

**RESPONSIBLE CORPORATE OFFICERS  
AND SECTION 113(c)(6) OF THE CLEAN AIR ACT:  
A DORMANT PROVISION WITH A USEFUL FUNCTION**

**PART I**

**INTRODUCTION**

Most credit the genesis of the public welfare statutes and the responsible corporate officer doctrine with two Supreme Court cases, *U.S. v. Dotterweich* [FN<sup>1</sup>] and *U.S. v. Park*, [FN<sup>2</sup>] where the Supreme Court upheld the use of strict liability for misdemeanor violations of the Food, Drug and Cosmetics Act. But the doctrine may be older still. Hammurabi's Code of Laws [FN<sup>3</sup>] made a residential home builder criminally liable "if 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." [FN<sup>4</sup>] If the builder were liable for the construction faults of his officers, this would make this the very first public welfare statute involving responsible corporate officers (RCOs). [FN<sup>5</sup>] What Hammurabi's Code recognized, as did *Dotterweich* in 1943, is that those who have a duty to prevent serious harm on a helpless public should be held liable. [FN<sup>6</sup>]

The flurry of criticism over the addition of the RCO provision to the Clean Air Act [FN<sup>7</sup>] 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 the Food, Drug and Cosmetics Act. 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, faces not misdemeanor sanctions but the most severe felony penalties. [FN<sup>8</sup>]

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.

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 in responsible relation to a public danger: the duty to actively seek out to prevent or remedy violations. This paper will explore 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, a value that

exists despite the fact that the RCO provision is rarely used to prosecute corporate officers. Part II will trace the evolution of criminal provisions and the addition of the responsible corporate officer clause in environmental statutes. Part III will follow the case law that has slowly evolved. Part IV will discuss why the RCO provision is not used more often, and how it nevertheless serves an important function in environmental law. Part V will conclude with suggested improvements of the legislature could clarify how and when the RCO doctrine should apply.

## **PART II**

### **THE RESPONSIBLE CORPORATE OFFICER IN ENVIRONMENTAL STATUTES**

#### **Development of Criminal Provisions in Environmental Statutes**

During the 1970s and 1980s when the major federal environmental statutes were first enacted, rigorous enforcement of the criminal provisions was the exception rather than the rule. [FN<sup>9</sup>] Limited enforcement during the implementation phase was seen as simply fair, as regulatory agencies focused on educating industry on how to comply with the vast and comprehensive regulatory scheme, which demanded the “dynamic and evolutionary” changes in behavior. [FN<sup>10</sup>] Compliance, implementation, and education were the main goals. [FN<sup>11</sup>] Also, lack of criminal enforcement was due to the fact that the first criminal provisions were misdemeanors, and frequently involved only minimal penalties-- so there was little justification for the added burden and expense of a criminal prosecution; [FN<sup>12</sup>] most of the EPA and the Department of Justice’s legal resources were devoted to defending the newly enacted laws from various challenges. [FN<sup>13</sup>]

#### **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. [FN<sup>14</sup>] Although criminal provisions were for the most part added gradually, public outrage to environmental disasters led to quick congressional response that included the addition of criminal provisions to environmental statutes. [FN<sup>15</sup>] 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 the how the public viewed environmental violations: that violations of environmental laws were serious crimes deserving of

serious penalties

### **Union Carbide, Bhopal India 1984**

In December 1984, a tank at a Union Carbide pesticide manufacturing facility in Bhopal, India, containing methyl isocyanate, an extremely toxic cyanide compound, leaked. [FN<sup>16</sup>] A dense cloud of the toxic gas formed and then spread out over an area of 40 square kilometers. Some 2000 people died in the first three days, and the gas cloud ultimately killed over 8,000 people. [FN<sup>17</sup>] Most of the victims, consisting of impoverished squatters who lived next to the factor in huts, died as a result of pulmonary edemas and respiratory infections, and 170,000 more suffered other injuries. [FN<sup>18</sup>] Survivors continue to suffer from an increased number of stillbirths and spontaneous abortions. [FN<sup>19</sup>] 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. [FN<sup>20</sup>] Union Carbide's behavior subsequent to the accident did little to add to a growing public perception of corporate indifference—each victim was compensated less than \$500 U.S. [FN<sup>21</sup>]

### **Prince William Sound and the Exxon-Valdez 1989**

On March 24, 1989, the Exxon Valdez oil tanker grounded on Bligh Reef, spilling nearly 11 million gallons into the biologically rich waters of the Prince William Sound. [FN<sup>22</sup>] Although the accident itself did not result in a loss of human life, it did severely damage a pristine ecosystem. Also, the damages to the economy and those living there were beyond calculation. An investigation revealed that Exxon failed to provide sufficient crew for the vessel, and that the ship lacked adequate navigation equipment. [FN<sup>23</sup>] Also, Exxon had been aware that the captain suffered from alcoholism, [FN<sup>24</sup>] a fact Exxon knew before March 24, 1989. [FN<sup>25</sup>]

### **The CAA 1990 Amendments: Overview.**

Whether the result of accidents like these, or a growing concern about the environment, by the 1990s, the public overwhelmingly favored broadening of criminal liability for violations of environmental laws. A survey conducted in 1990 found that 72% of the public was in favor of incarceration of deliberate environmental violators. [FN<sup>26</sup>] The public rated environmental crime seventh in importance in national priorities. [FN<sup>27</sup>]

Between 1988-1990, Congress added significantly more stringent environmental standards and tougher criminal provisions. [FN<sup>28</sup>] The Clean Air Act Amendments of 1990

followed this trend, and generally strengthened environmental protections by adding provisions for ozone and carbon monoxide in non-attainment areas, added provisions limiting emissions from motor vehicles, increasing the types of regulated pollutants. [FN<sup>29</sup>] The 1990 Amendments likewise increased the severity of its criminal sanctions; most all “knowing” violations were upgraded to felonies. [FN<sup>30</sup>] 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. [FN<sup>31</sup>] In addition, Congress added a “knowing endangerment” provision which imposes a maximum fine of \$250,000, and up to 15 years in prison. [FN<sup>32</sup>]

### **Shifting Responsibility**

An important theme contained in 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 position to best prevent violations. [FN<sup>33</sup>] This shift is apparent in a number of ways. In the definition section, § 302(e), Congress expanded the definition of “persons” to include a number of entities: “individuals,” in addition to “corporations, partnerships, associations, States, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.” [FN<sup>34</sup>] § 113(h) was amended to include “operators” in the definition of person, that is, any person who is *senior* management personnel” or “corporate officer.” [FN<sup>35</sup>] 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.” [FN<sup>36</sup>] Similarly, supervisors can be held criminally liable when they exercise “substantial control” over the workplace and the procedures employed. [FN<sup>37</sup>]

### **Responsible Corporate Officer Provision**

The 1990 Amendments also added the “responsible corporate officer” provision to its definition of “person” in subsection (c)(6). [FN<sup>38</sup>] This provision mirrors an identical one that appeared in the Clean Water Act in the 1977 Amendments. [FN<sup>39</sup>] What was true of both provisions is that neither in the 1977 enactment nor in 1990 in the Clean Air Act Amendments did Congress explain why. [FN<sup>40</sup>] The solitary comment when RCO was added to the Clean Air

Act was, “The 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.” [FN<sup>41</sup>] However, courts have used two canons of statutory construction to interpret the RCO. The first is that the legislature intended to give effect to every word in the statute; [FN<sup>42</sup>] 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.” [FN<sup>43</sup>] Hammurabi’s Code notwithstanding, the courts looked to the genesis of the RCO doctrine in the early Supreme Court decisions of *U.S. v. Dotterweich* [FN<sup>44</sup>] and *US v. Park* [FN<sup>45</sup>] to give meaning to the responsible corporate officer provision. [FN<sup>46</sup>]

### **PART III**

#### **THE RESPONSIBLE CORPORATE OFFICER**

#### **CASE LAW**

#### ***U.S. v. Dotterweich***

Dotterweich was the President and General Manager of Buffalo Pharmaceutical, Inc., a company that purchased drugs from manufacturers, repacked and then distributed them under its own label. [FN<sup>47</sup>] Despite the fact that Dotterweich argued that had no personal knowledge of the shipments, and therefore could not be found liable, he was convicted of misbranding and shipping adulterated drugs, a misdemeanor under the Food, Drug, and Cosmetic Act (FDCA). [FN<sup>48</sup>]

In upholding the conviction, the Supreme Court found that the 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. [FN<sup>49</sup>] Dotterweich also must be seen in an historical context—this was the beginning, as the Court noted, of an era of modern industrialism, where a helpless public was “largely beyond self protection.” [FN<sup>50</sup>] The Court also upheld the conviction although the statute applied strict liability, noting that Congress did not intend the FDCA to have a *mens rea* requirement, [FN<sup>51</sup>] and the misdemeanor sanctions were justified, despite the absence of culpable conduct, because of the corporate officer’s responsibility toward the public. [FN<sup>52</sup>] “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 upon a person otherwise innocent but standing in responsible relation to a public danger.” [FN<sup>53</sup>] 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 has a “responsible relationship” to a public danger. [FN<sup>54</sup>]

### *U.S. v. Park*

The Court expanded the concept of what constitutes a “relation to public danger” in *Park*. [FN<sup>55</sup>] Like *Dotterweich*, *Park* was the president of a large commercial distribution chain, a retail food company called Acme Markets, Inc. [FN<sup>56</sup>] Acme employed 36,000 people, and had 16 warehouses throughout the US. [FN<sup>57</sup>] In 1970, the Food and Drug Administration advised *Park* personally of appalling rodent infestation in two of Acme’s warehouses, one in Philadelphia and a second in Baltimore. As late as March 1972, FDA inspections revealed that conditions had improved but that there was still evidence that mice and rats excrement had contaminated food containers. [FN<sup>58</sup>] 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.” [FN<sup>59</sup>] *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. [FN<sup>60</sup>] 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. [FN<sup>61</sup>]

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. 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 public safety, and that the law imposed not only a duty to seek out and remedy violations, but to actively prevent them from occurring. [FN<sup>62</sup>]

The Court presciently noted that *Parks’* holding, in isolation, could support that a finding of guilt could be “predicated solely on the defendant’s position in the corporation,” implicitly

acknowledging that status based offenses are per se unconstitutional, and anticipating *mens rea* challenges that were to come in future public welfare statutes. [FN<sup>63</sup>] However, the Court focused on Park’s duty with regard to the corporation and to 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 working.” [FN<sup>64</sup>] The Court went on:

[t]he 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. (Emphasis added). [FN65]

*Park* strongly establishes that the responsible corporate officer provision is based in 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 recognizes “impossibility to prevent” the violation as an affirmative defense. [FN<sup>66</sup>]

### **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. [FN<sup>67</sup>] 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. [FN<sup>68</sup>] RCOs who are “responsible” under the statute have a duty to seek out and prevent those violations over which they have responsibility. [FN<sup>69</sup>]

A variation of the statute as the source of the duty is that the duty is imposed because of the officer’s status as a RCO. [FN<sup>70</sup>] However, this approach is far less defensible because the Supreme Court has rejected the idea of status-based crimes. [FN<sup>71</sup>]

The second approach is that the RCO doctrine imposes either a strict liability on the RCO, or that it lowers the government's evidentiary burden by presuming *mens rea*. [FN<sup>72</sup>]

### **Environmental Statutes as Public Welfare Statutes**

Unlike the FDCA, the CAA, CWA and other environmental statutes contain a *mens rea* requirement of "knowingly" in most instances. [FN<sup>73</sup>] Also, unlike the misdemeanor provisions contained in the FDCA, environmental statutes contain felony provisions. [FN<sup>74</sup>] 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, [FN<sup>75</sup>] the courts offered an early clarification that in fact they were. [FN<sup>76</sup>] This classification has added importance as courts have used it to uniformly reject a specific intent requirement in environmental law's criminal provisions. [FN<sup>77</sup>] 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. [FN<sup>78</sup>] The rationale for not requiring specific intent is the set forth in *U.S. v. Int'l Minerals* and is based on a high likelihood that the regulator knows that "when dangerous waste materials are involved, the probability of regulation is so great, that anyone who is aware he is in possession of them must be presumed to be aware of the regulation." [FN<sup>79</sup>] 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. [FN<sup>80</sup>]

### **Early Fears: The Responsible Corporate Officer Doctrine Imposes Strict Liability**

The addition of the RCO provision in the Clean Air Act led to panic that with the upgrade of criminal penalties to felonies coupled with increasingly aggressive enforcement of environmental violations by the EPA and the Department of Justice, [FN<sup>81</sup>] environmental violators would be facing strict liability crime. [FN<sup>82</sup>] 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. [FN<sup>83</sup>] One commentator stated plainly that the RCO doctrine was "simply strict liability applied." [FN<sup>84</sup>]

In fact, the Justice Department attempted to do just that, and use the 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 the EPA, wrote an early influential article [FN<sup>85</sup>] in which he accused the Justice Department 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. [FN<sup>86</sup>] Onsdorff's and others' fears proved to be unfounded—despite the DOJ's attempts, the courts roundly rejected the application of either strict liability or a lowered *mens rea* requirement in the early interpretation of the RCO provision. [FN<sup>87</sup>]

### **Early Cases: *Frezza Brothers* and *Johnson & Towers***

#### ***U.S. v. Frezzo Bros., Inc.***

The responsible corporate officer doctrine was used in a prosecution under the CWA in *Frezza Bros.* [FN<sup>88</sup>] Although frequently cited as supporting the removal of the *mens rea* requirement, *Frezza Bros.* has more historical value, and is in fact singularly 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 U.S. in violation of the CWA. [FN<sup>89</sup>] 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. [FN<sup>90</sup>] The court gave short shrift to the RCO doctrine, in a footnote no less, noting briefly in dicta that the brothers could be found guilty as individuals when the indictment charged them with acting as corporate officers. [FN<sup>91</sup>] What was true was that there was considerable evidence that the Frezzos had actual knowledge of their illegal acts.

#### ***United States v. Johnson & Towers, Inc.***

*Johnson & Towers, Inc.* [FN<sup>92</sup>] is also valuable as an historical reference. What is notable about *Johnson & Towers* is that the RCO doctrine was mentioned in a RCRA violation, and RCRA, unlike the Clean Air and Clean Water Acts, does not contain the 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.... 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." [FN<sup>93</sup>]

Although this was *dictum*, *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.

***U.S. v. MacDonald & Watson Waste Oil Co.***

The first case that led to the early fears that courts would begin to impose strict liability on corporate officers is *U.S. v. MacDonald & Watson Waste Oil Co.* [FN<sup>94</sup>] 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 RCRA § 3008(d)(1) [FN<sup>95</sup>] on two separate occasions, July 30 and 31, 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. D’Allesandro acknowledged that he had, on other occasions, accepted such shipments of contaminated waste that were outside the scope of his permit. [FN<sup>96</sup>] However, during the prosecution’s closing arguments, the prosecution conceded that the government had “no direct evidence that ... D’Allesandro actually knew that [those exact] shipments were coming in.” [FN<sup>97</sup>] To prove intent, at the prosecution’s request the court instructed the jury if they could find that the government satisfied the “knowing” requirement based on D’Allesandro’s position as a 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.” [FN<sup>98</sup>]

What the prosecution tried to establish was the knowledge requirement based solely on D’Allesandro’s status as a corporate officer. But the First Circuit reversed the convictions, finding the instructions to be an error of law. *Park* and *Dotterweich* were distinguishable, the court found, because RCRA, unlike the FDCA, explicitly required a mental state of knowingly—and 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 the statute required. [FN<sup>99</sup>] The scienter requirement assumed added importance, the court found, not simply because Congressional intent was clear, and but also because the violation involved meaningful time in prison, from 5 years for the first offence, up to 10 years for the second. [FN<sup>100</sup>] Although some courts have supported the idea that the misdemeanor/felony distinction would have no bearing on their decision about a *mens rea* requirement, *MacDonald*

& *Watson* clearly establishes that it does. [FN<sup>101</sup>]

### ***U.S. v. White***

The second of these cases was *U.S. v. White*, [FN<sup>102</sup>] in which the court rejected a theory of *respondeat superior*, which would have expanded the RCO doctrine beyond strict liability. In *White*, the U.S. charged one of the defendants, Steven Steed, in a Bill of Particulars as a “responsible corporate officer.” [FN<sup>103</sup>] 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. [FN<sup>104</sup>] 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*, the court refused to accept that the RCO doctrine could allow conviction without 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.” [FN<sup>105</sup>]

### ***U.S. v. Baytank, Inc.*** [FN<sup>106</sup>]

Onsdorff claims that in *Baytank*, the court implicitly applied what *MacDonald & Watson* found to be impermissible: the knowledge of a RCRA violation could be inferred from the defendant’s position as a corporate officer alone. However, here too, the evidence was quite powerful beyond the defendants’ position that they possessed actual knowledge of the violations, and that their positions as responsible corporate officers was 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.” Nordberg, the Executive Vice President, submitted permit applications to the EPA. Testimony revealed that both had intimate knowledge of the facility and regularly dealt with thousands of gallons of illegally stored hazardous wastes. [FN<sup>107</sup>]

### ***U.S. v. Brittain***

*MacDonald & Watson*, *Baytank* and *White* 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. [FN<sup>108</sup>] A later case, *U.S. v. Brittain*, [FN<sup>109</sup>] is occasionally cited as authority to

the contrary, but again does not support the courts' adoption of an altered *mens rea* under the RCO, except in dicta, and where the facts of the case clearly indicated actual knowledge and actual liability. [FN<sup>110</sup>]

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 the CWA. [FN<sup>111</sup>] 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 a RCO. [FN<sup>112</sup>] The court commented: "...[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.*"

*Brittain* seems to strongly support the application of either a theory of *respondeat superior*, or strict liability. Again, however, it is important to note that *Brittain's* consideration of the RCO doctrine was in *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. Brittain was aware that the plant had discharged sewage, he had personally observed the discharges, and that he told the plant supervisor to not report these to the EPA. [FN<sup>113</sup>]

*Brittain* does add to the RCO doctrine in one respect. In considering the construction of the provision (noting that the CWA did not define the term, and that the "legislative history is silent regarding Congress's intention" [FN]) the court found that the addition of responsible corporate officers was intended to *expand* criminal liability, not, as Brittain had argued, limit it to permit holders. [FN<sup>114</sup>]

*Brittain* demonstrates that critics were wrong with two predictions: The RCO doctrine has not "been refined to its current state." [FN<sup>115</sup>] It did not then nor has it not 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 the RCO is a myth, simply finding its basis in dicta in a few opinions. [FN<sup>116</sup>] This answers partly the question why the provision is not used more frequently.

## 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 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 *Parks*. What follows is a consideration of some of these cases, and how they have refined how the doctrine is used.

### *U.S. v. Iverson* [FN<sup>117</sup>]

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 more expensive than dumping it illegally. [FN<sup>118</sup>] 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. The original plant did not have sewer access. Later, though, in 1992, CH2O purchased another facility that did have sewer access, which Iverson employed to dispose of the wastewater. 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. [FN<sup>119</sup>]

The district court instructed the jury that it could find Iverson guilty if he (1) had knowledge that employees were discharging the wastewater, (2) that he had the authority and the capacity to prevent the discharges *and* (3) that he failed to prevent the on-going discharges of pollutants to the sewer system. [FN<sup>120</sup>]

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. On appeal, the Ninth Circuit rejected Iverson's narrow interpretation of an 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." [FN<sup>121</sup>]

*Iverson* was a direct application of *Parks* 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 ordered the discharges. However, *Iverson* is indicative of how the responsible officer would have the responsibility to report violations, especially when the knowledge is firsthand.

***United States v. Ming Hong* [FN<sup>122</sup>]**

*Ming Hong* adds an important detail that would otherwise limit application of the RCO doctrine, that is, 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, not as a complete filter system. He knew this, and in addition, he was in charge of the company's finances. He had explicitly refused to authorize payment of filters, he knew that the filtration Avion had was inadequate under their permit conditions, and was regularly at the site when illegal discharges occurred. [FN<sup>123</sup>] Despite the fact that Hong went to "great lengths" to shield his connection with Avion in an obvious attempt to avoid culpability, [FN<sup>124</sup>] the court found that he was the *de facto* owner, that he exercised substantial control over the discharges and was therefore criminally liable. [FN<sup>125</sup>]

Hong argued that the government was required to prove that he was a responsible corporate officer because the information charged him as such, and that even if no proof was required, the U.S. "failed to prove that he exerted sufficient control over operations [of Avion, the corporation], or that he had authority to prevent the illegal discharges ... to be held responsible for the discharges" that were the basis of the charges. [FN<sup>126</sup>] The court found that the gravamen" of liability as a RCO was not a formal designation as such, but, relying on the principles articulated in *Park*, whether the defendant "bore a responsible relationship to the violation" where it was "appropriate" to hold him liable. [FN<sup>127</sup>]

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

**Responsible Corporate Officers: Circumstantial Proof of *Mens rea***

***U.S. v. Self* [FN<sup>128</sup>]**

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 a RCO, like the defendant in *MacDonald & Watson*. [FN<sup>129</sup>] But the 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 a RCO alone. [FN<sup>130</sup>] *Self*, in comparison, dealt with sufficiency of the evidence. [FN<sup>131</sup>] *MacDonald & Watson* acknowledged what is of course common in criminal cases, that *mens rea* may be inferred from circumstantial evidence—here by using the RCO doctrine. [FN<sup>132</sup>] Still, at no time did the court believe that the *mens rea* was less 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; also, the facility’s vice-president and an employee testified that the defendant directed storage of hazardous waste in violation of RCRA. [FN<sup>133</sup>] The RCO doctrine cemented that this knowledge was not coincidence.

**Willful Blindness: *U.S. v. Hopkins* [FN<sup>134</sup>]**

*Hopkins* gives some indication of how the RCO might be used in a conscious avoidance or “willful blindness” instruction. “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.’” [FN<sup>135</sup>] The court stressed that willful blindness instructions were an appropriate means 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.” [FN<sup>136</sup>] 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 (*Hogan’s Heroes*), *Hopkins* would respond, “I know nothing, I hear nothing.” [FN<sup>137</sup>] 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 Hopkins guilt been less compelling. [FN<sup>138</sup>]

#### **PART IV**

#### **THE DORMANT PROVISION**

The DOJ has achieved a 95% conviction rate in the prosecution of environmental crimes. Over 80% of these convictions involved corporate officers. [FN<sup>139</sup>] Several states have adopted similar RCO provisions in their environmental statutes, with identical language as in Clean Air and Clean Water Acts, [FN<sup>140</sup>] yet despite the addition there is a notable absence of criminal convictions in state cases, although many states use the doctrine as a duty creating provision in the civil context, following *Park* and *Dotterweich*. [FN<sup>141</sup>] 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. The question is why?

An obvious answer 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 (ECS), which prosecutes environmental crimes at the Department of Justice, has too few resources to cover the entire country to argue a theory perceived to be vague and has received mixed treatment in the courts.

Yet another reason may lay in the fact that the government can prosecute environmental crimes under a conspiracy theory, and by applying *Pinkerton* liability. 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. [FN<sup>142</sup>] Additionally, the government can charge an individual under any of the appellations listed in § 302(e), which include corporate officers, agents, and employees.

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, but is not an effective way to find and prosecute the most serious violations. [FN<sup>143</sup>] Related to the procedure of how the Department of Justice learns of criminal violations is how enforcement is actually done, by “ratcheting up” violations from administrative penalties, to civil penalties,

and then finally into criminal prosecutions, [FN<sup>144</sup>] which perhaps give RCOs the opportunity to get “off the hook.”

There are reasons particular to the CAA of why the RCO doctrine is not used more often, and why there are few prosecutions under the CAA generally: proving violations is notoriously difficult, simply by the nature of the “gone with the wind” evidence. [FN<sup>145</sup>] Another reason for few prosecutions is that the CAA allows for an exemption for “accidents;” emission violations that are not “reasonably foreseeable,” [FN<sup>146</sup>] even though, as one commentator noted, these accidents frequently occur in the same factories again and again. [FN<sup>147</sup>] Even when evidence of these unlawful emissions is available, the violations under the CAA are measured in days, not in amounts or levels or toxicity, which significantly lower the dollar amount. [FN<sup>148</sup>] This lack of cost benefit may influence the decision to prosecute. The cumulative effect of these all these make violators difficult to target.

### **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?

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

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. [FN<sup>149</sup>] The foundation of this criticism is that environmental statutes such as the Clean Air and Clean Water Acts (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. [FN<sup>150</sup>] Some provisions have “negligent” as a mental state. [FN<sup>151</sup>] 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: its aspirational quality, a high degree of complexity, and its indeterminacy. [FN<sup>152</sup>] These distinctive qualities blur the between tortious and criminal conduct in environmental statutes.

### **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 environmental criminal policy. The first of these is that environmental law is aspirational: environmental law seeks goals that it knows are not immediately obtainable. For example, the Clean Air Act sought attainment of national ambient air quality standards by 1975—goals that have yet to be achieved even today in year 2004. Similarly, the CWA had a goal of swimmable waters by 1983, and zero discharges of pollutants into the nation’s waterways by 1985. [FN<sup>153</sup>] Environmental law lends itself to indeterminacy—it is “evolutionary and dynamic” in nature—it is constantly responding to advancements in science and technology, and evolving to our understanding of the environment itself. 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. [FN<sup>154</sup>] And of course, added to this indeterminacy is environmental law’s inherent complexity. [FN<sup>155</sup>] 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 since “time out of mind.” Criminal law requires these 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. Criminal law is therefore more appropriate for “addressing absolute duties,” whereas tort law is better suited for addressing “relative duties.” [FN<sup>156</sup>] The RCO doctrine of course plays into this—at least, its perception, in that responsible corporate officers 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. Further, policy makers and the legislature have not considered these important differences in enacting criminal provisions. [FN<sup>157</sup>]. 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,” [FN<sup>158</sup>] evidenced by the application of a negligence standard in some statutes.” [FN<sup>159</sup>]

### **Enforcement Policy of the Department of Justice**

Lazarus and others argue further that the blurred line gives prosecutors too wide a discretion in enforcement decisions, [FN<sup>160</sup>] and that such “ad hoc” prosecutorial decisions are “subjective and impressionistic,” and cannot be relied on to promote consistency and fairness.” [FN<sup>161</sup>]

The Department of Justice has guidelines describing how and when they will prosecute as environmental crimes, [FN<sup>162</sup>] 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.” [FN<sup>163</sup>]

While these rules offer guidelines on how the Department 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. [FN<sup>164</sup>]) 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. [FN<sup>165</sup>]

### **Brickey’s Response—the Intersection of Criminal and Environmental Law**

If Lazarus’ and others’ criticisms 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 is there no unfairness in judging those knowing failures to fulfill those duties as criminal. [FN<sup>166</sup>] 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. [FN<sup>167</sup>]

### **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. [FN<sup>168</sup>] She analyses how environmental

criminal enforcement is actually applied, finding that they are an appropriate application of traditional criminal law. [FN<sup>169</sup>]

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 the risk creating activity of illegal storage in violation of RCRA. [FN<sup>170</sup>]

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 be issued would be an administrative violation, whereas the failure to obtain a permit that would not be granted 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 the Clean Air and Clean Water Acts which criminalize “knowingly making false statements” in reporting document. [FN<sup>171</sup>] Requiring a corporate officer to make accurate statements is not influence by environmental law's “aspirational quality.” Rather, this provision, and others like it involve an unchanging, “elementary standards of conduct.” This area of law is not “dynamic and evolutionary, but, as she states, is “static, and unchanging, as old as the basic tenant, ‘thou shalt not lie.’” [FN<sup>172</sup>]

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 law is not inherently unfair—the application of a *mens rea* requirement leads to predictable outcomes, not ones that are unfair or unwittingly put the innocent in jail. She identifies the permits process as a classic example, which create equally identifiable standards of conduct, which operate as a covenant between the government and the polluter to define the terms by which they can pollute. [FN] It cannot be seen as unfair to prosecute those who have full notice of the standard. [FN<sup>173</sup>]

*U.S. v. Weintraub* [FN<sup>174</sup>] 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. [FN<sup>175</sup>] Friability determinations are made using complex applications of “Polarized Light Microscopy.” While the underlying science and policy were complex, indeterminate, and aspirational, Weintraub was aware of asbestos in the building and he was aware that asbestos removal required specialized licensed removers. [FN<sup>176</sup>] At one point, during the demolition, the EPA even warned Weintraub that his company was under investigation, but the illegal disposals continued. [FN<sup>177</sup>] The standard of conduct was clear, and he chose to violate it.

Another sample of how identifiable the standards of conduct are in environmental regulation is found in *U.S. v. Murphy Oil USA, Inc.*, [FN<sup>178</sup>] 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.”). [FN<sup>179</sup>]

### **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. [FN<sup>180</sup>] The effect of the RCO doctrine can and should be to codify a corporate officer’s duty to ensure greater compliance, accuracy in monitoring and reporting, and to deter violations by ensuring corporate accountability. [FN<sup>181</sup>] If Brickey’s analysis is valid, then these duties are not abstract, but are based on “static and unchanging” standards of conduct. [FN<sup>182</sup>] As a former Chief of the Environmental Crimes

Section once said, “the crimes we prosecute for involve conduct my five year old daughter would know was wrong.” [FN<sup>183</sup>]

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. [FN<sup>184</sup>] Corporate executives identify possibility of criminal sanctions as the number one reason for implementing environmental compliance programs. [FN<sup>185</sup>] The value cannot be underestimated, because there are simply not enough inspectors to ensure detection of all violations. [FN<sup>186</sup>]

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.” [FN<sup>187</sup>] The possibility of jail time then assumes an added importance, because “jailtime is one cost that cannot be passed onto consumers.” Criminal sanctions thus act to “level the playing field,” so that fewer will gain an economic advantage by violating. [FN<sup>188</sup>] Without criminal sanctions, industry could simply accept the monetary penalties as the cost of doing business, which could then be passed on to consumers. Enforcement acts as incentive to comply, and to not put those who do comply at a competitive disadvantage.

#### **Deterrence Value: Inadequate Monitoring**

Deterrence has added importance in the context of the Clean Air Act. EPA inspection of environmental standards is spread thinly throughout the country. [FN<sup>189</sup>] In recent testimony before the U.S. Senate, Eric Schaeffer, former Director of the EPA’s Office of Regulatory Enforcement reported that CAA emissions were notoriously difficult to monitor accurately, and that the EPA will assume compliance, when in fact, there is none. [FN<sup>190</sup>] 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. [FN<sup>191</sup>] A GAO report found that emission factors were “often wrong by an order of magnitude.” These include carcinogens from refineries can often be five times higher than the reported industry estimates. [FN<sup>192</sup>]

Another problem peculiar to the Clean Air Act 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.

One EPA official called the monitoring of these emissions pure guesswork. [FN<sup>193</sup>] Clean Air Act policy can then based on data that do not “accurately reflect reality” when based on inaccurate reporting.

### **Link to Culpability**

Another important link between traditional criminal law and environmental criminal law and the RCO doctrine is one of culpability—that traditional criminal law punishes culpable conduct. [FN<sup>194</sup>] Culpability is “the 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.” [FN<sup>195</sup>]

It is a misperception to see environmental violations as mere economic crimes, or to ignore, or see minimum culpability of a violator’s behavior. [FN<sup>196</sup>] 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—residue of wastes, slow and persistent leaks-- and the harm is hidden; though the risks continue over time. [FN<sup>197</sup>]

Hidden harms occur frequently in Clean Air Act violations, as breathing is a common activity, and where violations are simply never reported, or labeled as accidents. [FN<sup>198</sup>] 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.

## **PART IV CONCLUSION AND SUGGESTED IMPROVEMENTS**

How could the provision be improved? A source of confusion over the past 20 years of case law and commentary has been how the provision can and should be applied. As a starting point, one suggestion 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. [FN<sup>199</sup>] The recent enactment of the Sarbanes-Oxley Act [FN<sup>200</sup>] is indicative of this trend. Sarbanes-Oxley imposes a statutory duty on auditors to report violations of accounting laws—the public has a right to expect no less of a corporation’s environmental reporting duties.

Kathleen 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. [FN<sup>201</sup>]

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 the no responsible corporate officer has been sent to prison under a “technical violation,” but the statute could also reflect a better clarity. One possibility would shift what are the Justice Department’s 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 appropriate shift the prosecutor defining what is criminal, to the statute itself.

The legislature could also adopt the holding in *Self* and other decisions, that the officer’s position can be used circumstantial proof of knowledge of the violations. Criticisms here are well taken, and the courts have responded that there is nor should there be a strict liability or lowered *mens rea* requirement.

Finally, the Court in *Parks* noted that the duty is high when public safety is involved, but that the duty does not require what is impossible. [FN<sup>202</sup>] If the RCO provision is used, the statute could again explicitly recognize the affirmative defense outlined in *Parks*, that a defendant was ‘powerless’ to prevent or correct the violation....” 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 those risks. Central to idea of public welfare offenses is the notion that the corporation is run by individuals—*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. [FN<sup>203</sup>] Fulfilling that duty is, in the Court’s words, no more than we have a right to expect.

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## ENDNOTES

FN<sup>1</sup> *U.S. v. Dotterweich*, 320 U.S. 277 (1943).

FN<sup>2</sup> *U.S. v. Park*, 320 U.S. 277 (1943).

FN<sup>3</sup> Hammurabi ruled Babylon, the world’s first metropolis, from 1795-1750 BC. *See Ancient History Sourcebook: Code of Hammurabi, c. 1780 BCE* <<http://www.fordham.edu/halsall/ancient/hamcode.html>>.

FN<sup>4</sup> *Id.* § 230 has a similar provision with a slightly different penalty: If [the building collapse] kill the son of the owner the son of that builder shall be put to death.” Other similar provisions address unacceptable risks from faulty buildings and liability for shipbuilding. No. 231. “If it kill a slave of the owner, then he shall pay slave for slave to the owner of the house”; No. 232 “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; No. 233. “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.” No. 235. “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 shall take the boat apart and put it together tight at his own expense. The tight boat he shall give to the boat owner.

FN<sup>5</sup> Whether the Code recognized any defenses to liability is of course anyone’s guess.

FN<sup>6</sup> *Dotterweich*, 320 U.S. at 278.

FN<sup>7</sup> CAA 42 U.S.C. § 7601 et seq.

FN<sup>8</sup> *See* FN81 and accompanying text.

FN<sup>9</sup> Sheldon M. Novick, Donald Stever & Margaret G. Mellon, Editors, *Law of Environmental Protection*, Vol. 2 Environmental Law Group § 9:30 (West 2002).

FN<sup>10</sup> Kathleen Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 Tul. L.Rev. 487, 494-95 (Dec. 1996) (hereinafter *Crossroads*). *See also*, United States Senate Committee on the Judiciary, *Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?*, Testimony of Michael J. Penders (July 30, 2002).

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FN<sup>11</sup> *Crossroads* at 494.

FN<sup>12</sup> *Id.*

FN<sup>13</sup> *Id.*

FN<sup>14</sup> *See* FN27.

FN<sup>15</sup> For example, the Oil Pollution Control Act (OPA), 33 U.S.C. 2701 et seq., was enacted largely as a result of public outrage to the Exxon Valdez spill. OPA provided enhanced capabilities for oil spill response and natural resource damage assessment. 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 (Fall 1993) (“moral outrage” against environmental violations has blurred effectively enforcing a cost benefit based compliance scheme).

FN<sup>16</sup> *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F.Supp. 842, 844 (S.D.N.Y. 1986).

FN<sup>17</sup> Greenpeace U.S.A., *Toxics* <<http://www.greenpeaceusa.org/bhopal>>.

FN<sup>18</sup> *See* U.S. Environmental Protection Agency Website, *Technology Transfer Network Air Toxics* <[www.epa.gov/ttn/atw/hlthef/methylis.html](http://www.epa.gov/ttn/atw/hlthef/methylis.html)>).

FN<sup>19</sup> Greenpeace U.S.A., *Toxics* <<http://www.greenpeaceusa.org/bhopal>>. These included secondary respiratory infections, lung disabilities, and eye damage.

FN<sup>20</sup> *Id.*

FN<sup>21</sup> *Id.*

FN<sup>22</sup> *In re the Exxon Valdez*, 296 F.Supp.2d 1071, 1077 (D.Alaska 2004); *see also* Exxon Valdez Oil Spill Trustee Council, *Details About the Accident* <<http://www.evostc.state.ak.us/facts/details.html>>.

FN<sup>23</sup> *In re the Exxon Valdez*, 296 F.Supp.2d 1071, 1077 (D.Alaska 2004).

FN<sup>24</sup> *Id.*

FN<sup>25</sup> “Hazelwood had sought treatment for alcohol abuse in 1985 but had ‘fallen off the wagon’ by the spring of 1986. Exxon knew that Hazelwood had relapsed and that he was drinking while on board ship. Exxon officials heard multiple reports of Hazelwood's relapse, and Hazelwood was being watched by other Exxon officers. Yet, Exxon continued to allow Hazelwood to

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command a supertanker carrying a hazardous cargo. Because Exxon did nothing despite its knowledge that Hazelwood was once again drinking, Captain Hazelwood was *the* person in charge of a vessel as long as three football fields and carrying 53 million gallons of crude oil. Exxon officials knew that it was dangerous to have a captain with an alcohol problem commanding a supertanker. Exxon officials also knew that oil and fisheries could not mix with one another. Exxon officials knew that carrying huge volumes of crude oil through Prince William Sound was a dangerous business, yet they knowingly permitted a relapsed alcoholic to direct the operation of the *Exxon Valdez* through Prince William Sound.” *Id.*

FN<sup>26</sup> Environment Opinion Study, Inc., *A Survey of American Voters: Attitudes Toward the Environment* 14 (1990).

FN<sup>27</sup> Robert Deeb, *Environmental Criminal Liability*, 2 S.C. Env't'l L.J. 159, 160-61 (1993) (reporting that in a 1986 Department of Justice poll of public attitudes toward crime, respondents ranked environmental crime seventh in importance).

FN<sup>28</sup> Congress added criminal penalties to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) at § 103(b), 42 U.S.C. § 9603(b) (1988) (criminal sanctions for failure to notify; use of notice or information pursuant to notice in criminal case); to the Safe Drinking Water Act (SDWA) (§ 3009-1(a), 42 U.S.C. § 300h-2(b) (1988)) (criminal penalties for “willful violations); Toxic Substances Control Act (TSCA) § 16(b), 15 U.S.C. § 2615(b) (1988); Federal Insecticide Fungicide & Rodenticide Act (FIFRA) § 14(b), 7 U.S.C. § 1361(b) (1988); Endangered Species Act (ESA) § 11(b), 16 U.S.C. § 1540(b) (1988). Congress added more criminal penalty sections to the Clean Water Act in the 1990 Amendments. § 309(c) provides for enhanced penalties. S. REP. 101-94, 23, 1990 U.S.C.C.A.N. 722, 745. (“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.”).

FN<sup>29</sup> Pub. L. No. 101-549 §§103-109 Stat. 2399 (1990). The list of criteria pollutants is SO<sub>2</sub>, PM<sub>10</sub>, CO, Ozone, NO<sub>x</sub> and Lead. This list will be expanded. 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.

FN<sup>30</sup> Some of the Clean Air Act’s criminal provisions include: § 113(c)(2), which 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. Paragraph (c)(4) has a lowered mens rea of “negligently” for releases of hazardous air pollutants listed under § 7412 that places a person in “imminent danger of death or serious bodily injury,” with a maximum sentence of one year, with a five year penalty if the release is done “knowingly.”

FN<sup>31</sup> CAA § 113(c)(2)(C); 42 U.S.C. 7413(c)(2)(C). Additionally, violators are subject to the

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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 *Env'tl.L.Rep.* (Env't'l L.Inst.) 10096 (1990) (analysis of the impacts and mechanics of the guidelines).

FN<sup>32</sup> CAA § 113(c)(5); 42 U.S.C. 7413(c)(5). *See generally* John Gibson, *The Crime of Knowing Endangerment Under the Clean Air Act Amendments of 1990: Is It More “Bark Than Bite” As A Watchdog To Help Safeguard A Workplace Free From Life-Threatening Hazardous Air Pollutant Releases?*, 6 *Ford. Env't'l L. J.* 197 (1995). The “knowing endangerment” provisions in the Clean Air Act 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.

FN<sup>33</sup> *See, e.g., U.S. v. Shurelds*, 173 F.3d 430, at \*2-3 (6<sup>th</sup> Cir. 1999) (unpublished opinion) (discussing “normal activities” of employees under §113(h)). The Sixth Circuit rejected a void vagueness challenge to §113(h). The defendant, one Shurelds, contended that the Clean Air Act that had conflicting mental state requirements: § 113(c)(1) requires “knowingly,” while (h) required “knowing and willfully” as a mental state. The court found that exceptions contained in criminal provisions are normally construed as affirmative defenses.

FN<sup>34</sup> CAA 42 U.S.C. § 7602(e) (1990).

FN<sup>35</sup> *U.S. v. Itzkowitz*, 1998 WL 812573 (E.D.N.Y. 1998) (applying the “substantial control” standard in finding defendant an operator under § 113(h) of the CAA).

FN<sup>36</sup> CAA § 113(h), 42 U.S.C.A. § 7413(h).

FN<sup>37</sup> *See U.S. v. Pearson*, 274 F.3d 1225, 1231 (9<sup>th</sup> Cir. 2001). Pearson was charged with knowingly causing removal of asbestos containing material without complying with applicable work practice standards in violation of the Clean Air Act § 113(c)(1); 42 U.S.C. §7413(c)(1). Pearson had instructed employees to use less than appropriate amounts of water on the asbestos (a prevention measure 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 a RCO—the supervisor must have exercised “substantial control” in the workplace and over workplace procedures. *Id.* (citing *United States v. Walsh*, 8 F.3d 659, 662-63 (9<sup>th</sup> 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.”

FN<sup>38</sup> CAA § 113(c)(6), 42 U.S.C. s 7413(c)(6).

FN<sup>39</sup> CWA §309(c)(6); 33 U.S.C.A. § 1319.

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FN<sup>40</sup> *See U.S. v. Brittain*, 931 F.2d 1413, 1414 (10th Cir. 1991) (noting Congress' near silence on the subject).

FN<sup>41</sup> Report of the Committee on Environment and Public Works, U.S. Senate Report No. 95-127, 51.

FN<sup>42</sup> *See, e.g., U.S. v. George*, 266 F.3d 52, 62 (2<sup>nd</sup> Cir. 2001).

FN<sup>43</sup> *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (“Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing ... interpretations.”).

FN<sup>44</sup> *U.S. v. Park*, 320 U.S. 277 (1943).

FN<sup>45</sup> *U.S. v. Dotterweich*, 421 U.S. 658 (1975).

FN<sup>46</sup> Note that the public welfare offenses, the basis of the responsible corporate officer doctrine, is older still. *See United States v. Balint*, 258 U.S. 250, 252 (1922) (“the 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.” (*citing cases*)).

FN<sup>47</sup> *Dotterweich* at 278.

FN<sup>48</sup> *Id.*; FDCA § 301(a), 21 U.S.C. § 331(a), (k).

FN<sup>49</sup> *Dotterweich* at 280.

FN<sup>50</sup> *Id.* at 280-81.

FN<sup>51</sup> *Id.*

FN<sup>52</sup> *Id.*

FN<sup>53</sup> *Id.*

FN<sup>54</sup> *Id.* at 281.

FN<sup>55</sup> *U.S. v. Park*, 421 U.S. 658 (1975).

FN<sup>56</sup> *Id.* at 660.

FN<sup>57</sup> *Id.*

FN<sup>58</sup> *Id.*

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FN<sup>59</sup> *Id.* at 663 n. 6.

FN<sup>60</sup> *Id.* at 663-64.

FN<sup>61</sup> *Id.* at 664.

FN<sup>62</sup> *Id.* at 672.

FN<sup>63</sup> *See* FN59.

FN<sup>64</sup> *Park*, 421 U.S. at n. 16

FN<sup>65</sup> *Id.* at 673- 674.

FN<sup>66</sup> *Id.*

FN<sup>67</sup> Susan F. Mandiberg & Susan L. Smith, *CRIMES AGAINST THE ENVIRONMENT*, § 8-2(b)(3)(i) (Michie 1997) (hereinafter *CRIMES AGAINST THE ENVIRONMENT*).

FN<sup>68</sup> *See id.* at §3-3(a) n. 25 (*citing U.S. v. Washington Power Co.*, 793 F.2d 1079, 1082 (9<sup>th</sup> Cir. 1985); *Carolene Products Co. v. U.S.*, 140 F.2d 61, 66 (4<sup>th</sup> 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.”)).

FN<sup>69</sup> *Id.*

FN<sup>70</sup> *Id.* (*citing Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (statute incriminating “vagrancy” was unconstitutionally vague); and *Robinson v. California*, 370 U.S. 660 (1962) (reversing conviction for status as “drug addict”).

FN<sup>71</sup> *Id.*

FN<sup>72</sup> *Id.*

FN<sup>73</sup> CAA § 113(c)(2); 42 U.S.C.A. § 7413. “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

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followed under this chapter.”

FN<sup>74</sup> See, e.g., *id.* at § 113(c)(1); 42 U.S.C. § 7413(c)(1) (providing felony penalties for knowing violations).

FN<sup>75</sup> *U.S. v. Ahmad*, 101 F.3d 386 (5<sup>th</sup> Cir. 1996). This decision is widely regarded as an aberration. See 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 *Env'tl L.* 303, 331 (2002). This issue is by far from over, though apparently. See generally *id.*

FN<sup>76</sup> *United States v. Weintraub*, 273 F.3d 139 (2d Cir.2001) 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.” Accord *U.S. v. Hunter*, 193 F.R.D. 62 (N.D.N.Y. 2000); “Public 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.” *United States v. Weitzenhoff*, 1 F.3d 1523, 1529 (9<sup>th</sup> Cir.), *reh'g denied and amended* 35 F.3d 1275 (9<sup>th</sup> Cir. 1993). *Staples v. U.S.*, 511 U.S. 600, 618 (1994) 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. Except for the Fifth Circuit in *Ahmad* (see FN70, *supra*) courts have generally agreed that violations of the Clean Air Act and other environmental statutes are public welfare statutes and therefore not specific intent crimes—in other words, no showing that the violator was aware she was breaking the law, supported by the maxim, “ignorance of the law is not a defense.” Courts have generally followed *Weitzenhoff*. See, e.g., *U.S. v. Hopkins*, 53 F.3d 533, 540 (2d Cir. 1995), *U.S. v. Phillips*, 2004 WL 193258 (9<sup>th</sup> Cir. 2004); *U.S. v. Fiorillo*, 186 F.3d 1136, 1155-56 (9<sup>th</sup> Cir. 1999). *Phillips*, as earlier cases, rejected what it construed as a due process argument that the Clean Water Act required a mental state of willful 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. *Id.* at \*2. See also *U.S. v. Goldsmith*, 978 F.2d 643, 645 (11<sup>th</sup> Cir. 1992) (the government need only prove the defendant had knowledge of the general hazardous character of the materials to be found liable).

FN<sup>77</sup> See generally FN75 and cases cited.

FN<sup>78</sup> *U.S. v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 439 n. 3 (6<sup>th</sup> Cir. 1998).

FN<sup>79</sup> *U.S. v. Int'l Minerals & Chem. Corp.*, 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.”).

FN<sup>80</sup> *U.S. v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 439 n. 3 (6<sup>th</sup> Cir. 1998) “Defendants contend that RCRA is “gravely ambiguous” and requires application of the rule of lenity and an interpretation 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

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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 in Dean. Accordingly, we reject Defendants' argument for application of the rule of lenity."

FN<sup>81</sup> Prosecutions for environmental crimes rise every year, with increasing 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). Memorandum from Peggy Hutchins, Paralegal to Ronald A. Sarachan, Chief, Environmental Crimes Section (Mar. 19, 1996) (*cited in* Sean Bellew, Daniel T. Kurz, *Criminal Enforcement Of Environmental Laws: A Corporate Guide To Avoiding Liability*, 8 Vill. Env'tl L.J. 205, 205 (1997)); Professor Coffee noted an increasingly aggressive EPA policy of enforcing criminal provisions, prophesizing other agencies would follow. *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- 218 (March 1991).

The Environmental Crimes Section (ECS) of the Department of Justice in 2003 does 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 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." Kathleen Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 Tul. L.Rev. 487, 490 (Dec. 1996).

FN<sup>82</sup> See, e.g., Peter M. Gillon and Steven L. Humphreys, *Corporate Officer Liability Under Clean Air Act May Create Disincentives*, 6 NO. 5 Inside Litig. 6, 6 (1992). "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." See also, Brenda S. Hustis, John Y. Gotanda, *The Responsible Corporate Officer Doctrine: Designated Felon or Legal Fiction?*, 25 Loy. U. Chi. L.J. 169, 169 (Winter 1994) ("Such a sweeping application of the RCO doctrine could result in felony level criminal liability

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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.’”); “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.” Steven M. Morgan, P.C., Allison K. Obermann, Esq., *Perils Of The Profession: Responsible Corporate Officer Doctrine May Facilitate A Dramatic Increase In Criminal Prosecutions Of Environmental Offenders*, 45 S.W. L.J. 1199, 1200 (Winter 1991); 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 Env'tl L. Rep. 141 (Spring 1992).

FN<sup>83</sup> Sean Bellew, Daniel T. Kurz, *Criminal Enforcement Of Environmental Laws: A Corporate Guide To Avoiding Liability*, 8 Vill. Env'tl L.J. 205, 217-18 (1997). “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.’”

FN<sup>84</sup> *Id.*

FN<sup>85</sup> Keith A. Onsdorff & James M. Mesnard, *The Responsible Corporate Officer Doctrine in RCRA Criminal Enforcement: What You Don't Know Can Hurt You*, 22 Env'tl L. Rep. (Env'tl L. Inst.) 10,099, 10102 (1992) (hereinafter *Onsdorff*).

FN<sup>86</sup> *Id.*

FN<sup>87</sup> *See MacDonald & Watson, White, and Baytank*, discussed in Part III.

FN<sup>88</sup> *U.S. v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1130 (3d Cir. 1979).

FN<sup>89</sup> 33 U.S.C.A. § 1311(a).

FN<sup>90</sup> *Frezzo Bros., Inc.*, 602 F.2d at n. 11.

FN<sup>91</sup> *Id.* at n. 11. 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*, 421 U.S. 658 (1974) and *United States v. Dotterweich*, 320 U.S. 277 (1943). We have examined the judge's charge and we perceive no error in the instruction to the jury on this theory.”

FN<sup>92</sup> *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir.1984)

FN<sup>93</sup> *Id.*

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FN<sup>94</sup> *U.S. v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1<sup>st</sup> Cir. 1991).

FN<sup>95</sup> RCRA § 3008(d)(1), 42 U.S.C. §6928(d)(1), penalizes “Any 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....”

FN<sup>96</sup> *MacDonald & Watson* at 51.

FN<sup>97</sup> *Id.*

FN<sup>98</sup> *Id.* at 50-51.

FN<sup>99</sup> *Id.* at 51.

FN<sup>100</sup> *Id.*

FN<sup>101</sup> *United States v. Cattle King Packing Co.*, 793 F.2d 232, 240 (10th Cir. 1986)(misdemeanor criminal responsibility under FDCA does not require “consciousness of wrongdoing”).

FN<sup>102</sup> *U.S. v. White*, 766 F.Supp. 873 (E.D.Wash. 1991).

FN<sup>103</sup> *Id.* at 895.

FN<sup>104</sup> *Id.*

FN<sup>105</sup> *Id.*

FN<sup>106</sup> *U.S. v. Baytank, Inc.*, 934 F.2d 599 (1991).

FN<sup>107</sup> *Id.* at 616-17.

FN<sup>108</sup> *See generally*, Part III, *supra*, discussing *MacDonald & Watson*, *Johnson & Towers*, and *Baytank*.

FN<sup>109</sup> *U.S. v. Brittain*, 931 F.2d 1413, 1414 (10th Cir. 1991)

FN<sup>110</sup> *Id.*

FN<sup>111</sup> *Id.* Clean Water Act, §§ 301(a) & 309(c)(1); 33 U.S.C. §§ 1311(a) & 1319(c)(1).

FN<sup>112</sup> *Brittain* at 1414.

FN<sup>113</sup> *Id.*

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FN<sup>114</sup> *Id.*

FN<sup>115</sup> “Since Dotterweich, the RCO has been refined to its current state.” *Onsdorff* at 10101.

FN<sup>116</sup> Richard G. Singer, *The Myth of the Doctrine of the Responsible Corporate Officer*, 6 *Tox.L.Rep.* (BNA) 1378, 1380 n. 26 (Apr. 8, 1992).

FN<sup>117</sup> *U.S. v. Iverson*, 162 F.3d 1015 (9<sup>th</sup> Cir. 1998).

FN<sup>118</sup> *Id.* at 1018.

FN<sup>119</sup> *Id.*

FN<sup>120</sup> *Id.*

FN<sup>121</sup> *Id.*

FN<sup>122</sup> *U.S. v. Ming Hong*, 242 F.3d 528, 531 (4<sup>th</sup> Cir. 2001) (holding no formal designation required to establish individual as responsible corporate officer).

FN<sup>123</sup> *Id.* at 530.

FN<sup>124</sup> *Id.*

FN<sup>125</sup> *Id.*

FN<sup>126</sup> *Id.* at 531.

FN<sup>127</sup> *Id.*

FN<sup>128</sup> *U.S. v. Self*, 2 F.3d 1071 (10<sup>th</sup> Cir. 1993).

FN<sup>129</sup> *Id.* at 1087.

FN<sup>130</sup> *Id.* at 1087-88.

FN<sup>131</sup> *Id.*

FN<sup>132</sup> *Id.* See also, *U.S. v. Kelly*, 167 F.3d 1176 (7<sup>th</sup> Cir. 1999) (jury could infer knowledge of hazardous properties of waste and incur criminal liability through his responsibility for waste handling, his frequent visits to facility, and familiarity with age, location, contents of storage drums).

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FN<sup>133</sup> *Self*, 2 F.3d at 1088.

FN<sup>134</sup> *U.S. v. Hopkins*, 53 F.3d 533 (2nd Cir. 1995).

FN<sup>135</sup> *Id.* at 542.

FN<sup>136</sup> *Id.*

FN<sup>137</sup> *Id.*

FN<sup>138</sup> 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).

FN<sup>139</sup> Brenda S. Hustis, John Y. Gotanda, *The Responsible Corporate Officer Doctrine: Designated Felon or Legal Fiction?*, 25 Loy. U. Chi. L.J. 169, 169 (Winter 1994).

FN<sup>140</sup> See, e.g., Conn. Gen. Stat. Ann. § 25-7-122.1(b) (2003) “Person” includes, in addition to the entities referred to in section 25-7-103(19), any responsible corporate officer.”

FN<sup>141</sup> *People ex rel. Madigan v. Tang*, 805 N.E.2d 243, 255 (Ill. App. Dist. 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, Dept. of Env’tl Protection 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 (citations omitted), it is reasonable to construe the term “responsible corporate official” as used in N.J.S.A. 58:10A-3(l) 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.”).

FN<sup>142</sup> *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946) (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 found this as an alternative to liability in *U.S. v. Self*, 2 F.3d 1071, 1088 (10<sup>th</sup> Cir. 1993). Aider and abettor liability is a further means to establish a link up the corporate chain. See *id.*

FN<sup>143</sup> United States Senate Committee on the Judiciary, *Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?*, Testimony of Ronald A. Sarachan (July 30, 2002). Mr. Sarachan was a former Chief of the Environmental Crimes Section at the

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U.S. Dept. of Justice.

FN<sup>144</sup> There is no requirement that the government pursue civil actions prior to the initiation of criminal proceedings in Environmental statutes. *U.S. v. Frezzo Bros.*, 602 F.2d 1123, 1124 (1979).

FN<sup>145</sup> United States Senate Committee on the Judiciary, *Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?*, Testimony Ronald A. Sarachan (July 30, 2002). There have been a number of convictions for violations of work practice standards of asbestos removal under the CAA. *See, e.g., U.S. v. Tomlinson*, 189 F.3d 476 (9<sup>th</sup> Cir. 1999) (unpublished opinion); *U.S. v. Itzkowitz*, 1998 WL 812573 (E.D.N.Y.).

FN<sup>146</sup> *Id.*

FN<sup>147</sup> *Id.*

FN<sup>148</sup> *Id.*

FN<sup>149</sup> Richard Lazarus, *Meeting The Demands Of Integration In The Evolution Of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L.J. 2407, 2441 (Sept. 1995) (hereinafter Lazarus); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L.Rev. 193, 213-17 (1991); David A. Barker, *Environmental Crimes, Prosecutorial Discretion, And The Civil/Criminal Line*, 88 Vir. L.Rev. 1387, 1390-91 (Oct. 2001) (“When the law criminalizes all violators, it is the prosecutor, not the statute, that determines which violators will be held criminally liable.”)

FN<sup>150</sup> *See generally, id.*

FN<sup>151</sup> CAA § 113(c)(4); 42 U.S.C.A. § 7413(c)(4). “Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, 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.”

FN<sup>152</sup> Lazarus at 2444.

FN<sup>153</sup> CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1).

FN<sup>154</sup> Lazarus at 2431.

FN<sup>155</sup> *Id.* at 2443.

FN<sup>156</sup> *Id.* at 2444.

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FN<sup>157</sup> *Id.*

FN<sup>158</sup> “[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.” John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections On The Disappearing Tort/Crime Distinction In American Law*, 71 B.U. L. Rev. 193, 193 (March 1991).

FN<sup>159</sup> *Id.*

FN<sup>160</sup> See also Kevin A. Gaynor, Jodi C. Remer, *Environmental Criminal Prosecutions: Simple Fixes For A Flawed System*, 3 Vill. Env't'l L.J. 1, 11 (1992) (hereinafter *Simple Fixes*) (“Exacerbating the lack of centralized review of environmental criminal cases is the minimum level of culpability required for the 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.”); but see Kathleen Brickey, *The Rhetoric Of Environmental Crime: Culpability, Discretion, And Structural Reform* 84 Iowa L. Rev. 115, 130 -31 (Oct. 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.

FN<sup>161</sup> Lazarus at 2486-96

FN<sup>162</sup> See U.S. EPA Memorandum, *Exercise of Investigative Discretion* (Jan. 12, 1994) (“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 officers.”); F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 Env't'l L. Rep. (Env't'l.L.Inst.) 10,478 (1987).

FN<sup>163</sup> *Id.*

FN<sup>164</sup> *Id.* See also, United States Department of Justice 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.government/enrd/factors.htm>>).

FN<sup>165</sup> David A. Carr, ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS 115 (Bureau of Nat'l Affairs 1995).

FN<sup>166</sup> Kathleen Brickey, *Environmental Crime at the Crossroads: The Intersection of*

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*Environmental and Criminal Law Theory*, 71 Tul. L.Rev. 487 (Dec. 1996).

FN<sup>167</sup> 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 *Env't'l L.J.* 283, 321-22 (June 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.

FN<sup>168</sup> Kathleen Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 Tul. L.Rev. 487, 492 (Dec. 1996).

FN<sup>169</sup> *Id.*

FN<sup>170</sup> *Id.* at 512.

FN<sup>171</sup> *Id.* at 513.

FN<sup>172</sup> *Id.* at 515.

FN<sup>173</sup> United States Senate Committee on the Judiciary, *Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?*, Testimony of Ronald A. Sarachan (July 30, 2002). "I used to instruct new prosecutors ... when I was Chief at the ECS, the conduct we prosecuted people in environmental crimes cases was conduct my five year old daughter knew was wrong." *U.S. v. Murphy Oil USA, Inc.*, 143 F.Supp.2d 1054, 1109 (W.D.Wis. 2001) ("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.").

FN<sup>174</sup> *United States v. Weintraub*, 273 F.3d 139 (2d Cir.2001).

FN<sup>175</sup> *See, e.g.*, 55 Fed. Reg. 48406 (November 20, 1990)

FN<sup>176</sup> *Weintraub* at 142.

FN<sup>177</sup> *Id.*

FN<sup>178</sup> *U.S. v. Murphy Oil USA, Inc.*, 143 F.Supp.2d 1054, 1109 (W.D.Wis. 2001).

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FN<sup>179</sup> *Id.*

FN<sup>180</sup> CRIMES AGAINST THE ENVIRONMENT at § 3-3(a).

FN<sup>181</sup> 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.”

FN<sup>182</sup> *Crossroads* at 515.

FN<sup>183</sup> United States Senate Committee on the Judiciary, *Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?*, Testimony of Ronald A. Sarachan (July 30, 2002).

FN<sup>184</sup> *Id.*

FN<sup>185</sup> *Id.*

FN<sup>186</sup> *Id.*

FN<sup>187</sup> Kathleen Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 Tul. L.Rev. 487, 509 (Dec. 1996).

FN<sup>188</sup> *Id.*

FN<sup>189</sup> *See, e.g.*, U.S. E.P.A., *EPA Announces Unprecedented First "Draft Report On The Environment"; Report Shows Real Progress; Helps Identify Areas Where There Is "More To Be Done"* <News<http://yosemite.epa.gov/opa/admpress.nsf/0/0f5be335029e763d85256d4e006523fa?OpenDocument>>.

FN<sup>190</sup> United States Senate Committee on the Judiciary, *Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?*, Testimony of Eric Schaeffer (July 30, 2002). Eric Schaeffer is a former Director of EPA’s Officer of Regulatory Enforcement.

FN<sup>191</sup> *Id.*

FN<sup>192</sup> *Id.*

FN<sup>193</sup> *Id.*

FN<sup>194</sup> *Crossroads* at 606.

FN<sup>195</sup> *Id.* at 506.

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FN<sup>196</sup> See, e.g., Kathleen Brickey, *Wetlands Reform and the Criminal Enforcement Record: A Cautionary Tale*, 76 Wash. U.L.Q. 71 (Spring 1998). Conservative public interest groups came “to the rescue” of individuals prosecuted for violating Wetlands provisions in the Clean Water Act; the widespread delusion was that these were hapless victims of technical violations, and unfairly targeted by the Justice Department. Even a cursory look at the 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 TRO, 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 the CWA).

FN<sup>197</sup> Consider for example the radiation emissions involved in *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124 (9th Cir. 2002), which occurred at the world’s first plutonium production facility, the Hanford Engineering Works. The emissions included over 200 types of radionuclides that occurred over a 40-year period from 1944-1987. Risk in contracting cancer and thyroid related diseases will last for many decades.

FN<sup>198</sup> United States Senate Committee on the Judiciary, *Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?*, Testimony of Eric Schaeffer (July 30, 2002). Eric Schaeffer is a former Director of EPA’s Office of Regulatory Enforcement.

FN<sup>199</sup> See Kathleen Brickey, *Anderson’s Fall From Grace*, 81 Wash. U. L.Q. 917, 959 (Winter 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.”

FN<sup>200</sup> 15 U.S.C.A. § 7201 et seq.

FN<sup>201</sup> EPA identifies some of this conduct which, as Brickey notes, is clearly criminal. Data fraud is a common one. “The criminal enforcement program has successfully prosecuted significant violations across all major environmental statutes, including: data fraud cases (e.g., private laboratories submitting false environmental data to state and federal environmental agencies); indiscriminate hazardous waste dumping that resulted in serious injuries and death; industry-wide ocean dumping by cruise ships; oil spills that caused significant damage to waterways, wetlands and beaches; international smuggling of CFC refrigerants that damage the ozone layer and increase skin cancer risk; and illegal handling of hazardous substances such as pesticides and asbestos that exposed children, the poor and other especially vulnerable groups to potentially serious illness. U.S. Environmental Protection Agency, *Criminal Enforcement* <<http://www.epa.gov/compliance/criminal/>>.

FN<sup>202</sup> *U.S. v. Park*, 421 U.S. 658, 673 (1975).

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FN<sup>203</sup> Kevin L. Colbert, *Considerations of the Scierer Requirement and the Responsible Corporate Officer Doctrine for Knowing Violations of Criminal Statutes*, 33 S. Tex. L. Rev. 699, 726 (Sept. 1992). Colbert argues that if the RCO faces criminal liability based on position, defense of reasonable action should be available).