Chapter One

Mens Rea, Public Welfare Offenses, and the Responsible Corporate Officer Doctrine


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“You cannot punish corporations. . . . If you dissolve the offending corporation. . . .[y]ou merely drive what you are seeking to check into other forms or temporarily disorganize some important business altogether, to the infinite loss of thousands of entirely innocent persons, and to the great inconvenience of society as a whole.”

Woodrow Wilson
Address to the Annual ABA Meeting (1910)

Mens Rea. Historically, Anglo-American jurisprudence has required the government to prove that a defendant charged with a crime has performed a wrongful act ("actus rea") with a wrongful intent ("mens rea"), that is, "an evil-doing hand" and "an evil-meaning mind." See Morissette v. United States, 342 U.S. 246, 251 (1952). The Supreme Court has described this principle as being "as universal and persistent in mature systems of law as belief in freedom of the human will." Id. at 250. Generally speaking, prosecutors are required to prove that a defendant had the specific intent or purpose to commit a crime that is inherently evil or wrongful, or malum in se, such as robbery or assault. Society has traditionally dealt with these common law or mala in se crimes by criminal prosecution and appropriate punishment, including incarceration, to serve the purposes of retribution and deterrence.

However, with the dramatic growth of the administrative and regulatory state in the last several decades, many commercial activities that were otherwise not considered criminal — and indeed, were socially useful because they produced needed goods and services — were made subject to a vast array of complex laws and regulations. By 1900, there were only approximately 165 federal criminal laws on the books. By 1970, the number increased more than ten-fold to approximately 2,000. In 1998, an American Bar Association task force chaired by former Attorney General Edwin Meese III, issued a report, The Federalization of Criminal Law, which estimated the number of federal criminal statutes to be 3,300. By 2004, there were more than 4,000 separate criminal offenses scattered throughout 27,000 pages of the U.S. Code. John S. Baker, Jr., THE FEDERALIST SOC'Y FOR L. & PUB. POL., MEASURING EXPLOSIVE GROWTH OF FED. CRIME LEGISLATION (2004). As one commentator aptly described it, the "federal criminal code" is "simply an 'incomprehensible,' random and incoherent, 'duplicative, incomplete, and organizationally nonsensical' mass of federal legislation that carries criminal penalties." Julie R. O'Sullivan,

In addition to the plethora of federal criminal laws, the number of regulations in the Code of Federal Regulations (CFR), many of them criminally enforceable, far exceeds the statutes, with estimates ranging up to 300,000. See John C. Coffee, Jr., Does Unlawful Mean Criminal?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U.L. REV. 193, 216 (1991). Regulations issued by the Environmental Protection Agency (EPA) alone fill 30 volumes of the CFR, which is 50 percent more than the dense Internal Revenue Service (IRS) regulations. Indeed, the regulations just for three of the more than dozen environmental statutes — the Clean Air Act (CAA), Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA) — number 9,000 pages. Violations of any one of these may lead to criminal prosecution. Some members of Congress regard this explosive growth of regulations as an usurpation of its lawmaking role, and have periodically introduced remedial legislation to that effect. See, e.g., Congressional Responsibility Act of 2005 (H.R. 931), introduced by Rep. J.D. Hayworth (R-AZ), which would prohibit a regulation from taking effect unless the text of the regulation is enacted into law by Congress. Unfortunately, those legislative proposals have not been successful.

Environmental regulations are just as complex and confusing, if not more so, as the IRS code and regulations. As one former EPA official acknowledged, "RCRA is a regulatory cuckoo land of definition. . . . I believe we have five people in the agency who understand what 'hazardous waste' is." United States v. White, 766 F. Supp. 873, 882 (E.D. Wash. 1991). See also Inland Steel Co. v. EPA, 901 F.2d 1419, 1421 (7th Cir. 1990) (describing RCRA as a "statutory Cloud Cuckoo Land"). Environmental regulations are so vast and complex that most corporate officials candidly admit that it is simply impossible to comply with all of them. For example, if certain solvents are poured onto a surface to be cleaned, the rag used to wipe the surface becomes a hazardous waste, which is then subject to strict storage and disposal rules. However, if the solvent is first poured onto the rag, then the rag is not a hazardous waste. Businesses and individuals are faced with a "regulatory hydra" and regulatory terms suggestive of "Alice In Wonderland," as one court put it. United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

For the most part, sanctions available for violating these so-called mala prohibita offenses — conduct that is deemed wrongful only because a law or regulation prohibits or regulates it — range from administrative penalties or sanctions imposed by the appropriate regulatory agency, to civil proceedings in federal court in the form of injunctive relief, restitution, and penalties, and finally to criminal sanctions involving fines, incarceration, debarment from government contracts, and a variety of conditions for probation. Yet, unlike bank robbery, assault and other mala in se crimes, violations which cannot be brought before an administrative law judge or a civil court, regulatory offenses are well-suited for non-criminal treatment by using more appropriate administrative and civil remedies. This is especially true for those infractions that are committed in the course of carrying out otherwise socially useful business activities.

Unfortunately, as the next two chapters in this Report demonstrate, EPA and the
Department of Justice (DOJ) have been abusing their discretion by increasingly resorting to criminal penalties instead of utilizing more reasonable administrative and civil remedies for regulatory offenses, particularly in the environmental area. This criminal enforcement trend is due to a number of factors, including an increase in enforcement staff, increased statutory criminal penalties, and increased punishment provided for under the Sentencing Guidelines. In some cases, both civil and criminal charges are brought in parallel prosecutions by the agency and U.S. Attorneys, which can lead to abusive practices as further described in Chapter Five.

Corporate Criminal Liability. Because a corporation is an artificial or fictional entity, it cannot form any intent, criminal or otherwise; rather, it can act only through its officers, employees, and agents. Corporations have long been held to be vicariously liable for torts committed by their employees and agents in the scope of their duties. In 1909, that concept was extended by the Supreme Court when it ruled for the first time that a corporation may be held criminally responsible for the acts of its agents or employees if they were motivated in part to benefit the company and if the law required a showing of "specific intent." New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).

Shortly after this decision, the idea of criminally punishing a corporation drew sharp criticism, most notably from future U.S. President Woodrow Wilson, who stated before the Annual ABA Meeting in 1910:

You cannot punish corporations. . . . If you dissolve the offending corporation . . . [y]ou merely drive what you are seeking to check into other forms or temporarily disorganize some important business altogether, to the infinite loss of thousands of entirely innocent persons, and to the great inconvenience of society as a whole.

Over the last decade, even as more corporations are criminally prosecuted, there has been a growing consensus that holding corporations vicariously liable for the criminal acts of their employees is both wrong and unnecessary. As Professor Jeffrey S. Parker succinctly stated, "[c]orporate criminal liability conflicts with the fundamental moral precepts of criminal law, and arose only as a nineteenth century expedient to fill a gap in public law enforcement institutions that has long since closed. Under current conditions, there is no legitimate law enforcement purpose for corporate criminal liability that cannot be equally or better served by the alternative legal processes of civil liability." Jeffrey S. Parker, Doctrine of Destruction: The Case of Corporate Criminal Liability, 17 MANAGERIAL & DECISION ECON. 381 (1996). Despite the availability of administrative and civil remedies as alternatives to criminal sanctions, regulators and prosecutors have continued to criminalize business activity and target the corporation, its officers, and employees.

While the concept of imputing mens rea or criminal intent of employees and agents to the corporation is troubling enough, the boundary has been pushed even farther by holding a corporation criminally liable even when no individual in the corporation possessed any mens rea or intent to commit an offense. In United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987), cert. denied, 484 U.S. 943 (1987), the court held that under the so-called "collective knowledge" doctrine, the knowledge of individual employees can be combined to reach the critical mass of criminal intent, even if separately, they do not possess the necessary intent to be punished.
individually. Indeed, even if the acts of the employee are in direct conflict with corporate policy, the company can still be held criminally liable. The Bank of New England court further found that a corporation can also be found criminally liable if it is "willfully blind" or indifferent to the misconduct of its employees.

Individual Criminal Liability. Many regulatory statutes give prosecutors broad discretion to enforce the law administratively, civilly, or criminally. When the government chooses the criminal option, corporate officers or employees can be easily branded as felons and sent to prison for many years because the level of mens rea or intent required to be proven has been greatly watered down by the courts and Congress over the years. The level of criminal intent necessary to prosecute an individual depends to a great extent upon the level of intent specified in the statute being enforced. Unfortunately, there are now over 100 states of mens rea specified in federal criminal statutes that have been given different interpretations by federal judges, causing confusion in this area of the law. William S. Laufer, Culpability and the Sentencing of Corporations, 71 NEB. L. REV. 1049, 1065 (1992).

While the nomenclature used by federal courts varies widely, mens rea is generally categorized in descending order of culpability as follows:

(1) specific intent, perhaps the highest level of intent, requires conduct that is "knowing, purposeful, and willful" as well as factual knowledge of the law or regulation;

(2) general intent, where the conduct is "knowing," that is, the person may not know that the conduct was against the law, but intentionally committed the act in question;

(3) negligence, where the person failed to take reasonable steps to prevent the conduct, or was "willfully blind," "consciously avoided," or "reckless" regarding the consequences of their conduct; and

(4) strict liability, where criminal liability can be imposed even though the actor had no mens rea or intent to commit the offense, and was not negligent. As this chapter demonstrates, the trend has been to transform even knowing offenses into strict liability offenses.

On the other hand, the American Law Institute's Model Penal Code (MPC) has categorized criminal intent, from most to least culpable, as follows: (1) purpose, (2) knowledge, (3) recklessness, (4) negligence, and (5) strict liability. As the Supreme Court has noted, "'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." United States v. Bailey, 444 U.S. 394, 405-06 (1980). While most States have adopted the MPC's classifications of mens rea, Congress has not done so, thus leaving the federal law in this area more confusing than it need be. See also Kenneth W. Simons, Should the Model Penal Code's Mens Rea Provisions Be Amended?, 1 OHIO ST. J. CRIM. L. 179 (2003).

Over the last few decades, the case law has devolved to allow criminal prosecutions and convictions of "public welfare offenses" to stand without a showing of criminal intent or actual knowledge, which is tantamount to imposing strict liability. To make matters worse, targets of criminal prosecution include not only the individuals who actually committed the regulatory offense, but also the
company, under the doctrine of vicarious liability, and company officers, under the so-called responsible corporate officer doctrine, even though they neither were aware of nor condoned the employee's conduct. See DANIEL RIESEL, The Elements of Mens Rea, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL § 6.03 (Law Journal Press 2007).

Moreover, regulatory agencies promulgate rules that not only depart from the intent of Congress, but also impose criminal penalties that dispense with the showing of criminal intent. For example, at the 2002 Federalist Society annual meeting, the General Counsel of the Department of Treasury publicly boasted about his agency's "invention" of a bank regulation designed to prevent a particular form of money laundering by eliminating mens rea and making bank employees strictly liable, contrary to the intent of Congress. This erosion of the mens rea requirement has taken a heavy toll on individuals, employees, and corporations that are being increasingly ensnared by unfair and unwarranted criminal prosecution.

Categories of Criminal Regulatory Offenses. Generally speaking, any violation of regulatory statutes, such as the CWA, CAA, and RCRA, can be prosecuted administratively, civilly, or criminally. For example, under the CWA, the EPA may (1) seek penalties of up to $10,000 per day per violation and "cease and desist" orders in administrative proceedings; (2) file a civil action in federal district court and seek civil penalties of up to $25,000 per day per violation as well as injunctive relief; or (3) file criminal charges. In turn, criminal charges can be brought under three different levels or categories of intent: (1) "negligence" or a misdemeanor violation subject up to one-year imprisonment; (2) "knowing violation," a felony subject up to three-years imprisonment; and (3) "knowing endangerment," a violation subject up to 15 years imprisonment. 33 U.S.C. §§ 1319(a)-(g). Unlike the CWA and CAA, RCRA does not have a misdemeanor provision; any knowing violation is a felony.

The question that the courts face when the government elects to file a criminal action is what standard of intent is required to be shown. For "negligence" cases, the government has argued that simple negligence akin to that found in the tort law will suffice instead of having to prove highly reckless conduct or gross disregard of risks, standards which are generally required for proving criminal negligence. Defendants have argued that "knowing" or felony violations require proof of the more rigorous specific intent rather than the more relaxed general intent standard, where prosecutors need only prove that the defendant committed the act in question, namely, that he knowingly discharged a substance or filed a false monitoring report, regardless of whether he knew it was unlawful to do so, or that the report was in error.

However, for "knowing endangerment" violations, which can subject a person to up to 15 years in prison, Congress required that violators must possess actual knowledge that their conduct places someone in imminent danger of death or serious bodily injury, and that such knowledge cannot be imputed to them by another employee's knowledge. 33 U.S.C. § 1319(c)(3)(B); 42 U.S.C. § 6928(f). As will be discussed, corporate officials nevertheless have been prosecuted and convicted for knowing endangerment where it appears that they did not cause or have actual knowledge of the conditions causing the endangerment.

In 1985, the Supreme Court, in Liparota v. United States, 471 U.S. 419 (1985), was faced with that question in interpreting a food stamp fraud statute that makes it a crime to "knowingly" possess, transfer or use food
stamps not authorized by law or applicable regulations. The Court required that the prosecutor must prove that the defendant knew his conduct was unauthorized; otherwise, to dispense with a showing of mens rea "would be to criminalize a broad range of apparently innocent conduct." *Id. at 426.* Similarly, in *Cheek v. United States*, 498 U.S. 192 (1991), the Court held that a defendant could not be convicted of a "willful" violation of IRS law if there was a subjective good faith confusion with the complex code, even if the belief was irrational.

The Supreme Court reaffirmed the necessity of proving mens rea for "knowing" violations in subsequent cases involving regulatory requirements. For example, in *Staples v. United States*, 511 U.S. 600 (1994), the Court held that prosecution under the National Firearms Act, which made it unlawful to possess a machine gun not properly registered with the government, required the government to prove the defendant knew the specific features of his weapon came within the definition of a regulated firearm under the law. Because violations of the firearm law subjected a person to lengthy prison terms, the Court concluded that Congress did not intend to eliminate the mens rea requirement.

Initially, some lower courts also began to require that "knowing" violations of environmental laws also required a showing of specific intent. General intent, on the other hand, only requires a showing that the person intended to commit an act that is prohibited, even if the person was unaware of the prohibition. For example, in *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), the court held that the prosecution of defendants charged with disposing hazardous waste without a permit required the government to show that the defendants had a specific intent to violate RCRA. Similarly, in *United States v. Speach*, 968 F.2d 795 (9th Cir. 1992), the Ninth Circuit reversed a conviction in another RCRA illegal storage case, holding that the government had to prove that the defendant had actual knowledge that the facility did not possess the required RCRA permit; otherwise, removing the knowledge requirement "would criminalize innocent conduct." *Id. at 796.*

Unfortunately, this line of cases did not predominate in the courts. Instead, another line of case law has developed over the years, which has condoned the government's attempt to circumvent even the more relaxed general intent requirement for prosecuting regulatory offenses, particularly environmental offenses. This troubling jurisprudence was ushered in by the courts under the rubric of the public welfare offense doctrine and the related responsible corporate officer doctrine.

"[W]e have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities."

*Associate Justice Clarence Thomas*  
Public Welfare Offenses. In *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971), the Supreme Court considered whether the defendant could be charged with a "knowing" violation for failing to properly identify a highly corrosive chemical on shipping documents without actual knowledge of the law. The Court held that 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." *Id.* at 565. Violating safety laws meant to protect the public is considered a "public welfare offense," which essentially eliminates the mens rea requirement altogether and imposes strict liability upon those who violate the law, whether wittingly or not.

However, extending the *International Minerals* holding to all environmental regulations is problematic in two major respects. First, *International Minerals* involved a misdemeanor violation, where punishment would likely result in a small fine rather than in lengthy prison sentences for felony violations available under current environmental statutes. Second, the chemical substance at issue was highly dangerous, whereas many pollutants subject to environmental laws, such as the CWA and CAA, include benign substances such as sand, dirt, and other substances which, at low levels, pose no immediate or irreparable harm, or threat to health or the environment.

Nevertheless, the first major case to address mens rea issues stemming from the 1987 CWA Amendments in the felony context, extended the logic of *International Minerals*. In *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), municipal workers were convicted of discharging waste-activated sludge in violation of the permit. The Court classified the violation as a public welfare offense and held that the "knowingly violated" provision of the statute means only that a person "knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit." *Id.* at 1284. Thus, a prosecutor need only show general intent to engage in the conduct, a relatively easy standard to meet.

As noted by five Ninth Circuit judges who vigorously dissented from the denial of rehearing *en banc* in *Weitzenhoff* by the other 19 circuit judges, Congress did not criminalize "knowing discharges," but "knowing violations," and thus specific intent to violate the permit requirements was required to be shown. *Id.* at 1293-94. Since the plant workers were hired to discharge pollutants up to a certain level, they could easily be prosecuted under a general intent standard whenever those pollutants happened to exceed permit levels. Inadvertent exceedances are not a rare occurrence. Furthermore, since Congress also provided for negligent violations — which do not require a showing of any intent — knowing and negligent violations would become impermissibly blurred if the two categories of offenses were treated the same.

More importantly, the dissent clearly distinguished the public welfare offense ruling in *International Minerals* from that upon which the *Weitzenhoff* majority relied. First, unlike the misdemeanor statute at issue in *International Minerals*, the defendants in *Weitzenhoff* were facing prison sentences up to 10 years. As the Supreme Court noted in *Staples*, "the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties or short jail sentences. . . [A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a mens rea requirement."
511 U.S. at 616-18. Furthermore, the chemical substance at issue in *International Minerals* was highly caustic and dangerous to handle. Yet, as the dissent noted in *Weitzenhoff*, under the CWA, one could violate the law's prohibition on unpermitted discharges of "pollutants" simply by "skipping a stone into a lake" or "pouring hot stale coffee down the drain." 35 F.3d at 1298. Unfortunately, the Supreme Court declined to review this critical case. On the other hand, in *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1992), the Fifth Circuit was the lone appeals court that did require the government to show that the defendant knew he was discharging a pollutant in violation of the CWA, ruling that "[s]erious felonies . . . should not fall within the [public welfare] exception 'absent a clear statement from Congress that mens rea is not required.'" Id. at 391.

The Ninth Circuit would again have the opportunity to address the issue of mens rea under the CWA, but this time in the context of negligent conduct. In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), a pipeline company hired an independent contractor to straighten out a section of railway track that required using a backhoe to load rocks onto rail cars. Unfortunately, when the backhoe operator attempted to pick up some of the rocks that fell onto the track, he accidentally struck the pipeline. The operator quickly radioed the pipeline's pump station and the pipeline was shut down. Nevertheless, a small amount of oil flowed into the nearby Skagway River.

Even though Mr. Hanousek, the railmaster, was off duty and at home, he was criminally charged and convicted of "negligently" discharging oil in harmful quantities to waters of the United States, a violation of the CWA, because of the negligence of the backhoe operator. As discussed in the next two chapters, this was a clear case of prosecutorial abuse because it violated both EPA and DOJ guidelines that non-criminal remedies should be used where there is little environmental harm and an absence of culpable conduct. Moreover, this once-removed negligent conduct was based on ordinary tort negligence standards instead of typical criminal negligence requiring reckless conduct. Nevertheless, for his "crime," Mr. Hanousek, a first-offender, was sentenced under the harsh Sentencing Guidelines to the maximum sentence of twelve months' imprisonment for a misdemeanor (six months' incarceration and six months in a halfway house) and an additional six months of supervised release. The Ninth Circuit upheld the conviction and sentence.

The Supreme Court denied review, but in a rare dissent from a denial of certiorari, Justice Clarence Thomas, joined by Justice O'Connor, decried the notion that the CWA could be categorized as a public welfare offense: "[t]he seriousness of these penalties counsels against concluding that the [CWA] can accurately be classified as a public welfare statute." *Hanousek*, 528 U.S. 1102, 1104 (2000) (Thomas, J., dissenting from denial of certiorari). Thus, Justice Thomas recognized that substantial prison terms, which can be (and indeed have been) imposed under the CWA and other environmental statutes, should disqualify these laws as public welfare offenses where strict liability can be imposed. Justice Thomas further observed that the doctrine could virtually cover all criminal laws applicable to commercial activity when he remarked:

[W]e have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute
applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety. To the extent that any of our prior opinions have contributed to the Court of Appeals' overly broad interpretation of this doctrine, I would reconsider those cases. Because I believe the Courts of Appeals invoke this narrow doctrine too readily, I would grant certiorari to further delineate its limits.

_Id._ at 1104-05. Subsequent petitions to the Supreme Court in other cases urging it to review and clarify this important issue have also been denied. See, e.g., _United States v. Rubenstein_, 403 F.3d 93 (2d Cir. 2005), _cert. denied_, 546 U.S. 876 (2005). Nevertheless, future opportunities for review are likely to arise as more convictions and prison sentences are imposed for public welfare offenses.

"The message should be clear that prosecutions will go as high up the corporate hierarchy as the evidence permits and we will hold senior managers of corporations accountable, as well as the corporation itself."

_Granta Y. Nakayama_
EPA Assistant Administrator
Office of Enforcement and Administrator
June 12, 2006

**Responsible Corporate Officer Doctrine.**
Both the EPA and the Justice Department have been overly aggressive in pursuing criminal charges and prison sentences against company officers and the company itself for environmental offenses. Under the so-called responsible corporate officer doctrine, corporate officers can be held criminally liable for conduct of their employees even if they did not participate in the conduct, were unaware of the conduct, or specifically forbade the activity. This imputation of criminal liability to individual officers is a corollary to the public welfare offense doctrine in that mens rea could essentially be dispensed with when considering both the nature of the offense and the supervisory role of the "offender." Accordingly, the responsible corporate officer doctrine suffers from the same flaws that allow for abusive prosecution of public welfare offenses.

The Supreme Court articulated the doctrine in _United States v. Dotterweich_, 320 U.S. 277 (1943), and later in _United States v. Park_, 421 U.S. 658 (1975). In _Dotterweich_, the president of a pharmaceutical company was prosecuted for shipping adulterated and misbranded drugs in violation of the Federal Food, Drug and Cosmetic Act (FFDCA). Although the adulteration of the drugs was found to have been accidental, the defendant's conviction was affirmed. Balancing the relative interests and burdens, the Supreme Court stated:

Hardship there doubtless may be under a statute which thus penalizes the transaction
though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

320 U.S. at 284-85.

Thirty years later, the Court once again reviewed a CEO's conviction for adulteration under the FFDCA. In United States v. Park, the CEO of a retail grocery chain received a notice from the Food and Drug Administration of unsanitary conditions at one of the company's food warehouses. Later inspections revealed that the unsanitary warehouse conditions had not been corrected. Because the CEO was in a position to have prevented the violation, the Court affirmed the CEO's conviction, stating:

[T]he Act imposes not only a positive duty to seek out and remedy violations when they occur, but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

421 U.S. at 672. Central to the Court's decision to affirm the convictions in Dotterweich and Park was its finding that the FFDCA violations at issue were "public welfare offenses."

However, unlike these misdemeanor public welfare offenses, many environmental laws establish felony penalties for knowing conduct. For example, criminal provisions of the CWA, 33 U.S.C. § 1319(c)(2)(A), and RCRA, 42 U.S.C. §§ 6928(d)(2)(e) & (f) require "knowing" conduct on the part of the defendant, and for which substantial prison terms of several years are not only possible, but, likely to be imposed. Prosecutors have applied the responsible corporate officer doctrine to environmental offenses, which has generated conflicting decisions.

For example, in United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991), the First Circuit reversed the conviction of a company president for violating RCRA, because there was no evidence that the officer actually knew of the violations. The Court explicitly stated that the responsible corporate officer doctrine should not be applied to statutes requiring actual knowledge as a criterion for conviction. However, the Court suggested that a jury could infer actual knowledge from circumstantial evidence. Indeed, in United States v. Baytank, Inc., 934 F.2d 599 (5th Cir. 1991), the Fifth Circuit apparently applied the responsible corporate officer doctrine implicitly. The Court affirmed the convictions of two of Baytank's officers apparently without direct evidence that they actually knew of the RCRA violations, because "both individuals were intimately versed in and responsible for Baytank's operations." Id. at 616-17.

More recently, the Third Circuit reversed a district court judge who dismissed a guilty verdict against the owner of a dry cleaning business for a RCRA violation. In United States v. Wasserson, 418 F.3d 225 (3d. Cir. 2005), the owner of a dry cleaning business
was deemed criminally liable for improper disposal of certain dry cleaning chemicals by an employee who contacted a salvage company to dispose of the chemicals. The Third Circuit ruled that RCRA liability is not limited to those who actually cause the unlawful disposal; therefore, the owner himself could be held vicariously liable.

The CWA and CAA's definition of "person" raises potential due process issues, because the definition includes "responsible corporate officer[s]," under 33 U.S.C. § 1319(c)(6); 42 U.S.C. § 7413(c)(6). This would mean that a person could be responsible for crimes that she neither committed, nor for which she possessed the requisite knowledge. CEOs have no choice but to delegate responsibility for compliance with environmental laws and regulations to corporate environmental managers. Under the responsible corporate officer doctrine, however, delegating responsibility is no defense; a responsible corporate officer can be convicted without knowledge that a specific violation is occurring. Expanding the responsible corporate officer doctrine to CWA, CAA, and RCRA felonies will cause corporate industrial managers to rethink their career choice. Applying the responsible corporate officer doctrine to the prosecution of environmental felony offenses, in effect, confers "designated felon" status on industrial business managers. As the dissenters noted in Weitzenhoff, it would impose on these officers "a massive legal risk, unjustified by law or precedent." 35 F.3d at 1299.

One alarming case that illustrates how the responsible corporate officer doctrine can ensnare company officials is United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001). In 1998, Christian Hansen, the owner of a Georgia chemical facility, his son Randall, and Alfred Taylor, the plant manager, were all indicted four years after the facility was shut down, for violating the CWA and RCRA, including one "knowing endangerment" count under RCRA, for violations that occurred nearly six years earlier. The last count, which provides for up to 15 years in prison, was based on allegations that workers had been exposed to wastewater containing mercury. Randall Hansen, a Harvard MBA, who lived with his wife and two children in New Jersey, agreed to temporarily help his father operate and manage the Georgia company that was in bankruptcy. The plant manager, Alfred Taylor, accepted the position after the relevant period and resigned once the company was unable to make repairs to the facility.

At the trial, only one employee testified that he recalled slipping in the wastewater, but could not remember in which decade, let alone the year, the accident took place. He did remember, however, that he failed to report the incident to the company as required by company policy and did not seek medical attention; he simply rinsed himself off and returned to work. As for the dangerousness of the exposure to the mercury in the wastewater, the government's so-called "expert" told the jury that the basis for the Mad Hatter's "madness" in Alice in Wonderland was due to mercury exposure, once used in curing the felt in the hatmaking process.

The jury convicted all defendants on the CWA and RCRA counts, including the one RCRA "knowing endangerment" count based on the court's jury instructions on the responsible corporate officer doctrine: that if corporate officers "failed to detect" violations that may have been caused by others, that would amount to "knowing endangerment" even if they did not know the violation existed. The government argued that Randall Hansen should have shut the plant down even though, as temporary CEO, he had no authority to do
such decisions were subject to approval by the Board of Directors, the creditors' committee and the Bankruptcy Court. Indeed, Randall Hansen went so far as to seek funds to help remediate any lingering environmental problems after the plant was shut down, but his funding request was denied by the Bankruptcy Court. For their "crimes," Christian Hansen received eight years in prison, his son Randall received four years, and the plant manager received six years under the draconian Sentencing Guidelines.

It is clear that Congress did not intend to criminalize, what is, at most, managerial negligence, as a major felony "knowing endangerment" violation under RCRA which requires a willful scienter. Indeed, Congress stated that criminal liability under § 6928(e) should not attach to corporate officers who were "making difficult business judgments" or "for errors in judgment made without the necessary scienter, however dire may be the danger in fact created." S. Rep. No. 96-172 at 37-39. The Hansen case starkly illustrates how the responsible corporate officer doctrine can be abused by overly aggressive prosecutors and compliant courts. See also United States v. Hong, 242 F.3d 528 (4th Cir. 2001), cert. denied, 534 U.S. 823 (2001) (criminal liability and three-year sentence imposed on owner and investor in facility even though he was (1) not an officer of the company, (2) unaware of the violation, and (3) did not exercise direct supervision over wastewater treatment operations).

More recent prosecutions by DOJ underscore the risk corporate officers, and even directors face under the responsible corporate officer doctrine. In March 2007, Roderick Hills, an outside director of Chiquita Brands International, and former chairman of the SEC, was being threatened with a felony indictment even though he was not a corporate officer. His "crime" was that he voluntarily revealed to the Justice Department that Chiquita's subsidiary in Colombia had been making payments to a local militia group, which had extorted the company, in order to protect its employees from militia violence. When DOJ was asked whether the company should stop the payments, then Assistant Attorney General for the Criminal Division, Michael Chertoff, said he would get back to the company, but never did. Payments continued for the protection of the employees but finally stopped. The company was indicted and subsequently was forced to plead guilty in September 2007 for supporting a terrorist organization. Mr. Hills was fortunate to have been spared prosecution.

In another miscarriage of justice, three senior executives of Purdue Frederick Company were prosecuted and pled guilty in May 2007 for the unlawful marketing of OxyContin by the company sales representatives, even though they had no actual knowledge of or involvement in the offense, thus making them strictly liable under the responsible corporate officer doctrine.

Willful Blindness and Conscious Avoidance. Although many federal statutes require a conviction based on "knowing" violation of the law, prosecutors have tried to dilute the mens rea requirement further and make their jobs easier by requesting a "conscious avoidance" jury instruction. Such an instruction allows a jury to convict the defendant not on actual knowledge he possessed, but on the grounds that he could have known the facts of the unlawful conduct, but was unaware of them because of either willful blindness or conscious avoidance.

The circuit courts are split over whether a "conscious avoidance" jury instruction is permissible where the statute requires a "knowing" violation. As Circuit Judge
Easterbrook has noted, "[k]nowledge in a criminal statute means actual knowledge. What one ought to have known, but did not know, is not knowledge; it is not even (necessarily) recklessness." United States v. Ladish Malting Co., 135 F.3d 484, 488 (7th Cir. 1998). Other circuits are more liberal in allowing a "conscious avoidance" instruction. See, e.g., United States v. Svoboda, 347 F.3d 471 (2d Cir. 2003); United States v. Heredia, 483 F.3d 913 (2007) (en banc). In Heredia, the Ninth Circuit held, in an opinion written by Judge Kozinski, that a person can be convicted of a "knowing" violation if the defendant did not want to know the facts. In a strong dissent, Judge Graber, joined by three other judges, said, "[i]f Congress wants to criminalize willful ignorance, it is free to amend the statute to say so." Id. at 932 (Graber, J., dissenting). The Supreme Court declined to review this important mens rea issue on December 10, 2007, Heredia v. United States, 128 S. Ct. 804 (2007), and before that in Ebbers v. United States, 458 F.3d 110 (2d Cir. 2006), cert. denied, 127 S. Ct. 1483 (2007).

However, in 2005, the Supreme Court reversed the conviction of Arthur Andersen on obstruction of justice charges because the jury instructions "failed to convey the requisite consciousness of wrongdoing" with regard to the shredding of company documents that were later sought by the SEC in its investigation of the collapse of Enron. Arthur Andersen, LLP v. United States, 544 U.S. 696, 706 (2005). Hopefully, the Supreme Court will eventually clarify whether "willful blindness" or "conscious avoidance" is sufficient to show criminal knowledge.

Recent Criminal Legislation. Unfortunately, other recently enacted legislation has the potential to be abused by DOJ. For example, in March 2006, the USA PATRIOT Act, intended to detect potential terrorist activity, was amended to allow wiretapping of boardrooms and executives' phone conversations, if a suspected antitrust violation exists. DOJ has also used other legislation in ways not intended by Congress. For example, the Racketeer Influenced & Corrupt Organizations Act (RICO), enacted in 1970 to be used against the Mafia, was later directed against legitimate businesses. In 1986, Drexel-Burnham Lambert was threatened by then-U.S. Attorney Rudy Giuliani with a criminal RICO charge for securities violations, pled nolo contendere, and paid a $650 million fine. Since then, RICO has been invoked in other criminal cases, but more frequently in civil cases by one business against another or by the federal government against a business.

Other recent legislation that unfairly exposes corporations to criminal liability is the Health Insurers Portability & Accountability Act (HIPAA) enacted in 1996 and the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act enacted in 2000, criminalizing product liability with respect to defective tires. On February 25, 2008, Senator Pryor introduced S. 2663, a substitute for his Consumer Product Safety Commission Reform Act of 2007, in response to the recall of toys from China. His bill would impose massive fines for technical violations, allow state attorneys general and plaintiffs' lawyers to bring crippling civil lawsuits, and impose five-year prison terms for knowing and willful violations of product safety laws. The Senate approved the bill on March 6, 2008, which will be reconciled with a slightly less severe bill passed by the House in December 2007.

Sarbanes-Oxley: Certification Requirements. While Congress and the courts have imposed greater liability on corporate officers for environmental offenses, including the filing of false discharge monitoring reports,
Congress has also greatly expanded criminal liability in the securities law area with the 2002 passage of the Sarbanes-Oxley Act (SOX). SOX has been widely criticized as an overreaction to the Enron and WorldCom scandals. "SOX is one of many examples of the recent trend toward using criminal sanctions to deter and punish social and commercial conduct that traditionally has been subject only to civil sanctions." HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE: WHAT WE'VE LEARNED; HOW TO FIX IT 60 (AEI Press 2006). The direct costs of complying with SOX, including its unduly burdensome reporting requirements under Section 404, have been estimated to be $6 billion in 2006, with incalculable indirect costs, including reallocating corporate resources from maximizing shareholder value, reducing access to markets, and criminalizing corporate agency costs. Id.

Section 807 of SOX increases the penalty for knowingly committing securities fraud up to 25 years, and Section 903 increases related mail fraud violations from five to 20 years. But more troubling is the certification provision that imposes criminal liability upon CEOs and CFOs for certifying that complicated financial reports "fairly represent in all material respects the financial condition and results of the operations of the issuer." This criminal provision alone forces companies to overspend on compliance costs to prevent threats of criminal prosecution. Indeed, some public companies are going private and private companies are reconsidering whether they should go public.

Moreover, the criminalization of business activities by SOX and similar laws may cause the best and brightest to avoid taking responsible positions for fear that any misstep could trigger career-destroying prosecution. As two critics have pointed out, "[s]oaring penalties for corporate crimes and dilution of a mens rea requirement could have the paradoxical consequence of creating more corporate crime and not, as the standard story goes, less." CRAIG S. LERNER & MOIN A. YAHYA, 'LEFT BEHIND' AFTER SARBANES-OXLEY 30 REG. 44 (Cato Inst. Fall 2007).

Conclusion. The trend over the last two decades has been to eliminate mens rea as a requirement for criminal conviction of many regulatory offenses. Courts have even allowed prosecutors to use "knowing" statutes as if they were strict liability offenses. Because both corporations and corporate officers are being held vicariously criminally liable for employee misconduct, DOJ exerts tremendous leverage over them to waive their rights, extract guilty pleas, and accept severe punishments for regulatory offenses that should be handled administratively or civilly. Unless legislative reforms are instituted to prevent further erosion of the mens rea requirement in criminal prosecutions, the only recourse is a two-pronged approach: a more judicious use of prosecutorial discretion (as discussed in the next two chapters), and more vigilance by the courts.
RECOMMENDATIONS

1. The categories of mens rea should be standardized and clarified by the courts and the Congress similarly to the categories of mens rea in the Model Penal Code.

2. Convictions under the public welfare offense and responsible corporate officer doctrines should be appealed to circuit courts and the Supreme Court. The lower courts should address the issue in light of Justice Thomas's dissent to the denial of certiorari in *United States v. Hanousek*, and in light of the severe prison sentences currently imposed, which are in sharp contrast to the lenient sentences that informed the Court's early public welfare offense jurisprudence.

3. Corporate officers and managers charged with criminal prosecution of federal environmental and other regulatory laws should request jury instructions requiring a showing of criminal intent or actual knowledge, and object to "conscious avoidance" jury instructions. Convictions for "conscious avoidance" or "willful blindness" for "knowing" offenses should be appealed to the Supreme Court, which should review the issue in light of the split in the circuits.

4. Violation of agency-promulgated regulations should not be subject to criminal prosecution unless Congress codifies the regulations.
REFERENCE MATERIALS

Note: A listing of WLF publications relevant to this chapter can be found in the Appendix.


Lisa M. Fairfax, Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability under the Sarbanes-Oxley Act, 55 RUTGERS L. REV. 1 (2002).


TIMELINE: MENS REA, PUBLIC WELFARE OFFENSES, AND THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

1909: New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909). Supreme Court holds that corporations can be held criminally liable for the acts of its employees and agents.

1943: United States v. Dotterweich, 320 U.S. 277 (1943). Corporate officers can be criminally liable for conduct even though they did not engage in or condone the conduct under the Responsible Corporate Officer Doctrine.

1952: Morissette v. United States, 342 U.S. 246, 250 (1952). The Supreme Court underscores importance of proving mens rea or an evil intent.


1975: United States v. Park, 421 U.S. 658 (1975). Similar to the Dotterweich case, the Supreme Court affirms conviction of corporate officer for a misdemeanor safety violation that he did not commit but over which he had authority and control.

1984: United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984). Court holds that the prosecution of defendants charged with disposing hazardous waste without a permit required the government to show that the defendants had a specific intent to violate RCRA.

1985: Liparota v. United States, 471 U.S. 419 (1985). In a food stamp fraud case, Supreme Court holds that government must show specific intent.

1987: Congress amends the CWA to provide for felony penalties of up to three years in prison for "knowing" violations and up to 15 years for "knowing endangerment" violations.

1990: Congress amends the CAA to provide for felony violations similar to those in the 1987 amended CWA.

1992: *United States v. Speach*, 968 F.2d 795 (9th Cir. 1992) (government had to prove that the defendant had actual knowledge that the facility did not possess the required RCRA permit). *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1992) (defendant must have actual knowledge that discharged substance was pollutant).

1993: *United States v. Weitzenhoff*, 35 F.3d 1275, 1284 (9th Cir. 1993). The Ninth Circuit classified a felony violation of the CWA as a public welfare offense and upheld conviction when person "knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit." Supreme Court denies review.

1994: *Staples v. United States*, 511 U.S. 600 (1994). The Court held that the prosecution under the National Firearms Act for possessing a machine gun not properly registered with the government requires showing of specific intent.

1998: *United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998) ("Knowledge in a criminal statute means actual knowledge. What one ought to have known, but did not know, is not knowledge; it is not even (necessarily) recklessness.").


2001: *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001). Eleventh Circuit upholds conviction and prison sentences of eight, six, and four years for chemical facility's president, vice-president, and plant manager for "knowing endangerment" RCRA violation under responsible corporate officer doctrine.

July 2002: Congress enacts Sarbanes-Oxley Act that imposes duties on corporate officers to certify that financial reports filed with the Securities and Exchange Commission (SEC) are accurate.


2005: *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005) (Supreme Court reverses the conviction on obstruction of justice charges because different jury instruction "failed to convey the requisite consciousness of wrongdoing").

June 2006: Granta Nakayama, EPA's Assistant Administrator for Enforcement and Compliance, vows that EPA "will go as high up the corporate hierarchy as the evidence permits and we will hold senior managers of corporations accountable, as well as the corporation itself."


May 2007: Three executives of Purdue Frederick Company were prosecuted under the responsible corporate officer doctrine and pled guilty in May 2007 for the unlawful marketing of drug, even though they had no actual knowledge or involvement in the offense.

Mar. 2008: U.S. Senate passes consumer product safety law (S. 2663) sponsored by Senator Pryor in response to China toy recall, which increases criminal penalties to $20 million and prison terms to five years.