The Responsible Corporate Officer: Designated Felon or Legal Fiction?

Brenda S. Hustis
Assoc., Goodwin, Procter & Hoar, Boston, MA

John Y. Gotanda
Assoc., Goodwin, Procter & Hoar, Boston, MA
The Responsible Corporate Officer: Designated Felon or Legal Fiction?

Brenda S. Hustis* and John Y. Gotanda**

I. INTRODUCTION

Criminal enforcement of environmental laws through the prosecution of corporate officers and managers has dramatically increased in recent years.¹ Working together, the United States Environmental Protection Agency ("EPA") and the United States Department of Justice ("DOJ") have adopted a policy, based upon the powerful deterrent effect of personal liability for corporate wrongdoing, that directs enforcement personnel to seek criminal penalties against the highest ranking officers in the corporate hierarchy for whom personal culpability for environmental crimes can be shown.² Corporate officers and managers make up a startling 80% of all individuals who have been prosecuted for environmental crimes since 1983.³ Not only has there been a significant rise in the imposition of personal criminal liability against corporate officers, but overall fines and convictions for environmental violations have sharply increased in recent years. In the last four years alone, the DOJ has "collected more penalties and sent more people to jail for environmental crimes than in the entire previous history of EPA."⁴

* Associate, Goodwin, Procter & Hoar, Boston, Massachusetts; B.A., 1990, Boston College; J.D., 1993, The University of Texas School of Law.

** Associate, Goodwin, Procter & Hoar, Boston, Massachusetts; B.A., 1984, University of Hawaii; J.D., 1987, William S. Richardson School of Law, University of Hawaii.


³ Hartman & De Monaco, supra note 1, at 10,146. Of 565 individuals prosecuted for environmental crimes, 451 were officers and managers of corporations. Id. at 10,146 n.9.

⁴ Better Communication with Government, Public Said to Reduce Chance of Criminal Enforcement, 23 Env't Rep. (BNA) 1423, 1424 (Sept. 18, 1992) [hereinafter Better Communication]. A DOJ official has estimated that 94% of all fines ever collected by the DOJ for environmental violations were assessed from 1988 to 1992. Id.
This climate of heavy prosecutorial activity has been especially worrisome to corporate management in light of the controversial emergence of the "responsible corporate officer" ("RCO") doctrine in prosecutions under federal environmental statutes. The RCO doctrine, which arose in the context of misdemeanor prosecutions under strict liability public welfare statutes, provides that a corporate officer may be held personally liable for the criminal act of a subordinate employee if the officer "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 . . . failed to do so."5

Courts and commentators have varied widely in their interpretations of both the scope and applicability of the RCO doctrine in criminal prosecutions under federal environmental statutes that prescribe felony-level penalties and contain a mens rea requirement. According to those authorities who espouse a broad definition and application of the RCO doctrine, liability may be based solely on a person's position and authority in the corporation, thus displacing any express statutory mens rea requirement and creating a strict liability offense that is punishable as a felony.6 Such a sweeping application of the RCO doctrine could result in felony-level criminal liability being imposed against a corporate officer for the environmental crime of a subordinate even when the officer had no knowledge of the illegal activity, thus making the officer a "designated felon."7

In contrast, under the narrow application of the RCO doctrine advocated by other courts and commentators, criminal liability should not be based upon an individual's position in a company. Rather, the doctrine simply functions as another way to prove, through circumstantial evidence, that the corporate officer had the mens rea required by the statute.8 Under this approach, a corporate officer may only be held personally liable for the criminal act committed by a subordinate if

---

7. See Better Communication, supra note 4, at 1424.
8. See Hartman & De Monaco, supra note 1, at 10,152-53; infra part IV.C.
the officer had actual knowledge of the violation. Viewed from this perspective, the belief that the RCO doctrine provides an independent basis for criminal liability under federal environmental statutes is, in fact, a legal fiction.

In light of such varying views, it comes as no surprise that there has been considerable confusion not only concerning the meaning and application of the RCO doctrine, but also concerning the practical effect of its use in the prosecution of corporate officers for environmental crimes. Because of the unsettled state of the law in this area, a fear exists among corporate officers that they could be held criminally liable for a subordinate's violation of an environmental statute even though they had no knowledge of the violation.

This Article examines the origin of the RCO doctrine and analyzes attempts to extend its application to felony prosecutions under federal environmental laws that expressly include a showing of *mens rea* as an element of the crime. Part II of this Article traces the origin and development of the RCO doctrine in strict liability cases. Part III discusses the *mens rea* requirement for felonies contained in various federal environmental statutes, including the Resource Conservation and Recovery Act, the Clean Air Act, and the Clean Water Act. Part IV reviews three theories on the application of the RCO doctrine to felony prosecutions under these statutes and examines the cases used to support each theory. Part V analyzes the propriety of each of these theories, while Part VI evaluates their implications. Finally, Part VII concludes by urging that although the RCO doctrine should not be applied to environmental statutes imposing felony-level penalties and containing an explicit *mens rea* requirement, it should be permissible to use an officer's position in a company as circumstantial evidence that the officer had the requisite *mens rea* for a particular environmental offense.

II. DEVELOPMENT OF THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

Under traditional concepts of criminal law, a corporate officer could only be held personally liable for criminal acts that the officer directed, authorized, ratified, or personally undertook. For instance, direct

---

9. See infra part IV.C.

10. Courts have also applied the RCO doctrine in the civil context. See, e.g., *In re Dougherty*, 482 N.W.2d 485, 489 (Minn. Ct. App. 1992) ("[I]mposing liability on corporate officers is especially appropriate in the civil context."). This application, however, exceeds the scope of this Article and will not be addressed.

individual liability would attach where a corporate officer personally engaged in illegal activity, such as filing a false report or disposing of hazardous waste without a permit.\footnote{See Alan Zarky, The Responsible Corporate Officer Doctrine, 5 Tox. L. Rep. (BNA) 983, 985 (1991).} Similarly, an officer who commanded or authorized the unlawful act of another person could be held personally liable for the violation.\footnote{See id.} Such an authorization could even be as subtle as directing a subordinate to dispose of waste as cheaply and conveniently as possible, when the officer knew that the subordinate would probably dispose of the waste illegally.\footnote{See Seymour, supra note 11, at 340 (citing United States v. Greer, 850 F.2d 1447 (11th Cir. 1988), which held that a jury could have concluded that an employer's previous approval of illegal dumping and his directive to an employee to "handle" the problem of excess waste constituted an implicit order to dump the waste illegally).}

Beginning in the 1940's, courts began to analyze the personal liability of corporate officers under a different standard in certain circumstances. This standard, which has become known as the RCO doctrine,\footnote{It is important to note that although termed the responsible "corporate" officer doctrine, the application of the doctrine is not limited to officers of corporations. In one case, for example, the court invoked the RCO doctrine in convicting civilian employees of the U.S. Army—managers within a federal government organization—of illegally disposing of hazardous chemicals in violation of RCRA. United States v. Dee, 912 F.2d 741, 747-49 (4th Cir. 1990) (finding that although a civilian chemical engineer and his two supervisors were informed of the improper storage of hazardous chemicals, they failed to ensure proper storage, and concluding that "[the defendants'] criminal culpability arises solely from their ongoing failure to comply with RCRA during the period they were responsible for the [chemical plant]"); cert. denied, 499 U.S. 919 (1991).} states that a corporate officer may be held criminally liable for the failure to prevent or correct the criminal violation of a subordinate over whom the officer has responsibility or authority.\footnote{See Jane F. Barrett & Veronica M. Clarke, Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After United States v. Dee, 59 GEO. WASH. L. REV. 862, 882 (1991). See also United States v. Park, 421 U.S. 658, 673-74 (1975), discussed infra notes 35-43 and accompanying text; United States v. Dotterweich, 320 U.S. 277, 281 (1943), discussed infra notes 23-34 and accompanying text.} Personal criminal liability is imposed on the officer on the basis that the officer had a "responsible relation" to the violation, even if the officer was not aware of the illegal activity.\footnote{See Zarky, supra note 12, at 986; Park, 421 U.S. at 673-74; Dotterweich, 320 U.S. at 281.}

The RCO doctrine arose from two United States Supreme Court
decisions involving prosecutions under the Federal Food, Drug, and Cosmetic Act of 1938 ("FDCA"). The FDCA prohibits, *inter alia*, the shipment in interstate commerce of misbranded or adulterated food and drugs. Congress enacted the FDCA in an effort to expand its ability to prevent illicit and noxious articles, such as impure and adulterated food and drugs, from entering the stream of commerce. To achieve this goal, Congress designed the FDCA as a strict liability statute that dispenses with the conventional requirements for criminal conduct—an awareness of some wrongdoing—and imposes liability without regard to the state of mind of the violator.

The United States Supreme Court first addressed the issue of the personal liability of a corporate officer under the FDCA in *United States v. Dotterweich*. Dotterweich, the president and general manager of a small pharmaceutical packaging company, had been convicted, along with his company, for misdemeanor violations of the FDCA involving the shipment of misbranded drugs in interstate commerce. On appeal of his conviction, Dotterweich, who supervised the day-to-day operations of the company, argued that he could not be held personally liable for the violations because only the corporation was a "person" subject to prosecution within the meaning of the statute. The Supreme Court disagreed, ruling that the statutory term "person" includes both corporations and individuals and that the offense of shipping misbranded or adulterated drugs in interstate commerce is committed "by all who . . . have . . . a responsible share

21. *See Dotterweich*, 320 U.S. at 280. The Court characterized the FDCA as being necessary to protect "the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." *Id.*
22. *Id.* at 281.
23. 320 U.S. 277 (1943).
24. *Id.* at 278. Dotterweich was convicted under § 301(a) of the FDCA, which prohibited "[t]he introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded." *Id.* (quoting 21 U.S.C. § 331(a)). The offenses charged in the indictment consisted of "(1) the apparent use of 'old' labels that incorrectly stated the presence of an ingredient that had not been in such drugs for ten months; and, (2) a label overstating the amount of an ingredient in a second drug." 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) [hereinafter Singer, *Myth*].
26. Dotterweich, 320 U.S. at 279. The Circuit Court of Appeals had accepted Dotterweich's reasoning and reversed his conviction. *Id.*
in the furtherance of the transaction which the statute outlaws . . . though consciousness of wrongdoing be totally wanting." The Court added that "the historic conception of a 'misdemeanor' makes all those responsible for it equally guilty."^{27}

In holding Dotterweich personally liable for violations of the FDCA even though there was no showing that he knew of or participated in the illegal activity, the Supreme Court laid the foundation for the RCO doctrine. Although it acknowledged the apparent inequity in penalizing an officer who had no knowledge of the wrongdoing, the Court concluded that this result was appropriate because it was the product of a legislative balancing of hardships.^{29} Congress, the Court explained, perceived that the health risks to innocent and "wholly helpless" consumers outweighed any hardships suffered by officers like Dotterweich, who might not have intended to violate the statute, but who nevertheless stood in a "responsible relation to a public danger" and at least had an opportunity to inform himself of the existence of potentially dangerous conditions before engaging in the illicit commerce.^{30} Thus, the Court determined that for the benefit of the public welfare, Congress had placed the risk of hardship upon those standing in a position of "responsible relation" to the harm.^{31}

The Supreme Court refused to delineate precisely what might constitute a responsible relation, stating that it would be "too treacherous" to define or illustrate the class of employees who might be vulnerable to liability on the basis of their position.^{32} The Court stated that "[t]o attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering [an unlawful transaction] . . . would be mischievous futility."^{33} Instead, the Court concluded that "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted" in such matters.^{34}

Over thirty years later the Supreme Court reaffirmed and clarified the Dotterweich holding in United States v. Park.^{35} Defendant Park, the president of a national food store chain, had been convicted under the FDCA for causing the contamination of food held for sale

27. Id. at 284.
28. Id. at 281.
30. Id. at 281, 285.
31. Id.
32. Id. at 285.
33. Dotterweich, 320 U.S. at 285.
34. Id.
following its shipment in interstate commerce by 'allowing it to be stored in a rodent-infested warehouse.' On appeal, Park argued that he could not be held criminally liable for the FDCA violation because he had delegated responsibility for warehouse sanitation to "dependable subordinates" and therefore was not personally involved in the wrongful conduct. The Supreme Court disagreed, holding that it was not necessary for the government to prove that Park had committed a "wrongful action" because the criminal liability of corporate officers under the FDCA does not turn on an officer's "awareness of some wrongdoing" or "conscious fraud." The Court observed:

[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 Court stated that a finding of guilt must be based upon both a showing that the defendant had a responsible relation to the situation and, that by virtue of his position, he had the authority and responsibility to deal with the situation. Thus, implicit in the Court's opinion is the conclusion that the liability of a corporate officer may not be based solely on the defendant's position within the corporation. Nevertheless, the Court noted that corporate officials would be subject to criminal liability under the FDCA if their failure to exercise the supervisory responsibility conferred on them by the business organization resulted in a violation of the statute. The Court explained that the case law interpreting the FDCA established not only a positive duty to seek out and remedy violations when they occur, but also a duty to implement measures to ensure that violations do not occur in the first place. Echoing Dotterweich, the Court reasoned that the burdens

36. Id. at 660. Park was convicted under § 331(k) of the FDCA, which prohibited:

The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

Id. at 660-61 & n.2 (quoting 21 U.S.C. § 331(k) (1938)).
37. Park, 421 U.S. at 663-64.
38. Id. at 672-73.
39. Id. at 673-74.
40. Id.
41. Id. at 671.
42. Park, 421 U.S. at 672.
placed on corporate officers by the FDCA were permissible:

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.\(^4\)

In short, in *Dotterweich* and *Park*, the Supreme Court established the principle that a corporate official with authority and responsibility for supervising subordinates may be held criminally liable—without a showing of affirmative wrongful action or intent—for a subordinate's violation of a public welfare statute\(^4\) that contains no *mens rea* requirement and carries only misdemeanor penalties. This principle has become known as the RCO doctrine.

### III. ENVIRONMENTAL STATUTES AND THE REQUIRED PROOF OF KNOWLEDGE

The RCO doctrine originated in misdemeanor prosecutions under a public welfare statute—the FDCA—which has no *mens rea* requirement.\(^4\) In recent years, however, attempts have been made to extend the RCO doctrine as set forth in *Dotterweich* and *Park* to felony prosecutions under federal environmental laws which, unlike the FDCA, require the government to establish a *mens rea* of knowledge as an

---

43. *Id.* In light of this standard of care, the Court noted that evidence demonstrating that the official was "powerless" to prevent or correct the violation may be presented defensively at trial. *Id.* at 673 (quoting United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 (1964)). Park was unsuccessful in his attempt to persuade the jury that as president of such a large corporation, he had no choice but to delegate duties to responsible subordinates. *Park*, 421 U.S. at 663-64. The evidence presented by the government showed that Park had repeatedly been advised by the Food and Drug Administration of unsanitary warehouse conditions and therefore he was on notice that his system for delegating responsibility for warehouse sanitation was not working. *Park*, 421 U.S. at 661-62, 664.

44. The Supreme Court has described a public welfare offense as the product of a special type of regulatory legislation that dispenses with the *mens rea* requirement because the injury is the same regardless of the violator's intent. See *Morissette* v. United States, 342 U.S. 246, 255-56 (1952). In *Morissette*, the Court concluded that strict liability under public welfare offenses is justified because "[t]he accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." *Id.* at 256. The *Dotterweich* Court similarly described the FDCA as a "familiar" type of regulatory legislation that dispenses with the conventional *mens rea* requirement for criminal conduct and instead uses misdemeanor penalties to effect compliance. *Dotterweich*, 320 U.S. at 280-81.

45. *See supra* text accompanying notes 18-44.
element of the crime. Before considering the propriety of these attempts to extend the application of the RCO doctrine, a brief overview of the mens rea requirement and the methods of establishing this element of environmental criminal liability is in order.

A. The Mens Rea Requirement Generally

Historically, criminal laws have required that to secure a conviction, the government must show that the defendant had both "an evil meaning mind" and "an evil-doing hand." Indeed, the Supreme Court has recognized that the proof of criminal intent is central to the American criminal justice system, noting that "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

1. Direct vs. Circumstantial Evidence of Mens Rea

In general, there are two types of evidence that may be used to prove elements of a crime—direct evidence and circumstantial evidence. Direct evidence often consists of the testimony of a person, such as an eyewitness, who claims to have actual knowledge of a fact. This evidence directly establishes an element of the crime with-
out the use of inferences. By contrast, circumstantial evidence is proof of a collateral set of facts and circumstances from which an element of the crime may be inferred. There is no distinction made in the weight given to either direct or circumstantial evidence; nor is a greater level of certainty required for circumstantial evidence to suffice as proof of a fact.

Criminal intent is rarely proven by direct evidence because it is nearly impossible to show a defendant's subjective state of mind directly, unless, of course, the defendant openly confesses to it. Thus, it is often necessary to infer the defendant's state of mind from the circumstances surrounding the alleged criminal activity, such as the defendant's conduct, statements, expertise, or other evidence.

2. Using Willful Blindness to Satisfy the Knowledge Requirement

"Willful blindness" is a well-recognized evidentiary doctrine that allows the trier of fact to infer the element of knowledge from proof that defendants deliberately closed their eyes to avoid gaining knowledge of an unlawful act. A defendant's conscious choice to avoid learning the truth by deliberately remaining ignorant of facts that would otherwise be obvious permits the trier of fact to infer that the defendant knew of the existence of the wrongful action, thus satisfying the element of mens rea. Knowledge of facts that would induce most

---

52. See 1 DEVITT, supra note 50, § 12.04; Hartman & De Monaco, supra note 1, at 10,151 n.70.
53. 1 DEVITT, supra note 50, § 12.04; Hartman & De Monaco, supra note 1, at 10,151 n.70.
54. See 1 LAFAVE & SCOTT, supra note 46, § 3.5(f) (noting that a criminal defendant "does not often [at the time of the criminal act] speak or write out his thoughts for others to hear or read[;]" nor "will [he] generally admit later to having the intention which the crime requires"). See also 1 DEVITT, supra note 50, § 17.07.
55. See, e.g., United States v. Self, 2 F.3d 1071, 1087 (10th Cir. 1993) (holding that "knowledge of prior illegal activity ... most certainly provides circumstantial evidence of the defendant's later knowledge from which the jury may draw the necessary inference"). See 1 LAFAVE & SCOTT, supra note 46, § 3.5(f); 1 DEVITT, supra note 50, § 17.07. See also Hartman & De Monaco, supra note 1, at 10,151 n.70. The concept that criminal intent or knowledge may be proven by circumstantial evidence is so ensconced in American criminal jurisprudence that it is "explicitly or implicitly recognized in virtually every set of jury instructions now in publication." Hartman & De Monaco, supra note 1, at 10,151.
56. See 1 LAFAVE & SCOTT, supra note 46, § 3.5(b); Hartman & De Monaco, supra note 1, at 10,151-52; 1 DEVITT, supra note 50, § 17.09. See generally Ira P. Robbins, The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990).
57. See, e.g., Spurr v. United States, 174 U.S. 728, 735 (1898) (holding that wrongful intent "may be presumed if the [defendant] purposely keeps himself in ignorance of [the crime], or is grossly indifferent to his duty in respect to the ascertainment of that
people to investigate further, but which did not so induce the defendant, allows an inference that the defendant knew the facts that would be uncovered upon investigation and thus consciously avoided discovering those facts.\(^{58}\) Accordingly, under the willful blindness doctrine, a criminal defendant's actual knowledge and deliberate ignorance are considered to be equally culpable, and proof of either may satisfy the requirement of knowledge in a criminal statute.\(^{59}\)

**B. The Knowledge Requirement in Particular Environmental Statutes**

Most federal environmental statutes require proof of a *mens rea* of at least knowledge to satisfy the mental element of a felony violation.\(^{60}\) An act is generally said to be performed knowingly if it is done "voluntarily and intentionally and not because of ignorance, mistake, accident or some other reason."\(^{61}\) This requirement in criminal statutes

---

\(^{58}\) See United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 52 n.15 (1st Cir. 1991) (quoting with approval the district court's jury instruction on willful blindness); United States v. Cincotta, 689 F.2d 238, 243 n.2 (1st Cir. 1982) ("The conscious avoidance principle means only that specific knowledge may be inferred when a person knows other facts that would induce most people to acquire the specific knowledge in question."); *cert. denied*, 459 U.S. 991 (1982). Discussing the concept of knowledge, Professors LaFave and Scott wrote:

\[
\text{[O]ne has knowledge of a given fact when he has the means for obtaining such knowledge, when he has notice of facts which would put one on inquiry as to the existence of that fact, when he has information sufficient to generate a reasonable belief as to that fact, or when the circumstances are such that a reasonable man would believe that such a fact existed.}
\]

\(^{61}\) See also Seymour, supra note 11, at 347 n.47.

\(^{61}\) *LaFave & Scott*, supra note 46, § 3.5(b) (footnotes omitted).
is designed to guard against conviction of a defendant for either an unintentional act or one for which the defendant did not understand the consequences. 62

Determining the level of knowledge required for conviction under these complex and continually changing environmental statutes is not a straightforward task. The ambiguities within these statutes have caused considerable disagreement among the federal appellate courts as to what constitutes knowledge sufficient to subject a defendant to criminal liability. 63 The following sections discuss how the courts have interpreted the mens rea requirements of various federal environmental statutes.

1. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act ("RCRA") prohibits, inter alia, any person from knowingly treating, storing, or disposing of any hazardous waste without a permit or knowingly transporting such waste to a facility that does not have a permit. 64 One of the ambiguities raised by the mens rea requirement is whether the "knowing" state of mind required by RCRA attaches to each element of the crime. The majority of courts that have considered this question

62. MacDonald & Watson, 933 F.2d. at 52 n.15.
63. See Gaynor, Improving Fairness, supra note 47, at 1031. Most courts have correctly held that it is not necessary for the government to prove that a defendant had the specific intent to violate a federal environmental statute which requires only knowledge for the mens rea element. See Geoffrey M. Dugan, Liabilities of Corporate Individuals for Environmental Claims Under CERCLA: The Current State of the Law and Strategies for Coping, 23 Env'l. L. Rep. (Env't. L. Inst.) 10,074, 10,077 (Feb. 1993). A criminal defendant has the specific intent to commit a crime when he has a conscious objective to cause the specific result proscribed by the statute. See Kevin A. Gaynor et al., Environmental Criminal Prosecutions: Simple Fixes For A Flawed System, 7 Tox. L. Rep. (BNA) 351 (Jan. 27, 1993) (cit ing 22 C.J.S.2d § 32, at 38); 1 LAFAVE & SCOTT, supra note 46, § 3.5 (discussing the distinction between "general [criminal] intent" and "specific intent"). See also supra note 46 (discussing the four types of mens rea). Most federal appellate courts have only required the government to show that the defendant had the general criminal intent set forth in the statute. See Dugan, supra, at 10,077.
64. RCRA, 42 U.S.C. § 6928(d) (1988). A violation of § 6928(d) is committed by 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 under this subchapter . . . [or]
   (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either—
      (A) without a permit under this subchapter . . .; or
      (B) in knowing violation of any material condition or requirement of such permit . . .

have held that the knowledge requirement does not attach to every element of the crime. Courts have reached varying conclusions, however, as to which elements are subject to the knowledge requirement. For example, while most courts agree that it is not necessary for the government to prove the defendant knew the act committed constituted a crime, there has been considerable disagreement among the courts as to whether the government must show that the defendant knew of the permit requirement or knew that the facility lacked a proper permit.


66. See, e.g., Baytank, 934 F.2d at 613 ("[I]t is not required that [the defendant] know that there is a regulation which says what he is storing is hazardous under the RCRA." (footnote omitted)); Dee, 912 F.2d at 745 (applying the "time honored rule" that ignorance of the law is no defense to prosecutions for RCRA violations); Hayes Int'l Corp., 786 F.2d at 1503 (stating that those who operate in heavily regulated areas are presumed to know the applicable regulatory provisions). Contra Johnson & Towers, 741 F.2d at 668 (interpreting the knowledge requirement under § 6928(d) to apply to every element of the crime).

67. Compare Hayes Int'l Corp., 786 F.2d at 1505 ("[T]o convict under [42 U.S.C.] section 6928(d)(1), the jurors must find that . . . the defendant knew the disposal site had no permit.") and Johnson & Towers, 741 F.2d at 669 ("[T]o convict each defendant [under § 6928(d)(2)(A)] the jury must find that each knew that [the facility] . . . did not have a permit.") with Hoflin, 880 F.2d at 1039 ("[K]nowledge of the absence of a permit is not an element of the offense defined by § 6928(d)(2)(A)."").

There also has been some disagreement concerning whether the knowledge requirement attaches to the hazardous characteristics of the waste (as defined by the regulations). Most courts, however, have concluded that it is sufficient for RCRA purposes to prove that the defendant knew of the general deleterious nature of the waste. See Self, 2 F.3d at 1091 ("The defendant need have no specific knowledge of the particular hazardous characteristics of the material in question, only that it was a hazardous waste and not a benign or innocuous material such as water."); Goldsmith, 978 F.2d at 645 ("The government need only prove that a defendant had knowledge of 'the general hazardous character of the chemical.'"); Baytank, 934 F.2d at 613 ("[K]nowingly' [as used in § 6928(d)(2)(A)] means . . . that the defendant knows . . . that what is being stored factually has the potential for harm to others or the environment . . ."); Dee, 912 F.2d at 745 ("[T]he knowledge element of [42 U.S.C.] § 6928(d) does extend to knowledge of the general hazardous character of the wastes."); Hoflin, 880 F.2d at 1039 ("The term 'knowingly' modifies 'hazardous waste' as well as 'treats, stores or disposes of,' and thus, one who does not know the waste he is disposing of is hazardous cannot violate [42 U.S.C.] section 6928(d)(2)(A)."); Johnson & Towers, 741 F.2d at 668 ("[T]he word 'knowingly' [in 42 U.S.C. § 6928(d)(2)(A)] . . . must also encompass knowledge that the waste material is hazardous.").
The Third Circuit, in *United States v. Johnson & Towers, Inc.*,\(^6\) appears to have adopted the strictest and most traditional approach to the application of *mens rea* under RCRA.\(^6\) There, the court held that a violation of section 6928(d) requires proof of knowledge as to every element of the crime: that the defendant knew he or she was disposing of material that the defendant knew was hazardous; that the defendant knew a permit was required for disposal; and that a permit had not been obtained.\(^7\) This holding is a minority position and has been rejected by most other circuits.\(^8\)

In sum, there is considerable disagreement on how to apply the knowledge requirement contained in RCRA. As shown in parts IV and V, it appears that this disagreement, arising from the ambiguous language in the statute, has opened the door for prosecutors and courts to apply the RCO doctrine.

2. Clean Water Act and Clean Air Act

The language of the Clean Water Act ("CWA")\(^7\) and of the Clean Air Act ("CAA")\(^7\) further illustrates the ambiguity and confusion surrounding the knowledge element of the criminal enforcement provisions of federal environmental statutes, particularly as they apply to corporate officers. Like RCRA, both the CWA and the CAA require the government to prove "knowledge" before a defendant may be held criminally liable for a felony violation.\(^7\) In contrast to RCRA, however, the courts' confusion in interpreting the *mens rea* requirement of the CWA and CAA stems not from the textual ambiguity as to the application of the term "knowledge," but rather from the legislative amendments to the CWA and CAA that specifically included RCOs as criminally liable parties. Both the CWA and the CAA were amended after their enactment to include "any responsible corporate officer" in the definition of the term "person."\(^7\)

---

68. 741 F.2d 662 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985).
69. *See Dugan, supra* note 63, at 10,078.
70. *Johnson & Towers*, 741 F.2d at 669.
71. *See, e.g., Dee*, 912 F.2d at 745 ("[T]he government did not need to prove defendants knew violation of RCRA was a crime ... however ... the knowledge element of §6928(d) does extend to knowledge of the general hazardous character of the wastes."); *Hoflin*, 880 F.2d at 1039 ("[K]nowledge of the absence of a permit is not an element of the offense defined by 42 U.S.C. § 6928(d)(2)(A).").
The change that Congress intended to effect by these amendments is unclear. Several decades before these amendments, the Supreme Court had held, without the assistance of a legislative definition, that a corporate official was in fact a "person" subject to liability under the FDCA. Thus, the legislative amendments to include RCOs in the definition of "person" in these other acts would appear to have been unnecessary unless Congress intended a change more significant than merely including corporate officers as potentially liable parties under the CWA and CAA.

While it is possible that Congress might have intended to incorporate the RCO doctrine, as established in Dotterweich, into the CWA and CAA, such a result would create an internal inconsistency with respect to the statutes' mens rea requirements for felony violations. Both the CWA and CAA require the government to show that a defendant had "knowledge" of the violation to satisfy the mental element of the felony. The RCO doctrine, however, imposes liability without regard to the state of mind of the defendant. Thus, incorporating the RCO doctrine into the CWA and CAA would eliminate the mens rea clearly required for felonies by the express statutory language. Had Congress meant to displace the statutory mental element in felony prosecutions of corporate officers, it could have done so more clearly. It thus seems highly unlikely that Congress intended by this simple amendment to completely eliminate one element of a crime solely in prosecutions of corporate officials.

There is very little legislative history on these amendments from which to glean Congress' intent. The only comment concerning the addition of this category of individuals to the definition of "person" is found in a report from the Senate Committee on Environment and Public Works addressing the 1977 amendment to the CAA, which states:

For the purpose of liability for criminal penalties the term "person" is defined to include any responsible corporate officer.

---

7413(c)(3) (1988)).
76. See United States v. Dotterweich, 320 U.S. 277, 284 (1943); supra text accompanying notes 26-28.
77. See supra notes 15-44 and accompanying text.
78. Furthermore, it is questionable whether, if Congress had meant to codify the RCO doctrine, it would have left the courts such wide latitude to interpret the definition and scope of the doctrine, since application of the RCO doctrine to environmental criminal statutes was not generally accepted at the time Congress passed the amendments.
79. See Zarky, supra note 12, at 988 (discussing the legislative history of the CAA and CWA); Hartman & De Monaco, supra note 1, at 10,148. See also United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991).
This is based on a similar definition in the enforcement section of the Federal Water Pollution Control Act. 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.\footnote{S. REP. No. 94-717, 95th Cong., 2d Sess. 40 (1976), \textit{reprinted in 6 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, No. 95-16, 4701, 4741 (1978)).} Thus, while it is clear that Congress intended to hold corporate officers liable for environmental crimes committed under their watch, it is not clear that Congress intended a substantive change in the criminal law.

Moreover, at the time of these amendments, both the CWA and CAA called only for penalties at the misdemeanor level; felony sanctions were not added until later.\footnote{See Hartman & De Monaco, \textit{supra} note 1, at 10,148-49.} It is doubtful that Congress intended, either at the time of the RCO amendments or at the time of the felony amendments, to put corporate officers who had no actual knowledge of a violation at risk of being penalized with the substantial periods of incarceration that accompany felony convictions.\footnote{Id. at 10,148 & n.45, 10,149.} It is more probable that Congress added the "responsible corporate officer" language intending not to displace the \textit{mens rea} requirement of the statutes, but simply to make clear that corporate officials—not just the subordinate employee who personally executed the illegal act—were liable for knowing violations.\footnote{See Zarky, \textit{supra} note 12, at 985-87.} Nevertheless, the specific inclusion of the term "responsible corporate officer" in statutes imposing felony-level penalties for "knowing" violations has led to confusion in determining whether to evaluate the statutes' \textit{mens rea} element under the knowledge requirement specified in the text of the statute, or rather, under the less stringent RCO doctrine.

\section*{IV. THREE VIEWS ON EXTENDING THE RCO DOCTRINE TO ENVIRONMENTAL STATUTES: FROM STRICT LIABILITY TO LEGAL FICTION}

The ambiguity and confusion surrounding the \textit{mens rea} element required by many federal environmental statutes has caused courts and commentators to draw widely varying conclusions concerning whether the RCO doctrine may be extended to federal environmental statutes that have a required mental element and prescribe felony-level penal-
ties. Moreover, of those authorities that have advocated the extension of the RCO doctrine to these statutes, opinions are divided regarding the extent to which the RCO doctrine affects the statute's *mens rea* requirement. To date, no court has held that the RCO doctrine should be applied as a strict liability rule, that entirely displaces the express statutory *mens rea* requirement contained in these statutes. A few decisions, however, have suggested that such an application may be permissible. By contrast, some courts have held that the RCO doctrine does not replace the *mens rea* requirement. In some of these latter cases, however, courts have indicated that a modified version of the RCO doctrine may be applied in the context of environmental laws. These decisions have given rise to three distinct theories of the extent to which the RCO doctrine affects the *mens rea* requirement of federal environmental statutes: the strict liability approach; the reduced knowledge approach; and the status quo approach. Each of these theories and the cases that support them are discussed and analyzed below.

**A. The RCO Doctrine Creates Strict Liability**

Under the strict liability approach, the RCO doctrine as set forth in cases decided under the FDCA may be applied to environmental statutes requiring a *mens rea*. Such an application of the RCO doctrine therefore displaces the element of knowledge required by many environmental statutes and imposes a strict liability scheme, transforming a *mens rea*-requiring crime into a strict liability offense for corporate officers. Under this view, an officer may be convicted of a felony based simply upon the officer's position of authority rather than upon the officer's acts and actual mental state. Accordingly, the application of the RCO doctrine removes the mental element of the crime

---


86. See, e.g., *MacDonald & Watson*, 933 F.2d at 55; *Johnson & Towers*, 741 F.2d at 669-70.

87. See supra part II.

88. See *Zarky*, supra note 12, at 987. See also *Broudy*, supra note 6, at 1058.

89. See *Zarky*, supra note 12, at 987. See also supra text accompanying note 44.
based solely upon the defendant's "job description."\textsuperscript{90} The corporate officer becomes the "designated felon," criminally liable when subordinates commit illegal acts.

The Third Circuit's decision in \textit{United States v. Frezzo Bros., Inc.}\textsuperscript{91} has frequently been invoked to support the theory that the RCO doctrine imposes strict liability when applied to certain environmental statutes.\textsuperscript{92} In \textit{Frezzo}, a family-operated mushroom farming business and its corporate officers were convicted of willfully or negligently discharging pollutants into navigable waters without a permit in violation of the CWA.\textsuperscript{93} On appeal, the Third Circuit addressed the issue of RCO liability in a footnote, stating that "[t]he Government argued the case on the 'responsible corporate officer doctrine' recognized by the United States Supreme Court in \textit{United States v. Park} and \textit{United States v. Dotterweich}. We have examined the judge's charge and perceive no error in the instruction to the jury on this theory."\textsuperscript{94}

The Third Circuit's language in \textit{Frezzo} may appear on its face tacitly to support the application of the RCO doctrine to the CWA, thus lending credence to the view that corporate officers can be held strictly liable under that statute. In fact, however, it does not. The defendants were held liable as individuals on the basis of considerable evidence presented at trial that they \textit{actually knew} of the ongoing pollution violations and did not remedy them, which was sufficient to prove individual liability.\textsuperscript{95} On appeal of their convictions, the defendants in \textit{Frezzo} did not challenge how the liability of corporate officers had been defined at trial. Rather, they argued that it was improper for the

\textsuperscript{90} See \textit{Zarky}, supra note 12, at 987.

\textsuperscript{91} 602 F.2d 1123 (3d Cir. 1979), \textit{cert. denied}, 444 U.S. 1074 (1980).

\textsuperscript{92} See \textit{Zarky}, supra note 12, at 990 (commenting that the government "frequently" raises \textit{Frezzo} to support the proposition that the RCO doctrine creates strict liability in environmental statutes). \textit{See also} Mary Ellen Kris \& Gail L. Vannelli, \textit{Today's Criminal Environmental Enforcement Program: Why You May Be Vulnerable and Why You Should Guard Against Prosecution Through an Environmental Audit}, 16 COLUM. J. ENVTL. L. 227, 239 n.55 (citing \textit{Frezzo} for the proposition that the RCO doctrine imputes knowledge of violations to responsible managers).

\textsuperscript{93} \textit{Frezzo}, 602 F.2d at 1125. The charges were pursuant to CWA, 33 U.S.C. §§ 1311(a) and 1319(c). \textit{See id.} at 1124. The corporation was fined $50,000 and the individual defendants, the president and the secretary of the corporation, each were sentenced to 30 days in jail and were fined $50,000 in the aggregate. \textit{Id.}

\textsuperscript{94} \textit{Id.} at 1130 n.11 (citations omitted).

\textsuperscript{95} \textit{Frezzo}, 602 F.2d at 1125-29, 1129 n.9. At trial there was testimony that state and county employees had investigated and confronted the defendants concerning the pollution numerous times, and that the defendants had admitted in a letter to the state environmental agency that the holding tank they used to contain waste was effective only 95% of the time. \textit{See United States v. Frezzo Bros., Inc.}, 461 F. Supp. 266, 270 (E.D. Pa. 1978).
trial court to have instructed the jury that they could be found guilty as individuals when the government had argued the case on the RCO doctrine and the indictment had charged them with acting as corporate officials. 96 Thus, neither the issue of strict liability under the RCO doctrine nor the necessary mens rea of a corporate officer was before the Third Circuit in Frezzo.

The Tenth Circuit's opinion in United States v. Brittain 97 has also been used to support the proposition that the RCO doctrine creates strict liability when applied to environmental statutes. 98 In Brittain, the Public Utilities Director for the City of Enid, Oklahoma, was convicted of two misdemeanor counts under the CWA for willfully or negligently discharging pollutants into navigable waters without a permit. 99 Appealing his conviction, the Director argued that because he was not a permittee or an RCO of a permittee, he was not a "person" subject to liability under the CWA. 100 He reasoned that Congress would not have amended the statutory definition of a liable "person" to specifically include RCOs if that term had a common sense meaning that included all individuals, rather than just permittees. 101 The Tenth Circuit rejected this argument, concluding instead that the addition of "responsible corporate officer" to the CWA definition was an expansion rather than an implicit limitation of liability. 102

Although the Director was held liable as an individual and the question of RCO liability was not at issue in the case, the Tenth Circuit nevertheless suggested that it would be appropriate to apply the RCO doctrine to the CWA. 103 The court stated that "to be held criminally

96. Frezzo, 602 F.2d at 1130 n.11.
97. 931 F.2d 1413 (10th Cir. 1991).
99. Brittain, 931 F.2d at 1415, 1417-18. As in Frezzo, the defendant was convicted pursuant to CWA, 33 U.S.C. §§ 1311(a) and 1319(c). See id. at 1418.
100. Id. at 1419.
101. Id.
102. Brittain, 931 F.2d at 1419. The court explained that "[t]he plain language of the statute, after all, states that 'responsible corporate officers' are liable 'in addition to' the definition [of persons]." Id. (alteration in original) (citation omitted).
103. Id. at 1419-20, 1420 n.5. The government did not prosecute the case under an RCO theory, and the jury was never presented with the question of RCO liability. Id. Contrary to the Director's contention, the jury considered more evidence than simply his position of responsibility. Brittain, 931 F.2d at 1420. Evidence was presented at trial that the Director had primary operational responsibility for the facility, that he personally observed the unlawful discharges, that he was told by subordinates that such discharges were prone to occur during heavy rains, that he reviewed logs recording repeated illegal discharges, and that he instructed the plant supervisor not to report the
liable, [an RCO] would not have to 'willfully or negligently' cause a permit violation. Instead, the willfullness or negligence of the actor would be imputed to [the RCO] . . . by virtue of his position of responsibility.  

The court asserted that the public welfare objectives of the FDCA also applied to the CWA and that Congress, in specifically including RCOs as liable parties under the CWA, perceived the goal of eliminating pollution from the nation's waters to outweigh the hardships suffered by RCOs who are held criminally liable despite their lack of conscious wrongdoing.

This opinion appears to represent the broadest application of the RCO doctrine to an environmental statute. Under the Tenth Circuit's approach, the RCO doctrine simply imputes the requisite mens rea from a subordinate to a corporate official based solely upon the official's position in the company.

It is important to note, however, that RCO liability was never at issue in Brittain, and thus it is still not settled that the Tenth Circuit would apply the RCO doctrine to the CWA if it were directly confronted with that question. Moreover, the crime in Brittain involved only misdemeanor penalties and required a mens rea of willfullness or negligence. Because many environmental crimes today are felonies and require a mens rea of knowledge, the court's language in Brittain, apparently approving the application of the RCO doctrine to the CWA, does not support the elimination of the mens rea requirement in prosecutions under environmental provisions that carry felony-level penalties.

B. The RCO Doctrine Reduces the Mens Rea Requirement

Several commentators have suggested that rather than completely eliminating the mens rea requirement contained in environmental statutes, the application of the RCO doctrine simply reduces the requisite mental state needed for a defendant to be held criminally liable under those statutes. These commentators assert that the application

violations to the Environmental Protection Agency ("EPA") as required by the permit that the EPA had issued for the facility. Id. at 1419.

Id. at 1419.

Indeed, one commentator has noted that Brittain "should set off alarms in corporate board rooms" because it makes criminal liability vicarious for corporate officers. See Morgan & Obermann, supra note 98, at 1207.

See, e.g., Seymour, supra note 11, at 342-43 (concluding that the court's interpretation of the RCO doctrine as applied to RCRA in United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986), "minimized the burden of proof on the government"). See also Richard G. Singer, The "Responsible Corporate Officer" Doctrine in Environmental Cases, 6 Tox. L. Rep. (BNA) 1405, 1407 (Apr. 15, 1992) [hereinafter Singer, Environmental Cases] (discussing the reduced knowledge theory and concluding
of the RCO doctrine to such statutes permits the jury to infer a corporate officer's knowledge of a statutory violation from the fact that the officer held a particular position in the corporation.\textsuperscript{108} Thus, in addition to proving knowledge through circumstantial evidence and willful blindness,\textsuperscript{109} the government may prove knowledge simply by showing that a corporate officer should have known of the violation by virtue of the officer's position.\textsuperscript{110} Accordingly, these commentators view the effect of the RCO doctrine as reducing the level of \textit{mens rea} required to convict a corporate officer and easing the prosecution's burden.\textsuperscript{111}

The reduced knowledge approach relies upon the Third Circuit's opinion in \textit{United States v. Johnson & Towers, Inc.}\textsuperscript{112} In \textit{Johnson & Towers}, the Third Circuit ruled that any individual or "person" who knowingly treats, stores, or disposes of hazardous waste without a permit is subject to criminal liability under RCRA regardless of whether that individual is in the position to secure a permit.\textsuperscript{113} The defendants, two employees who were charged along with their company for RCRA violations, argued that only the owners or operators of a facility are "persons" subject to RCRA liability because only these individuals are in a position to obtain the requisite permit.\textsuperscript{114}

To support their argument that the term "person" in RCRA was not given the meaning suggested by the plain language of the statute, the defendants claimed that in two similar statutes, the CAA and the CWA, Congress amended the definition of person to add RCOs and that had Congress originally intended for this term to be given a common sense meaning, such an amendment would not have been necessary because RCOs are obviously people or persons in the common sense understanding of that word.\textsuperscript{115} The Third Circuit expressly declined to rule on the meaning of the term "person" in the CAA and the CWA, as

\begin{itemize}
  \item that the commentators who have interpreted certain cases as establishing this theory have misconstrued those opinions, and that what has been identified as a reduced knowledge standard is actually "an application of the long-standing doctrine that mistake (or ignorance) of the law is not relevant in most criminal proceedings").
  \item See, e.g., Seymour, \textit{supra} note 11, at 343.
  \item For a more thorough discussion of the use of circumstantial evidence and the doctrine of willful blindness in criminal cases generally, see \textit{supra} parts III.A. and III.B.
  \item See Seymour, \textit{supra} note 11, at 343.
  \item See \textit{id. See also} Singer, \textit{Environmental Cases, supra} note 107, at 1407 (rejecting the theory that the RCO doctrine reduced the knowledge required when applied to environmental statutes).
  \item \textit{Id.} at 666-67.
  \item \textit{Id.} at 664.
  \item \textit{Id.} at 665 n.3.
\end{itemize}
those acts were not before the court, but it noted that the addition of RCOs to the CAA and the CWA seemed to expand rather than implicitly limit liability.\footnote{116} Broadening the scope of this provision through the addition of RCOs, the court observed, could not have been meant to "relieve[e] from . . . liability the individual agents of the corporation."\footnote{117} Relying on \textit{Dotterweich}, the Third Circuit concluded that "in RCRA, no less than in the Food and Drug Act, Congress endeavored to control hazards that, 'in the circumstances of modern industrialism, are largely beyond self-protection.'"\footnote{118} Consequently, the Third Circuit rejected the defendants' assertion, holding that liability under RCRA attaches to any individual who knowingly handles hazardous waste without a permit.\footnote{119}

The Third Circuit also addressed the issue of the applicability of RCRA's knowledge requirement to the other elements of section 6928(d)(2). In doing so, the court ruled that to secure a conviction under this provision, the government must prove that the defendant had knowledge with respect to every element of the offense.\footnote{120} The court added, however, that criminal knowledge "\textit{may be inferred} by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."\footnote{121}

Some commentators note that this language appears to be similar to the RCO doctrine as set forth by the Supreme Court in \textit{Dotterweich} and \textit{Park} and, as a result, they maintain that the decision in \textit{Johnson \\& Towers} stands for the proposition that the RCO doctrine, as applied to federal environmental laws, reduces the government's burden of proving knowledge.\footnote{122} The Third Circuit's language in \textit{Johnson \\& Towers}, however, is actually consistent with the traditional use of circumstantial evidence to prove \textit{mens rea},\footnote{123} since the court did not state that liability \textit{must} be inferred, but only that it \textit{may} be inferred.\footnote{124} Thus, neither the holding nor the reasoning in \textit{Johnson \\& Towers} supports the use of a reduced knowledge approach in felony prosecutions under federal environmental laws.\footnote{125}

\begin{thebibliography}{99}
\bibitem{116} Johnson \\& Towers, 741 F.2d at 665 n.3.
\bibitem{117} Id. (quoting Dotterweich, 320 U.S. at 282).
\bibitem{118} Id. at 667 (quoting Dotterweich, 320 U.S. at 280).
\bibitem{119} Id.
\bibitem{120} Johnson \\& Towers, 741 F.2d at 670.
\bibitem{121} Id. at 670 (emphasis added).
\bibitem{122} See Seymour, supra note 11, at 342-43.
\bibitem{123} See supra part III.A.1.
\bibitem{124} See Johnson \\& Towers, 741 F.2d at 670.
\bibitem{125} See Singer, Environmental Cases, supra note 107, at 1407.
\end{thebibliography}
C. The RCO Doctrine Does Not Expand Liability

The third view as to the scope and applicability of the RCO doctrine is the status quo approach. According to this approach, the special instruction given on the liability of corporate officers does not alter the mental element normally required by the statute, but instead makes clear that an officer's knowing failure to act to prevent illegal activity renders the officer as culpable as the individual who actually performed the illegal act.

The First Circuit adopted the status quo approach in *United States v. MacDonald & Watson Waste Oil Co.*\(^{126}\) In that case, the First Circuit overturned the felony conviction of a company president, ruling that the trial court's jury instructions improperly suggested that the president could be convicted of a knowing RCRA violation based upon his position as a responsible corporate officer and without actual proof of knowledge.\(^{127}\) The jury had been instructed that knowledge could be proven either by a showing of actual knowledge or by a showing that the defendant was an RCO.\(^{128}\) The trial court stated that a defendant is an RCO if the defendant (1) was a corporate officer, (2) had the responsibility to supervise the allegedly illegal activities, and (3) knew or believed that illegal activity of the type alleged occurred.\(^{129}\)

The First Circuit ruled that this test was inconsistent with the express mens rea requirement in RCRA because it did not simply allow the jury to infer knowledge, but rather permitted the jury conclusively to presume knowledge "so long as the officer knew or even erroneously believed that illegal activity of the same type had occurred on another occasion."\(^{130}\) The First Circuit agreed that knowledge may be inferred from willful blindness or circumstantial evidence, including a defendant's position, responsibility, and conduct, and information provided to the defendant on prior occasions.\(^{131}\) The court, however, held that it was improper to allow a conclusive presumption of knowledge based on such evidence when the crime expressly requires the proof of knowledge as an element.\(^{132}\) The simple fact that the officer knew of a previous violation, the court reasoned, does not establish that he possessed knowledge of the violation charged.\(^{133}\) Accordingly,

---

\(^{126}\) 933 F.2d 35 (1st Cir. 1991).
\(^{127}\) Id. at 50-51.
\(^{128}\) Id.
\(^{129}\) Id. at 50, 52.
\(^{130}\) *MacDonald & Watson*, 933 F.2d at 53.
\(^{131}\) Id. at 52, 54.
\(^{132}\) Id. at 52.
\(^{133}\) Id. at 55.
the court concluded that "[i]n a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge."\(^{134}\)

The First Circuit thus demanded proof of *mens rea* where expressly required by statute. It rejected the application of the RCO doctrine as set forth in *Dotterweich* and *Park* to criminal statutes that expressly contain a knowledge requirement and impose felony-level penalties. The court noted, however, that if the trial court had explained to the jury that the RCO doctrine allowed a permissive inference of knowledge, rather than asserting as it did that the doctrine allowed a conclusive presumption, the conviction might have been upheld.\(^{135}\)

The use of the status quo approach is further supported by *United States v. White*,\(^ {136}\) in which the United States District Court for the Eastern District of Washington clearly rejected the proposition that a corporate officer may be held criminally liable for RCRA violations without proof of actual knowledge. In *White*, the prosecutor, relying upon *Park* and *Dotterweich*, argued that the company's environmental safety officer could be held liable for knowing criminal violations of RCRA simply by virtue of his position of responsibility and authority.\(^ {137}\) The court disagreed, holding that those cases were inapplicable because they involved strict liability crimes, whereas the criminal provision of RCRA contains a *mens rea* element of knowledge.\(^ {138}\) The RCO doctrine, the court ruled, does not apply to crimes where the applicable statute requires proof of knowledge as an element of the crime.\(^ {139}\) The court concluded that to secure a conviction, the government must prove that the defendant had actual knowledge of the violations, rather than merely showing that the defendant should have known of the violations.\(^ {140}\)

\(^{134}\) See MacDonald & Watson, 933 F.2d at 55.

\(^{135}\) Id. at 55 n.20. Based on this statement it has been argued that the First Circuit has reduced or shifted the prosecutor's burden and modified the RCO doctrine in the context of environmental laws. See Ondorff & Mesnard, supra note 6, at 10,103. As explained supra, however, the use of circumstantial evidence from which the trier of fact may infer the element of a crime is consistent with traditional notions of criminal law. See supra part III.A.1.


\(^{137}\) Id. at 894. As the court characterized the government's theory, "the government seeks to find [the defendant] guilty not as a principal, aider and abettor, nor [as a] co-conspirator, but purely under the theory of respondeat superior." Id.

\(^{138}\) Id. at 894-95.

\(^{139}\) White, 766 F.Supp. at 895.

\(^{140}\) Id.
V. ANALYSIS OF THE THREE THEORIES ON THE APPLICATION OF THE RCO DOCTRINE

Courts and commentators have presented a number of views as to the applicability of the RCO doctrine to criminal environmental statutes. The most sweeping of these views—that the RCO doctrine holds corporate officers strictly liable for the criminal violations of their subordinates—should be rejected. The RCO doctrine originated from strict liability offenses prescribing misdemeanor penalties.\(^{141}\) Since a strict liability statute makes all who have a responsible share in the violations equally culpable regardless of intent,\(^{142}\) it is considered acceptable in misdemeanor situations to hold a corporate officer criminally liable where the officer stands in a position of "responsible relation" to the wrongdoing.\(^{143}\) This reasoning, however, does not apply where a statute expressly prescribes a \textit{mens rea} of knowledge and imposes felony-level penalties.\(^{144}\) When felonies are at issue, all those guilty of the illegal act may not be equally culpable.\(^{145}\) Instead, culpability, and consequently punishment, should be based primarily on the alleged violator's state of mind.\(^{146}\) Therefore, despite the public welfare goal of environmental legislation, the rationale in \textit{Dotterweich} and \textit{Park} for applying the RCO doctrine simply does not support the application of this doctrine to the criminal provisions of environmental statutes having a specified \textit{mens rea} requirement and prescribing felony-level penalties.

Furthermore, when a criminal statute specifically requires proof of knowledge of the criminal act, as do many environmental statutes,\(^{147}\) the RCO doctrine cannot be applied as set forth in \textit{Dotterweich} and \textit{Park} because it would wholly eliminate the knowledge element of the crime for this one class of individuals. Moreover, although the Supreme Court has held strict liability to be constitutional in certain situations involving public welfare offenses that result in misdemeanor violations,\(^{148}\) imposing significant criminal penalties, such as those associated with a felony conviction, without first requiring a showing

\(^{141}\) See supra part II.

\(^{142}\) See supra note 28 and accompanying text.

\(^{143}\) See supra part II.

\(^{144}\) See Zarky, supra note 12, at 987, 994.

\(^{145}\) See id.

\(^{146}\) Id.

\(^{147}\) See supra note 60 and accompanying text.

of *mens rea* could raise constitutional due process concerns.\(^\text{149}\)

The reduced knowledge theory of RCO liability is also fundamentally flawed. Some commentators have argued that use of the RCO doctrine in felony prosecutions under federal environmental laws expressly prescribing a *mens rea* of knowledge reduces the government's burden of proof with respect to the showing of scienter and allows a conviction based upon a showing of a mental state of something less than actual knowledge.\(^\text{150}\) This proposition is incorrect and appears to be based on a misreading of the relevant cases and a degree of confusion regarding the knowledge required for a felony conviction under a federal environmental statute. As noted above, the majority of courts have held that the knowledge requirement under RCRA does not attach to every element of the crime.\(^\text{151}\) Courts are divided, however, as to which elements the knowledge requirement does attach.\(^\text{152}\) It is possible that some commentators may have interpreted a court's ruling that knowledge did not attach to certain elements of the crime to be the result of the court's application of the RCO doctrine.\(^\text{153}\) Such a view confuses two separate and distinct issues. In those cases where a court has held that a certain element of the crime did not require a showing of knowledge, the court was interpreting the statutory provision generally and was not limiting its holding to RCOs.\(^\text{154}\) Thus, in those situations, the court was not applying the RCO doctrine.

Additionally, some commentators have argued that when the trier of fact is permitted to infer knowledge through the use of circumstantial evidence of an officer's responsibility or authority, this lowers the level of *mens rea* required by statute.\(^\text{155}\) This view is also erroneous

---

149. See Gaynor, *Improving Fairness*, supra note 47, at 1031-32 (noting that "[t]o convict a defendant of a serious felony without a high degree of *mens rea* may be a violation of his Fifth Amendment right to Due Process" (footnote omitted)).


151. See *supra* part III.B.1.

152. See *supra* notes 66-67 and accompanying text.

153. See Singer, *Environmental Cases*, *supra* note 107, at 1407 (discussing this confusion).


155. See Ondorf & Mesnard, *supra* note 6, at 10,103 (stating that the use of circumstantial evidence to prove knowledge is "troubling"); Lisa Harig, *Ignorance is Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines*, 42 DUKE L.J. 145, 151 (1992) (stating that the application of the RCO doctrine is being used "at the very least" to allow the jury to infer knowledge from circumstantial evidence); Singer, *Environmental Cases*, *supra* note 107, at 1407 (discussing the misunderstanding of commentators concerning the use of circumstantial evidence and stating that it is almost impossible to prove knowledge by direct evidence).
because, as noted above, the use of circumstantial evidence has traditionally been an alternative means of proving facts where direct evidence is unavailable.\textsuperscript{156}

The third theory of RCO liability, the status quo approach, appears to have gathered the most support from courts and commentators. Under this approach, the statutorily required level of \textit{mens rea} is not changed even though a special instruction may be given to the jury making it clear that a knowing failure to act to prevent illegal activity renders the officer as culpable as the individual who personally performed the illegal act.\textsuperscript{157} According to Charles De Monaco, Assistant Chief of the Environmental Crimes Section of the DOJ, the federal government now follows this approach in the prosecution of environmental crimes.\textsuperscript{158} De Monaco asserts that the DOJ will not institute criminal proceedings against a corporate official for the illegal acts of a subordinate unless it has facts to show that the official had actual knowledge of the environmental violation.\textsuperscript{159} He adds, however, that a defendant's position, authority, and responsibility in the company may be circumstantial evidence of knowledge.\textsuperscript{160} The use of these factors as circumstantial evidence permits the jury to infer that the defendant had the requisite \textit{mens rea}, but it does not change the level of \textit{mens rea} required by statute to secure a conviction.\textsuperscript{161}

This approach to RCO liability is also supported by Professor Richard Singer, who asserts that the RCO doctrine is simply a "myth" based upon unnecessary dictum in the cases that have discussed it.\textsuperscript{162} Professor Singer correctly notes that in every case in which a conviction has been upheld, the facts have clearly shown, and the court has required proof that the defendant had actual knowledge of the illegal activity.\textsuperscript{163} He opines that commentators who declare an expansion of

\begin{footnotes}
\footnote{156. See supra part III.A.1.}
\footnote{157. See supra part IV.C.}
\footnote{158. See Hartman & De Monaco, supra note 1, at 10,152.}
\footnote{159. Better Communication, supra note 4, at 1424.}
\footnote{160. See id. For further information on the DOJ's policy concerning criminal prosecutions for violation of federal environmental statutes see U.S. DOJ FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATION IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR, Envtl. L. Rep. Admin. Material (Envtl. L. Inst.) 35,399 (July 1, 1991).}
\footnote{161. See Hartman & De Monaco, supra note 1, at 10,152.}
\footnote{162. See Singer, Myth, supra note 24, at 1378.}
\footnote{163. See Singer, Environmental Cases, supra note 107, at 1405. See also Dugan, supra note 63, at 10,078 (citing United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985) and United States v. White, 766 F. Supp. 873 (E.D. Wash. 1991), as cases in which attempts to expand criminal liability under environmental laws through application of the RCO doctrine have been rejected).}
\end{footnotes}
the RCO doctrine, as set forth in Dotterweich and Park, to environmental felony prosecutions have inaccurately based their conclusions upon court dicta and erroneous interpretations of the case law.\textsuperscript{164}

The problem remains, however, that while a majority of courts and commentators generally agree that the RCO doctrine, as set forth in Dotterweich and Park, is inapplicable to felony prosecutions involving environmental crimes containing a \textit{mens rea} element, many continue to use the language of the RCO doctrine when referring simply to the individual, rather than imputed or vicarious liability of corporate officers. Indeed, it is not uncommon to see the use of an officer's authority and responsibility as evidence of \textit{mens rea} being labeled the "RCO doctrine," even though such use is nothing more than traditional circumstantial evidence. The RCO doctrine, as set forth in Dotterweich and Park, is a strict liability rule that should not be applied to felony prosecutions under laws expressly requiring a showing of \textit{mens rea}. Nor should it be confused, however, with the use of an officer's position in a company as circumstantial evidence that allows a permissive inference of the requisite \textit{mens rea}.

\textbf{VI. TRENDS AND FORECASTS}

The confusion surrounding the use and application of the RCO doctrine, together with the recent sharp increase in prosecutions for environmental crimes, has been especially threatening to corporate officers because the potential punishment for those convicted is no longer just a "slap on the wrist."\textsuperscript{165} In the past, courts generally penalized those convicted of environmental crimes with suspended sentences, probation, or some type of community service.\textsuperscript{166} Today, however, significant fines and prison terms are no longer uncommon.\textsuperscript{167} This change has been attributed in part to the new agenda of prosecutors to seek harsher penalties as a deterrent to future violations, and also in part to federal judges, who are now more than ever constrained to strict application of penalties due to implementation of the mandatory Federal Sentencing Guidelines.\textsuperscript{168} These Guidelines significantly curtail the discretion of trial judges, requiring them to impose sentences that fall within a narrow range of possibilities established for each particular crime.\textsuperscript{169}

\begin{itemize}
\item \textsuperscript{164} Singer, \textit{Myth}, supra note 24, at 1378.
\item \textsuperscript{165} See Zarky, supra note 12, at 984; Morgan & Obermann, \textit{supra} note 98, at 1209.
\item \textsuperscript{166} Morgan & Obermann, \textit{supra} note 98, at 1210.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id. at 1210-11.
\item \textsuperscript{169} See id. at 1211.
\end{itemize}
While prosecutors might have attempted in the past to use the RCO doctrine as an aid in felony prosecutions believing that it would eliminate their burden of proving knowledge, courts have generally rejected these attempts to apply a strict liability scheme where the text of the statute expressly requires knowledge.\textsuperscript{170} There is little doubt regarding why prosecutors have tried to apply the RCO doctrine in felony prosecutions of corporate officials for violations of federal environmental statutes—the culpability of upper-level management is often more difficult to establish than that of the employees who physically undertake the illegal acts. There are established alternative means by which to prove knowledge, however, such as the use of circumstantial evidence when direct evidence is unavailable.\textsuperscript{171} Indeed, it appears that in all of the environmental cases raising the RCO doctrine, there has been considerable direct and circumstantial evidence of knowledge on the part of the corporate officers.\textsuperscript{172} Thus, while several commentators have cried foul at prosecutors' attempts to bypass the statutory \textit{mens rea} requirement through use of the RCO doctrine,\textsuperscript{173} the fear that laws enacted by Congress are being altered appears to be unfounded because the prosecutors in the cases discussed above could have established culpability without the use of the RCO doctrine.\textsuperscript{174} Furthermore, the courts have insisted that they do so and have thwarted attempts to take constitutionally suspect short-cuts. Accordingly, it is highly unlikely in a prosecution for a violation of a federal environmental statute that prescribes felony-level penalties, that a corporate official today would be imputed with the knowledge of a subordinate, or that the official would be convicted for violating the statute without proof, whether circumstantial or direct, that the officer had the requisite level of \textit{mens rea}.

\textbf{VII. CONCLUSION}

There is an understandable concern on the part of corporate officers, and especially corporate environmental managers, that they may become the "designated felon" and magnet for federal prosecutors when employees of their corporations violate federal environmental laws. Based on the limited case law available on this issue, however, it appears that a conviction obtained without the necessary proof of

\begin{itemize}
\item \textsuperscript{170} \cite{Singer, Environmental Cases, supra note 107, at 1407.}
\item \textsuperscript{171} \cite{supra part III.A.}
\item \textsuperscript{172} \cite{Singer, Environmental Cases, supra note 107, at 1405, 1407.}
\item \textsuperscript{173} \textit{See}, e.g., Zarky, \textit{supra} note 12, at 983, 987-88; Onsdorff & Mesnard, \textit{supra} note 6, at 10,100, 10,102; Broudy, \textit{supra} note 6, at 1071.
\item \textsuperscript{174} \cite{Singer, Environmental Cases, supra note 107, at 1405, 1407.}
\end{itemize}
mens rea required by the applicable environmental statute will not be upheld.

It does not appear that the RCO theory of strict criminal liability as set forth in Dotterweich and Park has been extended to environmental laws that prescribe a knowledge requirement and felony-level penalties. Nor should it be. In the context of prosecutions for violations of environmental laws, an employee's position in a company should be used only as circumstantial evidence of knowledge in criminal prosecutions. To prevent confusion and misunderstanding, prosecutors and courts should avoid labeling such an approach as the "responsible corporate officer" doctrine.