").

are based on static and unchanging standards of conduct.²¹⁸ As a former Chief of the Environmental Crimes Section once said, the crimes prosecuted involve “conduct that my . . . five-year-old daughter would [know] was wrong.”²¹⁹

The threat of criminal sanctions fills the gaps in the regulatory system—there is strong correlation between aggressive criminal enforcement programs and corporate decisions to implement environmental compliance and management programs.²²⁰ Corporate executives identify possibility of criminal sanctions as the number one reason for implementing environmental compliance programs.²²¹ The value of this deterrence cannot be underestimated, because there are simply not enough inspectors to ensure detection of all violations.²²²

Criminal deterrence assumes another vital role when the economic incentives to violate regulations are great. Compliance with environmental regulations can be prohibitively expensive to many companies, especially where the profit margin is not large. When monetary penalties from crimes are not much greater than compliance, polluters will risk the “prosecution lottery.”²²³ The possibility of jail time then assumes an added importance, because jail time is one cost that cannot be passed on to consumers. Criminal sanctions thus act to level the playing field so that fewer will gain an economic advantage by violating the law.²²⁴ Without criminal sanctions, industry could simply accept the monetary penalties as a cost of doing business, which could then be passed on to consumers. Criminal enforcement acts as a great incentive to comply, and it does not put those who do comply at a competitive disadvantage.

²¹⁸ Brickey, *Crossroads*, *supra* note 13, at 515.

²¹⁹ *Hearing*, *supra* note 13, at 115 (testimony of Ronald A. Sarachan).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ Brickey, *Crossroads*, *supra* note 13, at 509.

²²⁴ *Id.*

H. Deterrence Value: Inadequate Monitoring

Deterrence has added importance in the context of CAA. EPA inspection of environmental standards is spread thinly throughout the country.²²⁵ In recent testimony before the U.S. Senate, Eric Schaeffer, former Director of EPA's Office of Regulatory Enforcement reported that CAA emissions were notoriously difficult to monitor accurately, and that EPA will assume compliance, when in fact, there is none.²²⁶ EPA inspections of emission sources are limited. Often, EPA must rely on periodic samplings of thousands of sites that might occur as little as every three or four years.²²⁷ A GAO report found that "emission factors were often wrong by an order of magnitude."²²⁸ These include carcinogens from refineries can often be five times higher than the reported industry estimates.²²⁹

Another problem peculiar to CAA is the nature of so-called "fugitive emissions." These are leaks from refineries of smog forming volatile organic compounds from valves, flanges, and pumps, and are more difficult to monitor than the smokestack emissions. Monitoring of these emissions can be pure guesswork.²³⁰ CAA policy can then based on data that do not "accurately reflect reality" when based on inaccurate reporting.

I. Link to Culpability

Another important link between traditional criminal law, environmental criminal law, and the RCO doctrine is one of

²²⁵ See, e.g., Press Release, EPA, EPA Announces Unprecedented First "Draft Report On The Environment"; Report Shows Real Progress; Helps Identify Areas Where There Is "More To Be Done" (June 23, 2003), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/0f5be335029e763d85256d4e006523fa?OpenDocument>.

²²⁶ *Hearing, supra* note 13 (testimony of Eric Schaeffer). Eric Schaeffer is a former Director of EPA's Office of Regulatory Enforcement. *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

culpability—traditional criminal law punishes only culpable conduct.²³¹ Culpability is

[t]he societal judgment that the actor is not only responsible for harmful conduct, but is blameworthy as well, is an act of legal line-drawing. This is the pivotal juncture where the law of tort and the criminal law diverge, and what were once deemed mere bad acts are transformed into crimes.²³²

It is a misperception to see environmental violations as mere economic crimes, or to ignore them, or to see minimum culpability in a violator's behavior.²³³ Violators do not only harm the economy by gaining an unfair competitive advantage. To a much greater degree than traditional crimes, criminal violations of environmental laws have the ability to affect large populations, as the incidents at Bhopal and the Prince William Sound illustrate. Although these two incidents resulted in immediate and palpable harms, and were scrutinized by the public, more often environmental violations result in enduring and continuing harms—such as the residue of wastes and slow and persistent leaks—and the harm is hidden though the risks continue over time.²³⁴

²³¹ Brickey, *Crossroads*, *supra* note 13, at 606.

²³² *Id.* at 506.

²³³ See, e.g., Kathleen F. Brickey, *Wetlands Reform and the Criminal Enforcement Record: A Cautionary Tale*, 76 WASH. U. L.Q. 71 (1998). Conservative public interest groups helped individuals prosecuted for violating the wetlands provisions in CWA; the widespread delusion was that these were hapless victims of technical violations, and unfairly targeted by the Justice Department. Even a cursory look at one case demonstrated this was untrue: one of the defendants, Pozgai, had been warned by three different contractors, an Army Corps of Engineers biologist, and by the Corps in two cease and desist orders as well as a temporary restraining order, not to fill in the property—he did so and was held in contempt. *Id.* at 81 (noting the very few prosecutions for wetlands violations under CWA).

²³⁴ Consider, for example, the radiation emissions involved in *In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124 (9th Cir. 2002), which occurred at the world's first plutonium production facility, Hanford Engineering Works. The emissions included over 200 types of radionuclides that occurred over a forty

Hidden harms occur frequently in CAA violations, as breathing is a common activity, and where violations are simply never reported, or labeled as accidents.²³⁵ The potential for violators to cause disease without detection can never be adequately calculated. The deterrent value of aggressive enforcement of environmental statutes then becomes critical.

CONCLUSION AND SUGGESTED IMPROVEMENTS

How could the RCO provision be improved? A source of confusion over the past twenty years of case law and commentary has been how the RCO provision can and should be applied. As a starting point, one suggestion is that the statutes should explicitly adopt the most important holdings in the leading decisions, which are recognized applications of traditional criminal law. First, that the statute creates an affirmative duty for RCOs to seek out and prevent violations, and that a *knowing* failure to fulfill that duty is a criminal act. The public is demanding increased corporate accountability in all areas.²³⁶ The recent enactment of the Sarbanes-Oxley Act²³⁷ is indicative of this trend. Sarbanes-Oxley imposes a statutory duty on auditors to report violations of

year period from 1944 to 1987. Risk in contracting cancer and thyroid related diseases will last for many decades.

²³⁵ *Hearing, supra* note 13 (testimony and prepared statement of Eric Schaeffer).

²³⁶ See Kathleen F. Brickey, *Andersen's Fall From Grace*, 81 WASH. U. L.Q. 917, 959 (2003).

Andersen's fall from grace is a cautionary tale. Its history of failed audits reveals a firm culture that encouraged manipulation and deceit. Cast in the most favorable light, Andersen's lax policies and aggressive practices facilitated a massive corporate fraud. When exposure of the fraud became imminent, Andersen's lead Enron engagement partner orchestrated an expedited effort to shred incriminating documents before the investigators arrived. Andersen then sought to save face by publicly impugning the integrity of the investigation, portraying it as a gross abuse of prosecutorial power. All of this in order to save the firm.

Id.

²³⁷ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). The Act is codified in various sections of Titles 15 and 18 of the United States Code.

accounting laws—the public has a right to expect no less of a corporation in its environmental reporting duties.

Brickey has identified how clear these duties are. Sign reports honestly and accurately. Notify the EPA of substantive violations, as permits require. Most violations of environmental criminal laws involve such “elementary standards” of conduct.²³⁸

However, the concerns that Lazarus and others have voiced are valid: to be a criminal violation, the duty on a corporate officer must be unmistakably clear. What is true in the case law is that no responsible corporate officer has been sent to prison under a “technical violation,” but that the statute could also reflect a better clarity. One possibility would shift DOJ guidelines on how to identify criminal behavior to the statute to determine what level of care is to be expected from a responsible corporate officer. These would include an increased duty and culpability when the substances involved are hazardous, when the industry violates repeatedly, taking into account what are known as “bad actor” provisions—multiple cases of “accidents” being proof of breaching a duty of care the industry’s level of cooperation and compliance, and employee training programs. Such changes would appropriately shift from the prosecutor’s office being responsible for defining what is criminal, and give that task to the statute itself.

The legislature could also adopt the holding in *Self* and other decisions, that the officer’s position can be used as circumstantial proof of knowledge of the violations. Criticisms here are well taken, and the courts have responded that there is not, nor should there be, an imposition of strict liability or a lowered mens rea requirement.

Finally, the Court in *Park* noted that the duty is high when public safety is involved, but that the duty does not require that which is impossible.²³⁹ If the RCO provision is used, the statute could again explicitly recognize the affirmative defense outlined in

²³⁸ EPA identifies some of this conduct which, as Brickey notes, is clearly criminal. Data fraud is a common one. See *Criminal Enforcement*, U.S. Environmental Protection Agency, at <http://www.epa.gov/compliance/criminal/> (last visited Apr. 4, 2005).

²³⁹ *United States v. Park*, 421 U.S. 658, 673 (1975).

Park, that a “defendant was ‘powerless’ to prevent or correct the violation”²⁴⁰ The lessons from *Dotterweich* and *Park* are still valid. Corporations who expose a helpless public to large-scale risks have a duty to protect against, and hopefully prevent, those risks. Central to idea of public welfare offenses is the notion that the corporation is run by individuals—the notion that *someone* must be in charge. The RCO doctrine helps to ensure that someone in fact is in responsible by codifying this duty and holding those in the best position to prevent harm responsible. “The ‘responsible relationship’ the person might have to these activities may vary from being the plant manager who was at his office, the vessel captain who was in his cabin, or the corporate president in his office hundreds of miles from where the act occurred,” but someone must and should be held accountable.²⁴¹ Fulfilling that duty is, in the Court’s words, no more than we have a right to expect.²⁴²

²⁴⁰ Stephen N. Landsman, *Criminal Liability for Corporate Actions: The Responsible Share Doctrine*, J. DUPAGE COUNTY BAR ASS’N, May 1997, available at <http://www.dcba.org/brief/mayissue/1997/art50597.htm> (citations omitted).

²⁴¹ Kevin L. Colbert, *Considerations of the Scierter Requirement and the Responsible Corporate Officer Doctrine for Knowing Violations of Environmental Statutes*, 33 S. TEX. L. REV. 699, 701 n.16 (1992) (arguing that if the RCO faces criminal liability based on position, defense of reasonable action should be available).

²⁴² *Park*, 421 U.S. at 672.